COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Lowe v. Diebolt,*
2014 BCCA 280

Date: 20140709
Docket: CA041069

Between:

Stan T. Lowe, The Police Complaint Commissioner

Appellant
(Petitioner)

And

Hon. William J. Diebolt (ret'd.), Karen Burridge and Attorney General of British Columbia

Respondents
(Respondents)

Before: The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia, dated June 21, 2013 (*Lowe v. Diebolt*, 2013 BCSC 1092, Vancouver Docket No. S124731)

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Place and Date of Hearing and Judgment:	Vancouver, British Columbia March 14, 2014
Place and Date of Reasons:	Vancouver, British Columbia July 9, 2014

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Willcock

Summary:

The complainant was searched by the respondent police officer in August 2009. She filed a complaint approximately 18 months later. After investigation, the discipline authority under the Police Act *dismissed the*

complaint. The Police Complaint Commissioner appointed a retired judge to review the decision, and the retired judge also dismissed the complaint. The Commissioner sought judicial review, but was unsuccessful in Supreme Court. On appeal, the Court requested that the parties address issues of delay and standing as preliminary issues. Held: Appeal dismissed. The Commissioner was guilty of unreasonable delay in proceeding with judicial review. It was appropriate, in the circumstances of this case, to exercise discretion against allowing the judicial review procedure to continue given the effects of delay and the limited importance of the judicial review to the petitioner, the general public and the complainant and the prejudice to the respondent officer.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] This is an appeal by the Police Complaint Commissioner (the "Commissioner") from a decision of the Supreme Court dismissing his application for judicial review of a decision of a retired judge appointed to act as a discipline authority under s. 117 of the *Police Act*, R.S.B.C. 1996, c. 367. We requested that the parties address two preliminary issues at the outset of the hearing of the appeal: delay and standing. After hearing submissions on those preliminary issues, we dismissed the appeal with reasons to follow.

[2] The Commissioner was, in our view, unreasonably dilatory in commencing the judicial review proceedings. The *Police Act* emphasizes the need for dispatch in the police complaint process. Taking into account the exigencies of that process, the nature of the complaint in issue in this case, and the interests of the parties to the judicial review proceedings, we concluded that it was appropriate that the judicial review proceedings be dismissed.

[3] It is important, in analyzing the delay in this case, to understand the nature of the underlying complaint and the process that was followed to investigate it. I am therefore providing a fairly detailed account of the background to this case.

BACKGROUND

A. The Initiation of the Investigation

[4] On February 3, 2011, the Commissioner received a complaint by way of a form completed on his website. The complaint was as follows [I have taken the liberty of adding capitalizations and of expanding abbreviations]:

> Date of the Incident: 2009-08-28
>
> Time of the Incident: 8 - 9 pm
>
> Location of the Incident: On South Fraser Way between A&W and Petro-Canada
>
> Police Department Involved: Abbotsford
>
> …
>
> Incident Description: I was driving down South Fraser Way. I got pulled over, gave license and registration. [I was] asked to step out of car. Two other squad cars arrived. They claimed to "smell pot". I don't smoke weed, and I had just bought the car that day … from a person who I know doesn't either. They cuffed me [and] proceeded to search my car without consent. They opened a can of pop and dumped it all over my front seat, then searched me, then the female officer told me

> I could either go to the station and be searched or I could go with her into the Petro-Canada bathroom to have a strip search done. We walked to the [Petro-Canada] station. She asked if we could use the bathroom, and went in. She had me take off my bra, then pants, squat cough, then get dressed, and I was allowed to leave. Now, I'm pretty sure that [is] not allowed. I'm unaware of the exact date but it was either late August or early September. I've called the police department, to inquire about names and badge numbers. They won't give me any information at all.

[5] Subsequently – it appears on February 7, 2011 – the complainant provided additional information, setting out the badge numbers of three officers, and advising that the correct date of the occurrence was August 15, 2009. The Commissioner's office determined that the events giving rise to the complaint occurred at about 10:15 p.m. on that date, and that the female police officer involved was Cst. Burridge.

[6] Pursuant to s. 82 of the *Police Act*, the Commissioner's initial function was to determine whether the complaint was an "admissible" one:

> 82(1) On receiving a complaint directly from a complainant … 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) … and
>
> (c) the complaint is not frivolous or vexatious.

