COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Chu v. British Columbia (Police Complaint Commissioner),* 2021 BCCA 174

Date: 20210429
Dockets: CA46346; CA46348

Docket: CA46346

Between:

James S. ("Jim") Chu

Appellant
(Petitioner)

And

The Police Complaint Commissioner of British Columbia

Respondent
(Respondent)

And

The Honourable Ian H. Pitfield.

Respondent
(Respondent)

And

Kerry and Debra Charters

Respondents
(Interested Parties)

– and –

Docket: CA46348

Between:

Daryl Wiebe

Appellant
(Petitioner)

And

The Police Complaint Commissioner of British Columbia

Respondent
(Respondent)

Before: The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Grauer
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated August 2, 2019 (*Chu v. British Columbia (Police Complaint Commissioner)*,

2019 BCSC 1273, Vancouver Dockets S168841 & S1611386).

Counsel for the Appellant, James S. Chu (via videoconference):	D. Butcher, Q.C. E. Holzman
Counsel for the Appellant, Daryl Wiebe (via videoconference):	M. Shirreff
Counsel for the Respondent, The Police Complaint Commissioner of British Columbia (via videoconference):	D.K. Lovett, Q.C. A. Harlingten
Place and Date of Hearing:	Vancouver, British Columbia January 21, 2021
Place and Date of Judgment:	Vancouver, British Columbia April 29, 2021

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Mr. Justice Grauer
The Honourable Mr. Justice Voith

Summary:

In 2015, the Police Complaint Commissioner initiated disciplinary proceedings under the Police Act, R.S.B.C., 1996, c. 367 against former Chief Constable James ("Jim") Chu and former Superintendent Daryl Wiebe. The proceedings arose in relation to a public complaint made against Chief Constable Chu. The complaint alleged Chief Constable Chu had made written submissions in separate disciplinary proceedings that were intentionally designed to mislead the tribunal and cause a Constable's dismissal. Though Superintendent Wiebe had helped prepare the written submissions, he was not named in the complaint. In 2016, disciplinary authorities appointed by the Police Complaint Commissioner determined that the complaint appeared to be substantiated. These decisions required arranging disciplinary hearings to make factual findings and, if the complaint was indeed substantiated, to determine appropriate disciplinary or corrective measures. Some months later, Chief Constable Chu and Superintendent Wiebe brought petitions seeking judicial review of certain screening and procedural decisions made up to that point in the proceedings. The petitions were heard together in 2018 and 2019. The judge, however, dismissed the petitions as premature. Chief Constable Chu and Superintendent Wiebe both appealed, arguing the judge erred in finding the decisions were interlocutory and in failing to consider various factors properly. Superintendent Wiebe additionally argued that the judge erred in failing to distinguish between the two petitions in her analysis.

Held: Appeals dismissed. Although the decision to appoint the disciplinary authority in Chief Constable Chu's case appears to have been procedurally flawed, the judge did not err in determining that his petition was premature. The judge erred, however, in failing to consider Superintendent Wiebe's petition separately from Chief Constable Chu's. The Police Complaint Commissioner's decision to add him to a complaint that he was not referenced in was procedurally flawed, but it would not be in the interests of justice to quash and remit the decision given that the Police Complaint Commissioner could have initiated disciplinary proceedings against Superintendent Wiebe on its own initiative under s. 93 of the Police Act.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] These appeals arise from the orders of a chambers judge which dismissed petitions seeking judicial review brought by two former executives of the Vancouver Police Department ("VPD"), former Chief Constable James ("Jim") Chu ("C/Cst. Chu") and former Superintendent Daryl Wiebe ("Supt. Wiebe"). The judicial review related to certain decisions made by the Police Complaint Commissioner of British Columbia ("PCC") in disciplinary proceedings under the *Police Act,* R.S.B.C., 1996, c. 367 [the "*Act*"].

[2] In reasons for judgment indexed as 2019 BCSC 1273 (the "Reasons") the judge dismissed the petitions on the basis that judicial review was premature in that the administrative process had not yet "run its course".

[3] The principal issues on these appeals are whether the judge erred in reaching this conclusion and whether, as the appellants allege, the court should intervene at this stage of the

administrative process.

[4] For the reasons that follow, I would dismiss both appeals.

Background

[5] On December 26, 2011, VPD Constable Christopher Charters ("Cst. Charters") participated in an unauthorized police chase of a stolen SUV. The incident led to a misconduct investigation under Part XI of the *Act.* VPD Superintendent Mike Porteous conducted a disciplinary hearing and concluded that allegations of deceit and neglect of duty had been substantiated. He ordered that Cst. Charters be dismissed.

[6] Pursuant to s. 136 of the *Act*, Cst. Charters sought a public hearing into the matter (the "Hearing"). In February 2014, the PCC appointed retired judge, the Hon. William B. Smart, Q.C. ("Adjudicator Smart"), to adjudicate the hearing. On July 30, 2014, Adjudicator Smart issued his evidentiary findings, which essentially upheld Superintendent Porteous' findings. It then remained for Adjudicator Smart to determine the appropriate sanction.

[7] Adjudicator Smart received a number of submissions in advance of his sanction decision, including submissions from the VPD, which had requested and been accorded the opportunity by the Adjudicator to do so.

[8] Among these submissions were two signed letters submitted by C/Cst. Chu on the VPD's behalf. The first, dated September 8, 2014, was drafted by multiple individuals within the VPD, including C/Cst. Chu and Supt. Wiebe, and was reviewed by VPD legal counsel. The second, dated September 22, 2014, was written by C/Cst. Chu to respond to several questions raised at the public hearing a few days earlier in relation to the first letter. In the second letter, C/Cst. Chu advised Adjudicator Smart that the first letter was prepared for him by Supt. Wiebe and stated:

> While I take personal responsibility for the final contents of the letter, I provide this information only to emphasize that such a letter isn't something I take lightly, and so I consult extensively and take advice in the interests of accuracy, balance and fairness.

[9] The letters highlighted negative incidents in Cst. Charters' VPD employment record and recommended his dismissal. Their contents were contested by Mr. Charters' counsel and VPD Union President Tom Stamatakis in the course of the Hearing.

[10] Adjudicator Smart issued his sanction decision on October 31, 2014, in which he determined that Cst. Charters should receive a 40-day suspension. The Adjudicator referred to the letters submitted by C/Cst. Chu in his reasons, stating that they fell below the standard expected of a Chief Constable in such matters, being to ensure the submissions were "fair, balanced, complete, and accurate". However, Adjudicator Smart directed his criticisms at the VPD generally rather than at C/Cst. Chu.

[11] On January 23, 2015, C/Cst. Chu publicly announced his retirement from the VPD. That same day, Kerry and Debra Charters ("the Charters"), Cst. Charters' parents, filed a complaint against C/Cst. Chu with the PCC pertaining, in their words, to a "lack of honesty, lack of integrity, and serious misrepresentation of [C/Cst. Chu]…against [Cst. Charters]". The complaint alleged that the letters submitted by C/Cst. Chu were "misleading, inaccurate and untrue", and were submitted "for the sole purpose of attempting to mislead the court…". It goes without saying that these were serious allegations of misconduct.

