IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner),* 2018 BCSC 1642

Date: 20180927
Docket: S176716
Registry: Vancouver

Between:

Edgardo Ramiro Diaz-Rodriguez

Petitioner

And

Police Complaint Commissioner of British Columbia, and The Honourable Ronald McKinnon

Respondents

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Petitioner:	D. Butcher, Q.C. A. Srivastava
Counsel for the Respondents:	D.K. Lovett, Q.C. A. Westmacott, Q.C. A. Harlingten
Place and Dates of Hearing:	New Westminster, B.C May 8-10, June 8 and 19, 2018
Place and Date of Judgment:	Vancouver, B.C. September 27, 2018

[1] The petitioner, Constable Diaz-Rodriguez (“Diaz”) is a member of the South Coast British Columbia Transportation Authority Police Service (“Transit Police”) who, as a result of an incident on August 11, 2011, became subject to disciplinary proceedings under the *Police Act*, R.S.B.C. 1996, c. 367 [*Act*].

[2] He seeks judicial review of the decision of the Police Complaints Commissioner (“PCC”) to initiate a public hearing pursuant to s. 138(2) of the *Act*. The petitioner argues that the proposed public hearing ought to be quashed based on inordinate delay or, alternatively, that the decision of the PCC ought to be set aside on the basis that it is unreasonable in the circumstances.

[3] The respondent, the PCC, opposes the petition arguing firstly that it is premature. The PCC argues secondly that, if the petition proceeds, the petitioner failed to discharge the onus upon him to demonstrate that the delay resulted in an abuse of process, a denial of natural justice or that the PCC's decision to initiate a public hearing was unreasonable.

[4] Both parties agree that the delay in bringing the matter to this stage of the disciplinary proceeding has been lengthy. The matter arises from events that took place on August 10, 2011 and, as at the time of the hearing before me in May and June of 2018, had not yet completed.

[5] On June 19, 2018, I ordered a stay of proceedings in respect of the scheduled public hearing with reasons for judgment on the substantive application to follow. These are those reasons.

The Legislative Scheme

[6] The Office of the Police Complaint Commissioner derives its authority from the *Act*. The PCC is an independent officer of the legislature appointed under s. 47 of the *Act*.

[7] The mandate of the PCC is to act in the public interest to maintain confidence in police matters. As part of that mandate, the PCC oversees disciplinary cases

involving alleged police misconduct. Part 11 of the *Act* empowers the PCC to ensure that allegations of misconduct are dealt with appropriately in the public interest in accordance with the *Act*.

[8] Section 89(1) of the *Act* requires a chief constable of a municipal police department to immediately report to the PCC if a person suffers serious harm or a reportable injury as a result of conduct of a member of the municipal police force. Upon receipt of a report under s. 89(1), the disciplinary process commences.

[9] The PCC has oversight responsibilities, but does not directly involve him or herself in deciding misconduct complaints or allegations on their merits. Instead, the PCC is tasked with carrying out a gatekeeping role of ensuring the proper investigation of complaints: *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92 [*Florkow*], at para. 2.

[10] Section 93 of the *Act* provides the PCC with authority to order an investigation if, at any time, information comes to his or her attention concerning the conduct of a police officer which, if substantiated, would constitute misconduct as defined by the *Act*. An investigating officer is appointed to carry out the investigation.

[11] Additionally, if the PCC is of the view that an external investigation is necessary in the public interest, the PCC is empowered to, at any time, order an external investigation and appoint a constable of an external police force as the investigating officer: Section 92(1) of the *Act*.

[12] The conduct of investigations are governed by ss. 98 to 110, which set out timelines for periodic reporting, investigation powers, members' duties to cooperate, the taking and use of statements, and the mandatory contents of a final investigation report ("FIR").

[13] A FIR is required to contain:

1. a brief account of the investigative steps taken;

2. a complete summary of the relevant evidence;

3. a list of all witnesses interviewed by the investigating officer;

4. a list of all records relating to the investigation; and

5. the investigating officer's assessment of the evidence and analysis of the facts.

[14] Once the investigation, whether internal or external, is complete, within 10 business days from receiving the report, a discipline authority as defined in s. 76(1) must: review the report and any appendices; provide the report and those appendices to the complainant, if any; provide the report and those appendices to the member or former member; and notify all parties, including the PCC and the investigating officer of further steps to be taken (see: s. 112(1) of the *Act*).

[15] The *Act* further requires that included in the notification is a determination as to whether the alleged misconduct appears to have been substantiated and the range of disciplinary measures being considered by the disciplinary authority: s. 112(2) of the *Act*.

[16] If on review of the FIR, the discipline authority considers the conduct of the member or former member constitutes misconduct, the discipline authority must convene a discipline proceeding in respect of the matter. If the discipline authority considers the conduct to have been unsubstantiated, the discipline authority must provide a decision in accordance with ss. 112(1)(c) and 112(4). The member or former member who receives a FIR may request further investigation pursuant to s. 114. The discipline authority may accept the request for further investigation if he or she is satisfied that further investigative steps as described in the request will assist in ensuring the investigation is complete, or that one or more of the witnesses named in the request, or records or evidence listed in the request, may be material in determining whether any conduct of concern constitutes misconduct.

[17] If a discipline authority accepts a member or former member's request for further investigation, the investigating officer must prepare a supplementary investigation report (“SIR”) in compliance with s. 115(2)(b) of the *Act*.

[18] Similar to the FIR, the disciplinary authority must review the report, provide the report to both the complainant, if any, and the member, advise whether the misconduct alleged appears to have been substantiated, and if so, a range of disciplinary measures being considered. If the discipline authority considers that the conduct of the member or former member appears to constitute misconduct, a discipline proceeding must be convened. If the conduct appears to be unsubstantiated, the discipline authority must provide a decision in accordance with s. 116(1)(c): Section 116(4) of the *Act*.

[19] Under s. 117, the PCC has authority to order a review of the discipline authority's decision under ss. 112 or 116 by a retired judge. Such is triggered if the PCC considers there is a reasonable basis to believe that the decision of the discipline authority is incorrect. This jurisdiction is only triggered if the discipline authority finds the impugned conduct does not constitute misconduct. If the discipline authority determines misconduct has occurred, the PCC does not have the authority to appoint a retired judge under s. 117.