[7] Section 79 of the *Police Act* requires complaints to be made within a year of the events complained of, but gives the Commissioner authority to extend the limitation period where the Commissioner finds the criteria for extension are present:

> 79(1) A complaint must be made within the 12-month period beginning on the date of the conduct giving rise to the complaint or within any extension of that period allowed under subsection (2).
>
> (2)The police complaint commissioner may extend the time limit for making a complaint if the police complaint commissioner considers that there are good reasons for doing so and it is not contrary to the public interest.

[8] As the complaint in this matter was received almost 18 months after the events occurred, it would have been inadmissible unless the Commissioner found a basis for granting an extension.

[9] On February 21, 2011, the Commissioner wrote to the complainant and to the Chief Constable of the Abbotsford Police Department (as he was required to do under s. 83(2) of the *Act*), to advise them of his conclusions as to the admissibility of the complaint:

> I have reviewed the complaint received … on February 7, 2011 … and have determined that this complaint is admissible pursuant to Division 3. Though this complaint was received outside the 12 month limitation period, I consider it to be in the public interest to extend the time limit under section 79(2) of the *Police Act*.
>
> Based on the information reviewed to date, the misconduct alleged …, if substantiated, would constitute misconduct pursuant to section 77 of the *Police Act*.

[10] It is noteworthy that the letter addresses only one of the two requirements for an extension of the

limitation period. Even with respect to that requirement (i.e., that the extension not be contrary to the public interest), the Commissioner merely stated his conclusion rather than providing a rationale. His letter is silent on the requirement that there be "good reasons" for the extension, and there is nothing in the complaint or elsewhere in the record that assists in determining what those reasons might have been.

B. The Investigation

[11] In accordance with s. 90 of the *Police Act*, the Deputy Chief Constable of the Abbotsford Police Department initiated an investigation of the complaint once the Commissioner had determined that it was admissible. On February 28, 2011, he assigned Sgt. M. Drebit as the investigator. Under s. 99 of the *Police Act*, Sgt. Drebit was required to complete his investigation within six months, subject to any extensions granted by the Commissioner. He was also required, under s. 98 of the *Police Act*, to report to the Commissioner on the progress of his investigation within 30 business days of its commencement, and provide follow-up reports on progress at intervals of 20 business days or less.

[12] Sgt. Drebit conducted his investigation, and forwarded seven progress reports to the Commissioner. On August 26, 2011, he applied for an extension of time for the completion of his investigation. In granting the extension, the Commissioner noted:

> The British Columbia *Police Act* requires that investigations into allegations of misconduct against municipal officers must be completed within six months of the initiation of the investigation. The allegations in question must be investigated promptly and a decision delivered in a timely manner in order to ensure administrative fairness for all parties involved.

[13] The Commissioner noted that one reason for the extension was to allow the complainant time to consider an informal proposal to settle the matter that had been developed by the Abbotsford Police Department. The Commissioner found that an extension of time was in the public interest and in the best interest of all parties, and extended the deadline for the investigation to October 27, 2011.

[14] On October 27, 2011, Sgt. Drebit issued his final investigation report. The report detailed his investigations and interviews. Sgt. Drebit found that the events occurred shortly after 10:00 p.m. on August 15, 2009. At that time, Cst. Burridge and another member of the Abbotsford Police Department were transporting a prisoner in their vehicle. When they came upon the complainant's vehicle, the prisoner they were transporting advised them that the complainant was a drug dealer from whom he had purchased drugs. He described her as being involved in dial-a-dope operations. It appears that he could not remember the complainant's name, but correctly indicated that it started with a "J".

[15] The police conducted a CPIC (Canadian Police Information Centre) inquiry, and found that the complainant had outstanding charges of trafficking against her, and was subject to a number of conditions. The police decided to pull the complainant over on South Fraser Way. After the complainant's vehicle was stopped, Cst. Burridge noticed that the complainant was "wiggling around quite a bit" in her vehicle, activity that Cst. Burridge associated with hiding something in the vehicle or on the complainant's person.

[16] On approaching the vehicle, the officers detected an odour of burnt marijuana emanating from its

interior. The complainant was verbally aggressive and agitated. The police decided to search the vehicle. They did not find any drugs, though Cst. Burridge did locate what appeared to be burnt marijuana cigarette butts in the vehicle.

[17] After the search of the vehicle, Cst. Burridge advised the complainant that the police required her to undergo a strip search. It would have taken some time to travel to the detachment and conduct the search. As the complainant's vehicle had only a temporary licence that would expire at midnight, Cst. Burridge offered to expedite the search by conducting it in a nearby service station washroom rather than at the detachment. The complainant chose that option.