[12] The PCC reviewed the complaint pursuant to s. 82 of the *Act*, and on February 12, 2015, in a Notification of Admissibility of Complaint issued pursuant to s. 83(2) of the *Act*, determined that the allegations, if substantiated, would constitute misconduct on the part of C/Cst. Chu. The notice appointed:

- retired judge, the Hon. Ian Pitfield as discipline authority pursuant to s. 135(2)(b) of the *Act* ("DA Pitfield"); and
- Chief Superintendent David Critchley of the Burnaby RCMP detachment ("C/Supt. Critchley") to conduct an investigation pursuant to s. 91(1)(a) of the *Act*.

[13] The following day, in a decision I will return to in these reasons since it forms one of the grounds of Supt. Wiebe's appeal, the PCC issued a Notice of Admissibility of Complaint-Amendment that added Supt. Wiebe to the complaint and appointed:

- Chief Constable David Jones of the New Westminster Police Service ("DA Jones") as discipline authority pursuant to s. 135(1) of the *Act* "in relation to this matter" (i.e., Supt. Wiebe); and
- C/Supt. Critchley to also conduct an investigation pursuant to s. 91(1)(a) of the *Act* in relation to Supt. Wiebe.

[14] In determining that the complaint was admissible, the PCC considered the contents of the complaint as well as information from the VPD and from the Hearing.

[15] The PCC's appointment of DA Pitfield in relation to the complaint made against C/Cst. Chu was made from a shortlist of retired judges pre-approved by the Associate Chief Justice of the Supreme Court ("Associate Chief Justice"), ostensibly on the basis of s. 135(2) of the *Act*. I will return to this decision later in the reasons since it forms one of the grounds of C/Cst. Chu's appeal. The section provides:

> 135…
>
> (2) At any time after an investigation is initiated under this Part into the conduct of a member or former member of a municipal police department who is or was a chief constable or deputy chief constable at the time of the conduct of concern, if the police complaint commissioner considers it necessary in the public interest that a person other

> than the chair of the board be the discipline authority for the purposes of one or more provisions of this Division,
>
> (a) the police complaint commissioner must request the Associate Chief Justice of the Supreme Court to
>
> (i) consult with retired judges of the Provincial Court, the Supreme Court and the Court of Appeal, and
>
> (ii) recommend one or more retired judges to act as discipline authority for the purposes of those provisions, and
>
> (b) the police complaint commissioner must appoint one of the retired judges recommended to exercise the powers and perform the duties of a discipline authority under the applicable provision, in substitution of the chair of the board of the municipal police department.

[16] C/Supt. Critchely issued his final investigative report in relation to both C/Cst. Chu and Supt. Wiebe on May 31, 2016.

[17] On June 9, 2016, pursuant to s. 112 of the *Act*, DA Jones found that the complaint against Supt. Wiebe appeared to be unsubstantiated. On June 10, 2016, DA Pitfield, also pursuant to s. 112 of the *Act*, reached the opposite conclusion in relation to the complaint against C/Cst. Chu, finding that it appeared to be substantiated. DA Pitfield's proposed disciplinary or corrective measure was a written reprimand. Pursuant to s. 120 of the *Act* he offered C/Cst. Chu a prehearing conference which was declined. This meant that the next step in the administrative process was the disciplinary proceeding itself.

[18] On June 15, 2016, the Charters wrote to the PCC pursuant to s. 117(2) to request that he appoint a retired judge to review DA Jones' decision. On July 11, 2016, the PCC did so, appointing The Hon. Wally Oppal, Q.C. ("DA Oppal") as DA to conduct a second review pursuant to s. 117(4) of the *Act*. On July 28, 2016, pursuant to s. 117(9) of the *Act*, DA Oppal rendered his decision in which he concluded, contrary to DA Jones, that the complaint appeared to be substantiated with respect to Supt. Wiebe. DA Oppal's decision advised that he was considering "advice as to conduct" and a verbal or written reprimand as appropriate disciplinary or corrective measures.

[19] On September 23, 2016, C/Cst. Chu filed his petition seeking judicial review with the Supreme Court of British Columbia. Supt. Wiebe did likewise on December 7, 2016. On February 3, 2017, the two petitions were ordered to be heard at the same time.

[20] The petitions challenged the reasonableness of five decisions (the "impugned decisions").

[21] C/Cst. Chu sought to quash three decisions:

- the PCC's admissibility decision under s. 82 ("Decision #1");
- the PCC's decision to appoint DA Pitfield under s. 135 ("Decision #2"); and

- DA Pitfield's decision under s. 112 that the allegation of misconduct against C/Cst. Chu may be substantiated ("Decision #3").

[22] Supt. Wiebe sought to quash two decisions:

- the PCC's decision to add Supt. Wiebe to the complaint under s. 82 ("Decision #4"); and
- the PCC's decision to appoint DA Oppal to re-adjudicate the admissibility of the complaint against Supt. Wiebe under s. 117 ("Decision #5").

[23] Both disciplinary processes have, by consent of the parties, been held in abeyance since C/Cst. Chu and Supt. Wiebe filed their petitions seeking judicial review.

The Disciplinary Procedure

[24] It is necessary to first outline the key features of the disciplinary procedure under the *Act* as they apply to these appeals, since this informs where in the administrative process the petitions were filed.

[25] Justice Newbury provided this overview of the procedure in *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92:

> [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).
>
> …
>
> [6] Part XI of the Act is 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. …

[26] The PCC is appointed by the Legislature to oversee and monitor "complaints, investigations and the administration of discipline and proceedings": *Act, s.* 177(1). They exercise a "gatekeeping" function, as Justice Newbury outlined in *Elsner v. British Columbia (Police Complaint Commissioner),* 2018 BCCA 147:

> [60] It is obvious that the role of the PCC under Part XI is different from that of most

> administrative tribunals. As we have seen, the PCC acts as a 'gatekeeper' in ensuring civilian oversight of police complaints. The PCC does not *adjudicate* complaints on their merits, although his or her view of the results of investigations undertaken under Division 3 dictates in some instances whether further investigation or review will be required. (See *Florkow* at para. 8.) The PCC's role is more executive or prosecutorial in nature – deciding whether complaints are admissible, whether investigations should be ordered, to what stage the processes should be pursued, and who should be appointed as "authorities" and "adjudicators" under the Act. It is for those appointees to address the merits of the complaints and to give their reasons therefor, which are protected by "final and binding" privative clauses in Division 3. …
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> [Underline emphasis added; italic emphasis in original.]

