COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner),* 2020 BCCA 221

Date: 20200730
Docket: CA45636

Between:

Edgardo Ramiro Diaz-Rodriguez

Respondent
(Petitioner)

And

The Police Complaint Commissioner of British Columbia

Appellant
(Respondent)

And

The Honourable Ronald McKinnon

Respondent
(Respondent)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Fenlon
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated September 27, 2018 (*Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner)*, 2018 BCSC 1642, Vancouver Docket S176716).

Counsel for the Appellant:	D.K. Lovett, Q.C. A.K. Harlingten
Counsel for the Respondent Edgardo-Ramiro Diaz-Rodriguez:	D.G. Butcher, Q.C. A.D. Srivastava
Place and Date of Hearing:	Vancouver, British Columbia November 4–5, 2019
Place and Date of Judgment:	Vancouver, British Columbia July 30, 2020

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Groberman
The Madam Justice DeWitt-Van Oosten

Summary:

Mr. Diaz is a member of the Transit Police. In 2011, he and another constable assaulted the complainant at a SkyTrain station in Vancouver and subsequently alleged the complainant had committed a number of unfounded violations. Following a lengthy disciplinary proceeding under the Police Act, the Police Complaint Commissioner ordered a public hearing in 2017. That decision was quashed on judicial review as an abuse of process and for being unreasonable. Held: Appeal allowed. In quashing the decision as an abuse of process, the judge failed to consider the significant public interest in having the complaint addressed in full in accordance with the civilian police oversight provisions of the Police Act and did not address responsibility for the delay, much of which was attributable to parallel criminal proceedings and to the steps mandated by the Police Act. The judge also erred in finding the Commissioner's decision to be unreasonable. The Police Act directs that the Commissioner must arrange a public hearing if he considers there is a reasonable basis to believe that findings or penalties are incorrect or that a hearing is necessary in the public interest. It cannot be said that the decision to hold such a hearing was an unreasonable one in the circumstances.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] At the end of a lengthy disciplinary proceeding under the *Police Act*, R.S.B.C. 1996, c. 367 (the "*Act*"), involving the respondent, Constable Edgardo Ramiro Diaz-Rodriguez, the Police Complaints Commissioner ordered a public hearing. A chambers judge quashed that decision on judicial review, finding it was an abuse of process given the delay involved, and finding in any event that the decision to hold a public hearing was unreasonable at that stage of the proceedings. The Commissioner appeals that decision. For the reasons that follow, I would allow the appeal and restore the notice of public hearing.

Background

[2] Constable Diaz is a member of the South Coast BC Transportation Police Service (the "Transit Police"). The events giving rise to the disciplinary proceedings occurred on August 10, 2011 at the Rupert Street SkyTrain Station in Vancouver where he was on duty with Constable Michael Hughes.

[3] That evening, the complainant went to the upper deck of the SkyTrain station to meet a friend. He was a black, 22-year-old, first-year UBC student who played varsity football. He had no prior involvement with the police. The complainant did not plan to take the train so

had not purchased a ticket even though he had entered the "fare paid" zone. When he received a message from his friend advising of a change of plans, he began to descend the stairs from the SkyTrain platform. Constables Diaz and Hughes ran after the complainant and detained him. They formed the mistaken view that the complainant had not given them his real name. After a discussion lasting about five minutes, Constable Hughes told the complainant he was under arrest and both he and Constable Diaz grabbed the complainant's wrists. Constable Diaz tried to scoop the complainant's legs out from under him. At that point the complainant became concerned for his own safety and tried to run away. Constable Diaz tackled and punched him, then drew his baton and over the course of about nine seconds, used it to strike the complainant ten times in the head, neck and back—causing a six-inch laceration to the back of his head and lacerations to his hands, arms and back.

[4] As will be developed below, Constable Diaz eventually pleaded guilty to assault causing bodily harm. The sentencing judge concluded that Constable Diaz's use of his baton against someone suspected of fare evasion was not justified, and was due to "a loss of control … as a result of fear" and a hyper-vigilant state given the differences in stature between the complainant, who was 6'2" and 230–240 pounds and Constable Diaz who was 5'5" and 140 pounds.

[5] The complainant was taken from the scene by ambulance, treated, and then arrested and transported to Vancouver police cells on a charge of obstruction of a police officer. Almost 24 hours after the incident, Constable Diaz issued a violation ticket to the complainant for being in a fare-paid zone without proof of payment and for being intoxicated in public. The complainant was also later charged with causing a disturbance and assaulting a police officer. The charges were eventually stayed by the Crown but they became another aspect of the complaints against the two constables.

The Complaint Procedure

[6] The procedure for dealing with complaints against police officers is set out in Part XI of the *Act*, provisions that have been described as "dense, complicated and often confusing": *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92 at para. 6. In *Florkow*, Newbury J.A. helpfully distilled the labyrinth of procedural steps as follows:

> [3] 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 limitation specified in the Act: see s. 112(5).