[18] Cst. Burridge did not advise the complainant of her right to counsel prior to commencing the search. The search was conducted in the washroom of the service station, and no drugs were found. The complainant was allowed to leave.

[19] Sgt. Drebit was unable to substantiate the complainant's allegation that pop was poured on the seat of her car. He was also unable to substantiate certain complaints against the officers that were not included in the original complaint form.

[20] With respect to the complaints that the searches of the car and of the complainant were conducted improperly, Sgt. Drebit found that the search of the vehicle was reasonable, as was the detention of the complainant during the search.

[21] He found that the strip search of the complainant was improper, both because the complainant was not advised of her right to counsel before being searched, and because the search should not have been conducted at the service station. He determined, however, that the search did not amount to police misconduct. He found that Cst. Burridge did not act maliciously, or out of improper motives, and that the search had been conducted "in private and in a dignified manner." He concluded:

> [Cst. Burridge's] actions were based on good faith and were not morally blameworthy to the point of constituting police misconduct. This matter can be best characterized as a performance issue, which should undoubtedly be addressed.

[22] In an affidavit filed in these proceedings, Sgt. Drebit deposed that his investigation was hampered by the delay between the date of the alleged misconduct and the filing of the complaint. As a result of the delay, he was unable to determine who had been on shift at the Petro-Canada station at the time of the search, and so could not interview a person who would have been an independent witness. Surveillance video from the service station was also unavailable by the time the complaint was received. As well, the complainant's vehicle had been disposed of, with the result that it was impossible to verify certain allegations.

[23] Sgt. Drebit was also hampered by the fact that the memories of both the police officers and the complainant had faded by the time he began his investigations. The officers had not kept notes of the events, as no drugs had been located, and they had no reason to expect that they would be called upon to give evidence as to what had occurred. They had considerable difficulty remembering the events. Sgt. Drebit also commented that the complainant's memory of the interactions had been affected by the passage of time

and was not particularly reliable. He also noted that Cst. Burridge had been off work on maternity leave during the investigation, and that her memory of events was diminished.

C. The First Discipline Authority Decision

[24] As required by s. 112 of the *Police Act*, the Chief Constable of the Abbotsford Police Department reviewed Sgt. Drebit's report and the evidence and records referenced in it. He concluded that Cst. Burridge's conduct did not constitute misconduct. He provided his reasons for so finding in his Notice of Discipline Authority's decision dated November 4, 2011.

[25] At the outset of his report, he commented on the delay:

> This complaint was made to the Office of the Police Complaint Commissioner one and one-half years after the incident complained about took place. There is no reason given by the Complainant for the delay. The complaint was ruled as admissible without explanation. Such a delay makes a *Police Act* investigation more difficult. Memories fade about an incident that, to the members involved, is fairly routine and which did not result in an outcome where they had anticipated providing a detailed response.

[26] The Chief Constable agreed with most of Sgt. Drebit's conclusions. He found, however, that a strip search was not justified in the circumstances. He concluded:

> I find that the strip search was a violation of the *Charter*. However, I find that Cst. Burridge did not commit an abuse of process by conducting a strip search in these circumstances. She was acting in good faith and was not acting in an arbitrary or abusive fashion
>
> …
>
> I do direct that Cst. Burridge receive a one-on-one update on the law surrounding strip searches from an Abbotsford Police Department legal instructor.

[27] The evidence before us indicates that Cst. Burridge did undertake the training required by the Chief Constable.

D. The Review by the Retired Judge

[28] The Commissioner, on receiving the report, elected to exercise his powers to have it reviewed by a retired judge under s. 117 of the *Police Act*:

> 117(1) If, on review of a discipline authority's decision under section 112(4) … that conduct of a member or former member does not constitute misconduct, the police complaint commissioner considers that there is a reasonable basis to believe that the decision is incorrect, the police complaint commissioner may appoint a retired judge … to do the following:
>
> > (a) review the investigating officer's report referred to in section 112 … and the evidence and records referenced in that report; [and]
> >
> > (b) make her or his own decision on the matter ….

[29] By notice dated December 6, 2011, the Commissioner appointed the respondent, Hon. William J. Diebolt, a former Chief Judge of the Provincial Court of British Columbia, now retired, to review the Sgt.

Drebit's report insofar as it dealt with the strip search of the complainant.