[20] The appointment of a retired judge to review the investigating officer's report and make his or her own decision on the matter under s. 117(1) must be made within 20 business days after receiving the s. 112 or s. 116. Following appointment, the retired judge must, within 10 business days of receiving the relevant reports, conduct a review and notify those involved — being the complainant if any, the member or former member, the PCC, and the investigating officer — of the next applicable steps to be taken in accordance with s. 117.

[21] The retired judge must also advise whether he or she has found the evidence referenced in the report "appears sufficient to substantiate the allegation and require the taking of disciplinary or corrective measures": Section 117(8)(d) of the *Act*.

[22] If the retired judge concludes that evidence does appear to substantiate the allegations, the retired judge becomes the discipline authority and must convene a discipline proceeding. In advance of the discipline proceeding, pre-hearing conferences may take place to allow members or former members to "admit

misconduct" on a without prejudice basis and determine what disciplinary or corrective measures the member or former member may be prepared to accept. Pre-hearing conferences are subject to exceptions and time requirements. Specifically, they are unavailable where dismissal or loss of rank are possible disciplinary outcomes.

[23] Section 138 of the *Act* empowers the PCC to initiate a public hearing if he or she considers there is a reasonable basis to believe that a disciplinary authority's findings are incorrect, or that the discipline authority incorrectly applied corrective or disciplinary measures.

[24] Under s. 138(1)(d), the PCC may also arrange a public hearing if he or she "otherwise considers that a public hearing or review on the record is necessary in the public interest." The *Act* requires the PCC consider several factors when exercising his or her discretion under s. 138(1)(d) to call a public hearing. These factors include, but are not limited to, the nature and seriousness of the alleged misconduct, and the nature and seriousness of the harm or loss alleged to have been suffered by any person as a result of the conduct of a member or former member.

[25] Sections 142 to 155 govern the procedure of public hearings. Once a public hearing has been initiated, the PCC appoints a retired judge recommended by the Associate Chief Justice for the purpose of presiding over the hearing.

[26] Section 99 of the *Act* provides:

> 99 (1) An investigation into the conduct of a member or former member must be completed within 6 months after the date the investigation is initiated, unless
>
> > (a) the police complaint commissioner grants one or more extensions under this section, or
> >
> > (b) the discipline authority directs further investigation under section 115 or 132 (2).
>
> (2) The police complaint commissioner may grant an extension under this section only if the police complaint commissioner is satisfied that one or more of the following applies:

> (a) new investigative leads are discovered that could not have been revealed with reasonable care;
>
> (b) the case or investigation is unusually complex;
>
> (c) an extension is in the public interest.

[27] The combined effect of the sections I have noted, make clear the *Act* provides for a complex regulatory regime that allows the PCC a variety of initiatives to investigate alleged misconduct. That scheme has been described by Newbury J.A. in *Florkow*, at para. 6 as:

> … dense, complicated and often confusing. Its provisions are hedged round with exceptions, qualifications and limitations that are often located in other sections not in close proximity. One must frequently follow cross-references to other sections, and few provisions can be said to stand alone. It is not a model of clarity. …

[28] In light of the history of these proceedings, that observation seems understated.

Background

[29] On August 10, 2011, Diaz, while in the company of a fellow constable, Michael Hughes ("Hughes"), was involved in an incident with Mr. Riby-Williams ("Riby-Williams") at the Rupert SkyTrain station in East Vancouver.

[30] The constables interacted with Riby-Williams and determined that he did not have a valid ticket in the fare paid zone and, thus, was committing an offence.

[31] Riby-Williams allegedly provided a false name and then, after a database records check, was arrested for obstruction by Hughes. Riby-Williams resisted arrest and attempted to flee; both constables became involved in the pursuit.

[32] They eventually caught up with Riby-Williams and subdued him by delivering strikes with their batons over the course of several seconds. Almost the entirety of the event was captured on three security video cameras.

[33] On August 11, 2011 the incident was referred to the PCC as a "reportable injury" pursuant to s. 89 of the *Act*.

[34] On August 22, 2011, the PCC issued an order for investigation against both Diaz and Hughes. The PCC, having reviewed the video of the incident, stated:

> I am of the opinion that the conduct alleged against Constable. Diaz, if substantiated, would constitute misconduct, specifically abuse of authority as defined by s. 77(3)(a) of the *Police Act*.

[35] In accordance with the legislation, Inspector Brian MacDonald of the Transport Police was appointed the discipline authority ("DA") and he, in turn, appointed S/Sgt. Kent Harrison as the investigating officer (the "IO"). On January 17, 2012, upon the request of S/Sgt. Harrison, the PCC issued an amended order for investigation adding Constable Hughes as a member under investigation.

[36] On May 11, 2012, S/Sgt. Harrison submitted a final incident report ("FIO"). He was of the opinion that the allegations were sustainable as against both members for abuse of authority, specifically the use of unnecessary force. He made a second initial finding that Constable Hughes had further abused his authority by making an arrest without good and sufficient cause.

[37] On May 24, 2012, the DA issued a notice of the discipline pursuant to s. 112 of the *Act* wherein he considered a total of eight allegations. He found the following allegations to be substantiated as against both Diaz and Hughes:

(1) abuse of authority (using unnecessary force);

(2) discreditable conduct (recommending a charge of assaulting a police officer without sufficient grounds); and

(3) discreditable conduct (recommending a charge of intoxicated in a public place without sufficient grounds).

[38] He further found the abuse of authority allegation against Constable Hughes for arresting Riby-Williams without good and sufficient cause to appear substantiated by the evidence. That same allegation was not substantiated as against Diaz.

[39] The proposed disciplinary action was a two day suspension for Constable Diaz and three days for Constable Hughes.

[40] As was their right, on June 7 and July 11, 2012, respectively, Constables Hughes and Diaz requested a further investigation which resulted in S/Sgt. Harrison submitting two SIOs. Neither report made any further recommendations.

[41] On September 10, 2012 the DA considered the material in the SIOs but his conclusions respecting both constables were substantially unchanged from the first notice.