[27] A complaint's admissibility falls under s. 82 of the *Act,* pursuant to which Decision #1 and Decision #4 were made:

> 82 (1) On receiving a complaint directly from a complainant or receiving a copy or record of a complaint from a member or designated individual referred to in section 78 (2) (b), the police complaint commissioner must determine whether the complaint is admissible or inadmissible under this Division.
>
> (2) A complaint or a part of a complaint is admissible under this Division if
>
> (a) the conduct alleged would, if substantiated, constitute misconduct by the member,
>
> (b) the complaint is made within the time allowed under section 79 (1) or (2) [time limit for making complaints], and
>
> (c) the complaint is not frivolous or vexatious.
>
> (3) A complaint or a part of a complaint is inadmissible under this Division insofar as it relates to any of the following:
>
> (a) the general direction and management or operation of a municipal police department;
>
> (b) the inadequacy or inappropriateness of any of the following in respect of a municipal police department:
>
> (i) its staffing or resource allocation;
>
> (ii) its training programs or resources;
>
> (iii) its standing orders or policies;
>
> (iv) its ability to respond to requests for assistance;
>
> (v) its internal procedures.
>
> [Emphasis added.]

[28] Misconduct is defined in s. 77 of the *Act* as conduct that constitutes either an offence or a "disciplinary breach of public trust". The latter category includes "discreditable conduct", which is defined as:

> 77(3)
>
> (h) … when on or off duty, conducting oneself in a manner that the member knows, or ought to know, would be likely to bring discredit on the municipal police department, including, without limitation, doing any of the following:
>
> (i) acting in a disorderly manner that is prejudicial to the maintenance of discipline in

> the municipal police department;
>
> (ii) contravening a provision of this Act or a regulation, rule or guideline made under this Act;
>
> (iii) without lawful excuse, failing to report to a peace officer whose duty it is to receive the report, or to a Crown counsel, any information or evidence, either for or against any prisoner or defendant, that is material to an alleged offence under an enactment of British Columbia or Canada;
>
> [Emphasis added.]

[29] Reasons are required if the PCC finds a complaint to be inadmissible; only notice is required if they find a complaint to be admissible: ss. 83(1) and (2). If the PCC finds a complaint inadmissible, they must take no further disciplinary action in relation to it: s. 83(4).

[30] Adjudications are performed by a DA. In the case of an admissible complaint against an incumbent or former Chief Constable, the DA becomes, by default, the chair of the board who employs or employed the member or former member (collectively “members”) of the police force: s. 76(1) “disciplinary authority” (b)(i). In the case of the VPD, this is the Mayor of Vancouver. If the PCC considers it “necessary in the public interest”, they may designate a senior officer of another police department as DA, or, where a complaint against an incumbent or former Chief Constable is concerned, a retired judge recommended by the Associate Chief Justice: ss. 135(1) and (2). Decision #2 respecting C/Cst. Chu was made pursuant to this latter provision.

[31] From the moment they are appointed, the DA may attempt to resolve a complaint through informal resolution, or, with the PCC’s approval, through mediation between the complainant(s) and the member: ss. 157–158. Complaints that are resolved in this way before any disciplinary or corrective measures are taken are not entered in the service record of discipline of the affected member: s. 167(1).

[32] Unless an admissible complaint is resolved informally or in mediation, the Chief Constable of the affected police department must promptly initiate an investigation and appoint a Constable as Investigating Officer (“IO”): s. 90(1). The IO then investigates the complaint and provides a final investigative report within six months, with their assessment of the evidence and facts: ss. 98(1) and (5) and 99(1).

[33] In the case of an admissible complaint against a former or incumbent Chief Constable, the PCC must direct that the investigation be carried out by either a Constable of an external police force or a Special Provincial Constable appointed by the Minister as IO: s. 91(1).

[34] In addition to administering the complaint procedure, the PCC has an independent power to order an investigation, whether or not a complaint has been registered: s. 93.

[35] The PCC may also discontinue an investigation if it considers that further investigation is “neither necessary nor reasonably practicable”, if satisfied as a result of additional information that

the complaint is “frivolous or vexatious”, or if the conclusion is reached that the complaint was knowingly false or misleading: s. 109(1).

[36] Once completed, the IO delivers their report to the Discipline Authority. The DA’s role is to review the report and determine the next steps in the process. If they consider that the conduct at issue “appears to constitute misconduct”, they must convene a discipline proceeding, as DA Pitfield did in Decision #3: s. 112(3). If they consider the conduct does not constitute misconduct, they must notify that decision to the complainant(s), the member, the PCC and the IO: s. 112(4).

[37] The PCC may disagree with a DA’s finding that the impugned conduct does not constitute misconduct. If the PCC considers that there is “a reasonable basis to believe that the decision is incorrect”, they may appoint a retired judge recommended by the Associate Chief Justice to review the IO’s report, as the PCC did in Decision #5: ss. 117(1) and (4).

[38] If the retired judge considers that the conduct appears to constitute misconduct, they will become the DA and must convene disciplinary proceedings themselves: s. 117(9).

[39] To place the petitions at issue in these appeals in context, both C/Cst. Chu and Supt. Wiebe filed their petitions at this point of the administrative process. In both cases, the respective IOs had been appointed and had delivered their final investigative reports. The respective DAs had been appointed, had reviewed the final investigative reports and had made determinations on whether the allegations in the Charters’ complaint appeared to constitute misconduct. DA Pitfield and DA Oppal, the latter appointed after reviewing DA Jones’ initial determinations respecting Supt. Wiebe, had both concluded that the conduct of the appellants appeared to constitute misconduct.

[40] Disciplinary proceedings follow. At their conclusion, the DA must make findings in respect of each allegation of misconduct and, if they find that any of the allegations have been proven, invite submissions on proposed disciplinary or corrective measures: s. 125. The DA must then propose disciplinary or corrective measures for each allegation found to be proven and report their findings to the PCC, the member and the complainant(s): ss. 128(1) and 133(1).

[41] Upon receiving the DA’s report, the member or the complainant(s) may file a written request with the PCC for a public hearing or review on the record: s. 133(5). The PCC must arrange such proceedings if they consider there is a “reasonable basis to believe” that the DA’s findings respecting misconduct or disciplinary measures were incorrect, or if they consider it necessary in the public interest: ss. 138(1)(c) and (d). The PCC may do so on their own initiative if the limitation period for filing a written request has expired: s. 138(1)(b).

[42] The PCC must then determine which of the two options is appropriate. A review on the record may be arranged if the PCC is satisfied that it would be unnecessary to cross-examine witnesses or receive additional evidence, or if a hearing is not “required to preserve or restore

public confidence" in the matter: s. 137(2). In such circumstances, the PCC *may* appoint a retired judge recommended by the Associate Chief Justice to serve as adjudicator: s. 141(2).

[43] If a public hearing is required, the PCC *must* appoint a retired judge recommended by the Associate Chief Justice to serve as adjudicator: ss. 142(1) and (2).

[44] A public hearing or review on the record initiated by the PCC may be cancelled at any point by the PCC on the basis of new evidence or the public interest; if the hearing or review was initiated by a member, it may be cancelled upon that member's request: s. 153.

[45] As at the disciplinary hearing stage, at the conclusion of the public hearing or review on the record, the adjudicator must determine whether misconduct has been proven and, if so, what disciplinary or corrective measures are appropriate: ss. 141(10) and 143(9).