[30] The retired judge reviewed the matter and provided his decision on December 20, 2011. In his decision, he commented on the effect of delay on the complaint:

> There are some difficulties with this case that should be mentioned at this time. The complaint that gives rise to these proceedings was made almost 18 months following the event. First, this passage of time, as usual, causes some failing of the memory and recall of witnesses. In this case none of the officers at the scene have any notes of this occurrence….
>
> The second problem is the destruction of [the complainant's] vehicle, which it seems, according to her statement, … occurred at least a month after the incident in question. As indicated earlier had this complaint been made forthwith, evidence concerning this vehicle could have assisted in the investigation….
>
> The delay aforesaid could account for some variations in the recall of all the witnesses. However [the complainant's] explanation for delay, trying to ascertain the officers' names who were involved, rings somewhat hollow. … One would expect that given her allegations of the night in question … that she would act with some dispatch concerning her complaint.
>
> Constable Burridge was on maternity leave when her interview occurred with Sergeant Drebit on October 5, 2011. I do not know when her baby was born or the duration of her maternity leave but clearly she had other pressing matters on her mind as well as her police duties since the event date which is the subject of this matter.

[31] With respect to the details of the events of the evening in question, the retired judge preferred the evidence of Cst. Burridge, as he had some concerns about the credibility of the complainant.

[32] The retired judge found that Cst. Burridge ought not to have conducted the strip search away from a police station, but found that her motivation for doing so was to reduce the inconvenience to the complainant. He found that the constable acted in good faith in doing so. The judge also found that Cst. Burridge had failed to provide the complainant with a proper *Charter* warning, but found that that constituted "a performance issue but does not give rise to a finding of police misconduct." The judge concluded:

> I am satisfied upon the foregoing, a careful review of all the documentation forwarded to me, and the relevant law, that the allegation that the actions of Constable Burridge against [the complainant] on August 15, 2009 constitute misconduct has not been substantiated by proof on a balance of probabilities, the standard of proof required in this case and in all civil cases.

[33] The *Police Act* includes a privative clause that protects the retired judge's decision:

> 117(11) The retired judge's decision …
>
> (a) is not open to question or review by a court on any ground, and
>
> (b) is final and conclusive.

[34] The Commissioner did not commence judicial review proceedings until more than 6 months had elapsed from the date of the retired judge's decision. Further delay ensued because notice of the application for judicial review was not served on the Attorney General as required by s. 16 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 ("*JRPA*"). The judicial review application was not heard for almost a full year.

DECISION OF THE CHAMBERS JUDGE ON JUDICIAL REVIEW

[35] On the judicial review, the Commissioner took the position that, having found a breach of the *Charter*, the retired judge erred in holding the officer's conduct not to constitute misconduct. He contended that the officer either knew that her conduct of an invasive search was unauthorized, or was reckless in that regard. The chambers judge rejected that argument:

> [46] I do not agree with this position. The question of misconduct is different from whether a *Charter* breach occurred, and also from whether evidence obtained from an illegal search should be excluded. That is clear from the definition of the charged misconduct, which requires recklessness or intent. The "intent" cannot refer to the physical act of the search, because it is virtually impossible to conduct a physical search non-intentionally. It must refer to the *mens rea*, or state of mind of the officer. Recklessness must be interpreted in the same manner. The fact that an officer is ignorant of the law related to searches does not, by itself, indicate intent or recklessness. It is more in line with negligence, or, for that matter, poor training….
>
> [48] The Adjudicator found that there were objective grounds for the arrest, and I do not think the petitioner takes issue with that. The Adjudicator also appears to have concluded that there were objective grounds for a strip search because [the complainant] wiggled around. The adjudicator concluded that Cst. Burridge acted in good faith in conducting the search in the gas station. Those are not unreasonable conclusions….
>
> [52] … On several occasions, I invited the petitioner's counsel to point me to anything in the record indicating either intentional or reckless misconduct by Cst. Burridge other than the search itself. He could not do so other than to point out her acknowledgment that she did not have grounds to arrest. But that factor merely circles back to the validity of the search. There was nothing in the evidence to show that Cst. Burridge knew that the lack of grounds for arrest meant she could not do the search, something which might amount to intention. While there might be cases in which the misconduct bespeaks intention or recklessness, this is not one of them.

[36] The judge found the retired judge's conclusions to have met the standard of reasonableness.

