SUPREME COURT OF NOVA SCOTIA

Citation: *Low v. Nova Scotia Police Complaints Commissioner,* 2020 NSSC 113

Date: 20200408
Docket: Hfx No. 490970
Registry: Halifax

Carrie Low

Applicant

v.

Nova Scotia Police Complaints Commissioner,
The Attorney General of Nova Scotia

Respondents

Judge:	The Honourable Justice Ann E. Smith
Heard:	March 3, 2020, in Halifax Nova Scotia
Counsel:	Jessica D. Rose, for the Applicant Sheldon A. Choo, Department of Justice (NS), for the Respondents

By the Court:

Introduction

[1] On May 13, 2019, Ms. Carrie Low filed a public complaint (the "Complaint") to the Nova Scotia Police Complaints Commissioner (the "Commissioner"). The Complaint expressed a number of concerns about the police handling of her May 19, 2018 report to the Halifax Regional Police ("HRP") that she was the victim of a serious sexual assault. Form 5, the form provided to Ms. Low entitled, "Form 5 – Public Complaint – [Section 31(1)] *Police Act Regulations*" asked Ms. Low to provide the "Name(s) of Police Officer(s) being complained about." Ms. Low wrote, "Cst. Novakovic and Cst. Jerrell Smith."

[2] The Complaint was signed by Ms. Low on May 13, 2019 and date-stamped "received" at the Officer of the Police Complaints Commissioner on May 13, 2019.

[3] On May 21, 2019 the Commissioner wrote to Ms. Low advising that her complaint against Cst. Novakovic was filed beyond the six-month time limit for filing complaints against municipal police officers as Cst. Novakovic's involvement "appears to be limited to May 2018. Given this, we are unable to process the complaint." Ms. Low had been advised by the Commissioner's office on May 14, 2019 that Cst. Jerell Smith was a member of the Royal Canadian Mounted Police ("RCMP") and not a member of the HRP.

[4] On June 13, 2019 Ms. Low sent an email to the Commissioner asking that the Commissioner's decision not to process the Complaint be reconsidered and reviewed on the basis that Ms. Low did not discover the "true nature of the negligence and lack of care" in her case until she received a copy of the HRP Policy on Investigating Sexual Assaults. This information was disclosed to Ms. Low as a result of her request for information pursuant to the *Freedom of Information and Protection of Privacy Act* 1993, c. 5, s.1 and was attached to a letter to Ms. Low from FOIPOP Coordinator, Inspector Donald Moser, dated April 23, 2019. Ms. Low also stated in her email to the Commissioner that the six-month time limit should only apply once there was "discoverability of negligence."

[5] The Commissioner responded to Ms. Low's request to reconsider the Complaint by letter dated July 9, 2019. The Commissioner stated that the

Complaint alleged that "the negligent actions occurred between May 2018 and March 2019." The Commissioner noted that Cst. Novakovic's involvement in Ms. Low's case "appears to be limited to May 2018 and is outside of the six (6) months." The Commissioner stated, "Both the RCMP and Nova Scotia Office of the Police Complaints Commissioner consider the date of the occurrence, or incident, giving rise to the complaint to be the starting date for the timeline. In your case that date is May 19, 2018 and the six (6) months starts then." The Commissioner concluded her letter by stating, "As I have no authority to extend this six (6) months, your complaint against Cst. Novakovic cannot be processed."

[6] Ms. Low seeks Judicial Review of the Commissioner's July 9, 2019 decision.

The Grounds for Review

[7] Ms. Low seeks judicial review on the following grounds:

1. The Commissioner violated the duty of procedural fairness, specifically, by failing to clarify with the applicant whether her complaint concerned only the named officer(s) or also unknown officers or the police department generally;
2. The Commissioner based her decision on an erroneous finding of fact, made without regard for the material before her, that the applicant's complaint was directed only at Constable Novakovic rather than unknown officers and the police department generally;
3. The Commissioner based her decision on an erroneous finding of fact, made without regard for the material before her, that the limitation period, imposed by section 29 of the *Police Regulations*, began to run on May 19, 2018;
4. The Commissioner erred in law by failing to fulfil her statutory duty to refer the applicant's complaint to the chief officer of the department, as required by section 71 of the *Police Act*;
5. The Commissioner erred in law by failing to provide a purposive interpretation of section 29 of the *Police Regulations* that includes the doctrine of discoverability.

[8] Ms. Low requests that the decision of the Commission be remitted back to the Commissioner for redetermination. She also seeks a declaration that the doctrine of discoverability applies to section 29 of the *Police Regulations*.