[46] An appeal to this Court on a question of law lies, with leave of a Justice, from an adjudicator's decision in a public hearing alone: ss. 154(2) and (3).

[47] As Justice Newbury explained in *Florkow,* Part XI, viewed in its entirety, reflects both a balancing of interests and an intent to "ensure timeliness and efficiency in resolving complaints":

> [61] … 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….
>
> [Emphasis added.]

[48] Justice Groberman likewise stressed the *Act*'s emphasis on efficiency in *Lowe v. Diebolt,* 2014 BCCA 280 [*Lowe*]:

> [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. …
>
> [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.
>
> [63] Indeed, the need for the disciplinary process to be speedy appears to be uncontroversial. In *Florkow* … at paras. 49 and 50, this Court noted concerns respecting the efficiency of the process expressed by Josiah Wood in his 2007 *Report on the Review of the Police Complaint Process in British Columbia*, a report that was influential in the development of the current police disciplinary regime. The Court returned to this issue at para. 59, and again quoted from the Wood Report:

> … One of the goals of the 2010 amendments … was to make the complaint process less time-consuming. Mr. Wood noted [at para. 203 of the Report] the dissatisfaction of both complainants and police with the lack of timeliness in the process as it existed in 2007:
>
> > While the lack of timeliness, in the present complaint process generally, is considered elsewhere in this report, it is appropriate to note here that the surveys and the interviews conducted revealed that both complainants and respondents were critical of the length of time it takes for complaints to be resolved. For complainants, delay leads to a perception that their complaints are not taken seriously and thus will not be investigated fairly. For respondents there is a real sense of prejudice from having unresolved complaints hanging over their heads for long periods of time while they are expected to continue carrying out their duties. From the point of view of those two most important stakeholders in the process, an oversight function that adds significantly to a process that already takes too long to unfold must be viewed as completely unsatisfactory.
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> [Emphasis by the Court in *Florkow*; citations omitted.]

[49] Notwithstanding these aims, the *Act*'s many stages and requirements may in some cases dictate a "long and circuitous route" to the resolution of disciplinary issues: *Diaz-Rodriguez v. British Columbia (Police Complaint Commissioner),* 2020 BCCA 221 at para. 52 [*Diaz-Rodriguez*].

Judgment Appealed From

[50] The petitions were heard before Justice Choi over four dates in October 2018, and January and June 2019. On August 2, 2019, she dismissed both petitions as premature.

[51] The judge reviewed the procedural history of the matter, beginning with the proceedings against Cst. Charters, and set out the parties' positions. As the petitions were heard before the Supreme Court of Canada released its judgment in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 [*Vavilov*], the parties argued the petitions on the basis of the prevailing law, being *Dunsmuir v. New Brunswick,* 2008 SCC 9 and subsequent cases.

[52] Both C/Cst. Chu and Supt. Wiebe argued that the PCC's decisions were made without jurisdiction, were "procedurally unfair due to the failure to provide reasons", and/or were unreasonable: Reasons at para. 31.

[53] C/Cst. Chu argued that the Charters' complaint was "clearly frivolous and vexatious" and that it was therefore unreasonable for the PCC to admit it: at para. 35. Further, the PCC's reasons for admitting the complaint failed to address whether the letters related to the "general direction and management or operation" of the department or "its internal procedures", both of which in his view should have rendered the complaint inadmissible pursuant to s. 82(3): at para. 35. Third, he argued that the PCC exceeded its jurisdiction by appointing DA Pitfield before the investigation had begun, and on the basis of a pre-approved shortlist of retired judges rather than in direct consultation with the Associate Chief Justice: at para. 39.

[54] Supt. Wiebe adopted all of C/Cst. Chu's arguments, but emphasized that the decisions against him were "more egregious given that he was not even the subject of a complaint": at para. 42. He further argued that his involvement in the first letter was minimal and limited to its early stages, such that there was insufficient evidence to admit the complaint against him. Consequently, the PCC's decisions to admit the complaint against him and to appoint DA Oppal were unreasonable.

[55] Both appellants also argued that the PCC breached the duty of fairness by "diverging from the statutory provisions" without providing sufficient reasons: at para. 44.

[56] The PCC countered that the petitions should be dismissed as premature since the disciplinary process had not concluded: at para. 49. He added that the decisions were entitled to deference and required only a low (or in some cases no) duty of fairness, relying on *Knight v. Indian Head School Division No. 19,* [1990] 1 S.C.R. 653. In the case of the s. 82 decisions (Decisions #1 and #4), he argued that the *Act* did not require reasons and that in any event screening decisions do not trigger a duty of fairness: at para. 54.

[57] The parties disputed the PCC's standing in the judicial review proceedings. The point, however, was neither developed below nor pursued on appeal.

[58] The judge acceded to the PCC's argument that the petitions were premature. Given its brevity, I will set out the entirety of the judge's analysis:

> [61] For the reasons that follow, I dismiss the petitions on the basis of prematurity. The weight of the case law is clear that courts have long been reticent to allow the judicial review of applications brought before the end of the underlying administrative proceedings….
>
> [62] Although the petitioners argue that the impugned decisions are final ones, I find they are discrete decisions in and of themselves, but are interlocutory. The administrative process has not yet "run its course", a process the legislature designed to occur in full first before judicial review.
>
> [63] Further, as stated in [*Canada (Border Services Agency) v.*] *CB Powell Limited*[, 2010 FCA 61] at para. 33, "the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts." This point also arises in *Brown v. British Columbia (Police Complaint Commissioner)*, 2001 BCSC 1115 (B.C. S.C. [In Chambers]). The case law does not support a finding that any of the PCC's decisions or Discipline Authority Pitfield's decision exceed jurisdiction so clearly as to allow a review at this stage.
>
> …
>
> [65] In the case at bar, none of the PCC's four decisions under review are decisions on the merits. The PCC did not determine whether any misconduct was substantiated. They were decisions made to move the administrative process forward. While Discipline Authority Pitfield's decision was on the merits, the discipline proceeding is not concluded. I must, therefore, find that the petitions are premature and must be dismissed.
>
> [66] Given my reasons on prematurity, there is no need to review the PCC's ss. 82, 117, or 135 decisions, Discipline Authority Pitfield's s. 112 decision, or the standing issue.

Issues on Appeal

[59] This appeal raises three issues: (1) whether the judge erred in finding the decisions were "interlocutory"; (2) whether the judge erred in exercising her discretion by failing to address all relevant considerations properly; and (3) depending on the answer to the first two questions, what result ought to follow.

[60] While the two petitions arose out of the same factual background and share a number of commonalities, it bears repeating that they represent separate proceedings.

Analysis

(i) Standard of Review

[61] This was explained by Justice Willcock in *British Columbia (Ministry of Public Safety and Solicitor General) v. Mzite,* 2014 BCCA 220 [*Mzite*]:

> [39] A judge's decision to consider a petition to review an interim decision by an administrative tribunal is discretionary. That decision must be exercised judicially, having regard to the criteria identified by these cases. We ought not to interfere with the exercise of that discretion in the absence of an error in principle or substantial misapprehension of the evidence.