[37] The judge went on to discuss briefly the issue of delay. He said:

> [55] Cst. Burridge argued that I should exercise my discretion and dismiss the petition because of delay. Section 79 of the *Act* provides that a complaint must be filed within 12 months of the impugned conduct, but that can be extended by the petitioner. The search occurred in August 2009. The complaint was not filed until February 2011 but the petitioner extended the time to allow it to be filed. Within that attenuated time frame, it took the petitioner six months to file this petition. Cst. Burridge contrasts that with the 10-day period in which a retired judge must conduct the s. 117 review.
>
> [56] I agree with Cst. Burridge that, given the circumstances, the time the petitioner took to file this proceeding is troubling. However, having reached the conclusion to dismiss the petition on its merits, it is unnecessary for me to deal with this issue.

ANALYSIS

A. Delay as Discretionary Bar to Judicial Review

[38] The common law has always recognized that there is a discretionary element to prerogative relief. Where a party is guilty of delay in seeking judicial review, a court has discretion to deny the relief, even if the

relief would, apart from the delay, have been granted: see Jones & de Villars, *Principles of Administrative Law* (5th ed.) (Toronto: Carswell Division of Thomson Reuters Canada Limited, 2009) at 657 and the cases cited therein.

[39] The discretion to refuse prerogative relief on the basis of delay was not diminished by the bringing into force, in 1977, of the *JRPA.* The *JRPA* includes the following provision:

> 8(1) If, in a proceeding referred to in section 2 the court had, before February 1, 1977, a discretion to refuse to grant relief on any ground, the court has the same discretion to refuse to grant relief on the same ground.

[40] Section 2 of the *JRPA* refers to all proceedings that are predecessors to judicial review, including proceedings for *certiorari*. This Court has recognized that "undue delay has long been a discretionary bar to the granting of judicial review remedies": see *Speckling v. British Columbia (Labour Relations Board)*, 2008 BCCA 155 at para. 15.

[41] Most modern statutes governing judicial review expressly place temporal limits on the bringing of judicial review proceedings. In the federal sphere, for example, s. 18.1(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, requires judicial review applications to be brought within 30 days of the decision that is the subject of the review. In British Columbia, in respect of tribunals to which the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, applies, s. 57 requires judicial review proceedings to be brought within 60 days of the issuance of a decision. Other jurisdictions have similarly short limitation periods for judicial review.

[42] No such statute applies to the case before us. Indeed, s. 11 of the *JRPA* specifically provides:

> 11 An application for judicial review is not barred by passage of time unless
>
> (a) an enactment otherwise provides, and
>
> (b) the court considers that substantial prejudice or hardship will result to any other person affected by reason of delay.

[43] The section presents a number of interpretive difficulties. Read literally, and in isolation from other legislative provisions, it might be interpreted to mean that even in the face of an express statutory limitation period on judicial review (such as s. 57 of the *Administrative Tribunals Act*), the passage of time will not defeat a judicial review application unless the court is also satisfied that someone will suffer "substantial prejudice or hardship" by reason of the delay. It is not obvious who need suffer prejudice – it is an "other person" but whether that means someone other than the applicant, someone other than the decision maker, or someone other than a party to the proceeding is unclear.

[44] While s. 11 has been cited occasionally by courts, I am not aware of any case that attempts to interpret it comprehensively. Generally, when courts have referred to the section at all, they have cited only s. 11(b), ignoring entirely clause (a) and the presence of the conjunction "and" between clause (a) and clause (b).

[45] Fortunately, it is unnecessary, for the purposes of the case before us, to fully decipher the intent of s. 11. As I read the section, it is an attempt to place an absolute bar on judicial review proceedings in certain

limited situations. That absolute bar, whatever its breadth, does not serve to eliminate the discretionary bars to judicial review that are preserved by s. 8 of the *JRPA*. As McLachlin J.A. (as she then was) put it in *Re Carpenter and Vancouver Police Board* (1986), 34 D.L.R. (4th) 50 at 75, "[d]elay alone is insufficient to permit the court to refuse a remedy under the *Judicial Review Procedure Act*. What must be shown is 'unreasonable delay.'"

[46] What is "unreasonable" will depend on a constellation of factors. The court must consider the underlying administrative scheme – how does it operate and what are its objectives? To what extent might those objectives be undermined by delay? The court must also consider the interests of the parties – is the issue brought forward on the judicial review of critical importance to one or the other party? On the other hand, will the delay result in hardship, prejudice, or injustice? Because judicial review is concerned with matters of public law, the effect of proceeding with the judicial review or of terminating it on the proper functioning of an administrative regime must also be considered.