[42] On receipt of the DA's decision, the PCC concluded the investigation and resulting findings involved misconduct by both officers beyond the scope of the original allegation of abuse of authority; the investigation had not originally been ordered with regard to discreditable conduct. Therefore, on November 23, 2012, the PCC ordered an external investigation pursuant to s. 93(1) of the *Act*. At the same time, a notice of appointment of a new DA (the "Second DA") and an extension of time to investigate was issued.

[43] The PCC rationalized the further appointment because of the first DA's decision to add counts, and his characterization of the new discreditable conduct allegations. Nonetheless, the PCC ordered that those counts contained in the first FIR be re-characterized and investigated as "deceit".

[44] He ordered that the New Westminster Police Department ("NWPD") conduct a new external investigation into the deceit allegations and any other misconduct or potential misconduct under the *Act*. Chief Constable David Jones was appointed as the Second DA for "all matters related to the actions" of both constables — that is, for the counts that the first DA considered as well as any other counts recommended for substantiation after the conclusion of the external investigation.

[45] Chief Constable Jones appointed NWPD Sgt. Andrew Perry as the investigating officer (the "Second IO") who, on May 23, 2013, submitted a second FIR. He concluded that in addition to the allegations originally recommended by the

first IO, both constables had each committed a second abuse of authority by issuing a violation ticket to Mr. Riby-Williams for being intoxicated in a public place without good and sufficient cause. He also concluded that Constable Hughes may have committed an additional abuse of authority for arresting Riby-Williams for causing a disturbance, without good and sufficient cause.

[46] The Second IO did not recommend substantiation of any other allegation against either member. The Second IO's FIR was 207 pages long, and incorporated nearly all of the initial IO's FIR and SIRs. It contained the following:

- transcripts of three compelled statements taken from Cst. Diaz on November 15, 2011, January 25, 2012, and April 30, 2013;
- transcripts of two compelled statements taken from Cst. Hughes on October 5, 2011, and February 16, 2012;
- notes and reports made by both members;
- notes and a statement of Mr. Riby-Williams taken on December 29, 2011, and a telephone conversation with him on December 18, 2012;
- notes and a statement of Catherine Masi, a friend of Mr. Riby-Williams who happened to be a the Rupert SkyTrain Station at the time of the incident, made shortly after the incident; and
- video of the incident from three different cameras.

[47] Following receipt of the second FIR, the PCC requested that the discipline authority order the Second IO to take further investigative steps. On July 22, 2013 a third SIR of 376 pages was produced.

[48] On July 26, 2013, the Second DA issued a notice of discipline authority's decision pursuant to s. 112 of the *Act*. He found that the evidence substantiated two counts of abuse of authority against Constable Diaz for (1) using unnecessary force

and (2) issuing a violation ticket for drunkenness in a public place to Riby-Williams without good and sufficient cause.

[49] The Second DA concluded the deceit allegations against both Diaz and Hughes were unsubstantiated. The Second DA recommended a five-day suspension for both members for the unnecessary force allegation. He recommended a further one-day suspension for Constable Diaz for issuing a violation ticket without good and sufficient cause for a total of six days' suspension.

[50] In keeping with the *Act*, the Second DA offered both members of pre-hearing conference, the purpose of which is to determine whether a consensual arrangement can be reached between the discipline authority and the constables under investigation as to the proposed disciplinary action.

[51] Further, on July 26, 2013, the Second DA issued a notice of discipline proceeding to both members, returnable on September 18, 2013.

[52] Upon receipt of the Second DA's report, the PCC issued a notice of appointment of retired judge pursuant to s. 117 of the *Act* on August 26, 2013. He appointed the Honourable Ian H. Pitfield (the "Third DA") to review the matter, on the basis that "there is a reasonable basis to believe" that the Second DA's decision not to substantiate the deceit allegations was incorrect.

[53] That appointment provided no factual or legal reasoning for the PCC's conclusion. The determination came on the last of the 20 business days allowable to make such an appointment.

[54] Upon the making of such an appointment, the retired judge has 10 business days after receiving the relevant reports in which to conduct and conclude his or her investigation and notify the parties of the next applicable steps. The PCC granted a further extension of time because Mr. Pitfield was on holidays.

[55] On September 23, 2013 Constable Diaz requested the discipline proceeding before the Second DA be suspended until October 15, 2013 — a date following the

scheduled release by Mr. Pitfield of the s. 117 review decision. Accordingly, the discipline proceeding was adjourned to October 15, 2013, and then again to November 12, 2013, and finally to January 27, 2014.

[56] On October 9, 2013 Mr. Pitfield delivered his s. 117 review decision. He concluded that the FIR "appeared to substantiate" the following allegations against both members:

- abuse of authority, for arresting and recommending a charge of assaulting a police officer against Mr. Riby-Williams without good and sufficient cause;
- deceit, for issuing a violation ticket to Mr. Riby-Williams that to their knowledge was false and misleading;
- deceit, for arresting and recommending charges against Mr. Riby-Williams for causing a disturbance that to their knowledge was false of misleading; and
- deceit, for arresting and recommending charges against Mr. Riby-Williams for assaulting a police officer that to their knowledge was false or misleading.

[57] It is noteworthy that different disciplinary options are open to the DA in respect of different "offences". The offence of "deceit" is punishable by suspension and/or dismissal.

[58] At this stage of the proceeding, matters as against both constables became bifurcated. The Second DA, Chief Constable Jones, remained the DA for the allegations that he considered the evidence appeared to substantiate, and Mr. Pitfield became the DA for the allegations that he considered the evidence appeared to substantiate.

[59] Mr. Pitfield offered a pre-hearing conference to both members for all of the counts before him. He noted that the principle in *R. v. Kienapple*, [1975] 1 S.C.R. 729, might apply to some of the counts he considered substantiated as they arose from the same set of facts as some of the counts found to be substantiated by the

Second DA. He therefore proposed to separate the counts so that the discipline process still under the jurisdiction of the Second DA could occur before any process on the "new counts".

[60] On October 10, 2013, Diaz was suspended from operational duties with pay.

[61] That same day, the Third DA — Mr. Pitfield — issued a corrigendum to his October 9 decision, noting that a pre-hearing conference cannot be offered when the possible sanctions include dismissal or reduction in rank.

[62] I note that by late 2013, Hughes had voluntarily left the Transit Police. The discipline proceeding on January 9, 2014 occurred in his absence and resulted in the substantiation of four allegations against him and the imposition of a total of nine-days of suspension. The PCC accepted the findings and penalties imposed as conclusive.