[7] The description of the procedural provisions as "dense and complicated" is borne out by the manner in which the complaints process involving Constable Diaz and Constable Hughes unfolded. It is necessary at this point to address the steps taken in some detail.

[8] The day after the incident occurred, the Transit Police referred the matter to the Commissioner as a "reportable injury" under s. 89 of the *Act*. The Commissioner issued an order for the Transit Police to carry out an investigation in relation to Constable Diaz because in his view the conduct alleged, if substantiated, would constitute misconduct in the nature of an abuse of authority. The Transit Police appointed Inspector Brian MacDonald as the discipline authority ("DA"), and he in turn appointed Staff Sgt. Kent Harrison as the investigating officer (the "IO"). In January 2012, at the request of the IO, the Commissioner issued an amended order for investigation adding Constable Hughes as a member under investigation.

[9] The IO submitted a final incident report on May 11, 2012, stating that he was of the opinion that the allegations were sustainable against both members for abuse of authority, and specifically for the use of unnecessary force. Based on that report, the DA issued a notice of discipline under s. 112 of the *Act* on May 24, 2012. He agreed with the IO that abuse of authority for using unnecessary force was sustainable, but found that the following allegations should also be pursued against both constables:

- discreditable conduct (for recommending a charge of assaulting a police officer without sufficient grounds); and
- discreditable conduct (for recommending a charge of being intoxicated in a public place without sufficient grounds).

[10] The DA proposed a two-day suspension for Constable Diaz, and a three-day suspension for Constable Hughes. On July 11, 2012, Constable Diaz exercised his right to request that a further investigation be conducted. As a result, the IO submitted a supplementary investigation report, but did not make any further recommendations. The DA

considered the supplementary investigation report on September 10, 2012, but did not change his opinion on the allegations that had been substantiated against the two constables.

[11] On receiving the DA's decision, the Commissioner became concerned about procedural fairness to the members, because the allegations the DA found to be substantiated went beyond the scope of the original allegation of abuse of authority upon which the investigation had been founded. As a result, on November 23, 2012, the Commissioner ordered the New Westminster Police Department ("NWPD") to conduct an external investigation under s. 93(1) of the *Act* and appointed Chief Constable David Jones as the DA (the "Second DA"). The Commissioner recast the additional allegations identified by the first DA as "deceit" rather than discreditable conduct and directed that they be investigated on that basis.

[12] The Second DA then appointed NWPD Sgt. Andrew Perry as the investigating officer (the "Second IO"). The Second IO submitted a second investigation report on May 23, 2013 in which he concluded that, in addition to the abuse of authority for unnecessary force, both constables had committed a second abuse of authority by issuing a violation ticket to the complainant 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 the complainant for causing a disturbance, without good and sufficient cause to do so.

[13] After receiving the second investigation report, the Commissioner requested that the Second DA order the Second IO to take further investigative steps. This led to a third supplementary investigation report being produced on July 22, 2013.

[14] On July 26, the Second DA issued a notice of discipline authority's decision under s. 112 of the *Act*, finding that the evidence substantiated two counts of abuse of authority against Constable Diaz:

- using unnecessary force; and
- issuing a violation ticket for drunkenness in a public place without good and sufficient cause.

He concluded that the deceit allegations against both Constables Diaz and Hughes were unsubstantiated and recommended a five-day suspension for both members for the unnecessary force allegation. He recommended an additional one-day suspension for Constable Diaz for issuing a violation ticket without good and sufficient cause. The Second

DA issued a notice of discipline proceeding to both members, returnable on September 18, 2013.

[15] Upon receiving the Second DA's report on August 26, the Commissioner issued a notice of appointment of a retired judge under s. 117 of the *Act* because he was of the view that the Second DA's decision not to substantiate the deceit allegations was incorrect. Retired judge Ian H. Pitfield thus became the third DA to review the matter.

[16] On September 23, 2013, Constable Diaz requested the discipline proceeding before the Second DA be suspended until the Third DA completed his review and decision. As a result, the Second DA's proceedings were adjourned, and did not resume until January 27, 2014.

[17] The Third DA delivered his initial review on October 9, 2013, concluding that the matters investigated by the Second DA appeared to substantiate the following allegations against both members:

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

[18] Matters against the two constables became bifurcated at this stage of the proceedings. The Second DA remained the DA for the allegations that he considered the evidence appeared to substantiate, and the Third DA became the DA for the additional allegations that he considered the evidence appeared to substantiate.

[19] The day after the Third DA's report was made, Constable Diaz was suspended from operational duties with pay. By then, Constable Hughes had voluntarily left the Transit Police. A discipline proceeding occurred in his absence on January 9, 2014 which resulted in the substantiation of four allegations against him and the imposition of a nine-day suspension. The Commissioner accepted those findings and penalties and no further disciplinary proceedings were taken against Constable Hughes.