B. Delay as a Preliminary Matter

[47] At the hearing of this matter, the Commissioner conceded that the overall delay in the administrative process has been substantial, and that the court might well consider it inappropriate to return this matter for a further hearing by a disciplinary authority under the *Police Act*. He argued, however, that delay should only be seen as a bar to the granting of a specific remedy, and should not be seen as a reason to dismiss the judicial review application before passing on its merits.

[48] While not cited by the Commissioner, there is some support in the jurisprudence of this Court for the proposition that a judicial review proceeding should not be dismissed on the basis of delay until after the merits of the judicial review have been fully considered. In *MacLean v. University of British Columbia Appeal Board* (1993), 87 B.C.L.R. (2d) 238, Lambert J.A. said, at para. 16:

> [16] In my opinion, a decision on a question of delay should not be made as a preliminary matter …. In my opinion, the question of whether delays should affect the outcome of a Judicial Review Application must be made in conjunction with the merits of the Judicial Review Application itself. It is only when those merits are weighed and the prejudice to both sides has been weighed that it is possible for the chambers judge to exercise the principled and guided discretion that is conferred on a chambers judge in relation to granting a remedy under the *Judicial Review Procedure Act*.

[49] To the extent that he was noting that the substantive issues on a judicial review must be taken into consideration in determining whether it is appropriate to dismiss the petition on the basis of delay, it seems to me that what he said was unexceptional. If, however, he was asserting that, as a matter of law, a judicial review petition cannot be dismissed on grounds of delay until after a full hearing on the merits, it seems to me that the proposition is inconsistent with precedent, and goes much further than was necessary to deal with the case before the Court.

[50] In terms of precedent, I note that, historically, *certiorari* was a two-stage procedure. At a preliminary stage, the court determined that it was appropriate to embark upon a review of the administrative decision – to require that the tribunal's record be placed before it for review. At the second stage, the court reviewed the record, and determined whether to grant a remedy. Delay in bringing judicial review proceedings could be

taken into account at the first stage as well as the second. Indeed, in jurisdictions that maintain the vestiges of a two-stage process, delay continues to be relevant at both stages: see, for example, *R. v. Dairy Produce Quota Tribunal for England and Wales ex p. Caswell*, [1990] UKHL 5, [1990] 2 AC 738.

[51] In *Roeder v. British Columbia Securities Commission*, 2005 BCCA 189, this Court was called upon to consider whether an administrative tribunal could dismiss an application on grounds of delay on a preliminary application, before considering the merits. Madam Justice Huddart wrote for the Court:

> [66] In the absence of legislative restraints or guidance on its exercise of discretion under s. 171, the Commission turned to court decisions provided to it by counsel. The Commission looked to the approach various courts had taken to the issue of delay without regard for the nature of the procedure being used.
>
> [67] On this appeal, counsel provided substantially more authorities on the issue of whether a court will terminate a proceeding without consideration of the merits. I find most useful among them those where the court was being asked to set aside the order of a court or tribunal. Those decisions come after a trial, findings of fact, and the making of an order. The claimant has had his day in court. As a matter of basic principle, it follows that a review for fairness of the trial or hearing will generally not be terminated without very good reason. The usual reason for termination will be that the evidence does not give rise to the reasonable possibility the trial or hearing was unfair.
>
> [68] However, flowing through the authorities to which we were referred are countervailing concerns about the efficient use of a court's and litigant's resources, finality in decision-making, avoidance of multiple proceedings, and fairness to third parties affected by the orders. On an application to 'dismiss for delay,' a court will usually want to hear submissions on the underlying issues to assess the strength of the case on review in a preliminary way. The nature of the illegality or error alleged will be important. Where a real possibility of an injustice is established, a court is more likely to ensure the proceeding continues. Where hardship will be suffered because of a long delay, a court is more likely to terminate the proceeding. But the fundamental principle is always the interests of justice as seen by the reasonable person represented by the reviewing court. To those considerations must be added, when a regulatory decision-maker is asked to make an order in the exercise of its discretionary power to revoke or vary an order, the impact on the administration of the regulatory scheme, and particularly, any prejudice to the public interest the order was made to protect.

[52] In my view, these comments are also applicable to an application to dismiss a judicial review application on grounds of delay. While it will normally be necessary for the court to consider, in a preliminary way, the substantive issues that are sought to be raised, it will not always be necessary to hear them fully. At a minimum, a court embarking on an application to dismiss a judicial review petition for delay must understand the nature of the substantive issues sought to be argued, and appreciate the importance of those issues to the parties. In particular, it must be able to assess the prejudice to the petitioner in the event that the petitioner is deprived of the right to have the issues determined.