[63] As a result of the investigation by the Second DA, Chief Constable Jones, a recommendation was made that criminal proceedings be instituted against both constables and the matter was referred to Crown counsel.

[64] On January 23, 2014, the PCC suspended all proceedings under the *Act* pending the outcome of the concurrent criminal investigation which was being conducted by the NWPD.

[65] Counsel for the petitioner notes that the PCC had the power to observe and direct a report to Crown counsel initially if he considered that the conduct of any members "may" constitute an offence. That authority was not exercised at any earlier point in the proceedings despite the fact it had been discussed between the Second IO and the deputy PCC as a possibility as early as November 2012.

[66] Diaz did not object to the suspension of the *Police Act* proceedings while the matter was in the criminal courts.

[67] On January 31, 2014, counsel for Diaz advised Crown counsel that Diaz would consent to waive the limitation period for initiating summary conviction

proceedings if criminal charges were laid. On a date unknown to Constable Diaz, but before May 27, 2014, a report was forwarded to Crown counsel by NWPD respecting one allegation of assault causing bodily harm.

[68] On January 22, 2015, an information was sworn in Provincial Court charging both Diaz and Hughes with assault with a weapon, and Diaz with assault causing bodily harm. The Crown proceeded by way of indictment. Section 109(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 requires a sentencing judge to impose a minimum 10-year firearms prohibition on a person convicted of an offence under s. 267 when the Crown proceeds by indictment.

[69] On March 26, 2015, trial dates were fixed for April 25 to May 6, 2016. There were available dates in November 2015, but Diaz's counsel was unavailable.

[70] On May 31, 2016 Crown counsel advised the Court that it was proceeding summarily and Diaz entered a guilty plea to assault causing bodily harm. The count alleging assault with a weapon was stayed as were both charges against Constable Hughes.

[71] On June 24, 2016, P.C.J. Bahen granted a suspended sentence to Diaz.

[72] On July 6, 2016, the PCC lifted the suspension of the *Police Act* proceedings and they resumed.

[73] On July 15, 2016, the Second DA issued a notice of discipline proceeding to Constable Diaz, returnable August 11, 2016. On August 18, 2016, the Second DA conducted a discipline proceeding for Diaz. Diaz admitted the first allegation of abuse of authority for unnecessary force, but denied the second allegation of abuse of authority for issuing a violation ticket to Riby-Williams for being drunk in a public place without good and sufficient cause.

[74] On August 31, 2016, the Second DA dismissed the second allegation and, on September 16, 2016 imposed a five-day suspension for the admitted allegation. This

was the same measure as had been originally proposed and the same imposed upon Constable Hughes and accepted by the PCC.

[75] On August 10, 2016, now five years following the date of the underlying incident, the Third DA issued a notice of discipline proceeding to Diaz, returnable August 22, 2016.

[76] On October 17, 2016 the Third DA granted an application by Constables Diaz and Hughes to dismiss the deceit allegations as being not known to law. In particular, it was held that issuing a violation ticket, or arresting and recommending charges against an individual are not matters that satisfy the definition of "deceit" as defined in s. 77 of the *Act.*

[77] On November 29, 2016, the PCC issued the first public hearing notice respecting the Second DA's dismissal of one misconduct count against Diaz and the penalty imposed. Neither Riby-Williams nor Constable Diaz had applied or requested a public hearing.

[78] Per s. 138(3), the PCC must make a determination as to whether to arrange a public hearing "promptly after receiving the request referred to [in s. 136] or promptly after the expiry of the relevant limitation period [20 days after discipline report], as the case may be, but in any event, the determination must be made within 20 business days after that request is received or that limitation period has expired".

[79] Seemingly, the direction for a public hearing fell outside the limitation period, given the PCC was informed of the Second DA's decision in September, 2016 but such appears moot by virtue of what followed.

[80] The PCC justified the necessity of a public hearing into the Second DA's decision based upon the Second DA's interpretation or application of Part 11 of the *Act*, specifically:

(1) his analysis of the mental element required for abuse of authority was incorrect;

(2) the disciplinary or corrective measures imposed on Diaz were inadequate and "not commensurate with the seriousness of the conduct of the injury caused to Mr. Riby-Williams"; and

(3) a public hearing was necessary in the public interest.

[81] The PCC considered the following factors in concluding that the public interest warranted a public hearing:

(1) the complaint was of a serious nature as the allegations involve the breach of public trust;

(2) there was an arguable case made that the DA's interpretation or application of Part 11 of the *Act* was incorrect;

(3) the disciplinary or corrective measures proposed were inadequate or inappropriate;

(4) it would be necessary to examine and cross-examine witnesses and to receive evidence that was not part of the record of the discipline proceedings in order to ensure that procedural fairness and accountability is maintained; and

(5) there is a reasonable prospect that a public hearing would assist in determining the truth.

[82] The PCC appointed retired Judge McKinnon as public hearing adjudicator.

[83] On December 9, 2016, the Third DA issued a notice of discipline proceeding to Constables Diaz and Hughes for the remaining allegations, returnable February 28, 2017. The discipline proceeding took place from February 28 to March 2, 2017.

[84] On February 6, 2017, Diaz filed a petition in Supreme Court — file S-171135 — seeking judicial review of the PCC's decision to convene a public hearing regarding the disposition by the Second DA. In it, he sought orders prohibiting the

Third DA from recording any findings he might make, quashing the notice of public hearing, and prohibiting retired Judge McKinnon from proceeding with the public hearing.

[85] On March 16, 2017 the Third DA dismissed all of the remaining allegations against both members. He concluded that Riby-Williams had been lawfully arrested for obstruction, was not arrested for either assaulting a police officer or causing a disturbance, and any other charges were made or recommended after arrest.

[86] The petitioner filed a notice of hearing of the petition above-noted, returnable June 28, 2017.

[87] On June 12, 2017 the PCC filed a response to the first petition.

[88] On June 15, 2017, 61 days following the Third DA's final decision, the PCC issued a second public hearing notice bearing the same file number as the first public hearing notice. Again, neither Riby-Williams nor Diaz made such a request for a public hearing. The PCC issued the notice on his own motion pursuant to section 138(1) of the *Act*. The notice purported to order a hearing with respect to the findings and rulings of both the Second and Third DAs, and appointed retired Judge McKinnon as the adjudicator.