The Record

[9] On a judicial review, *Civil Procedure Rule* 7.09(1)(a) requires the decision-making authority to file with the Court "a complete copy of the record." The Record of the Respondent filed by the Commissioner comprised seven items:

1. The Complaint (Form 5 plus four and one-half typed pages) submitted by Ms. Low

2. Copy of the Complaint with handwritten notes of the Commissioner

3. Note to File dated May 14, 2019 of Jeff Garber (Police Complaints Commissioner) Re: The Matter of Carrie Low, Cst. Novakovic (HRP) and Cst. Jarell [*sic*] (RCMP)

4. Memo to file dated May 15, 2019 of Judith A. McPhee, Q.C. (Office of Complaints Commissioner) Re: Matter of Carrie Low, Cst. Novakovic (HRP) and Cst. Jerell Smith (RCMP)

5. Letter from Judith A. McPhee, Q.C., Police Complaints Commissioner to Carrie Low dated May 21, 2019 Re: The Matter of Carrie Low and Cst. Bojan Novakovic of the Halifax Regional Police

6. Email dated June 13, 2019 from Carrie Low to "COM, POL", addressed to Judith McPhee re "Request for review"

7. Letter dated July 9, 2019 from Judith McPhee, Q.C. to Carrie Low.

Issues

[10] Ms. Low identifies the following issues:

1. Does the doctrine of discoverability apply to the limitation period?

2. Was the Commissioner's finding that the Complaint was time barred unreasonable?

3. Did the Commissioner breach the duty of fairness?

The Standard of Review for each Issue

[11] In *Canada (Minister of Citizenship and Immigration) v. Varilov*, 2019 SCC 65 (S.C.C.), (*Varilov*) the majority ruling of the Supreme Court of Canada confirmed that reasonableness is the presumptive standard for judicial review of the merits of an administrative decision. The Supreme Court said that that presumption can be rebutted in only two situations: (1) where the legislature has indicated that it intends a different standard to apply; and (2) where the rule of law requires that the standard of correctness be applied.

[12] The Applicant says that there is no standard of review analysis applicable to judicial review of procedural fairness claims. She says that failure to provide procedural fairness will result in the decision being set aside.

[13] The Respondent agrees, noting the comments of Fichaud J.A. in *Bowater Mersey Paper Co v. C.E.P., Local 141* 2010 NSCA 19 (N.S.C.A.), that although the reviewing judge does not conduct a standard of review analysis for procedural fairness, the judge must still determine the content of the duty of fairness and then determine whether that duty was breached.

[14] The parties agree that the Commissioner's finding that the Complaint was time barred is to be reviewed on the basis of reasonableness.

[15] The Applicant says that the Commissioner's decision not to apply the doctrine of discoverability to the limitation period must be reviewed on a standard of correctness. The Respondent says that the standard of review is that of reasonableness, as per *Vavilov*, because that there is no indication in the *Police Act*, R.S.N.S. 1989, c. 214 or *Police Regulations* N.S. Reg. 230/2005 that suggests a different standard of review than reasonableness ought to be applied. The Respondent also says that the rule of law does not require that the standard of correctness be applied. The Applicant says that even if reasonableness is the standard, the Commissioner's decision also falls short of that standard.

The Statutory Regime

[16] A review of the statutory underpinnings of the Commissioner's duties are helpful. The Commissioner is governed by the *Police Act* (the "*Act*") and *Police Regulations*. Section 11 of the *Act* states that the Governor in Council "shall appoint a person to be the Nova Scotia Police Complaints Commissioner. This appointment is for a term not exceeding three years and may be re-appointed."

[17] Ms. Judith McPhee, Q.C. was the Commissioner who dealt with the Complaint and determined not to proceed with it.

[18] The Commissioner is given the following duties in s. 12 of the *Act*:

> 12 (1) The Complaints Commissioner shall
>
> (a) attempt to resolve complaints referred to the Complaints Commissioner under this Act; and
>
> (b) perform the duties assigned to the Complaints Commissioner by this Act, the regulations, the Minister or the Governor in Council.
>
> (2) The Complaints Commissioner is a member of the Review Board.
>
> (3) For greater clarity the Complaints Commissioner shall not sit as a member of a panel of the Review Board conducting a hearing into a complaint that has been dealt with by the Complaints Commissioner under this Act.

[19] The *Act* grants the Governor in Council the ability to make regulations respecting a wide range of issues. Section 97(1) provides, in part:

> 97(1) The Governor in Council may make regulations
>
> …
>
> (aa) relating to the powers, functions or duties of the Review Board or the Complaints Commissioner under this Act or any matter relating to the functions or duties assigned to the Review Board or the Complaints Commissioners;
>
> …
>
> (aq) defining any word or expression used but not defined in this Act;
>
> (ar) further defining any word or expression defined in this Act;
>
> (as) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act, including the governance of the Provincial Police.

[20] Section 34(5) of the *Act* provides that where the Governor in Council enters into an Agreement with the Royal Canadian Mounted Police ("RCMP"), the Royal Canadian Mounted *Police Act* applies, and the complaints process therein applies to members of the RCMP in their capacity as provincial police.

[21] *Police Regulation* 29 states:

> 29 If a complaint is made more than 6 months after the date of the occurrence that gave rise to the complaint, the complaint must not be processed.

[22] If a complaint is made within the time period set out in *Regulation* 29, the complaint is referred to the chief officer of the relevant municipal police department. The complaint then follows a process set out in the *Act* and *Regulations*.