[53] The Commissioner has not persuaded me that the case before us is one in which the Court is required to determine the merits of the judicial review application before deciding whether to dismiss the petition on the grounds of delay. I say this because it is clear from a preliminary consideration of the petition that its dismissal will result in little, if any, prejudice to the Commissioner. For reasons that I will discuss, neither the public interest nor any special interest that may be attributed to the Commissioner will be furthered by determining the merits of this case.

C. Can an Appellate Court Apply the Discretionary Bar?

[54] Before turning to the circumstances that convince me this matter should be dismissed by reason of delay, I will address the question of whether it is appropriate for this Court to dismiss the petition on grounds of delay when the chambers judge did not take that route.

[55] Where a judge hearing a judicial review application exercises discretion, an appeal court will generally be required to defer to the exercise of discretion: see *Henthorne v. British Columbia Ferry Services Inc.*, 2011 BCCA 476 at para. 78. Thus, if the chambers judge had determined that the delay in bringing the petition in this case was not so prejudicial or egregious as to justify dismissing the petition, this Court would not be entitled to interfere with that decision unless it was made on an improper basis.

[56] On the other hand, where, as here, the chambers judge has found it unnecessary to deal with a discretionary matter, and where an exercise of that discretion by an appeal court is, in all respects, consistent with the chambers judge's findings, the discretion may be exercised in the first instance on appeal. I note that in *P.P.G. Industries v. A.G. (Canada)*, [1976] 2 S.C.R. 739, the Supreme Court of Canada held that a judicial review should fail on the basis of delay, though, in reasons reported as *In re Anti-Dumping Tribunal and re: transparent sheet glass*, [1972] F.C. 1078, the judge at first instance had not specifically addressed that issue.

[57] In the case before us, the chambers judge indicated that the delay was "troubling" and suggested that he might have dismissed the petition on that ground, though he found it unnecessary to fully address the issue, as he dealt with the petition on the merits. In the circumstances, it is open to this Court to consider whether to dismiss the petition on grounds of delay.

D. The Significance of Delay in this Case

[58] As I have indicated, there are several factors that must be considered in deciding whether a judicial review proceeding should be dismissed as a result of unreasonable delay.

[59] It has been noted that good public administration requires that administrative decisions be made quickly, and that they have finality: *R. v. Monopolies and Mergers Commission ex p. Argyll Group PLC*, [1986] 2 All ER 257, [1986] EWCA Civ. 8; *O'Reilly v. Mackman*, [1983] UKHL 1, [1983] 2 A.C. 237.

[60] This general concern over delay in administrative law is merely a starting point for analysis. A court considering whether it is appropriate for a judicial review application to proceed despite delay must consider the administrative process that is under review. The statutory scheme will be of importance; where the provisions of the statute emphasize the need for decisions to be made quickly, it will be an indication that there should be very limited tolerance for delay. The subject matter of the administrative regime is also of importance; a court must assess whether, from a public administrative standpoint, there will be serious negative consequences if delay is allowed.

[61] The statutory scheme of the *Police Act* emphasizes the need for decisions to be made quickly. There

are limitation periods at all phases of the complex complaint procedure, and limited provisions allowing for extensions. Where extensions are granted, they must be justified, and specific grounds for extension are set out. The statute contains a strong privative clause purporting to oust all review of decisions of a retired judge appointed as a disciplinary authority. It would be ironic if such a provision were interpreted as sanctioning lengthier delays than are allowed by provisions that allow for review or appeal, but provide short limitation periods.

[62] The subject matter of the complaint process also argues in favour of limited tolerance for delay. The disciplinary process is designed primarily to discourage inappropriate conduct and to provide corrective measures to ensure that misconduct is not repeated. It is not a punitive regime. In order to be effective, it is essential that corrective and disciplinary measures be implemented within a reasonable period.

[63] Indeed, the need for the disciplinary process to be speedy appears to be uncontroversial. In *Florkow v. British Columbia (Police Complaint Commissioner)*, 2013 BCCA 92 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.
> >
> > [Emphasis by the Court in *Florkow.*]

[64] The investigator and the disciplinary authorities in this case have all commented on difficulties engendered by delay. The Commissioner himself has emphasized the need for timely decisions in his various pronouncements.

