COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bentley v. The Police Complaint Commissioner,* 2014 BCCA 181

Date: 20140512
Docket: CA040214

Between:

Craig Bentley and John Grywinski

Appellants
(Petitioners)

And

The Police Complaint Commissioner and Chief Constable Bob Rich

Respondents
(Respondents)

Before: The Honourable Madam Justice Garson
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Willcock

On appeal from: Orders of the Supreme Court of British Columbia, dated January 25, 2012 and August 7, 2012 (*Bentley v. The Police Complaint Commissioner*, 2012 BCSC 106 and 2012 BCSC 1186, Vancouver Docket No. S110977).

Counsel for the Appellants:	M.K. Woodall
Counsel for the Respondents:	J.S. Heaney
Place and Date of Hearing:	Vancouver, British Columbia January 29 and 30, 2014
Supplementary Written Submissions:	March 12, 2014
Place and Date of Judgment:	Vancouver, British Columbia May 12, 2014

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Willcock

Summary:

The Police Complaint Commissioner issued an Order for Investigation (the "Order") into the conduct of the appellant police officers, which effectively reopened an investigation into a complaint against them that had previously been summarily dismissed. The original complaint was made by the mother of a murder victim. The appellant police officers had received a tip from an informant about an alleged murder plot against the victim. The police officers attempted to ascertain the reliability of the tip and then determined to warn the target of the alleged murder plot. However by the time they reached her home she had already been murdered.

The Commissioner issued an Order re-opening the dismissed complaint. Statutorily he could do so within thirty days if he determined it was in the public interest that the investigation be re-opened, alternatively he could do so at any time if he had new information. The Order was made outside the 30 day time limit.

The Order issued by the Commissioner stated that the investigation was reopened under s. 54(6)(a)(ii) the public interest section of the Police Act R.S.B.C. 1996, c. 367. But in the body of the Order, reference was made to new evidence.

On this appeal, the police officers challenge two separate orders of Supreme Court justices sitting in judicial review of the Police Complaint Commissioner proceeding. In the first order the judge declined to order production of the file of the Commissioner. In the second order the judge dismissed the petition seeking to quash the Commissioner's Order re-opening the investigation.

Held: ***The appeal was allowed and the Commissioner's Order re-opening the investigation was quashed****. It was therefore unnecessary to consider the appeal of the order dismissing as premature the application for production of the Commissioner's file.*

The Court held that the Commissioner's reasons contained in his order either misstated the law in terms of his jurisdiction or were insufficiently clear to allow the appellants to determine on what basis the investigation had been ordered reopened. The court has no authority to cure a defective order made under the Police Act. It was not within the purview of the chambers judge to assume the Commissioner intended to cite the new evidence provision (ss. 54(8)) when he expressly stated he was acting under another provision.

Reviewed on a standard of correctness, the Commissioner exceeded his jurisdiction and the chambers judge erred in law by characterizing the argument about the defect in the Order as merely technical.

Introduction

[1] The appellants, Craig Bentley and John Grywinski, are police officers. In May 2009, the Police Complaint Commissioner issued an Order for Investigation (the "Order") which effectively reopened an investigation into a complaint against them that had previously been summarily dismissed. On this appeal, the police officers challenge two separate orders of Supreme Court justices sitting in judicial review of the Police Complaint Commissioner proceeding.

[2] In the first order, Madam Justice Brown dismissed the officers' request that certain documents be filed with the court and transmitted to the appellants by the Commissioner. Specifically, the appellants sought the record of proceedings, including a memorandum that they said the Commissioner relied on in deciding to reopen the investigation: *Bentley v. The Police Complaint Commissioner*, 2012 BCSC 106. In the second order, Madam Justice Gerow dismissed the appellants' petition to have the Order for Investigation quashed on the basis that the Commissioner lacked the necessary jurisdiction to make the Order: *Bentley v. British Columbia (Police Complaint Commissioner)*, 2012 BCSC 1186.

[3] For the reasons that follow, I would allow the appeal and quash the Order for Investigation. In my view, the Commissioner exceeded his statutory grant of power by issuing the Order on the grounds of public interest when he was clearly out of time to do so.