[89] The PCC stated the second public hearing notice replaced the first, and that the first public hearing would be held in abeyance pending the results of the petition.

[90] The second notice of public hearing incorporated much of the chronology set out in the first public hearing notice. What was added was the factual background relating to the Third DAs decisions of October 17, 2016 and March 16, 2017.

[91] The PCC considered that a public hearing into the Third DAs decision was necessary because:

(1) the “conduct at issue, if not subjected to a Public Hearing, would likely undermine public confidence in ‘the police, the handling of complaints or the disciplinary process’”;

(2) *Police Act* discipline proceedings entail "no adjudication in the usual sense" because there is no other party to the proceeding and no ability to call and cross-examine witnesses or make submissions;

(3) a public hearing would "assure police accountability" and "assist in determining the truth"; and

(4) an "arguable" case could be made that the Third DA's interpretation or application of Part 11 of the *Police Act* was incorrect because he had not substantiated one allegation against Constable Diaz that had been substantiated by the Second DA as against Hughes on "essentially the same facts".

[92] Finally, the PCC particularizes the alleged misconduct as:

> (i) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz and former Constable Hughes committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a) of the *Police Act,* which is oppressive conduct towards a member of the public, by recommending charges against Mr. Riby-Williams for Assaulting a Police Officer without good and sufficient cause.
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> (ii) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz and former Constable Hughes committed the disciplinary default of *Deceit* contrary to section 77(3)(f)(i)(A) or (B) by knowingly making false or misleading written statements and/or false or misleading entries into official documents, based on false or misleading statements to support charges against Mr. Charles Riby-Williams in SCBCTAPS General Occurrence file 2011-11318.
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> (iii) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a) of the *Police Act,* which is oppressive conduct towards against [*sic*] a member of the public, by recommending charges against Mr. Riby-Williams for Causing a Disturbance without good and sufficient cause.
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> (iv) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(ii)(A) of the *Police Act* by intentionally or recklessly using unnecessary force on any person.
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> (v) That on or about August 10, 2011, at or near the City of Vancouver, British Columbia, it is alleged that Constable Diaz committed the disciplinary default of *Abuse of Authority* contrary to section 77(3)(a)(i) of

> the *Police Act* when he intentionally issued Mr. Riby-Williams a violation ticket for Drunkenness in a Public Place, contrary to section 41 of the *Liquor Control and Licensing Act* without good or sufficient cause.

[93] The PCC, pursuant to s. 143(9)(a), stated the adjudicator was not limited to the particularized allegations. In effect, it was an inquiry "at large". Such was new from that of the first public hearing notice.

[94] The public hearing commenced before retired Judge McKinnon. The PCC appointed public hearing counsel, Mr. Hickford, and commission counsel, Mark Jette. Retired Judge McKinnon retained counsel, Brock Martland as his counsel. Pre-trial applications were made seeking the recusal of retired Judge McKinnon and an order that particulars be delivered. Those were heard in September, November 2017 and January 2018.

[95] Rulings were made on September 28, and November 17, 2017 and February 6, 2018. Retired Judge McKinnon concluded he had no authority to order particulars under the section of the *Act* governing his appointment. He declined to recuse himself.

[96] The evidence of Mr. Riby-Williams was heard on February 13 to 15, 2018.

[97] The hearing was scheduled to resume July 9 to 13 and 23 to 24 with submission scheduled for October 11 and 12, 2018, subject to new commission counsel, Mr. Delbigio, being available on those dates. Counsel for the petitioner notes that the PCC stated in the second notice of public hearing that it replaced the notice issued November 29, 2016, thus rendering the first petition brought respecting that notice as moot. The PCC did not order that the two public hearings be joined, but rather ordered all allegations arising from the matter be joined in a single public hearing.

[98] Despite the present petition being filed July 17, 2017, the response was not filed until March 15, 2018.

[99] It is from that set of facts that the petitioner argues Diaz has been subjected to unreasonable delay which, in the result, should result in an order quashing of the second notice of public hearing. Alternatively, the petitioner challenges the reasonableness of the PCC's decision to issue a second notice of public hearing, noting that the issuance of the notice of a second public hearing came almost six years following the event — in which time no cogent new information was produced.

The Issues

[100] The petitioner argues that there has been unreasonable delay amounting to a denial of natural justice and/or an abuse of process.

[101] While acknowledging administrative tribunals are not governed by the same strictures as criminal cases and s. 11(b) the *Charter* does not apply, the petitioner argue s. 7 of the *Charter* has application to administrative tribunals. At issue in particular is whether there has been unreasonable delay in the administrative proceedings such that the petitioner's s. 7 *Charter* right has been breached. Alternatively, the question is whether there been unacceptable delay amounting to an abuse of process.

[102] To succeed in showing that delay has caused an abuse of process, the applicant must establish that: (1) the delay is unacceptable; and (2) there is a serious prejudice arising from the delay itself, not from the underlying allegations or charges: *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*], at paras. 101 and 115.

[103] The petitioner argues in the further alternative that the PCC's decision to initiate a public hearing is unreasonable on the basis that the PCC: failed to act in accordance with, and within the limits of the enabling statute; failed to act in a principled and consistent way by presenting conclusory statements as reasons; relying on irrelevant factors; and failing to consider the relevant factors.

[104] The respondent opposes the relief sought — the quashing of the second public hearing — asserting the petition must be dismissed on the basis of

prematurity. This, it is argued, is given that the administrative process has not been permitted to run its course.

[105] The respondents argue the issue of delay was not raised before adjudicator McKinnon, and ought to have been before proceeding with judicial review. In the alternative, the respondents argue that that the petitioner has not established a s. 7 *Charter* violation, nor has he established that the delay is such as to amount to an abuse of process or denial of natural justice.

[106] Finally, the respondents argue that the determination by the PCC to initiate the second public hearing is reasonable — reasonableness being the agreed standard of review — and therefore should not be disturbed.

Standing of the PCC

[107] The petitioner did not object to the PCC's standing to make submissions in this judicial review, but questions the PCC's neutrality, arguing that the PCC has "stepped directly into the adjudicative fray and taken an adversarial role against the petitioner".