[65] Courts must also consider the circumstances of the individual case in assessing the gravity of delay. It must consider the importance of the proceeding to each party, and to the public in general. It must also assess the prejudice caused by delay, as well as the potential prejudice in dismissing what might be a meritorious judicial review proceeding.

[66] In the case before us, it is obvious that the proceedings are of critical importance to Cst. Burridge. She faces potential disciplinary action, which could have an effect on her career. It is obviously in her interests

that the disciplinary proceeding be terminated.

[67] It is unclear, on the other hand, what importance can be ascribed to this case from the point of view of the Commissioner. His role, under the statute, is to ensure that the complaints against the police are dealt with in accordance with the statutory regime. He has a strong interest in ensuring that the procedures set out in the statute are respected, and in ensuring that his own directives are followed. He is not given a role in the substantive disposition of complaints, and, as a neutral party in the administrative regime, can have no legitimate interest in the outcome of a complaint proceeding. Indeed, as I have noted, the Court had sufficient doubts as to the interest of the Commissioner in this matter as to require submissions on his standing.

[68] *P.P.G. Industries v. A.G. (Canada)* shows that the absence of an interest in the outcome of the administrative process on the part of the petitioner is a factor to be considered in deciding whether it is appropriate to dismiss the judicial review application on the ground of delay.

[69] The interests of the complainant should also be taken into account. They appear to be limited. The circumstance of the complaint strongly suggest that it was brought for the purposes of assisting her in her civil claim against Cst. Burridge. She has not, herself, taken any active role in the proceeding, beyond having been interviewed. She has not involved herself in any way in this judicial review proceeding. It appears that her interests lie in proceeding with a civil claim, and those interests will not be affected by the termination of the administrative process.

[70] I am also unable to accept that there is any strong public interest in having this case decided. The events giving rise to the complaint, while of concern and worthy of investigation under the *Police Act* process, did not involve egregious conduct and do not appear to have given rise to serious harm.

[71] In terms of prejudice, I accept that the delay in bringing the judicial review proceedings, while lengthy, is not, in and of itself, particularly prejudicial to Cst. Burridge, though it has, undoubtedly, added incrementally to the existing prejudice. We are entitled, however, to consider the bigger picture, including the unexplained delay in the laying of the complaint, and the extended administrative procedures that were undertaken. Almost five years have passed since the events giving rise to the complaint; there is no practical ability to augment the investigation at this stage. Cst. Burridge has been subject to disciplinary proceedings for years for what was, at worst, a limited transgression. It is time that she be allowed to proceed with her career. The prejudice to Cst. Burridge in allowing the matter to proceed further is considerable.

[72] On the other hand, it is unclear that the Commissioner will be prejudiced in any substantial way by the dismissal of the judicial review on account of delay. It is unclear what the Commissioner could achieve by proceeding with this appeal. The Commissioner wishes to present argument to the effect that the searches conducted in this case were unlawful, and that the retired judge's findings that Cst. Burridge's conduct was not reckless was unreasonable. Neither of these arguments address questions of general importance. The law concerning the validity of searches is well-developed; this case cannot be said to raise any new or important issues in that regard. The question of whether the retired judge applied too lenient a standard to

the actions of the police in this case is also a question of no general importance, as it has no precedential force for future proceedings.

CONCLUSION

[73] In all of the circumstances, the inordinate delay in proceeding with the judicial review, considered in the context of an already much-delayed proceeding, justifies the dismissal of the judicial review proceeding. It is for that reason that I considered that the appeal should be dismissed.

[74] As I have indicated, we heard submissions by the parties on the standing of the Commissioner to bring these judicial review proceedings. I have no doubt that the Commissioner may bring judicial review proceedings concerning the procedures undertaken in the police complaint process, and also concerning compliance with his own directions and orders. Such matters are properly within the sphere of the Commissioner's direct concerns under the statute. The arguments raised in these proceedings, however, are directed at the substantive correctness of the retired judge's conclusions; the factum filed by the Commissioner takes an adversarial position against Cst. Burridge, and potentially raises concerns over the neutrality of the Commissioner in complaint proceedings. Given my conclusions on the issue of delay, it is unnecessary to reach any final conclusion on the issue of standing. I am, in any event, reticent to do so, as it was not an issue considered by the chambers judge. Accordingly, I would leave open the question of whether the Commissioner may bring judicial review proceedings to challenge, on substantive grounds, decisions of a retired judge appointed as a discipline authority under s. 117 of the *Police Act*.

[75] These, then, are my reasons for dismissing the appeal.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Mr. Justice Willcock"