Background

a. The Police Conduct and the Underlying Incident

[4] First, I turn to the underlying incident which forms the factual backdrop to these proceedings. In September 2005, Cst. Bentley and his partner spoke with a potential confidential informant who was incarcerated at Matsqui Institution. The informant provided non-specific information at this first meeting and Cst. Bentley was identified as the informant's primary handler. On November 17, 2005, the informant, having been released from custody, renewed contact with Cst. Bentley. The informant disclosed that Amjad Khan had offered him money to kill Khan's girlfriend.

The informant provided the girlfriend's address to the constable. Cst. Bentley apprised his supervisor, Sgt. John Grywinski, of the then alleged murder plot. The police officers say that over the course of the next few days they attempted to ascertain the reliability of the information and resolve how to proceed without jeopardizing the safety of the confidential informant.

[5] On November 22, 2005, Cst. Bentley went with another officer to the address they had been given by the informant, who had said it was the home of the possible murder target. Tragically, by the time they arrived, police tape surrounded the house and Ms. Tasha Lynn Rossette had already been murdered. The murder is believed to have occurred late in the evening of November 20, 2005. Mr. Khan and an accomplice have since been convicted of Ms. Rossette's murder. Ms. Rossette had been Mr. Khan's girlfriend.

b. Complaint Proceedings

[6] On September 11, 2008, Ms. Rossette's mother made an official complaint under the *Police Act*, R.S.B.C. 1996, c. 367, alleging that the appellants had failed in their duty to advise her daughter about the threat to her life. Subsequent to the complaint an investigation was conducted by the Vancouver Police Department Professional Standards Section (the "Discipline Authority") who summarily dismissed the complaint on March 2, 2009. As required by the *Police Act*, on March 10, 2009 notice of that decision was served on the Police Complaint Commissioner and, at about the same time, communicated to the complainant.

[7] Sections 54(2) and 54(7) of the *Act* (as it was then in force), provided that a decision of the Discipline Authority to summarily dismiss a complaint was final and not to be further investigated. There were two exceptions in the *Act*, however, that are relevant to this appeal: first, s. 54(6)(a)(ii) permitted the Commissioner to further investigate the complaint within 30 days of its dismissal if he or she deemed it "in the public interest" to do so; and, second, s. 54(8) stated that, the Commissioner could make an order for investigation at any time if "new information" was received that, in opinion of the Commissioner, required investigation.

[8] On May 14, 2009, the Commissioner decided to reopen the investigation. The language of the Commissioner's Order for Investigation is important to the issues that arise on appeal. I set it out in full below:

> To: Detective Constable Bentley (#1552)
> Staff Sergeant Grywinski (#1247)
> Vancouver Police Department (Respondents)
>
> And to: Chief Constable Jim Chu
> Vancouver Police Department (Discipline Authority)
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> ---
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> On September 28, 2008, the Office of the Police Complaint Commissioner received a Form One Record of Complaint from Ms. Simone Rossette alleging that the respondents had information relating to her daughter's subsequent murder, but neither warned her daughter of the threat on her life, nor did they act upon the information they had received concerning this threat. The Professional Standards Section of the Vancouver Police Department conducted an investigation into the allegations raised by Ms. Rossette.
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> On March 2, 2009, Inspector Mario Giardini, as the designated Discipline Authority for the Vancouver Police Department, issued his decision summarily dismissing the neglect of duty allegations against the respondent officers. A copy of Inspector Giardini's decision was sent to Ms. Rossette by way of registered mail, but remained unclaimed at the post office.
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> Upon receiving the Discipline Authority's letter dismissing the allegations against Detective Bentley and Staff Sergeant Grywinski, my office requested a copy of the investigation conducted by the Professional Standards investigator. Following a review of the materials provided and further discussions with the investigator, it was discovered that documentation gathered in a separate "Code of Conduct" investigation conducted by Inspector Porteous of the Vancouver Police Department was not provided to the Professional Standards Section to assist in their *Police Act* investigation.
>
> According to section 54 of the *Police Act,* as Police Complaint Commissioner, I may either confirm the Discipline Authority's decision to summarily dismiss the allegations, or, if I find that it is in the public interest, I may set aside the summary dismissal and order a public trust investigation be conducted into the alleged misconduct,
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> Based on my review of the available evidence to date, in my opinion, it is in the public interest that a full and complete *Police Act* investigation be conducted into the above-noted allegations against Detective Constable Bentley and Staff Sergeant Grywinski. Therefore, pursuant to sections 54(6)(a)(ii) and 55(3) of the *Police Act,* I order that the alleged professional misconduct be investigated in order to allow the Professional Standards Section of the Vancouver Police Department to review Inspector Porteous's investigation and any other documentation not accessed by the Professional Standards Section in their original investigation. In addition to the above described misconducts alleged, I also order that the investigating officer may