[108] The respondents, relying upon *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, say there are several considerations in favour of the PCC's participation, notably: the PCC's expertise and familiarity with the relative administrative scheme will assist the Court in reaching a just outcome; and, but for the involvement of the PCC, the petition would proceed unopposed depriving the court of hearing both sides of the dispute.

[109] Balancing the need for fully informed adjudication against the importance of maintaining impartiality, I exercised my discretion in this case to accept the standing of the PCC.

[110] I should note that over the objection of counsel for the respondents, in the interest of economy of time, I heard from counsel for former constable Hughes whose petition was initially to be heard at the same time as the Diaz petition.

[111] On reflection, I agree with counsel for the respondents that counsel for Mr. Hughes has no standing in this proceeding and, as such, have not considered submissions made on his behalf in reaching my conclusion.

Is the Petition Premature?

[112] The PCC submits the Court ought to decline to adjudicate given the record below is incomplete.

[113] Section 8 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, is discretionary: *Lowe v. Diebolt*, 2014 BCCA 280 [*Lowe*], at paras. 38-39. It is therefore open to a reviewing court to decline to hear the merits of an application in appropriate circumstances, including where judicial review is considered premature resulting in fragmentation of the proceedings.

[114] The prematurity principle, according to the respondents, is aimed at preventing fragmentation of the administrative process and piecemeal court proceedings with all of the attendant costs and delays associated with “premature forays to court".

[115] The prematurity argument also aims at avoiding the waste associated with hearing an interlocutory judicial review application when the applicant for such review may ultimately succeed at the end of the administrative process.

[116] The petitioner suggests it is disingenuous, coming from the PCC, to oppose the hearing of the petition based upon the “fragmentation of proceedings” given the proceedings to date being fragmented in the extreme as a result of the path chosen by the PCC to ultimately call for a public hearing into the conduct of both Constables Diaz and Hughes some five plus years following the incident giving rise to the allegations against them.

[117] Further, the petitioner argues, and I agree, that the petition does not raise a challenge to an interlocutory decision made during the adjudicative process. He

argues that two adjudicative tribunals – the Second and Third DAs – rendered final decisions leaving nothing left to decide in either discipline proceeding.

[118] It is the PCC's decision to initiate a public hearing that is the subject of this application for judicial review. That decision is final. Once the public hearing process is initiated, the PCC's authority is exhausted and there is no further jurisdiction to exercise.

[119] The *Act*, not the PCC, provides for the public hearing process, and the adjudicator, not the PCC, determines its outcome. The PCC has standing in the public hearing only through counsel.

[120] Finally, there is no question here of the petitioner failing to exhaust alternate adequate remedies as was the case in *Black v. Canada (Attorney General)*, 2012 FC 1306 [*Black*], a case relied upon by the respondents. In *Black*, the RCMP member had a statutory right of appeal to the RCMP Commissioner. Here, Diaz has no right of statutory review or appeal rights of any decisions made by the PCC under the *Act*.

[121] A similar result arose in *Florkow*, where the PCC appealed the decision of a chambers judge which ruled the PCC did not have authority to direct a public hearing at the time and circumstance in which he did — being outside of the prescribed limitation period.

[122] In the chambers hearing below, the PCC argued prematurity of the judicial review application. The chambers judge rejected that assertion and was sustained on appeal.

[123] Accordingly, it is my view that the application for judicial review is timely in that there is a complete evidentiary record on which to assess the petitioner's claims of unreasonable delay and the reasonableness of the decision of the PCC to initiate the public hearing process.

[124] As such I move on to consider the merits of the petition.

Unreasonable Delay

The Application of *Jordan*

[125] The petitioner argues that *R. v. Jordan*, 2016 SCC 27 [*Jordan*], has application, if only by implication, to administrative proceedings in that it creates a presumption that "accused persons will have suffered prejudice to their *Charter* protected liberty, security of the person and fair trial interests" in the event more than 18 months passes in proceedings wholly in Provincial Court, or 30 months where the proceedings are conducted in Supreme Court.

[126] *Jordan* goes on to state at para. 54 that "once the ceiling is breached, an absence of actual prejudice cannot convert an unreasonable delay into a reasonable one". While no doubt a profound shift in the criminal arena, the respondent correctly points out that these are administrative, not criminal proceedings. Section 11(b) of the *Charter* – the right to be tried within a reasonable time – has no application in disciplinary proceedings.

[127] Nonetheless, the petitioner argues that *Jordan* has changed the mindset respecting delay and the reasoning has application to proceedings such as these.

[128] He notes that in *Henson v. British Columbia (Superintendent of Motor Vehicles)*, 2017 BCSC 783 [*Henson*], the petitioner applied to quash an adjudicator's decision upholding a roadside driving prohibition based upon delay. The delay in question was over 17 months. The prohibition — the subject matter of the application — had been stayed by the superintendent or the Court during most of the delay.

[129] The immediate roadside prohibition legislation, like Part 11 of the *Act*, stresses timeliness. In *Henson*, while the petition was dismissed, Dewitt-Van Oosten J. accepted that *Charter* considerations might be a relevant and useful tool in assessing the public interest in delay in non-criminal proceedings; she specifically noted the aptness of the *Jordan* analysis.

[130] Although the petition was dismissed, she noted the 17-month delay was "close to the line". Ultimately, however, in balancing the interests at stake, Dewitt-Van Oosten J. found in favour of the superintendent and dismissed the petition.

[131] In *Bui v. British Columbia (Superintendent of Motor Vehicles)*, 2016 BCSC 1572 [*Bui*], Kent J. dismissed an application for a stay where 20 months elapsed from the date of oral hearing to the date of decision. He noted that while the delay exceeded the 18-month presumptive ceiling in *Jordan*, *Blencoe* remained the appropriate framework for considering delay in administrative proceedings.

[132] Mr. Justice Kent stated, at para. 20:

> [20] In the administrative law context, the parties agree that *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, is the governing standard respecting undue delay in administrative proceedings. That standard requires "proof of significant prejudice which results from an unacceptable delay" and the court expressly notes that "few lengthy delays will meet this threshold".

[133] In *Bui*, the petitioner acknowledged he could not prove "significant prejudice". The petitioner here alleges he has.