[20] However, the Second DA also made a recommendation to Crown counsel that criminal proceedings be instituted against both constables. At that point, on January 23, 2014, the Commissioner suspended all proceedings pending the outcome of the criminal investigation. As noted earlier, Constable Diaz eventually entered a guilty plea to assault causing bodily harm and received a suspended sentence and 12 months' probation on June 24, 2016. The Commissioner then lifted the suspension of the disciplinary proceedings and they resumed on July 6, 2016.

[21] On July 15, 2016 the Second DA issued a notice of discipline proceeding to Constable Diaz. The proceeding began on August 18, 2016. Constable 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 the complainant for being intoxicated in a public place. The Second DA dismissed the contested allegation and on September 16, 2016 imposed a five-day suspension for the use of unnecessary force.

[22] Meanwhile, on August 10, 2016, five years after the date of the underlying incident, the Third DA had issued a notice of discipline proceeding to Constable Diaz relating to the deceit allegations. Ultimately, however, the Third DA dismissed the deceit allegations on October 17, 2016, finding that issuing a violation ticket or arresting and recommending charges against an individual are not matters that constitute "deceit" as defined in s. 77 of the *Act*.

[23] On November 29, 2016, the Commissioner issued the first public hearing notice in respect of the Second DA's dismissal of the misconduct count relating to the issuance of the ticket for intoxication in a public place and the penalty he had imposed for the remaining disciplinary breaches. The Commissioner appointed retired Judge McKinnon as the public hearing adjudicator.

[24] On December 9, 2016, the Third DA issued a notice of discipline proceeding to Constables Diaz and Hughes for the remaining allegations before him. The discipline proceeding was set to commence on February 28, 2017.

[25] On February 6, 2017, Constable Diaz filed a petition seeking to quash the Commissioner's decision to convene a public hearing in relation to the Second DA's decision.

[26] On March 16, 2017, the Third DA dismissed all of the remaining allegations he was addressing against both members. On June 15, 2017, the Commissioner issued a second public hearing notice encompassing the findings and rulings of both the Second and Third

DAs, and appointed retired Judge McKinnon as the adjudicator. It is that decision of June 15, 2017 that the chambers judge held to be an abuse of process and unreasonable.

Issues

[27] Three issues are raised on appeal:

1. Did the judge err in reviewing the decision before the disciplinary proceeding had completed?

2. Did the judge err in quashing the decision as an abuse of process?

3. Did the judge err in finding the Commissioner's decision to be unreasonable?

[28] I turn now to the first ground of appeal.

1. Did the judge err in reviewing the decision before the disciplinary proceeding had completed?

[29] Generally, a court will not hear a judicial review petition before a tribunal has rendered its final decision: *ICBC v. Yuan*, 2009 BCCA 279 at para. 24. The prematurity principle is aimed at letting the tribunal get on with its work, and preventing fragmented and piecemeal proceedings with all the attendant costs and delays associated with premature forays into court. The principle is also aimed at avoiding the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may ultimately succeed at the end of the administrative process.

[30] The Commissioner argues that the judge failed to give effect to the prematurity principle. He points out that the public hearing was well under way—the adjudicator had ruled on a number of preliminary matters, and had heard the testimony of the complainant before the hearing was stayed by the judicial review judge. In these circumstances, the Commissioner submits that the judge should have declined to interrupt the administrative proceeding, and should have let the adjudicator rule on any objections Constable Diaz had about delay and abuse of process. He emphasizes that the decision in issue is a screening or procedural one, and not the kind of final decision that is normally the subject of judicial review.

[31] I would not accede to this submission. First, in my view the judge correctly characterized the decision as final, rather than interlocutory. The Commissioner acts as a gatekeeper in ensuring civilian oversight of police complaints. He does not adjudicate complaints on their merits, but can direct that certain investigative steps be taken. Once the Commissioner made his decision to direct a public hearing, his role in that process was at an

end. There is no right of appeal of the Commissioner's decision within the administrative scheme of the *Act*.

[32] Second, it is difficult to conceive how an adjudicator, appointed by the Commissioner and directed to hold a public hearing in the public interest under the *Act*, would have jurisdiction to determine that the hearing was an abuse of process. No authority was provided in support of that proposition.

[33] Third, there is no hard and fast rule that a court will not hear a judicial review petition before a tribunal has rendered its final decision. There are many situations in which demands of justice and efficiency weigh in favour of early review by the courts. In other words, prematurity is not an absolute bar, but a discretionary one: *Yuan* at para. 24. It was therefore open to the judge to exercise his discretion to review the decision of the Commissioner under s. 8 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[34] The judge reviewed all of these arguments and the applicable principles. He noted there was a complete evidentiary record on which to assess the applicant's claims of unreasonable delay and the reasonableness of the decision, and exercised his discretion to proceed with the review. That decision is owed deference on appeal, and I see no basis on which this court could interfere with it.