[62] In the event that the judge erred in her prematurity analysis, it is open to this Court to undertake its own review of the impugned decisions, pursuant to its power to make any order that could have been made in the court below: *Court of Appeal Act,* R.S.B.C. 1996, c. 77, s. 9(1)(a). While this Court is ordinarily reluctant to review issues that were not fully considered in the court below (*Gorenshtein v. British Columbia (Employment Standards Tribunal),* 2016 BCCA 457 at paras. 46–47), in my view it would be appropriate to do so here given the stage of the proceedings and the fact that the Court's role in reviewing administrative decisions is to "effectively step into the shoes of the judge below": *Crook v. British Columbia (Director of Child, Family and Community Service),* 2020 BCCA 192 at para. 35.

(ii) The Legal Framework

[63] The prematurity principle was concisely summarized by Justice Fenlon in *Diaz-Rodriguez*:

> [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.
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> …
>
> [33] … 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.
>
> [Emphasis added.]

[64] While screening decisions were once regarded by courts as "jurisdictional" or "preliminary" issues calling for a relatively interventionist approach, this is no longer the case. As Justice Willcock explained in *Mzite:*

> [30] The Supreme Court of Canada, in *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission*), 2012 SCC 10 at para. 33, held the decision in *Bell v. Ontario Human Rights Commission*, [1971] S.C.R. 756, broadly construing the discretion to engage in judicial review of interim decisions, particularly those going to a tribunal's jurisdiction, should no longer be followed. In doing so, the court described practical and theoretical reasons for the rule that restraint should be exercised in hearing appeals from administrative tribunals before they have completed their work:
>
> > [36] While such intervention may sometimes be appropriate, there are sound practical and theoretical reasons for restraint… Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes…Thus, reviewing courts now show more restraint in short-circuiting the decision-making role of the tribunal, particularly when asked to review a preliminary screening decision such as that at issue in *Bell* (1971). [Citations omitted.]
>
> [Emphasis added.]

[65] The prematurity principle's underlying aims overlap with those of similar doctrines, like the adequate alternative remedies doctrine, which, as explained by the Federal Court of Appeal in *C.B. Powell Limited v. Canada (Border Services Agency),* 2010 FCA 61 [*C.B. Powell*], urge judicial restraint absent "exceptional circumstances":

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.
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> [Emphasis added.]

[66] Factors to consider in determining whether the Court's discretion to intervene early, which have been described under the rubric of "special" or "exceptional circumstances", may include hardship or prejudice to the applicant; waste of resources; delay if judicial review proceeds; fragmentation of proceedings; the strength of the case; and the statutory context: *Thielmann v.*

Association of Professional Engineers and Geoscientists of the Province of Manitoba, 2020 MBCA 8 at para. 50; *ICBC v. Yuan,* 2009 BCCA 279 [*Yuan*] at paras. 23–24. The analysis is flexible and does not necessarily turn on a single factor: *Workers' Compensation Appeal Tribunal v. Hill,* 2011 BCCA 49 [*Hill*] at para. 36; *Thielmann* at para. 49.

(iii) Parties Positions

[67] The appellants approach the application of the prematurity principle slightly differently.

[68] In his appeal, C/Cst. Chu submits that the judge erred in principle in finding that the impugned decisions were interlocutory. In particular, he argues that the PCC's admissibility decision under s. 82 was, so far as the PCC's role is concerned, a final decision on the merits. He analogizes the s. 82 decision to the decisions in *Imperial Parking v. Bali,* 2005 BCSC 643 [*Bali*] and *Yuan,* where he says courts treated admissibility decisions of the British Columbia Human Rights Tribunal ("HRT") as final for the purposes of the prematurity analysis.

[69] C/Cst. Chu also submits that the judge failed to properly consider (1) the lack of redress from the PCC's decision under the *Act,* and (2) the prematurity doctrine's underlying concerns, as expressed in *Bali* and other cases, which in his view militated in favour of intervention.

[70] Supt. Wiebe argues that the judge erred by failing to consider all relevant considerations in finding his petition premature. Specifically, he submits that the judge failed to consider (1) the jurisdictional nature of the issues; (2) the efficiency gains of early intervention; and (3) the discrete nature of the decisions within the proceedings.

[71] Supt. Wiebe adds that his circumstances are "more egregious" than those of C/Cst. Chu because he was improperly added to the Charters' complaint despite not being named in it. He submits at paras. 87–88 of his factum that s. 82 only contemplates "complaints that the PCC has received" and that "[a]bsent a complaint about [him], there was no basis for the PCC to add [him] to this matter".

[72] Respecting the finality of the impugned decisions, the PCC counters that neither he nor the DAs made "final" decisions in the sense of adjudications on the merits. He highlights the Federal Court of Appeal's decision in *Black v. Canada (Attorney General),* 2013 FCA 201, which distinguished between procedural matters and substantive issues in the context of R.C.M.P. disciplinary proceedings, characterizing the former as "interlocutory": at para. 8. He submits that the administrative separation between the PCC and substantive decision makers under the *Act* is not a principled basis for interpreting the prematurity principle differently in this context. Finding the impugned decisions to be "final", he submits, risks the "prospect of endless forays into court to challenge PCC (or discipline authority) decisions" contrary to the purposes of the *Police Act.*

[73] In respect of the other grounds raised by the appellants, the PCC contends that the judge made no error of principle in her analysis. The judge considered whether the issues were

"jurisdictional" and rejected that contention consistent with the case authorities. While the PCC acknowledges that the judge's consideration of efficiencies and fragmentation in her reasons was minimal, he points out that no single factor is determinative. Furthermore, the exceptions to the prematurity principle are "narrow" and the threshold for intervention "exceptionally high": *Thielmann* at para. 46. He cites *Barker v. Hayes,* 2008 BCCA 148 [*Barker*] for the proposition that efficiency concerns may cut both ways in the assessment of whether to intervene early.

(iv) Discussion

(1) Were the Impugned Decisions Interlocutory?

[74] A central question when the prematurity principle is considered is whether the decision is "final" or "interlocutory". This issue may arise where the administrative process is divided into screening, investigative and merits stages. The disciplinary proceedings under the *Act* are one example, the process under human rights legislation being another: see *Human Rights Code,* R.S.B.C. 1996, c. 210, ss. 27–27.1 [*HRC*].

[75] The judge found that the impugned decisions were "discrete decisions in and of themselves, but [were] interlocutory": Reasons at para. 62. C/Cst. Chu challenges this finding on appeal.

[76] As I have noted above, courts have occasionally used different language in discussing this issue: *C.B. Powell* at para. 31. Regardless of these differences, in my view it can be taken from the applicable authorities that, however a decision susceptible to judicial review is described, the prematurity principle is engaged whenever the decision maker has not finished its work.