The Complaint

[23] A member of the public may make a complaint about a member or members of a police department, or a complaint about a police department generally. In that regard, s. 27 of the *Police Regulations* provides:

> Making complaint
>
> 27 A complaint may be made to any of the following, as applicable:
>
> (a) for a complaint about a police department generally, the complaints officer of the police department or any other member of the police department;
>
> (b) for a complaint against a member, the complaints officer of the police department of which the member complained of is a member, or any other member of the police department;
>
> (c) for any complaint, the board or the Complaints Commissioner.
>
> [emphasis added]

[24] "Form 5 – Public Complaint" does not provide a "box" or area where a member of the public can indicate that they have a complaint against a police department, generally. The form asks only that the member of the public indicate the "Name(s) of Police Officer(s)."

[25] Form 5 provides a space to provide "Details of Complaint: (Including any injuries, medical attention, witnesses etc. – Use separate sheet of paper if required)." On the Complaint, Ms. Low wrote in this space, "Please see attached document." The document attached is approximately 4.5 typed pages. It begins as follows:

> Public Complaint: Halifax Regional Police
>
> Please find below a detailed description of my complaint relating to a pattern of conduct by the Halifax Regional Police. This pattern of conduct, amounting to negligence, was cumulative and pervasive in my interactions with police. The negligent actions occurred between May 2018 and March 2019. As such, this complaint arises from a cumulative failure on the part of the Halifax Regional Police to properly investigate a serious crime in accordance with its own policies.

> This crime was reported to the Halifax Regional Police on Saturday, May 19 2018.
>
> Specifically, I am filing a complaint related to the following failures on the part of the Halifax Regional Police to conduct their investigation in a manner that was consistent with either their standard of care or their Sexual Assault Investigation Police:
>
> 1) Failure to collect essential evidence relating to a serious crime. Specifically, the clothing worn by a victim during a sexual assault.
> 2) Failure to send a trauma informed response trained officer to interview the victim. Failure to alert the Sexual Assault Investigative Team (SAIT) in a timely manner that a serious sexual assault had occurred. In accordance with s. 7.4 of the Sexual Assault Investigation Policy, a trauma informed response trained officer should whenever possible be sent to a sexual assault call to complete the preliminary investigation and SAIT must be informed directly when a sexual assault occurs.
> 3) Failure to process a toxicology report due to improper submission of an essential document. The toxicology report was not conducted as of one year following the sexual assault.
> 4) Failure to attend the scene of the crime and to seek evidence. No reason was provided as to why the police did not attend the crime scene despite the fact that an exact location was provided and the police confirmed that they were aware of this location and its occupants.
> 5) Failure to follow Halifax Regional Police Policy relating to Sexual Assault Investigations, including by failing to dispatch members of patrol trained in a trauma informed response whenever possible (6.1), thoroughly investigation the incident (6.6(2)), and treating sexual assault cases with sensitivity by fully informing the victim of the investigative and judicial process (7.6 (Bii)).
> 6) Failure to clearly identify a lead investigating officer as a point of contact for a victim.
>
> Please see below a detailed timeline and description of the period between May 19, 2018 and March 2019 when the negligent actions occurred.
>
> [emphasis added]

[26] Certain of the underlined portions of the narrative of the Complaint make it clear that, despite being requested by Form 5 to name the Police Officer(s) being complained about, and naming Cst. Jerell Smith and Cst. Novakovic, Ms. Low was complaining generally about how the HRP dealt with her sexual assault report, and not just about the conduct of Cst. Novakovic and Cst. Smith.

Issue 1: Does the doctrine of discoverability apply to the limitation period?

[27] The starting point for this analysis is the most recent statement of the Supreme Court of Canada of the discoverability doctrine in the context of limitations periods: *Pioneer Corporation. v. Godfrey*, 2019 SCC 42 (S.C.C.) ("*Pioneer*").

[28] In *Pioneer*, the majority of the Court affirmed that limitation periods may be subject to a rule of discoverability, such that a cause of action will not accrue for the purpose of the running of a limitation period until the material facts on which the cause of action is based have been discovered, or ought to have been discovered by the exercise of reasonable diligence. The discoverability rule is a rule of construction to aid in the interpretation of statutory limitation periods. (*Pioneer*, paras. 31-32)

[29] The rule of discoverability does not apply to every limitation period, *Pioneer*, at para. 33:

> Absent legislative intervention, the discoverability rule applies only where the limitation period in question runs from the accrual of the cause of action, or from some other event that occurs when the plaintiff has knowledge of the injury sustained.
>
> [emphasis added]

[30] In *Pioneer*, the Court referred in this regard to the decision of the Manitoba Court of Appeal in *Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.) at para. 22:

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specific time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.
>
> [emphasis of the Court in *Pioneer*]

[31] In *Pioneer*, the Court explained that two points flow from the statements of the Manitoba Court of Appeal in *Fehr v. Jacob*:

> [34] …First, where the running of a limitation period is contingent upon the accrual of a cause of action or some other event that can occur only when the plaintiff has knowledge of his or her injury, the discoverability principle applies in order to ensure that the plaintiff had knowledge of the existence of his or her legal rights before such rights expire (*Peixeiro* [*Peixeiro v. Haberman*, [1997] 3 S.C.R. 549]), at para. 39.
>
> Secondly (and conversely), where a statutory limitation period runs from an event unrelated to the accrual of the cause of action or which does not require the plaintiff's knowledge of his or her injury, the rule of discoverability will not apply. In *Ryan*, [*Ryan v. Moore*, 2005 SCC 38] for example, this Court held that discoverability did not apply to s. 5 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32, which stated that an action against a deceased could not be brought after one year from the date of death. As the Court explained (para. 24):
>
> > The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action.
> >
> > [emphasis by the Court in *Pioneer*]
>
> By tying, then, the limitation period to an event unrelated to the cause of action, and which did not necessitate the plaintiff's knowledge of any injury, the legislature had clearly displaced the discoverability rule. (*Ryan*, at para. 27)

[32] In *Pioneer*, the Court applied the discoverability principle to extend the two-year limitation period in the *Competition Act*:

> [36] In determining whether a limitation period runs from the accrual of action or knowledge of the injury, such that discoverability applies, substance, not form, is to prevail: even where the statute does not explicitly state that the limitation period runs from "the accrual of the cause of action", discoverability will apply if it is evident that the operation of a limitation period is, in substance, conditioned upon accrual of a cause of action or knowledge of an injury. Indeed, clear statutory text is necessary to oust its application. In *Peixeiro*, for example, this Court applied the discoverability rule to s. 206(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8., which stated that an action must be commenced within two years of the time when "damages were sustained" (para. 2). The use of the phrase "damages were sustained" rather than "when the cause of action arose" was a "distinction without a difference", as it was unlikely that the legislature intended that the limitation period should run without the plaintiff's knowledge (para. 38).
>
> [37] It is therefore clear that the "the judge-made discoverability rule will apply when the requisite limitation statute indicates that time starts to run from when the cause of action arose (or other wording to that effect)" (G. Mew, D. Rolph and D. Zacks, *The Law of Limitations* (3rd ed. 2016), at p. 103, emphasis added). And, while my colleague Côté J. claims to disagree with my analysis, I am fortified by

> the endorsement in her reasons of this formulation of discoverability (paras. 140 and 149).
>
> [emphasis added]

[33] In *Tomec v. Economical Mutual Insurance Company* 2019 ONCA 882 (Ont.C.A.), the Ontario Court of Appeal determined that a two-year limitation period in the *Ontario Insurance Act* and a *Schedule* to that *Act*, were subject to discoverability.

[34] The Court of Appeal stated that "the analysis is not focused on whether a limitation period is tied to a fixed event […] Rather, the question is whether the limitation period is related to the cause of action or the plaintiff's knowledge." (para. 32) The Court of Appeal rejected the insurer's argument that a refusal to pay a benefit is a specific event that is not tied to a cause of action, finding that the applicable limitation period "is tied to the accrual of the cause of action." (para. 37) The Court of Appeal stated that "[T]he refusal to pay a benefit and the ability to make a claim are inextricably intertwined in the cause of action. The refusal cannot be stripped out of the cause of action and treated as if it is independent of it." (para. 36)

[35] The Respondent says that the discoverability rule does not apply to section 29 of the *Police Regulations*. In support of that position, it refers, *inter alia*, to the decision of the Alberta Court of Appeal in *Engel v. Edmonton (City) Police Service* 2008 ABCA (Alta. C.A.). In *Engel*, the Court of Appeal strictly interpreted time limits for a complaint against police officers. The complainant filed a complaint in June 2005 against seven officers alleged to have been involved in an unauthorized search in 2004 of the complainant's name on a police database information system. The Chief of Police determined he did not have jurisdiction to deal with any of the alleged misconduct (except for one complaint) as he was time barred due to the applicable statutory time limits. Watson J.A., writing for the Alberta Court of Appeal stated:

> 9 Section 43(1) states that all complaints with respect to "…a police officer other than the chief of police, shall be referred to the chief". In Engel's case, the complaint was made on June 30, 2005 to da Costa as the Acting Chief of Police. Section 43(11), which was given Royal Assent and came into force on proclamation on June 2, 2005, provides:
>
> > 43(11) The chief of police, with respect to a complaint under subsection (1), or the commission, with respect to a complaint under subsection (2) or section 46(1), shall dismiss any complaint that is made more than one year after the events on which it is based occurred.

> 10 Based on the grammatical and ordinary reading of the language, in its context, and mindful of the object of the enactment, it is clear that the Legislature intended to establish a firm one year time limitation. As the judge below noted, the word "shall" is imperative under s. 28(2) of the *Interpretation Act*, R.S.A. 2000, c. I-8. No discretion is given to a police chief to vary the time limitation. The questions remain whether that express limit should be interpreted to inapplicable to cases arising before June 2, 2005, or to cases before or after that date which are grounded on events which involve misconduct which are not, nor cannot be, discoverable within that period.