Delay and the Legislative Scheme

[134] In further support of his position that delay is antithetical to the intention of the legislature in crafting Part 11 of the *Act*, the petitioner points out that 2010 amendments to the *Act* provide, what he says, is unequivocal evidence of the legislature's concern with timeliness in the context of administrative decision-making. The amendments were designed to ensure that the disciplinary process was timely and fair to stakeholders — both the public and the police.

[135] Delay has been the subject of comment by the Court of Appeal in both *Florkow* and *Lowe*.

[136] In the latter, the Court of Appeal found there was considerable prejudice to a member exposed to *Police Act* processes extending over five years for what was "at worst, a limited transgression". Groberman J.A., citing *Florkow*, noted at para. 63 of

that case that "[i]ndeed, the need for the disciplinary process to be speedy appears to be uncontroversial".

[137] In *Florkow* the activity giving rise to this disciplinary process involved the arrest of a man police mistakenly thought was involved in an assault. The man, who did not speak fluent English, resisted arrest and sustained injuries including a serious fracture to the orbit of his left eye in the process.

[138] In *Florkow*, it was held that one of the goals of the 2010 amendments to the *Act* was to make the complaint process less time-consuming. At para. 61, Newbury J.A. stated:

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

Section 7 of the *Charter*

[139] While s. 11(b) of the *Charter* does not apply, s. 7 does have application to administrative tribunals and delay in administrative proceedings can amount to a breach of s. 7 rights in extreme cases: *Blencoe*, at paras 45-46.

[140] Section 7 of the *Charter* reads:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[141] In *Blencoe*, the court acknowledged that s. 7 liberty rights include personal autonomy, specifically the freedom to live one's own life and to make decisions that

are of fundamental importance. Prejudice arises when state action interferes with the "irreducible sphere of personal autonomy".

[142] However, as noted in *Blencoe*, at para. 83:

> [83] It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these fundamental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.

[143] In that case, the alleged prejudice was essentially confined to personal hardship; the respondent was not employable, his financial resources were depleted, and he had suffered physically and psychologically. The majority, however, held that the state had not interfered with his family's abilities to make essential life choices, and that the stress, stigma, and anxiety suffered by the respondent did not deprive him of his right to liberty or security of the person.

[144] The prejudice suffered by the petitioner here, while perhaps not far off the above referenced criteria in *Blencoe*, does not, establish his s. 7 *Charter* right has been directly violated by unreasonable delay in the proceedings.

Remedies Pursuant to Administrative Law Principles

[145] In *Blencoe*, however, the Court also addressed the question of whether delay could amount to a denial of natural justice and/or an abuse of process using administrative law principles.

[146] *Blencoe* preceded *Jordan* and, in the administrative law context, declined to impose presumptive ceilings for delay. However, the majority left open the possibility that a party could establish significant prejudice that affected the fairness of the hearing: see paras. 101-104. The majority also left open the possibility of establishing another form of prejudice amounting to an abuse of process "even where the fairness of the hearing has not been compromised": see paras. 105-115.

[147] Thus, even absent a s. 7 breach, delay itself can amount to an abuse of process if the petitioner can establish that the delay is unacceptable and, as a consequence, he or she has experienced significant prejudice arising from the delay itself and not the underlying allegations or charges.

Analysis

[148] Here, the petitioner's position is that a public hearing will uncover nothing new given all of the evidence necessary to bring the matter to its conclusion was available within months if not weeks of the event itself. With that in mind, how delay can affect the fairness of the scheduled public hearing is unclear.

[149] Video depictions of the events in question coupled with witness statements from the major actors made at or near the time of the incident have long since been in place. What has not occurred is the rigorous cross-examination of the petitioner, which might occur or be expected to occur at a public hearing. The absence of cross-examination, however, was contemplated by the legislature in its design of the investigative tools included in Part 11 of the *Act.*

[150] As a result, I find that this is an instance where delay has not caused prejudice to the fairness of the hearing itself.

[151] As to the second form of prejudice — that amounting to an abuse of process — that can arise whether or not hearing fairness has been compromised: *Blencoe*, at para. 115.

[152] At para. 120, the Majority in *Blencoe* stated:

> [120] In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, *supra*, at p. 9-68). According to L'Heureux-Dubé J. in *Power*, *supra*, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this

> nature will be extremely rare" (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

[153] The petitioner argues that is what has happened here. He states that the cumulative effect of the delay, as noted in his affidavit, is he has been relegated in his employment to demeaning, administrative work — not career enhancing operational tasks. He says that his lengthy absence from operational duties has jeopardized his career prospects and his continued employment is threatened if the delay continues.

[154] He alleges his reputation, both within the department and in the community at large, has been adversely affected by the allegations, findings and resultant publicity.

[155] In determining whether the delay has been inordinate, I refer to *Blencoe*, where the majority discussed the appropriate analysis is the assessment of delay, at para. 122:

> [122] The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[156] Here, there is no doubt but the delay has been extraordinary. It is now seven years and counting since the incident.

[157] The respondents argue extraordinary delay does not equate to inordinate delay given the "toolbox" that the legislature provided the PCC, and the disciplinary avenues that the PCC must follow in a lock step fashion in compliance with the legislation.

[158] Admittedly, the issues raised by the reasonably brief encounter between the petitioner and Mr. Riby-Williams did not involve complex issues, either legal or

factual. Still, the matter proceeded at a snail's like pace at various stages with extensions being granted numerous times.

[159] Nor can it be said, in my view, that the continued investigation through the appointment of a Second and Third DA was necessitated to provide new investigative leads that could not have been revealed with reasonable care.

[160] I agree with the petitioner's submission, without undermining the seriousness of the misconduct found to have been substantiated, that the underlying event, as was the case in *Lowe* was a "limited transgression".

[161] In *Lowe*, the delay was five years. At paras. 59-72, the court emphasized the "limited tolerance for delay" in the *Act*. In particular, at paras. 61-62, Groberman J.A. stated:

> [61] The statutory scheme of the Police Act emphasizes the need for decisions to be made quickly. There are limitation periods at all phases of the complex complaint procedure, and limited provisions allowing for extensions. Where extensions are granted, they must be justified, and specific grounds for extension are set out. The statute contains a strong privative clause purporting to oust all review of decisions of a retired judge appointed as a disciplinary authority. It would be ironic if such a provision were interpreted as sanctioning lengthier delays than are allowed by provisions that allow for review or appeal, but provide short limitation periods.
>
> [62] The subject matter of the complaint process also argues in favour of limited tolerance for delay. The disciplinary process is designed primarily to discourage inappropriate conduct and to provide corrective measures to ensure that misconduct is not repeated. It is not a punitive regime. In order to be effective, it is essential that corrective and disciplinary measures be implemented within a reasonable period.