2. Did the judge err in quashing the decision as an abuse of process?

[35] I begin with the standard of review. This is not a case in which an administrative tribunal has made its own determination on the question of delay and abuse of process. The chambers judge was called upon to make an original determination as to whether the Commissioner's decision to hold a public hearing amounted to an abuse of process which should be stayed. In such circumstances, the appellate standard of review in *Housen v. Nikolaisen*, 2002 SCC 33, applies: see *Canada (Attorney General) v. Boogaard*, 2015 FCA 150 at para. 28. The judge's decision on this issue is therefore reviewable on a standard of palpable and overriding error, unless he made an extricable error of law, such as omitting to apply one aspect of a test, which would be reviewable on a standard of correctness: *Housen* at para. 36.

[36] The judge recognized that an allegation of delay amounting to an abuse of process in an administrative proceeding is an aspect of procedural fairness to be assessed under the framework established by the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44. Under that framework, there are two routes by which delay may be found to give rise to prejudice amounting to procedural unfairness. First, delay may cause prejudice to the fairness of the hearing itself, impairing the ability of a party

to answer the case they have to meet, for example, where memories have faded, essential witnesses have died or are no longer available, or key evidence has been lost: *Blencoe* at para. 102.

[37] The second way in which delay may be prejudicial occurs when the delay has caused significant personal or psychological prejudice of such magnitude that the public's sense of decency and fairness is affected, and it would be contrary to the interests of justice to allow the proceeding to go ahead. In such cases, the delay may constitute an abuse of process: *Blencoe* at para. 115.

[38] The judge determined that the delay in this case had not caused prejudice to the fairness of the hearing itself, given that video depictions of the events and witness statements made at the time of the incident had preserved the evidence: at paras. 149–150. That finding is not challenged on appeal. In issue is whether the delay caused such significant personal or psychological prejudice to Constable Diaz that it would be an abuse of process to permit the hearing to proceed.

[39] The judge began his analysis on this question by determining whether the delay had been inordinate, quoting the following passage from *Blencoe*:

> 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.
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> [Emphasis added.]

[40] Applying these factors, the judge found the issues raised by "the brief encounter" between Constable Diaz and the complainant did not involve complex legal or factual issues. He questioned the Commissioner's decision to pursue the number of investigative steps taken, and found in particular that the referral of the complaint and the new allegations of deceit to the NWPD for an external investigation created substantial delay given that an external investigation could have been put in motion before the Transit Police's internal investigation: at para. 164. In his view, by taking this step the Commissioner improperly "reset the process to the beginning": at paras. 165 and 167. The judge noted that the NWPD's decision to refer the matter to the Crown for possible criminal charges could have been done by the Commissioner himself earlier in the process under s. 111 of the *Act*. In addition, he found the delay had been exacerbated by "at least three extensions" which he said appeared on their face to be "unwarranted by s. 99(2)": at para. 170. The judge found

neither the first nor second public hearing had been called for in a timely fashion: at para. 171.

[41] The judge found the delay of seven years to be inordinate, but observed that inordinate delay alone did not establish an abuse of process warranting a stay of proceedings, saying:

> [176] … 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.

[42] The judge found Constable Diaz met these criteria based on the following:

> [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.
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> …
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> [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.
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> [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.
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> [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".
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> [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*.
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> [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.
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> [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.
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> [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.

[43] Having reviewed these facts, the judge concluded that "the continuation of the process would bring the *Police Act* disciplinary hearing procedures into disrepute" (at para. 189) and quashed the Commissioner's decision to hold a public hearing.

[44] Although I agree with the judge that the history of these proceedings may aptly be described as "tortured," and that the process fell well short of the goal of the 2010 amendments to the police complaint process of "timely decisions" (*Lowe v. Diebolt,* 2014 BCCA 280 at paras. 61–63), I would respectfully disagree that the delay met the high standard of abuse of process established in *Blencoe*. My reasons for that view follow.

[45] *Blencoe* directs that the assessment of inordinate delay requires a contextual analysis which takes into account the nature of the case, its complexity, the purpose and nature of the proceedings, the requirements of a fair hearing process, legislative requirements, and whether the respondent contributed to or waived delay, as well as the rights at stake and other circumstances of the case. Delay expressly sanctioned by the provisions of a tribunal's constituent legislation is not properly taken into account when assessing whether delay is unreasonable: *Blencoe* at para. 122.

[46] Although the judge acknowledged that not all of the delay was attributable to the Commissioner (at para. 176), he started from the presumption that the delay in issue was seven years, that "the default setting in the *Act* is six months from start to finish", and that the proceedings had dragged on because of inappropriate steps taken by the Commissioner: at paras. 170–175.

[47] The judge erred in assuming that the *Act* provides for a six-month process. To the contrary, the *Act* provides that a complaint must be made within 12 months of the event (s. 79) and if deemed an admissible complaint (s. 82), an investigation into whether a disciplinary proceeding should take place is to be completed within six months unless an extension is granted (s. 99). The *Act* clearly contemplates further time-consuming steps, including requests by members for further investigation, and the discipline proceeding itself which can be followed by a review and a public hearing.