[36] The Court of Appeal in *Engel* distinguished between the ability granted by the legislature to complain about the police and the right to commence an action:

> 28 Discoverability seeks to preserve a party's ability to recover a personal remedy unless legislation expressly removes it. The appellant is correct that the object of an ability to complain about police conduct is to benefit the public through effective and proper policing: *Plimmer v. Calgary (City) Chief of Police*, [2004] A.J. No. 616, 2004 ABCA 175 (Alta. C.A.) at para. 32. That does not mean, however, that the Legislature sees the ability of an individual to complain – in service of a policy of general interest – as being equivalent to a plaintiff's ability to commence an action to recover personal damages as contemplated in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.) at para. 36. The weight of authority on discoverability defines what is discoverable as being the nature of the harm done to the plaintiff such that the plaintiff has an actionable claim for that harm: see e.g. *A. v. Hoare*, [2008] UKHL 6 (U.K.H.L.); *Mustapha v. Culligan Canada Ltd*., reserved, March 18, 2008, on S.C.C. No. 31902 [2007 CarswellOnt 4075 (S.C.C.)] from 275 D.L.R. (4^{th} 473 (Ont.C.A.).

[37] Of course, *Engel* was decided eleven (11) years before the Supreme Court of Canada's decision in *Pioneer* and, obviously, before the majority of the Court's ruling that discoverability applies to limitation periods, unless clear statutory text ousts its application (*Pioneer*, para. 34) or when it is evident that the operation of a limitation period is, in substance, conditioned upon accrual of a cause of action, or some other event, which is conditioned upon knowledge of injury. (*Pioneer*, paras. 36 and 37)

[38] The discoverability doctrine involves statutory construction – in this case, of the wording of *Police Regulation* 9:

> If a complaint is made more than 6 months after the date of the occurrence that gave rise to the complaint, the complaint must not be processed.
>
> [emphasis added]

[39] The Commissioner, in her July 9, 2010 letter to Ms. Low, stated that the Nova Scotia Office of the Police Complaints Commissioner "consider(s) the date of the occurrence, or incident, giving rise to the complaint to be the starting date for the timeline. In your case that date is May 19, 2018 and the six (6) months starts then."

[40] It is unclear to this Court the basis for the Commissioner's conclusion that the six (6) month period began to run on May 19, 2018. That was the date Ms. Low reported to the HRP that she had been sexually assaulted. The report of a sexual assault set in motion the activities of members of the HRP and RCMP of which Ms. Low later had complaints. This might include Ms. Low's statement in the Complaint that:

> Cst. Novakovic of the HRP attended the hospital and spoke with me regarding the sexual assault that occurred late night May 18th/early morning of May 19th. Cst. Novakovic did not indicate that he was trained in Trauma Informed response. He provided me with a plastic sealing bag to put my clothing in and informed me that an officer would come by my residence that evening to pick up the sealed bag.

Of course, Ms. Low did not know that HRP's Policy relating to Sexual Assault Investigations provided that members of the HRP should be dispatched to investigate sexual assaults until she received a copy of that Policy from HRP Inspector Moser on or about April 23, 2019. Ms. Low also did not know that her clothing had not been sent to a lab for analysis until April 10, 2019.

[41] There may be occurrences which naturally give rise to a member of the public immediately knowing the date of the occurrence, i.e. a complaint involving alleged police misconduct in connection with an arrest. However, a civilian can only complain about police misconduct if she knows about it. There may be police misconduct arising from what police fail to do, as well as what they do. There may be police misconduct which occurs after a report of an event involving police, that a complainant only learns about after she makes the original report.

[42] Further, Form 5 does not limit a complaint to a single incident. In Ms. Low's narrative she expressed concerns about the clothing she was wearing on May 19, 2018 not being picked up for DNA testing by the HRP until May 29, 2018, despite Ms. Low being provided with a plastic sealing bag by Cst. Novakovic on May 19th and told by him that he would pick up her clothing that evening (May 19th). As noted above, Ms. Low did not learn that her clothing had not been sent to a lab for analysis as of April 10, 2019, until that date.

[43] Ms. Low states in the Complaint that she did not learn until April 10, 2019 that the wrong form had been sent to the lab when her rape kit was submitted, and no toxicology report had been completed.

[44] Nor did Ms. Low learn that the HRP had not, allegedly, followed the HRP Policy relating to Sexual Assault Investigations until she received a copy of this Policy by letter dated April 23, 2019 from Inspector Donald Moser.

[45] Each of these complaints and other concerns expressed by Ms. Low in the Complaint could have, on their own, constituted a separate complaint. Yet the Commissioner, in effect, determined that each of these complaints were also out of time.

[46] This Court determines that discoverability applies to the limitation period in *Police Regulation* 29. There is no legislative language found in either the *Police Act* or *Police Regulations* which clearly ousts the presumption, per *Pioneer,* that the rule of discoverability applies to every limitation period. Further, the six (6) month limitation period does not run from an event unrelated to the accrual of the cause of action. Rather, the limitation period in this case runs from "some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained": *Pioneer*, para. 34. The laying of the Complaint was inextricably linked to Ms. Low's knowledge that the alleged action or inaction of members of the HRP caused her injury. The Supreme Court in *Pioneer* refers to both the accrual of a "cause of action" or "from some other event that can occur only when the plaintiff has knowledge of his or her injury."

[47] A complaint of police misconduct is serious both for the officer(s) involved, for the complainant and for the community. There is no reason why discoverability should not apply in the context of legislation which provides a statutory scheme to allow members of the public to hold police officers and departments responsible for their conduct.