[162] I note the appeal in *Lowe* flowed from an application brought by the PCC for judicial review of a s. 117 review. On the review, retired Judge Diebolt had determined that the abuse of authority required a mental element and was not substantiated merely by a determination in later proceedings that a search was in breach of an accused's *Charter* rights.

[163] The initial investigation in this case was derailed by the FIR, which substantiated allegations against each constable beyond the purview of the original

investigation authorized by the PCC not, in the submission of respondents' counsel, as a result of improper motives of the PCC.

[164] Nonetheless, the referral to the NWPD had the effect of creating substantial delay. Section 92 of the *Act* provides that the PCC may initiate investigation by an external body if necessary in the public interest in the first instance. Such was not done.

[165] I agree with the petitioner that s. 93(1) does not allow the PCC to simply reset the process to its beginning because he concluded the first DA had improperly included findings of misconduct by both constables beyond that initially referenced by the PCC in the referral.

[166] Section 93(1) empowers the PCC to order an investigation "at any time information comes to the attention of" the PCC regarding potential misconduct, whether or not a complaint has been made. He can direct the investigation to the member's own department, an external department or a special provincial constable.

[167] It does not, in my view, allow the PCC to reset the investigation, 15 months post event when he found fault with the first DA's decision of September 10, 2012 — a decision which left unchanged his earlier findings of May 24, 2012.

[168] The eventual determination by the NWPD to refer the matter to Crown counsel was a decision which could have been taken by the PCC, via s. 111 of the *Act*, in the first instance or by the first DA.

[169] Nothing in the record indicates the NWPD made the determination to refer the matter to the Crown based on new information that only came to light during the external investigation.

[170] The delay here has been exacerbated by at least three extensions: to the first IO, and the Second and Third DAs. These extensions appear, on their face, to be unwarranted by s. 99(2).

[171] Neither the first nor the second public hearing was called for in a timely fashion.

[172] While I agree that the presumptive ceilings established in *Jordan* have no direct application in this proceeding (*Bui),* I do not agree that the principle extracted from *Jordan* and the express language in *Florkow* is to be ignored.

[173] More importantly, I have concluded that the delay here has been occasioned, in no small part, by improperly resetting the investigation to its original stage via the appointment of the Second DA, and extensions that do not seem to have been warranted by s. 99(2).

[174] In the result, I find the delay has been inordinate.

[175] I further find that the delays have resulted in significant prejudice to the petitioner — beyond that which would necessarily arise from the nature of the allegations he faces. It is therefore hard to characterize the delay in this case as anything other than unacceptable. The default setting in the *Act* is six months from start to finish. Here the investigation is ongoing seven years following the event giving rise to its initiation.

[176] Despite my conclusion there has been unacceptable delay and that such delay is not all attributable to the options provided the PCC in Part 11 of the *Act*, that conclusion in and of itself does not warrant a stay of proceedings. It must be further shown that delay has caused significant psychological harm to the person or attached a stigma to that person's reputation, such that the continuation of the proceedings at issue would bring the *Acts* administrative processes into disrepute.

[177] According to the respondents, “few lengthy delays will meet this threshold and the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process”. The respondents says such cases are extremely rare and the facts here to not warrant the relief sought.

[178] With respect, I disagree.

[179] To be clear, I do not presume prejudice from delay alone, I find that such has occurred.

[180] One aspect of prejudice is the PCC's decision to not restrict the public hearing to particularized allegations, as was the case throughout the tortured history of the proceeding but to expand the scope of the hearing beyond allegations previously known to the petitioner.

[181] Such is difficult to understand given the PCC's appointment of the second DA following the report of the first DA whose findings went beyond those referred to him in the first instance.

[182] Additionally, I find that the delay has resulted in the petitioner being on administrative leave for close to five years and counting. He is unable to use police equipment, including computers, and has not been allowed to apply to take operational courses since 2012.

[183] His uncontroverted evidence is that his work day consists of non-operational activities such as taking equipment for repairs and watching over non-police personnel as they perform maintenance at his place of work.

[184] He has been threatened, for want of a better term, with suspension without pay by the Chief of Transit Police if he "caused any further delays in the process".

[185] On a personal level, the petitioner deposes that he suffers from anxiety and depression as a result of the allegations. In my view, such are a natural consequence of the allegations, but I also am of the view that the lengthy delays have exacerbated such symptoms beyond what was described by the petitioner in *Blencoe.*

[186] The uncertainty surrounding these proceedings has impacted on decisions as to the number of children the petitioner and his wife will have. The potential for unemployment, he says, resulted in him and his wife having one rather than two or three children.

[187] Lastly, while the petitioner provided no expert evidence concerning the impact of the delay on his mental state, I note and accept that the petitioner has undergone counselling concerns for his mental health and experienced physical manifestations — being tightness in the chest — as a result of the stress.

[188] Again, while I accept some mental stress might reasonably be expected as a consequence of the allegations brought on by the petitioner's admitted misconduct, I conclude that the duration of the investigation has exacerbated that stress and prolonged it beyond that which is reasonable.

Conclusion

[189] Such leads me to conclude that the petition must be allowed and PCC's decision to require a second public hearing, at least as it relates to the petitioner, must be quashed. The continuation of the proceeding as it relates to the petitioner, specifically the public hearing, would amount to an abuse of process and, in the parlance of *Blencoe*, I find that the continuation of the process would bring the *Police Act* disciplinary hearing procedures into disrepute.

[190] Having regard to that conclusion, I find it unnecessary to consider the submissions concerning the reasonableness of the PCC's decision to call for a second public hearing. With that said, if it were necessary to the result, I would have concluded that the PCC's decision call for the second public hearing was unreasonable adopting the petitioner's argument as set out in paragraphs 90-133 of the petition.

"Harvey J."