> investigate any other potential disciplinary defaults that have been identified during the investigation into this incident.
>
> A Public Trust complaint investigated pursuant to Division 4 of the *Police Act* must be completed within six (6) months. Unless the circumstances of this investigation warrant an extension, the investigation limitation period is scheduled to expire on November 14th, 2009.

[9] On February 14, 2011, the appellants filed their petition in this proceeding in the Supreme Court of British Columbia. They argued that the Commissioner was without jurisdiction to make the Order and that he was required to disclose documents on which he relied in making the Order. They sought the following relief in their amended petition:

> 1. An order quashing the *Order for Investigation* dated 14 May 2009 and the *Order for External Investigation and Notice of Extension* dated 12 November 2010 ("the Orders").
> 2. An order declaring the Orders to be a nullities, and of no force or effect.
> 3. An order in the nature of *certiorari* requiring the police complaint commissioner to transmit the record of the proceedings before him to the Supreme Court including, but not limited, the information in the possession of the office of the police complaint commissioner upon which he based the Order.

[10] In response to the petition, the respondents filed the affidavit of Mr. Thomas Steenvoorden, an investigator with the Office of the Police Complaint Commissioner. It was Mr. Steenvoorden who had conduct of the file of the complaint against Cst. Bentley and Sgt. Grywinski subsequent to the Commissioner being notified that the complaint against them had been dismissed. In his affidavit, Mr. Steenvoorden explains at some length the events that followed the dismissal of the complaint. At para. 11 he deposed:

> Also on April 30, 2009, I completed my review of the Summary Dismissal and forwarded a copy of my analysis to the Deputy Police Complaint Commissioner Bruce Brown. I included my concern about the VPD's revelation earlier that day about the Porteous Investigation and that its findings had not been before Inspector Giardini when he issued the Summary Dismissal. This was entirely new information to the Commissioner's office. I recommended that the Complaint be returned to the VPD for investigation.
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> [Emphasis added.]

[11] The appellants proceeded with their application to compel the Commissioner to produce the record of proceedings first. They said the Commissioner was relying on those documents to justify his decision to reopen the investigation on the grounds that he had received "new information", as indicated by Mr. Steenvoorden's affidavit. On January 25, 2012, Brown J. dismissed their application on the grounds that it was premature. Her order is one of two under appeal.

[12] The second order under appeal dismissed the appellants' application to quash the Order for Investigation. It was made by Gerow J. on August 7, 2012. The officers argued that the complaint had already been summarily dismissed and in those circumstances the Commissioner's statutory authority to investigate further was limited. They argued that under the governing legislation the Commissioner was permitted to so order only if there was new information that he determined required consideration or if he determined within 30 days of the summary dismissal that it was in the public interest to reopen the investigation.

[13] In terms of the latter provision, in the appellants' submission, the Commissioner did not have jurisdiction to order further investigation in the public interest because his order came well after the 30-day deadline. They pointed out that he expressly relied on this provision in the Order.

[14] At para. 40, Gerow J. summarized the petitioners' arguments concerning the "new information" provision:

> The petitioners further submit that:
>
> 1. It is the Commissioner who must form the opinion and he cannot rely on the recommendations made by an employee in his office; i.e. Mr. Steenvoorden;
> 2. There must be new information and it is implicit that the information must concern the merits of the complaint; and
> 3. The information must require investigation. If the Commissioner receives new information that does not materially add to the information that the discipline authority already had, it could not reasonably be said that the new information requires investigation, even if it is "new" in some sense.