[48] In this case, the initial Transit Police investigation began on August 22, 2011, and the investigation report was completed on May 11, 2012, two months and three weeks longer than the six-month period provided for in the *Act*. However, the request to add Constable Hughes to the investigation occurred in December 2011, four months into the investigation.

[49] From June 7, 2012, to September 10, 2012, a supplementary investigation was carried out at the request of Constable Diaz and Constable Hughes—a further three months. The NWPD investigation began November 23, 2012, and the report from that investigation

was submitted on May 23, 2013, a period of six months. Further investigative steps were taken at the request of the Commissioner, and an amended investigation report was submitted July 22, 2013, which accounted for an additional two months.

[50] In total, the Transit Police and NWPD investigations lasted approximately a year and a half, when the five months of supplementary investigation requested by Constables Diaz and Hughes are removed from the process**.** Delays occasioned by the party alleging unreasonable delay or other third parties are not to be attributed to the tribunal: *Blencoe* at para. 59.

[51] Of particular significance is the failure of the judge to take into account the suspension of the administrative proceedings under s. 179(4) the *Act* for two and a half years while the criminal charges proceeded. Constable Diaz was advised of his right to object to the suspension of the administrative proceedings under s. 179(5), but did not do so. When that period of suspension is taken into account, the time from the incident to the issuance of the first notice of public hearing (August 11, 2011 to November 29, 2016) was approximately three years, and to the second notice of public hearing about three and a half years.

[52] In the present case, the judge was highly critical of the convoluted process flowing from the Commissioner's decisions, without recognizing that the proceedings unfolded in accordance with the complex procedures provided for in the *Act*. The legislation specifically contemplates that some cases will go through not only an investigation, a disciplinary hearing, and a review by a retired judge, but also a public hearing where the Commissioner is of the opinion that a public hearing will assist in resolving the issues presented in the case: *Florkow* at para. 61. In some cases, as in the present one, discipline proceedings may also become bifurcated, adding to the complexity. In addition, the *Act* recognizes the potential for parallel criminal proceedings and provides for suspension of the disciplinary process pending their resolution (s. 179(4)). There is no doubt the process here took a long and circuitous route, but the judge erred, in my view, by not recognizing the time attributable to the legislative requirements.

[53] In addition, the judge criticized the Commissioner for ordering a second external investigation by the NWPD. However, he did not take into account the Commissioner's reason for doing so—procedural fairness to Constable Diaz who did not have notice of the First DA's intention to consider the issuance of the tickets as a potential source of misconduct.

[54] As to the prejudice flowing from the decision of the Commissioner to order a public hearing *de novo* and thus "expand the scope of the hearing" (noted by the judge at para. 180), s. 143(3) of the *Act dictates* that a public hearing is to proceed in that manner.

[55] Next, in my view the judge did not give sufficient weight to the admonition in *Blencoe* that the party seeking a stay of proceedings due to delay bears a "heavy burden": at paras. 117, 120. The tenor of the jurisprudence since *Blencoe* accords with the very high bar set in that case. It is helpful at this point to consider those cases.

[56] Mr. Blencoe was the subject of two human rights complaints initiated in 1995 alleging sexual harassment. In 1997, he brought judicial review proceedings. This Court found that the 30-month delay breached Mr. Blencoe's s. 7 *Charter* rights and stayed the proceeding. That decision was reversed on appeal. Although the Supreme Court of Canada found that s. 7 of the *Charter* applies to administrative tribunals (at para. 45) and that the right to security of the person can be violated by "serious state imposed psychological stress" (at para. 56), it found Mr. Blencoe's s. 7 claim failed on the merits. The Court also recognized that the administrative law remedy of delay amounting to an abuse of process can be invoked to impugn the validity of proceedings and provide a remedy (at paras. 101–102). In that regard, the Court was not persuaded that Mr. Blencoe's case constituted an abuse of process.

[57] Mr. Blencoe had been a cabinet minister, but was publicly ousted from cabinet when the human rights complaints were filed. He did not stand for re-election and considered himself unemployable as a result of the complaints. His work in politics was deemed to be finished and he and his family were hounded by the media. He suffered from severe depression and both he and his wife sought psychological counselling. Mr. Blencoe was prescribed medication. His family relocated to Ontario in an attempt to avoid the media and find new employment, but ultimately returned to British Columbia because the public notoriety followed him. Despite these relatively compelling circumstances, the majority found that Mr. Blencoe had not demonstrated significant personal or psychological prejudice as a result of the delay, as distinct from the allegations themselves, and that the delay was not such that it "would offend the community sense of decency and fairness": *Blencoe* at para. 32.

[58] In *Crown Packaging Ltd. v. Ghinis*, 2002 BCCA 172, a delay of seven years from the first alleged instance of harassment and four and a half years from the associated human rights complaint against an employer did not amount to an abuse of process. Although the process was "marked by lack of direction, internal confusion, and unnecessary delay" on the

part of the Human Rights Commission (at para. 5), the prejudice resulting from the delay did not meet the high threshold to support a stay of proceedings.