[48] Applying the discoverability doctrine, Ms. Low's complaint was timely because she did not discover the aspects of her Complaint reviewed previously until on or about April 23, 2019.

[49] If the "occurrence" is not cumulative, it still follows that any complaint in the body of the Complaint that occurred six (6) months before the date of the Complaint would be timely. This would include the fact that as of April 10, 2019

no toxicology report had been performed and Ms. Low's clothing had not been sent for testing and analysis.

[50] This Court need not determine whether the standard of review of the Commissioner's decision not to apply the doctrine of discoverability to the limitation period is correctness or reasonableness, because even if the standard is reasonableness, the Commissioner's decision fails.

Issue 2: Was the Commissioner's finding that the Complaint was time barred unreasonable?

[51] The parties agree that the Commissioner's finding that the Complaint was time barred is to be reviewed on the standard of reasonableness.

[52] The majority in *Vavilov* stated:

> [13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.
>
> [14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.
>
> [15] <u>In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified</u>. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.
>
> [emphasis added]

[53] The Commissioner's May 21, 2019 letter to Ms. Low was succinct. This Court would add the adjective "unresponsive" to many of Ms. Low's concerns outlined in the Complaint. That descriptor is apt because this letter totally ignores the fact that the Complaint is not simply focused on the conduct of Cst. Bojan Novakovic. Rather, the Complaint is much broader in scope and is directed against the members of the HRP in general who dealt with Ms. Low's report of a violent sexual assault.

[54] The Court refers to the following statements in the Complaint in support:

> Public Complaint: Halifax Regional Police
>
> Please find below a detailed description of my complaint relating to a pattern of conduct by the Halifax Regional Police. This pattern of conduct, amounting to negligence, was cumulative and pervasive in my interactions with police. The negligent actions occurred between May 2018 and March 2019. As such, this complaint arises from a cumulative failure on the part of the Halifax Regional Police to properly investigate a serious crime in accordance with its own policies. This crime was reported to the Halifax Regional Police on Saturday, May 19[,] 2018.
>
> Specifically, I am filing a complaint related to the following failures on the part of the Halifax Regional Police to conduct their investigation in a manner that was consistent with either their standard of care or their Sexual Assault Investigation Policy:

[55] Ms. Low was required by Form 5 to indicate the name of the Police Officer(s) being complained about. There was no place or option on Form 5 to indicate that her complaint was about the conduct of the HRP in dealing with her report of a sexual assault.

[56] The Commissioner ignores the broader aspect of the Complaint against the HRP department. This is evident both from the content of the Commissioner's May 21, 2019 letter as well as that letter's "re" line which arbitrarily reduces Ms. Low's complaint, without notice or clarification from Ms. Low, to a single complaint against a single officer, Cst. Novakovic:

> **Re: The matter of Carrie Low and Cst. Bojan Novakovic of the Halifax Regional Police**
>
> My officer confirmed with you on May 14, 2019, that the Cst. Smith you have named in your complaint is a member of the RCMP. I understand that you have initiated the complaint process with the Civilian Review and Complaint Commission for the RCMP in this regard.

> Your complaint against Cst. Novakovic is beyond the six-month time limit for filing complaints against municipal police officers as his involvement appears to be limited to May 2018. Given this, we are unable to process the complaint.
>
> [emphasis added]

[57] The entirety of the Complaint was dismissed by the Commissioner with no reason as to why that was the case, since the Commissioner only refers to that aspect of the Complaint concerning Cst. Novakovic.

[58] Yet, it is clear from the Complaint that Ms. Low was complaining about the HRP's "failure to process a toxicology report due to improper submission of an essential document. The toxicology report was not conducted as of one year following the sexual assault." The Commissioner makes no reference to this part of Ms. Low's Complaint. If, as the Commissioner suggests, Cst. Novakovic's involvement "'appears' to be limited to May 2018" her decision is silent on why that part of the Complaint (the alleged failure of the HRP to process the toxicology report within one year following the sexual assault) was also dismissed.

[59] The Commissioner made notes on a copy of the Complaint date-stamped "Received, Office of the Police Commissioner." The notes made by the Commissioner are limited to the names of the officers mentioned by Ms. Low in the Complaint with an indication of whether the officer is a member of the HRP or a member of the RCMP.

[60] In a "Memo To File" dated May 15, 2019, with the Subject line: "Matter of Carrie Low, Cst. Novakovic (HRP) and Cst. Jerell Smith (RCP)", the Commissioner recorded, *inter alia*:

> This writer contacted S/Sgt. Don Steinburg (HRP i/c of SAIT) on Tuesday, May 14th to advise we had received a complaint from Carrie Low. The complaint is essentially about how the investigation into her sexual assault is progressing. Advised S/Sgt. that the only one officer named in the complaint was HRP and the time for filing that complaint has expired.
>
> [emphasis added]

[61] It seems clear that the Commissioner's focus in writing this memo was on the officers who Ms. Low named or referred to in the Complaint. The notes the Commissioner made on the copy of the Complaint indicating whether an officer referred to in the Complaint was a member of the RCMP or a member of the HRP support that conclusion.