[15] At para. 41, the chambers judge stated that it was evident from the Order that the Commissioner had new information. She wrote:

> In my view, the petitioners' argument is overly technical. The body of the 2009 order makes it clear that the Commissioner received information that material had not been received and reviewed in the investigation leading up to the summary dismissal.

[16] The chambers judge went on to find that the Commissioner had made the Order under the "new information" provision despite the fact that the Order cited the public interest provision. She rejected the petitioners' arguments on jurisdiction and refused to quash the Order.

Discussion

a. Grounds of Appeal

[17] The appellants ask this Court to quash the Commissioner's order, arguing that Gerow J. erred in her jurisdictional determination. In the alternative, they ask that Mr. Steenvoorden's memorandum be transmitted to them, saying Brown J. erred in concluding their application was premature. They say that they require the Steenvoorden memorandum in order to support the claim in their petition that there was no new information on which the investigation could be re-opened. They expect that the Steenvooorden memorandum would provide the necessary evidentiary foundation to prove that there was no new information.

[18] Three main issues arise out of the order of Gerow J. First, the appellants argue that a careful review of the record leads to the conclusion that there was no new evidence provided to the Commissioner and consequently he was without jurisdiction to order the continued investigation on that basis under s. 54(8). The respondents contend that the chambers judge found as a fact that there was new evidence and her decision on this point ought not to be disturbed on appeal.

[19] Second, the appellants argue that the Commissioner was out of time to order the investigation in the public interest under s. 54(6)(a)(ii). The respondents argue that the Commissioner intended to make his order under s. 54(8), the new

information provision, and the Order ought not to be quashed on account of an irregularity.

[20] Third, the respondents argue that this Court ought not to quash the Order even if it is determined that the Order was made without jurisdiction. They say the appellants were guilty of unreasonable delay because they did not file their petition to quash the Order for 21 months after it was issued. The respondents say the appellants' decision to wait to challenge the Order should bar them from the relief sought.

[21] In my view, the chambers judge Gerow J. erred and I would quash the Order for Investigation on the second ground of appeal; namely, that the Order was made out of time and the Commissioner was therefore without jurisdiction. In light of this conclusion it is not necessary to consider either the first ground of appeal or the appeal of the order made by Brown J. regarding the production of documents.

b. Relevant Provisions of the *Police Act*

[22] First, I turn to the sections of the *Police Act* that are important to this appeal. As it was then, the *Act* provided that a discipline authority could summarily dismiss a complaint, as here, pursuant to s. 54(1). Section 54(3) required the discipline authority to then provide a copy of its decision to the Police Complaint Commissioner. It will be recalled that in this case that was done on March 10, 2009:

> 54 (1) A discipline authority may summarily dismiss a public trust complaint, whether or not the complainant or third party complainant has filed a notice of withdrawal under section 52.2, if the discipline authority is satisfied that
>
> (a) the complaint is frivolous or vexatious,
>
> (b) there is no reasonable likelihood that further investigation would produce evidence of a public trust default, or
>
> the complaint concerns an act or omission that, to the knowledge of the complainant or third party complainant, occurred more than 12 months before the complaint was made.(2) Subject to this section, a public trust complaint that has been summarily dismissed under subsection (1) must not be investigated or further investigated under this Division, but nothing in this subsection prevents further action being taken in relation to any internal discipline component or service or policy component of the complaint.

(3) If a discipline authority decides to summarily dismiss a public trust complaint, the discipline authority must, within 10 business days after making that decision, provide to the complainant, the respondent and the police complaint commissioner written notice of the discipline authority's decision, the reasons for it and the recourse that is available to the complainant under this Part.

(4) A complainant may apply to the police complaint commissioner for a review of the decision of a discipline authority to summarily dismiss his or her complaint under this section.

(5) An application for a review under subsection (4) must be filed with the police complaint commissioner within 30 days after the date of the notice provided under subsection (3).