[59] In *Law Society of British Columbia v. Ewachniuk*, 2003 BCCA 223, this Court held that a delay of five years from citation to decision in Law Society proceedings resulting in a finding of professional misconduct for witness intimidation did not amount to an abuse of process. Similarly, in *Christie v. Law Society of British Columbia*, 2010 BCCA 195, a delay of about three years from the date of a complaint to a finding that Mr. Christie had improperly sent subpoenas seeking pre-trial production of documents from non-parties did not establish an abuse of process.

[60] The majority in *Robertson v. British Columbia (Teacher's Act, Commissioner),* 2014 BCCA 331, held that, despite the College of Teachers' 35-year delay in proceeding in respect of an allegation of a teacher's sexual misconduct, he had not suffered individual prejudice or hearing prejudice, and permitting him to avoid facing a disciplinary hearing would bring the regulatory process into disrepute.

[61] In *Sazant v. College of Physicians and Surgeons of Ontario,* 2012 ONCA 727, the delay in issue related to disciplinary proceedings commenced in 2004 after criminal charges were stayed. The appellant doctor was alleged to have sexually abused three boys between 1970 and 1991. The court held the delay did not amount to an abuse of process. The Court concluded it would have been impractical and unfair for the College to pursue misconduct charges before the criminal proceedings were fully resolved, and that the doctor had failed to demonstrate he suffered actual significant prejudice caused by the delay that would bring the administration of justice into disrepute.

[62] In *Hennig v. Institute of Chartered Accountants of Alberta,* 2008 ABCA 241, four years and one month elapsed between the receipt of the complaint and the time the appellants were advised that a hearing would be held, due in part to suspension of the investigation pending the outcome of a parallel Alberta Securities Commission investigation, and in part due to procrastination of the investigator in preparing his report. Although the process took longer than it should have, the court found that the delay did not justify a stay.

[63] In *Peet v. Law Society of Saskatchewan,* 2014 SKCA 109, Mr. Peet was found guilty of conduct unbecoming of a lawyer in respect of complaints made about four years earlier. The court found that Mr. Peet's bald assertion that the delay negatively affected his professional and personal life did not demonstrate significant prejudice that would offend the public's sense of decency and fairness and warrant a stay.

[64] In *Holder v. College of Physicians and Surgeons of Manitoba,* 2002 MBCA 135, the College decided to hold an inquiry into an allegation of sexual misconduct some six years after the complaint was made, once the complainant became physically and emotionally capable of facilitating an investigation. Although Dr. Holder had previously been informed no further action would be taken, only to be told that the matter had been reopened, the court found this was insufficient to support a claim of abuse of process.

[65] In *Camara v. Canada,* 2015 FCA 43, a seven-year delay in addressing an RCMP officer's grievance with respect to suspension without pay and allowances was held not to amount to an abuse of process. The court noted the appellant had requested and been given a number of extensions of time in the course of the proceedings, there was no evidence he made any attempt to speed up the process, and that he was no longer a member of the RCMP.

[66] Constable Diaz relies on two cases in which an abuse of process was established due to delay. In *Stinchcombe v. Law Society of Alberta,* 2002 ABCA 106, Mr. Stinchcombe was charged by the Law Society with conduct deserving of sanction six years after he was suspended from practice, and seven or eight years after the complaints against him were filed. The Court of Appeal of Alberta held the delay was inordinate, that the parallel criminal proceedings did not justify the delay, and that the blame for the delay fell squarely on the Law Society. The delay in that case had caused serious prejudice to Mr. Stinchcombe's ability to defend himself because tapes of police interviews with the complainant had been destroyed, and the complainants' lawyer, who had previously indicated to the RCMP that he was concerned about the complainant having lied, no longer had any memory of the relevant conversations. The Court concluded that the circumstances resulted in a denial of natural justice and granted a stay of proceedings. The stay was thus granted not on the basis of prejudice arising from personal or psychological harm, but on the basis of hearing prejudice.

[67] Personal or psychological prejudice warranting a stay of proceedings was found in *Investment Dealers Association of Canada v. McBain*, 2007 SKCA 70. In that case, the Investment Dealers Association, a regulatory organization of the securities industry in Saskatchewan, commenced disciplinary proceedings against the respondent three years and eight months after receiving complaints and commencing an investigation into his improper supervision of an employee in his retail brokerage firm. The employee had been charged with misconduct in parallel proceedings, but could not be disciplined due to the expiration of a limitation period. The Saskatchewan Court of Appeal found the delay amounted to an abuse of process because the respondent's reputation, career, and personal life were adversely affected following the original investigation. The respondent's business dwindled from revenues of $12 million to zero within two years, but had recovered

to its previous level in the years following. The notice of hearing issued after the delay rekindled significant negative publicity. The Court found that reviving the matter at that point, with the accompanying publicity that would undoubtedly cause further harm to the respondent's business, would be grossly unfair to him, and that the unfairness was greater than the offence alleged against him, which involved a lack of supervision of an employee alleged to be the actual wrongdoer. The Court concluded that, in the circumstances, allowing the proceedings to continue would bring the relevant disciplinary system into disrepute.