[77] At the hearing of this appeal, both appellants raised this Court's decision in *Diaz-Rodriguez,* which was issued after the appellants had filed their notices of appeal. In that case, the PCC directed a public hearing following the completion of a lengthy disciplinary proceeding under the *Act*, which was under way when judicial review was sought. Mr. Diaz-Rodriguez filed a petition for judicial review of the PCC's decision, alleging among other things that delays in the proceeding rendered the decision an abuse of process. Justice Fenlon found that the chambers judge correctly characterized the PCC's decision to direct the hearing as "final, rather than interlocutory":

> [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*.
>
> [Emphasis added.]

[78] The Court then overturned the chambers judge's order to quash the PCC's decision, finding the judge failed to properly weigh the public interest in holding a public hearing or consider how parallel criminal proceedings had led to delays: at paras. 71–73. The Court found the PCC's decision was reasonable in the circumstances: at para. 82.

[79] In the proceedings below, Justice Choi noted several differences between *Diaz-Rodriguez* and the petitions before her. Referencing the chambers decision in *Diaz-Rodriguez,* she explained:

> [64] *Diaz-Rodriguez* is distinguishable in many respects from the case at bar. The petitions challenged the initiation of a public hearing, which was a final decision. Two adjudicative tribunals, the second and third discipline authorities, had issued their final discipline proceeding decisions "leaving nothing left to decide": para. 117. The petitions did not raise a challenge to an interlocutory decision. Mr. Justice Harvey found that the judicial review was timely, not premature, because there was 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" (at para. 123). As well, there were extraordinary procedural delays, resulting in a five-year piecemeal process.

[80] I agree with these comments and regard *Bali* and *Yuan*—cases cited by C/Cst. Chu—as unhelpful on the interlocutory/finality issue, since both cases turned on the courts' exercise of discretion to intervene early, rather than the finality of the respective decisions.

[81] While the impugned decisions in this case could be judicially reviewed, the disciplinary processes they are embedded in have far from run their course. Unlike *Diaz-Rodriguez,* the disciplinary hearings involving the appellants have not yet begun and, in my view, it is within this context that Justice Fenlon's statement at para. 31 of that authority that the decision in question was "final" should be viewed. Following the conclusion of the hearings involving the appellants, the PCC may be called upon to make further procedural decisions, for instance to institute a review on the record or a public hearing. It cannot be said that the relevant decision makers—the PCC, DA Pitfield or DA Oppal—have "nothing left to decide", which is the feature that distinguishes these proceedings from *Diaz-Rodriguez*.

[82] In my view, then, the judge did not err in finding the impugned decisions were interlocutory.

(2) Did the Judge Err in Failing to Address All Relevant Considerations Properly?

[83] The question then becomes whether the appellants have demonstrated on appeal that the judge erred in giving effect to the application of the prematurity principle. More specifically, the question is whether the judge, in the exercise of her discretion, erred in giving "insufficient weight to all relevant circumstances": *Eastside Pharmacy Ltd. v. British Columbia (Minister of Health),* 2019 BCCA 60 at para. 46.

[84] When considered within this framework, in my view, the answer is “no” with respect to C/Cst. Chu’s appeal, but “yes” with respect to Supt. Wiebe’s.

[85] It bears emphasis that the decision to intervene at this early stage is discretionary and not every flaw will justify intervention. In this regard, it is helpful to consider certain authorities identified by the parties as precedents for early review in the circumstances.

[86] In their written submissions, the appellants relied on the decisions in *Bali, Yuan, Hill* and *Mzite,* all of which concerned judicial reviews of decisions by the HRT to dismiss applications to dismiss complaints pursuant to s. 27 of the *HRC.*

[87] In *Bali*, the petitioner had applied to dismiss a complaint against them on the grounds that it was filed out of time and failed to disclose a *prima facie* case. In refusing the application, the tribunal, on its own initiative, supplemented the evidence on the timing of the complaint with internal documents that it admitted as business records without testimony from their author. The chambers judge quashed the decision on procedural fairness grounds. In her reasons, the judge canvassed certain factors justifying early intervention:

> [55] … The first is that there has been a breach of the rules of natural justice. Moreover, the question of whether a complaint has been brought within the prescribed time limitation is a threshold issue and a close cousin to an issue concerning jurisdiction. It was dealt with as a discrete issue pursuant to a separate application before the Tribunal Member unconnected to the merits of the complaint at large. If the matter is remitted back to the Tribunal for a re-determination, one possible outcome is that the complaint will be dismissed for being out of time and there would never be a hearing on the merits. In these circumstances, judicial intervention now is not premature.

[88] In *Yuan*, the complainant filed a human rights complaint against ICBC that alleged discrimination on the basis of disability in treating his insurance claim less favourably than it would have had he been disabled. ICBC applied unsuccessfully to dismiss the complaint as having no reasonable prospect of success. The chambers judge quashed the tribunal’s decision not to dismiss the complaint, finding that its decision was patently unreasonable. Although allowing the appeal on the remedy, this Court upheld the judge’s decision to intervene, explaining:

> [25] In the case at bar, the chambers judge had full argument on the issue of prematurity. He concluded that it would not be inappropriate to proceed. In doing so, he emphasized that the judicial review was not dependent on an evidentiary record in the case, and that it would not fragment proceedings. He recognized that the issue before him was closely related to the question of whether the Tribunal was acting within its jurisdiction in hearing the complaint. He was aware of the general caution with which courts approach judicial review at an interlocutory stage of proceedings, and took into account appropriate considerations of justice and efficiency. I cannot say that he proceeded other than in accordance with proper principles.

[89] In *Hill*, the complainant filed a complaint against her former employer, alleging that she had been terminated because of her age. The chambers judge quashed the tribunal’s decision to not dismiss the complaint, finding that it had misapprehended key evidence respecting the alleged

nexus between the complainant's termination and her age. Though likewise allowing the appeal on the remedy, this Court upheld the chambers judge's decision to intervene. The Court explained:

> [40] It is evident the primary factor motivating the chambers judge to embark on judicial review was her concern about the Tribunal's misapprehension of the evidence …
>
> [41] First, I agree with the chambers judge that the Tribunal misapprehended the evidence before it about the conversation between Ms. Hill and Mr. Campbell. I also agree this error related to the critical evidence on the material issue raised by Ms. Hill's complaint, and operated substantially in her favour, strengthening her complaint in a manner that was not supported by the evidence. While the general principle is the Tribunal should be allowed to complete its process if there is a reasonable prospect the complaint will succeed, its gate-keeping function is also important. While a hearing under s. 27 is not a fact-finding exercise, such decisions must nevertheless be based on a correct assessment of the evidence if they are to accomplish their legislative purpose of removing claims with no reasonable prospect of success.
>
> [42] I am satisfied the error here was sufficiently material to justify the chambers judge's concern it had influenced the Tribunal's decision, and possibly interfered with the legislative intention of s. 27 to eliminate complaints with no reasonable prospect of success.
>
> [43] Further, this was not a review of an interlocutory decision on an evidentiary or procedural issue that arose in the middle of a hearing. The decision to embark on judicial review was taken between two discrete stages of the process. The s. 27 application was complete. The hearing before the Tribunal had not commenced. Thus the concern about fragmenting ongoing proceedings before the Tribunal was less significant. While the judicial review delayed the Tribunal's process, it was reasonable for the chambers judge to consider that correction of the record before the Tribunal might better serve the interests of justice and efficiency than permitting a full hearing to proceed without that correction.