(6) Whether or not an application for a review is filed with the police complaint commissioner in relation to a public trust complaint that is summarily dismissed under this section, the police complaint commissioner must, within 30 days after the date of the notice provided under subsection (3),

> (a) examine the discipline authority's decision and the reasons for the summary dismissal, and either
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> > (i) confirm the discipline authority's decision, or
> >
> > (ii) if the police complaint commissioner concludes that it is in the public interest to investigate the complaint, order the discipline authority to conduct an investigation into the complaint, and
>
> (b) notify in writing the discipline authority, the complainant and the respondent of the outcome of the police complaint commissioner's examination under paragraph (a).

(7) The decision of a discipline authority to summarily dismiss a public trust complaint is final and the complaint is deemed to have been dismissed unless

> (a) an application for review is received by the police complaint commissioner under subsection (5), or
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> (b) the police complaint commissioner makes an order under subsection (6)(a)(ii).

(8) Whether or not, within the time required by this section, an application for review is received under subsection (5) or an order is made under subsection (6)(a)(ii), the police complaint commissioner may at any time order a discipline authority to investigate a public trust complaint that has been summarily dismissed if new information is received that, in the opinion of the police complaint commissioner, requires an investigation.

(9) On receiving new information and ordering a discipline authority to investigate a public trust complaint under subsection (8), the police complaint commissioner must notify in writing the discipline authority, the complainant and the respondent of the nature of the new information and the reasons for ordering the investigation.

[Emphasis added.]

[23] The Commissioner cited s. 54(6)(a)(ii) and s. 55(3) in the Order for Investigation as the provisions under which he acted to reopen the investigation. The latter provided:

> 55 (3) Despite any other provision of this Act, the police complaint commissioner may order an investigation into the conduct of a municipal constable, chief constable or deputy chief constable, whether or not a record of complaint has been lodged.

Neither party has made submissions on the applicability of s. 55(3) to the Order, or this appeal, nor did Gerow J. address it in the decision below. Neither party relies on this section as authority for the impugned order.

[24] Thus, the statutory scheme as it then stood provided two possible, relevant avenues for the Commissioner to reopen or continue an investigation that a discipline authority had dismissed. First, the Commissioner could have concluded that it was in the public interest to investigate but he was required to so order within 30 days of being notified that a complaint was dismissed. Here the 30 days elapsed without the required notice; therefore, the appellants submit, the Commissioner was without jurisdiction to investigate on the public interest grounds established in s. 54(6)(a)(ii), as he purports to do.

[25] Second, if the Commissioner received new information that in his opinion required investigation, he could, at any time, order a further investigation. On the facts of this case, the chambers judge concluded that the Commissioner intended to act pursuant to this new information clause, s. 54(8). However, the Commissioner's order did not cite that section rather, as noted above, the Order cited ss. 6(a)(ii) and s. 55(3).

[26] The chambers judge dismissed the argument that the order did not meet the statutory requirements on the basis that the defects, if any, were merely technical. It appears the chambers judge concluded that it could be inferred from the Order and surrounding circumstances that the Commissioner intended to exercise his jurisdiction under ss. 8 (the new evidence provision). She said at paras. 41-42:

> In my view, the petitioners' argument is overly technical. The body of the 2009 order makes it clear that the Commissioner received information that material had not been received and reviewed in the investigation leading up to the summary dismissal. The petitioners argue that it is clear the Commissioner considered this information to be noteworthy, but there is no evidence that he formed an opinion that it was new information that required investigation in the sense he would be justified in invoking s. 54(8).
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> In my opinion, the fact that the 2009 order says on its face that it is pursuant to s. 54(6)(a)(ii) and 55(3), is not determinative. The 2009 order states that the reason the summary dismissal was not confirmed by the Commissioner is that the investigation was incomplete in his view. The email correspondence which follows makes it clear that the "new information" refers to the fact that not all of the information that was available to the Professional Standards Branch in their *Police Act* investigation was accurate.

c. Standard of Review

[27] The respondents submit that Gerow J.'s order dismissing the petition to quash the investigation order was a discretionary decision. They argue that since the chambers judge exercised her discretion this Court must review her decision on a highly deferential basis. The respondents' argument is based on what they say is the permissive language found in s. 2 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, which provides that "the court may grant any relief that the applicant would be entitled to…" The respondents further rely on *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, and *Harelkin v. University of Regina*, [1979] 2 SCR 561, for the proposition that in deciding a judicial review application a court is exercising its discretion in determining an appropriate remedy.