[68] These cases demonstrate that it will be the rare case indeed in which delay in an administrative proceeding will amount to an abuse of process justifying a stay of proceedings. The judge did not address these authorities, although *Blencoe* directs (at para. 130) that delay should be considered in comparison to analogous cases. In my view, even accepting the judge's finding that Constable Diaz experienced prejudice due to delay rather than the nature of the allegations, Constable Diaz's circumstances do not reach the significant level of personal and psychological stress required to establish an abuse of process.

[69] Constable Diaz contends on appeal, as he did before the reviewing judge, that the cases relied on by the Commissioner are no longer persuasive after *R. v. Jordan*, 2016 SCC 27. He acknowledges that *Jordan* concerns the right to be tried within a reasonable time in criminal cases, and is therefore not *directly* relevant to administrative proceedings, but he contends that *Jordan* marks a shift in the common law approach to delay generally, and signals intolerance for complacency and delay in all cases. He notes that in *Florkow*, this Court emphasized the objective of "speedy" resolutions of police complaints.

[70] In my view, it is neither necessary nor appropriate to import the principles in *Jordan* into the assessment of delay in administrative proceedings. The Supreme Court of Canada drew a clear line between criminal cases and administrative proceedings in *Blencoe*, noting that there is no constitutional right outside of the criminal context to be tried within a reasonable time. Indeed, the Supreme Court of Canada found that this Court erred in transplanting s. 11(b) principles into administrative proceedings under s. 7: *Blencoe* at paras. 91–96. The Court observed that "there are appropriate remedies available in the administrative law context to deal with state-caused delay": *Blencoe* at para. 101. In my view that continues to be so.

[71] Finally, and most significantly in my respectful view, the judge failed to apply one element of the applicable test. The task before him was described by the majority in *Blencoe* this way:

> 120 … 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" …

In the present case, the judge considered the prejudice to Constable Diaz in the context of the public interest in a fair administrative process, but did not balance that interest against the competing public interest in having the incident reviewed at a public hearing. As noted above, failing to apply one aspect of a test constitutes an extricable error of law to be reviewed on a standard of correctness.

[72] In my view, the public interest in having the complaint addressed in full in accordance with the civilian police oversight provisions of the *Act* is significant. As the sentencing judge observed, Constable Diaz was responding to a technical violation of fare-evasion. His use of a police baton to repeatedly strike a young man in the head—a deadly force target—was a disturbing use of force. The attempt after the fact to lay apparently unfounded charges of assaulting a police officer, being intoxicated in a public place, and causing a disturbance, was also troubling. Further, a penalty of five days' suspension could well call into question the adequacy of the police-controlled disciplinary process.

[73] In this context, and in light of much of the delay being attributable to the criminal proceedings and to the steps mandated by the *Act*, I am of the view that the need for fairness in the administrative process did not outweigh the public interest in the public hearing proceeding.

[74] That is not the end of the matter, however, because the judge found that even if the delay did not amount to an abuse of process, the decision was an unreasonable one. I turn now to that issue.

3. Did the judge err in finding the Commissioner's decision to be unreasonable?

[75] Having quashed the decision on the basis of abuse of process, the judge found it unnecessary to consider the secondary issue of unreasonableness. He stated nonetheless that he would conclude the decision to hold a public hearing was unreasonable, adopting paras. 90–113 of Constable Diaz's written submissions.

[76] It is common ground on appeal that the judge was required to use a reasonableness standard of review in relation to the Commissioner's decision to hold a public hearing: *Dickhout v. British Columbia (Police Complaint Commissioner),* 2011 BCSC 880 at paras. 26 –27. As stated in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65,

review on a standard of reasonableness gives effect to the legislative intent to leave certain decisions with administrative bodies: *Vavilov* at para. 82. Reasonableness review involves approaching the decision with an eye to its justification, transparency and intelligibility. If the decision falls within a range of possible and acceptable outcomes, it is reasonable and ought not to be interfered with: *Dunsmuir v. New Brunswick,* 2008 SCC 9 at para. 47.

[77] In each of the two notices of public hearing he issued, the Commissioner gave extensive reasons for his decision. In broad strokes, he was of the view that the DAs had not interpreted Part XI of the *Act* correctly when they determined that issuing tickets for various contraventions without foundation did not constitute disciplinary defaults. The Commissioner was also of the view that the suspension imposed on Constable Diaz was an insufficient penalty in the circumstances, and that a public hearing was necessary in the public interest under s. 138 of the *Act* which provides:

> 138 …
>
> the police complaint commissioner must arrange a public hearing or review on the record if the police complaint commissioner
>
> (c) considers that there is a reasonable basis to believe that
>
> (i) the discipline authority's findings under section 125(1)(a) *[conclusion of discipline proceeding]* are incorrect, or
>
> (ii) the discipline authority has incorrectly applied section 126 *[imposition of disciplinary or corrective measures]* in proposing disciplinary or corrective measures under section 128(1) *[disciplinary disposition record]*, or
>
> (d) otherwise considers that a public hearing or review on the record is necessary in the public interest.