[62] If there is a presumption that the Commissioner inquired as to whether there were members of the HRP who dealt with Ms. Low's report of sexual assault, other than those members Ms. Low had interacted with (and therefore referred to by name in her Complaint), that presumption is rebutted by the Commissioner's statements in her memo to file of May 15, 2019. The Commissioner states that she advised S/Sgt. Don Steinberg (HRP) that "the only one officer named in the complaint was HRP and the time for filing that complaint has expired."

[63] The Complaint states that Cst. Steven Rideout advised Ms. Low on April 10, 2019 that the wrong form was sent to the lab when the rape kit and toxicology was sent to the lab for testing, so to date the toxicology had not been done. Ms. Low also states in the Complaint that it was Cst. Rideout who told her on April 10, 2019 that her clothing had not, as of that date, been sent to the lab for testing. The Commissioner's notes indicate that Cst. Rideout was a member of the RCMP. However, neither the Commissioner's initial response to the Complaint of May 21, 2019 nor her subsequent response to Ms. Low of July 9, 2019 advise that Cst. Rideout was the officer responsible for dealing with the toxicology report and the sending of Ms. Low's clothing for analysis.

[64] How would Ms. Low know which members of the HRP (if any) apart from those she spoke with or met, were responsible for, in the words of the Commissioner, (May 15, 2019 "Memo to File") "how the investigation into her sexual assault is progressing"? Again, the "Subject" line of this Memo to File makes it clear that the Commissioner was focused only on Ms. Low's interaction with Cst. Novakovic and Cst. Smith, and not the broader aspect of Ms. Low's Complaint against the HRP generally.

[65] The Commissioner made an unreasonable decision when she concluded that all aspects of Ms. Low's Complaint were untimely and that she was therefore unable to process the Complaint. The Commissioner also unreasonably failed to consider that Ms. Low's Complaint was not limited to a complaint about Cst. Novakovic, but rather about how members of the HRP, those known or unknown to Ms. Low, had dealt with her report of a sexual assault.

Issue 3: Did the Commissioner breach the duty of fairness?

[66] Either the procedure followed by the Commissioner in dismissing the Complaint was fair, or it was not.

[67] Consideration of *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, is required in this context. *Baker* sets out five non-exhaustive factors that are relevant to a determination of the content of the duty of fairness in any given case. They consist of:

i. The nature of the decision;

ii. The nature of the statutory scheme;

iii. The importance to the individual affected;

iv. The legitimate expectations of the person challenging the decision; and

v. The choices of procedure made by the decision maker.

[68] A helpful summary of the role of this Court (in reviewing for procedural fairness) is found in *Burt v. Kelly*, 2006 NSCA 27 (N.S.C.A.) wherein, at paras. 19-21, Justice Cromwell noted as follows:

> 19 The judge's concern was not that the Board improperly exercised its discretion or that any decision or ruling it made was in itself reviewable. Those are the kinds of matters that we typically think of as engaging the standard of judicial review. The standard of review is generally applied to the "end products" of the Board's deliberations, that is, to its rulings and decisions: see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at para 102. In this case, the judge was concerned that the process followed by the Board had resulted in unfairness – in other words, that the Board had failed in its duty to act fairly. This concern goes to the content of the Board's duty of fairness, that is, to the manner in which its decision was made: *C.U.P.E.* at para. 102.
>
> 20. Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. In my respectful view, the judge did not adequately consider the first of these steps.
>
> 21. The first step - determining the content of the tribunal's duty of fairness - must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step - assessing whether the Board lived up to its duty -- assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's

> procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for this review.
>
> [emphasis added]

[69] In *Taylor v. Nova Scotia (Attorney General)* 2019 NSSC 292, Moir J. reviewed the "*Baker*" factors in the context of a decision of the Nova Scotia Police Complaints Commissioner to not refer a public complaint to the Police Review Board:

> [120] I adopt the submission of Mr. Choo on the first factor, the nature of the decision:
>
> > This review is of a decision by the Commissioner to not forward the Applicant's complaint to the Police Review Board. This is not a preliminary decision but one that is determinative. If the matter is not forwarded, there is no appeal mechanism; a complainant must seek Judicial Review. This suggests a higher level of procedural fairness is owed.
>
> [121] As to the nature of the statutory scheme, we need to focus specifically on the role of the Police Complaints Commissioner but also on the context supplied by the provisions in the statute for laying complaints, first instance determinations, the right to seek review, the discretion of the commissioner, and the purpose of the Police Review Board.
>
> [122] Subsection 74(4) casts the commissioner's discretion broadly, "the complaints commissioner is satisfied that the complaint is frivolous, vexatious, without merit or an abuse of process". That broad discretion and its place in the complaint process, indicate that the commissioner has a gatekeeper role to filter out complaints that have no merit.
>
> [123] Read in isolation this would suggest a duty of fairness at the lower levels. However, we cannot ignore the immediate context, "Where the Complaints Commissioner is unable to resolve the complaint, the complaint shall be referred to the Review Board…". Note the mandatory "shall". The discretion is an exception to what is otherwise required.
>
> [124] The right to request review applies to the member complained about when the police authority finds the complaint has merit as well as in cases, like Mr. Taylor's, where the police authority determine otherwise. The Police Review Board exists to provide civilian oversight. The discretion cannot be meant to override that.
>
> [125] The gatekeeper role suggests a higher duty of fairness when it is seen in light of the legislative purpose of civilian oversight.