[28] The appellants contend that the decision of the chambers judge in this case was not an exercise of discretion; rather, they say, the judge was determining a question of law. Specifically, they say that whether the Commissioner exceeded his jurisdiction is a question of pure law and, consequently, this Court's review of the judge's order should be conducted on a standard of correctness.

[29] I do not agree with the respondents on this point. *Henthorne v. British Columbia Ferry Services Inc*., 2011 BCCA 476, is authority for the proposition that the reviewing judge's choice of standard of review, and the application of the facts to that standard, are questions of law. The Court of Appeal owes the reviewing judge

no deference as to these conclusions. As Mr. Justice Groberman said in *Henthorne* at para. 74, this Court steps into the shoes of the reviewing judge and owes him or her no deference on these issues. See also: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at para. 43; *British Columbia (Ministry of Children and Family Development) v. Harrison*, 2012 BCCA 277 at para. 58; *Vandale v. Workers' Compensation Appeal Tribunal*, 2013 BCCA 391 at para. 43; *Florkow v. Police Complaint Commissioner*, 2013 BCCA 92 at para. 41.

[30] It is true that a judge sitting in judicial review has, in certain circumstances, a residual discretion to refuse relief; for example, where balance of convenience factors are involved. However, that is not the case here. The appellants argue correctly, in my view, that the Supreme Court of Canada did not say in *Khosa* or *Harelkin* that all the decisions that arise in a judicial review are discretionary.

[31] In conclusion, this Court's review of the decision of Gerow J. in which she found that the Commissioner had jurisdiction to re-open the complaint should be carried out on a standard of correctness.

d. The Order Does Not Comply with the *Police Act*

[32] The appellants say that the Order is fundamentally flawed as it does not comply with either the "new information" or the "public interest" provisions under which the Commissioner could then have reopened an investigation.

[33] I turn first to the "public interest" avenue established in s. 54(6)(a)(ii). The complaint was dismissed by the Discipline Authority pursuant to s. 54(1) on March 2, 2009. The Commissioner was notified of the dismissal pursuant to s. 54(3) on March 10, 2009. The 30-day time limit for the Commissioner to order an investigation pursuant to this provision thus expired on April 10, 2009. However, the Commissioner's order was not made until May 14, 2009.

[34] If the Commissioner's order was made under ss. 54(6)(a)(ii), as it expressly states, it would appear to be out of time. There is no provision permitting an extension of time and none was argued before us. On its face, the Order was made in the public interest pursuant to ss. 6(a)(ii).

[35] The Commissioner argues that the Order, while not perfect, is in substantial conformity with the statute. The Commissioner concedes that it would have been preferable for the Order to unambiguously express his opinion that it was necessary to order an investigation on the basis of new information as he had jurisdiction to do pursuant to ss. 8. The Commissioner also concedes, and necessarily so, that he ought to have cited the correct section and ought not to have cited public interest as a factor in granting the Order. But he submits that the error in the Order, if there is one, is merely an irregularity.

[36] Below I repeat that part of the Order which the Commissioner points to in arguing that he exercised his authority under the ss. 8. He asks this Court to consider the importance of the following passages:

> Upon receiving the Discipline Authority's letter dismissing the allegations against Detective Bentley and Staff Sergeant Grywinski, my office requested a copy of the investigation conducted by the Professional Standards investigator. Following a review of the materials provided and further discussions with the investigator, it was discovered that documentation gathered in a separate "Code of Conduct" investigation conducted by Inspector Porteous of the Vancouver Police Department was not provided to the Professional Standards Section to assist in their *Police Act* investigation.

[37] This portion of the order would appear to presage an order based on ss. 8 (new information). However, what follows is the actual order:

> According to section 54 of the *Police Act,* as Police Complaint Commissioner, I may either confirm the Discipline Authority's decision to summarily dismiss the allegations, or, if I find that it is in the public interest, I may set aside the summary dismissal and order a public trust investigation be conducted into the alleged misconduct,
>
> Based on my review of the available evidence to date, in my opinion, it is in the public interest that a full and complete *Police Act* investigation be conducted into the above-noted allegations against Detective Constable Bentley and Staff Sergeant Grywinski. Therefore, pursuant to sections 54(6)(a)(ii) and 55(3) of the *Police Act,* I order that the alleged professional misconduct be investigated in order to allow the Professional Standards Section of the Vancouver Police Department to review Inspector Porteous's investigation and any other documentation not accessed by the Professional Standards Section in their original investigation.