[78] In determining whether a public hearing is necessary in the public interest, the Commissioner is to consider the following factors in s. 138(2):

> (a) the nature and seriousness of the complaint or alleged misconduct;
>
> (b) the nature and seriousness of harm or loss alleged to have been suffered by any person as a result of the conduct of the member or former member, including, without limitation, whether
>
> (i) the conduct has caused, or would be likely to cause, physical, emotional or psychological harm or financial loss to a person,
>
> (ii) the conduct has violated, or would be likely to violate, a person's dignity, privacy or other rights recognized by law, or
>
> (iii) the conduct has undermined, or would be likely to undermine, public confidence in the police, the handling of complaints or the disciplinary process;
>
> (c) whether there is a reasonable prospect that a public hearing or review would assist in determining the truth;

> (d) whether an arguable case can be made that
>
> (i) there was a flaw in the investigation,
>
> (ii) the disciplinary or corrective measures proposed are inappropriate or inadequate, or
>
> (iii) the discipline authority's interpretation or application of this Part or any other enactment was incorrect.

[79] The factors considered by the Commissioner in the present case and recorded in the Notice of Public Hearing included his view that the alleged misconduct involves a "significant breach of public trust and that the harm suffered by [the complainant was] particularly serious". He was concerned that there were conflicting and unresolved descriptions of what had occurred. Returning to the statutory factors, he said:

> 31. … I consider 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" and that a hearing is required in order to restore that public confidence. In this case, the only evidence heard by Discipline Authority Pitfield was that of former Constable Hughes, Constable Diaz and Sergeant Perry, who conducted the investigation. This is typical of such proceedings because only the member or former member whose conduct at issue has discretion to call (or not to call) witnesses. There is no adjudication in the usual sense because there is no other party to that proceeding and consequently there is no ability to independently call witnesses, no cross-examination of witnesses called and no submissions made other than those made on behalf of the subject of the discipline. Additionally, in this case, Discipline Authority Pitfield made a preliminary determination, based only on legal submissions, to summarily dismiss some of the allegations even though section 117(9) directed him to conduct a discipline proceeding in accordance with sections 123 and 124 of the Police Act.
>
> 32. In this case, and in addition to [complainant], Constable Bentley and Constable Smith, there were a number of independent civilian witnesses to the incident. It is my view that, in all of the circumstances here, a full and *de novo* Public Hearing is warranted to assure police accountability and to assist in determining the truth. There are varying versions of what occurred including civilian witness versions and those of [complainant] that contradict those of Constable Diaz and former Constable Hughes. Pursuit of the truth would benefit from all testimony being tested by cross-examination and associated assessments of credibility by the Adjudicator with legal submissions on the merits by Discipline Authority counsel, Public Hearing counsel, in addition to counsel for Constable Diaz and former Constable Hughes.
>
> [Emphasis added.]

[80] The judge adopted Constable Diaz's contention that it was an error for the Commissioner to conclude that a public hearing was required so many years into the process when the *Act* allows for a disciplinary proceeding to occur without one. He also adopted Constable Diaz's submission that, contrary to the Commissioner's rationale, nothing more would be learned by holding a public hearing given the number of witness statements and the video recordings of the incident which have been available throughout the

proceedings. Finally, he accepted that the penalty of five days was on parity with penalties in comparable cases, and that there was no basis for questioning the DAs' interpretation of the *Act*. The thrust of the reasoning accepted by the judge is that there is little or nothing to be gained by holding a public hearing.

[81] In my respectful view the judge in adopting these submissions effectively applied a correctness standard of review, stepping into the place of the Commissioner.

[82] Section 138 of the *Act* directs that the Commissioner must arrange a public hearing if he considers there is a reasonable basis to believe that findings or penalties are incorrect or that a hearing is necessary in the public interest. The Commissioner therefore has no option but to hold a public hearing if he is of the view that statutory concerns have arisen. He has been assigned the role of providing civilian oversight to the police complaints process. The *Act* contemplates that there will be times when, despite internal and external investigations and disciplinary proceedings, and further reviews by retired judges, preservation of the public confidence in the process will ultimately require a public hearing. The Commissioner's decision in this regard is entitled to considerable deference. In my opinion it cannot be said that the direction to hold a public hearing in the circumstances of this case was an unreasonable one.

Disposition

[83] I would allow the appeal, set aside the decision of the judge quashing the direction of the Commissioner, and restore the June 15, 2017, notice of public hearing.

[84] The Commissioner did not seek costs of the appeal, and none are ordered.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"