> [126] The statute provides the commissioner's power to appoint an investigator and to act on the investigator's report: s.74(2). The statute and the *Police Regulations* leave procedure for investigations, and satisfaction on whether the complaint is without merit, mostly to the Police Complaints Commissioner herself. This suggests a lower level of procedural fairness.
>
> [127] On balance, the nature of the statutory scheme suggests a duty of procedural fairness that is neither the highest nor the lowest.
>
> [128] I adopt Mr. Choo's submission on the third factor, importance of the decision to those affected:
>
> > The allegations made by the Applicant suggest abuse of power, and an infringement of his *Charter* rights. These allegations, if true, are serious. This decision in undoubtedly important to him. But it should also be viewed in the context that the Applicant's liberty or other *Charter* rights are not in jeopardy as a result of this decision. Nevertheless, this decision does have importance, not only to the Applicant, but to the Respondents, Constables Paris and Norris. A decision to refer the matter to a hearing by the Police Review Board would have impacts on the Constables professionally as well as personally, particularly if the allegations were without merit. Given the importance to all involved, this would suggest a higher duty of procedural fairness.
>
> I would only add that the inquiry into importance must not be limited to tangible interests. A person may have a strong interest in the Police Review Board hearing a complaint that legitimately raises a public policy issue. The correct stance when police consider using their power to arrest for breach of the peace would be such an issue when it arises in the context of race.
>
> [emphasis added]

[70] The Commissioner's decision to dismiss Ms. Low's complaint was determinative. The first *Baker* factor, i.e. the nature of the decision, attracted, as per Moir J. in *Taylor* a "higher level of procedural fairness." This Court adopts the findings of Moir J. in *Taylor* in light of the other *Baker* factors.

[71] In *Taylor*, Moir J. found that, on balance, the second *Baker* factor, "the nature of the statutory scheme" suggested a duty of procedural fairness that "is neither the highest nor the lowest." (para. 127) As to the third *Baker* factor, the importance of the decision to those affected, Moir J. found that this attracted a higher duty of procedural fairness (para. 128), although, Moir J. so found in the context of a decision by the Commissioner not to refer a complaint to the Police Review Board. This Court finds that the dismissal of the Complaint at the outset based upon its timeliness also attracts a high level of procedural fairness.

[72] As to the fourth *Baker* factor, "the legitimate expectations of the person challenging the decision", in *Taylor*, Moir J. determined that this attracted a lower level of a duty of fairness. This Court finds that Ms. Low's legitimate expectations were surely, at a minimum, that the matters raised in her Complaint would each be considered before a decision that the entire Complaint should not be processed on basis of timeliness being reached.

[73] There is nothing in the Commissioner's letter that would give Ms. Low any comfort that that was done; in fact, the opposite is the case.

[74] This Court is not suggesting that the Commissioner was required to take a specific or particular form of action, i.e. send to Ms. Low the kind of letter which was sent to her by the RCMP after she filed an identical complaint to it concerning the same matters (counsel for Ms. Low calls this letter a 'procedural fairness' letter), but this Court finds that it would have been both prudent and fair, before dismissing the entirety of the Complaint, for the Commissioner to clarify with Ms. Low whether she was only complaining about Cst. Novakovic or not, before sending her a letter with the "re" line of "The matter of Carrie Low and Cst. Bojan Novakovic of the Halifax Regional Police" and stating, "Your complaint against Cst. Novakovic is beyond the six-month time limit for filing complaints against municipal police officers as his involvement appears to be limited to May 2018." If, as the Commissioner stated, Cst. Novakovic's involvement was limited to May 2018, surely the requirements of procedural fairness owed to Ms. Low would have mandated, at a minimum, a statement why other aspects of the Complaint (which Cst. Novakovic could not have been involved with such as not sending the rape kit for processing and not retrieving Ms. Low's clothing for analysis and with respect to HRP officers not allegedly following the HRP Policy on Investigating Sexual Assaults) were also unable to be processed on the basis of being out of time.

[75] In terms of the fifth *Baker* factor, "the choices of procedure made by the decision maker", both the *Act* and the *Police Regulations* are silent on procedures that must be followed when the Commissioner determines to process a complaint because it is out of time. This suggests a lower duty of fairness.

[76] Overall, when the Baker factors are considered together, a moderate level of procedural fairness was owed to Ms. Low in the circumstances.

[77] This Court finds that the Commissioner's decision breached the duty of fairness owed to Ms. Low.

Conclusion

[78] The Commissioner's July 9, 2019 decision refusing to reconsider her May 21, 2019 decision, and that decision as well, are set aside. The matter is remitted back to the Commissioner for determination after applying the doctrine of discoverability to the Complaint and processing the Complaint in light of this Court's conclusions on reasonableness and procedural fairness.

[79] Ms. Low is entitled to her party and party costs of this judicial review. If necessary, the parties may deliver written submissions as to costs to me within thirty (30) calendar days of this decision.

Smith, J.