[38] The paragraph of the Commissioner's order that precedes the sections in which he appears to exercise his authority under ss. 54(6)(a)(ii) makes reference to

discovering the Porteous "Code of Conduct" investigation. Under ss. 8 the Commissioner could reopen the investigation at any time if new evidence is discovered. The chambers judge decided that the Order was not defective, describing the appellants' argument as "overly technical". She further held that the fact that the Order stated that it was made pursuant to s. 54(6)(a)(ii) was not determinative of the substance of the jurisdiction question. I cannot agree with this conclusion.

[39] The appellants are entitled to know the basis on which the Commissioner purported to exercise his jurisdiction to reopen the dismissed complaint against them. Where the basis of the Order is required by law to be stated, as I believe it is here, the Order must be "sufficiently clear, precise and intelligible" to enable the affected parties to determine why the administrative tribunal decided as it did: Donald Brown and John Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (consulted on 25 April 2014), (Toronto: Canvasback Publishing, 2008), ch.12:5310.

[40] The Order in question states that the investigation is reopened under ss. (6)(a)(ii). The Commissioner clearly indicates that it is in the public interest to do so yet he also identifies information that was not before the Discipline Authority and says he is ordering the investigation so that previously unexamined information can be reviewed. In my opinion, the Commissioner's reasons either misstate the basis of the Order in terms of his jurisdiction, or is insufficiently clear to allow the appellants to determine on what basis the investigation has been ordered reopened. Moreover, it is not entirely clear whether the Commissioner did turn his mind to s. 54(8) or what conclusion he would have reached if he had considered whether there was sufficient new information that "requires an investigation" going to the merits of the complaint. Indeed he might have concluded that the "new information" was, as the appellants argue, simply a re-stating of information already gathered.

[41] The court has no authority to cure a defective order made under the *Police Act*. It was not within the purview of the chambers judge to assume the

Commissioner intended to cite ss. 8 when he expressly stated he was acting under another provision.

[42] I do not see this deficiency as a "technical" flaw but rather one that goes to the very heart of the Commissioner's jurisdiction. The legislature expressly granted the Commissioner the power to investigate a complaint that has been summarily dismissed if he deems it is in the public interest to do so. However, the legislature just as clearly limited this aspect of the Commissioner's power by placing on it a 30-day time limit. We must assume that the legislature did so intentionally and presumably for good policy reasons.

[43] The Office of the Police Complaint Commissioner is a creature of statute and its powers are limited to those conferred by the legislature. The Supreme Court of Canada addressed the profound importance that true questions of jurisdiction represent the rule of law in the seminal case, *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 29:

> Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, at p. 234; also Dr. Q v. College of Physicians and Surgeons of British Columbia, 2003 SCC 19 at para. 21.

The legislature chose to include in the *Police Act* a time limit to reopen investigations on public interest grounds: the intent is express and it is clear. It is not for a court to ignore or override such a provision. Nor is it for the court to infer from insufficient reasons that the Commissioner's jurisdiction was exercised pursuant to another section of the statute.

[44] Reviewed on a standard of correctness, it is my view that the Commissioner exceeded his jurisdiction and the chambers judge erred in law by characterizing the argument about the defect in the order as merely technical.

[45] I see no merit to the delay argument raised by the respondents. I do not consider the delay inordinate. This conclusion should not be taken as accepting the respondent's argument that delay could, in certain circumstances, overcome a jurisdictional defect. It is unnecessary to consider that question and I decline to do so.

[46] In light of my conclusion that the Order for Investigation should be quashed, it is unnecessary to decide the ground of appeal relating to Brown J.'s order.

Disposition

[47] I would allow the appeal and grant the order to quash the Commissioner's Order for Investigation.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice MacKenzie"

I agree:

"The Honourable Mr. Justice Willcock"