[90] All three of these decisions were rendered prior to *Halifax,* which, as noted, affirmed the need for restraint in reviewing screening decisions. They should accordingly be "considered carefully", although they may nevertheless serve as guides where appropriate: *Mzite* at para. 37.

[91] In *Mzite*, the complainant brought a human rights complaint well out of time, which alleged discrimination in the provision of anti-retroviral treatments while he was incarcerated. The complainant justified the late filing in part through the allegedly systemic character of the issue. The chambers judge granted the Minister's application for judicial review of the tribunal's decision not to dismiss the complaint, finding the decision was patently unreasonable in that the complaint was "extremely late-filed", did not adequately explain the delay and did not raise systemic issues: at para. 26. The judge's decision was upheld by this Court. As Justice Willcock explained:

> A. Prematurity
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> [29] In my opinion the judge reasonably exercised his discretion to hear the petition.
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> …
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> [40] It *was* an error, in my view, for the judge to say because an application to strike a complaint on the grounds of timeliness could be subject to judicial review, so, conversely, a decision not to strike a claim must be open to judicial review. That argument was effectively dealt with in *Hill* at para. 38. The potential finality of the order sought from the Tribunal is not determinative. It is only a factor that may be considered in the exercise of the discretion.
>
> [41] The decision under review was, however, a substantive, rather than a procedural

> decision. The resolution of the question is of significant value to the parties. Its resolution prior to the hearing of the substantive complaint could potentially result in a saving of significant time and expense on the part of all parties. The decision arose out of a distinct preliminary process and the petition was brought before the substantive hearing had commenced, during an interval in proceedings. It cannot be said that the petition so interfered with the process of the Tribunal that it ought not to have been heard.
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> …
>
> [44] All of the features of the decision in this case made it appropriate for judicial review when the petition came on for hearing, despite the fact the Tribunal had not finished its work. While the exercise of the discretion to engage in preliminary review should be rare, it cannot be said that the judge in this case erred in exercising that discretion.
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> [Emphasis in original.]

[92] All four cases therefore involved evident procedural or substantive errors that, in one manner or another, rendered the proceedings "so deeply flawed that it [was] clear and obvious that judicial review [would] be successful": *Thielmann* at para. 50. This feature, alongside efficiency and fragmentation concerns, was key to the courts' decisions to intervene early. While the discretionary nature of the remedy means that the authorities do not necessarily compel the result of a particular case, it is, in my view, worth bearing these considerations in mind in assessing the appellants' arguments.

[93] As noted above at paras. 69–70, the appellants argue that many of the factors that led courts to intervene early in the above cases are present here, and the judge erred in failing to canvass them properly. They include the lack of specific redress from s. 82 decisions under the *Act,* the "jurisdictional" character of the issues, the efficiency gains of early intervention and the discrete nature of the decisions within the proceedings. Supt. Wiebe further argues that the judge failed to specifically consider the merits of his own application, emphasizing that his circumstances are "more egregious" given that "he was not even the subject of a compliant [and] the PCC itself expanded the complaint to include Supt. Wiebe without any reasons": Reasons at para. 42.

[94] It is helpful at this point to review the judge's findings.

[95] The judge addressed the jurisdictional nature of the issues at para. 63 of the Reasons. She cited *C.B. Powell* for the proposition that "the presence of so-called jurisdictional issues is not an exceptional circumstance justifying early recourse to courts", consistent with the Supreme Court of Canada's statements in *Halifax*: cited in *Mzite* as referred to above at para. 64. The judge then found that the decisions did not "exceed jurisdiction so clearly as to allow a review at this stage": Reasons at para. 63.

[96] The judge reviewed the values of efficiency and avoiding splintering proceedings in her review of the applicable principles at paras. 56–57. She then contrasted the petitions with the chambers decision in *Diaz-Rodriguez* at para. 64 on the grounds that the proceedings in *Diaz-Rodriguez* featured a complete evidentiary record and involved exceptional delays.

[97] As I have noted, the judge addressed the issue of fragmentation at para. 62 of her Reasons and correctly found that the impugned decisions were “discrete” but “interlocutory” in that the administrative process had not yet “run its course”.

[98] I agree that the judge’s consideration of efficiency and fragmentation in these passages was not thorough. The question is whether this alone amounts to a reversible error. As I have indicated above, it is necessary to consider the judge’s reasons in light of each appeal separately.

[99] With respect to C/Cst. Chu’s appeal, the judge, in my view, did not err on this point. While the judge’s analysis could have been more expansive, it is clear that she gave weight to these factors. Her analysis was consistent with the case authorities and was not clearly wrong. Her comment that the legislature “designed [the process] to occur in full first before judicial review” (at para. 62) notably accords with this Court’s comments in *Florkow* and *Lowe* that the disciplinary process under the *Act* is intended to render its decisions with due dispatch.

[100] The fact that the legislature designed the disciplinary process as it did answers, in my view, the concern that no specific recourse is available for s. 82 decisions under the *Act.* While this factor played some role in this Court’s decision in *Diaz-Rodriguez* (at para. 32), s. 82 decisions amount to determinations by the PCC as part of its screening function that, given the materials at their disposal, a member’s conduct “would, if substantiated, constitute misconduct”. Nothing more, nothing less. Nothing prevents a member from vigorously defending their actions at the disciplinary hearing stage, where they may well be exonerated.

[101] Similarly, some of the substantive issues raised in oral argument—for instance that C/Cst. Chu was representing an employer in an adversarial labour relations-type exercise—are, in my view, more appropriately canvassed at the disciplinary proceeding stage, rather than as a challenge to a screening decision.

[102] I am therefore largely unpersuaded by C/Cst. Chu’s submissions. I see no error in the judge’s analysis and would therefore not accede to this ground of appeal.

[103] That said, I would comment on one point that arose in oral argument in C/Cst. Chu’s appeal. Decision #2 appointed DA Pitfield from a shortlist of retired judges at the same time that it initiated C/Supt. Critchley’s investigation. Section 135(2), however, requires that the former occur “after an investigation is initiated” (emphasis added). In argument, counsel for the PCC acknowledged that the provision gave the PCC little “wiggle room”, but argued that the decision nonetheless fell within the range of permissible outcomes.

[104] I disagree. By rendering these two decisions together, the PCC effectively “leapfrogged” (*Florkow* at para. 43) its obligation to request the Associate Chief Justice to consult with retired judges for the purpose of appointing a DA before initiating an investigation. This was an impermissible step.

[105] I appreciate that the use of a pre-approved shortlist was likely intended to address the statutory requirements as efficiently as possible. However, efficiency cannot supersede the *Act*'s requirements. In any event, since s. 135(2) only applies to incumbent or former Chief Constables, its demands are not onerous. Disciplinary proceedings against Chief Constables cannot be expected to be routine.

[106] The point, however, is not pivotal. As I discuss below, had I found that the judge erred in respect of C/Cst. Chu's appeal, I would nevertheless have concluded that the error regarding Decision #2 was harmless.

[107] I now turn to Supt. Wiebe's appeal.

[108] In my view, the judge failed to properly distinguish Supt. Wiebe's circumstances from those of C/Cst. Chu. Although the judge acknowledged the distinctiveness of Supt. Wiebe's petition and arguments at para. 42 of the Reasons, she did not consider them separately in her prematurity analysis. This was an error in principle.

[109] In my view, this omission was significant in that there were compelling reasons to review Decision #4, being the screening decision that initiated proceedings against Supt. Wiebe the day after proceedings were initiated against C/Cst. Chu. As in the four cases canvassed above, the proceedings against Supt. Wiebe were fundamentally flawed from the outset. Adding Supt. Wiebe to the Charters' complaint under s. 82 was clearly incongruent with the *Act*'s requirements. While the decision was entitled to all due "restraint", particularly at this early stage of the proceedings (*Halifax* at para. 17), the error was manifest and deserved to be addressed.

[110] That is because Decision #4 added Supt. Wiebe to the Charters' complaint despite the fact that he was never named in it. The Charters' complaint only identified C/Cst. Chu. The *Act* is clear that the screening process set out in s. 82 regarding whether a complaint is admissible relates to "the member", that is C/Cst. Chu: s. 82(2)(a).

[111] There is no procedure in the *Act* for the PCC, on its own motion, to amend a complaint against one member to include another. In fact, s. 93 of the *Act* provides the mechanism for the PCC to proceed on its own accord, "[r]egardless of whether a complaint is made or registered under section 78":

> 93 (1) Regardless of whether a complaint is made or registered under section 78, if at any time information comes to the attention of the police complaint commissioner concerning the conduct of a person who, at the time of the conduct, was a member of a municipal police department and that conduct would, if substantiated, constitute misconduct, the police complaint commissioner may
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> (a) order an investigation into the conduct of the member or former member, and
>
> (b) direct that the investigation into the matter be conducted under this Division by any of the following as investigating officer:
>
> (i) a constable of the municipal police department who has no connection with

> the matter and whose rank is equivalent to or higher than the rank of the member or former member whose conduct is the subject of the investigation;
>
> (ii) a constable of an external police force who is appointed for the purpose of this section by a chief constable, a chief officer or the commissioner, as the case may be, of the external police force;
>
> (iii) a special provincial constable appointed for the purpose of this section by the minister.

[112] The *Act* specifically provides this process in cases where a complainant withdraws their complaint: s. 94(2).

[113] In light of this, I agree with Supt. Wiebe that the PCC's decision was in error. It had to proceed, if at all, under s. 93, not s. 82.

(3) What Result Ought to Follow?

[114] This leads to the question of what to do. More specifically, should Decision #4 be quashed and remitted to the decision maker?

[115] In my view, it should not. I say this for reasons of practicality and judicial efficiency. Put simply, had the PCC acted under s. 93 rather than s. 82, essentially the same process would have unfolded, albeit under a different structure. In these circumstances, the interests of justice would not be served by requiring the PCC to restart the proceedings from the beginning.

[116] In *Vavilov,* the Supreme Court of Canada explained that courts' remedial discretion on judicial review must be guided by the need to promote "expedient and cost-efficient decision making", stating:

> [142] … while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended… . An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose… Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed….
>
> [Emphasis added; citations omitted.]

[117] This may occur where a decision reflects benign procedural flaws. In *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board,* [1994] 1 S.C.R. 202*,* the Supreme Court cited with approval the case *R. v. Monopolies & Mergers Commission,* [1986] 2 All E.R. 257, [1986] 1

W.L.R 763 (C.A.):

> [54] … In that case, a Chairman interpreted a statute administered by his Commission in order to determine whether a take over proposal had been abandoned. When he decided that abandonment had, in fact, occurred, he stopped a monopolies and mergers reference at the threshold stage. Upon judicial review, the Court of Appeal held that the Chairman had properly interpreted the statute, but the court also held that he had no statutory authority to act alone. Nonetheless, the discretionary remedies at the disposal of the court were withheld, at least partly because "[g]ood public administration is concerned with substance rather than form" and because the Commission "would have reached and would now reach the same conclusion as did their experienced chairman" (p. 774). Given the circumstances of this case as I have described them, this statement is accurate here, although I would reiterate its exceptional character and would not wish to apply it broadly.
>
> [Emphasis added.]

[118] Similarly, quashing and remitting Decision #4 would, in my view, privilege form over substance. The appeal belongs to those "limited scenarios" in which doing so would "serve no useful purpose": *Vavilov* at para. 142.

[119] As I have noted, quashing and remitting Decision #4 would sideline the fact that the PCC could have initiated substantially the same process against Supt. Wiebe under s. 93 that it began under s. 82. Supt. Wiebe acknowledges as much in his submissions but argues that Decision #4 ought to be quashed.

[120] I disagree. The differences between s. 82 and s. 93 do not justify restarting the process. I acknowledge that the s. 93 procedure provides more limited rights of notice and participation to third parties than those available to complainants under s. 82. For example, had the proceedings against Supt. Wiebe been commenced pursuant to s. 93, the Charters would not have had standing to challenge DA Jones' decision which resulted in the appointment of DA Oppal. The PCC, however, decided to make that appointment; and I note that it could have done so on its own initiative pursuant to s. 117(1) and (4) of the *Act.* The fact that the proceedings against Supt. Wiebe were initiated under s. 82, therefore, has made little practical difference.

[121] I add that in so far as C/Cst. Chu is concerned, were this Court to quash Decision #2 and remit the matter, the PCC could again approach the Associate Chief Justice for the purpose of appointing a DA. It is entirely conceivable that DA Pitfield would be appointed a second time. This would place C/Cst. Chu in precisely the same position he was in before DA Pitfield made Decision #3, with the same DA considering the same evidence from the same investigation. This would, in my view, serve no useful purpose.

[122] Furthermore, the timing of these appeals cannot be ignored. The s. 82 decisions the appellants now challenge date to February 12 and 13, 2015. Despite this, they raised no objections until they received unfavourable decisions from the respective DAs, on June 10, 2016 in the case of C/Cst. Chu and July 28, 2016 in the case of Supt. Wiebe. They then waited several months before seeking judicial review, a process that has been ongoing since September and December 2016

respectively. It has been over six years since these proceedings began, and still no resolution is in sight. These appeals illustrate, as well as any, the dangers of prematurely seeking judicial review of ongoing administrative proceedings.

[123] In my view it would not serve the interests of efficiency to interrupt the disciplinary proceedings in the manner urged by the appellants.

Disposition

[124] I would dismiss both appeals.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Voith"