IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bentley v. The Police Complaint Commissioner,* 2012 BCSC 106

Date: 20120125
Docket: S110977
Registry: Vancouver

Between:

Craig Bentley and John Grywinski

Petitioners

And

The Police Complaint Commissioner and Chief Constable Bob Rich

Respondents

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

Counsel for the petitioners:	M.K. Woodall
Counsel for the respondents:	J.S. Heaney
Place and Date of Hearing:	Vancouver, B.C. October 21, 2011
Place and Date of Judgment:	Vancouver, B.C. January 25, 2012

[1] The petitioners apply for:

1. an order in the nature of *certiorari* requiring the Police Complaint Commissioner to transmit the record of proceedings before him;

2. an order that the Police Complaint Commissioner produce the document forwarded by Thomas Stenvoorden to the Deputy Police Complaint Commissioner on April 30, 2009; and

3. an order that Thomas Stenvoorden be cross-examined on his Affidavit #1.

BACKGROUND

[2] The applicants are police officers; the respondent is the Police Complaint Commissioner. In the petition itself, the petitioners seek an order quashing an order made by the Police Complaint Commissioner on November 12, 2010 and an order declaring that order to be a nullity.

[3] The petitioners argue on the petition that the complaint which underlies the matter was dismissed summarily on March 2, 2009 and that the Police Complaint Commissioner does not have jurisdiction to further investigate the complaint once it is dismissed.

[4] On November 12, 2010, the Police Complaint Commissioner ordered an extension of the investigation. In February 2011, the petitioners filed the petition. In response, the Police Complaint Commissioner filed an affidavit of Tom Stenvoorden. In that affidavit, Mr. Stenvoorden said:

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

[5] The petitioners say that the reference to "new information" is an effort on the part of the Police Complaint Commissioner's office to provide a basis for the new investigation. The petitioners wish to investigate this allegation more thoroughly by obtaining the background documents and cross-examining Mr. Stenvoorden on his affidavit.

POSITIONS OF THE PARTIES

[6] The petitioner argues that s. 17 of the *Judicial Review Procedure Act*, RSBC 1996, c. 241 provides:

> On an application for judicial review of a decision made in the exercise or purported exercise of a statutory power of decision, the court may direct that the record of the proceeding, or any part of it, be filed in the court.

[7] The petitioner argues that "record of proceeding" is defined in s. 1 of the *Judicial Review Procedure Act* to include a document produced in evidence at a hearing before a tribunal. The petitioner recognizes that the Police Complaint Commissioner is not a tribunal, so part (d) of the definition does not apply expressly. However, the petitioner argues that "includes" means the list set out in the definition is not exhaustive. The petitioner relies on *Hartwig v. Commission of Inquiry Into Matters Relating to the Death of Neil Stonechild,* 2007 SKCA 74, 284 DLR (4th) 268 for the proposition that:

> [T]he parties to a judicial review application should be able to put before a reviewing court all of the material which bears on the arguments they are entitled to make.

[8] The petitioner argues that the Stenvoorden affidavit summarizes the new information and says that if this information was considered by the Police Complaint Commissioner, then it formed part of the record of proceedings and should be disclosed.

[9] The petitioner argues that the doctrine of deliberative secrecy does not apply. The petitioner says that the doctrine of deliberative secrecy applies to thought processes, draft decisions and the like of the decision maker. Mr. Stenvoorden is not the decision maker and his memo is not protected by deliberative secrecy. In

any event, the petitioner says that the Police Complaint Commissioner waived secrecy by filing an affidavit which discloses the substance of the review memo.

[10] With respect to cross-examination of Mr. Stenvoorden, the petitioner relies on *Brown v. Garrison* (1967), 63 WWR 248 for the proposition that where the affidavit in question concludes facts that are in issue, the deponent will be ordered to attend for cross-examination if cross-examination is sought. The petitioners say that the text of the order which sets out the Police Complaint Commissioner's reasons for issuing the order does not make reference to new information. The Stenvoorden affidavit claims that there was new information and invites the reader to assume that the Police Complaint Commissioner was made aware of that new information and that he based his decision on the new information. They would not be able to file an affidavit as to what was in fact considered by the Police Complaint Commissioner when issuing the order.

[11] The respondents oppose each of the three orders sought by the applicants. First, the respondents argue that the report prepared by Mr. Stenvoorden is not part of the record of proceeding and the applicants have no legal basis for access to it. The respondents say that they have already produced the record of proceedings. They say that the petitioners seek access to pre-decisional deliberative material that the Police Complaint Commissioner had before him when he exercised his wide discretion under the *Police Act*, RSBC 1996, c. 367. They say that the demand is akin to requiring a tribunal to produce memos from its legal counsel or communications between tribunal members. The petitioners say that they are immune from attempts to discover these deliberative materials.

[12] With respect to procedural fairness, the petitioners say that a decision as to procedure, such as this, attracts the fewest procedural requirements and the administrative record associated with such a decision would correspondingly be limited.

[13] Finally, the respondents say that the applicant's petition and therefore their application, is premature. The respondents rely on the decision of Madam Justice

Ballance in *Ince v. Graham* (21 January 2011), Victoria 11-0060 (BCSC) and say that there are several reasons why the court will be reluctant to embark on a review before the tribunal has completed its function:

1. judicial intervention may fragment the proceedings of the tribunal;

2. the tribunal may resolve the dispute to the parties' satisfaction;

3. intervention may become a moot event;

4. it is helpful for the court to have a full evidentiary record of the tribunal's analysis of the dispute; and

5. courts avoid deciding constitutional or *Charter* issues based on hypothetical facts or in a vacuum.

[14] The respondents say that seeking the report at this time is fragmenting the complaint proceeding. The applicants are seeking to bring the investigation to a standstill before the FIR is completed.

DISCUSSION

[15] In or about 2005, police were informed that Tasha Lynn Rossette was at risk of being murdered. She was murdered later in 2005. Her mother filed a complaint alleging that the police officers had a duty to inform Tasha Lynn Rossette of the information they received and that they had failed in their duty by not providing that information to her and by not acting appropriately on the information. During the investigation of that complaint, Simone Rossette alleged that Bentley had committed perjury in his evidence at the preliminary inquiry.

[16] On March 2, 2009, the discipline authority of the Vancouver Police Department dismissed both the complaint of neglect of duty and the complaint of perjury pursuant to s. 54(1) of the *Police Act.*

[17] Section 54(2) of the *Police Act* provided at that time:

> ... a public trust complaint that has been summarily dismissed ... must not be investigated or further investigated ... but nothing in this subsection prevents further action being taken in relation to any internal discipline component or service or policy component of the complaint.

[18] Despite s. 54(2) there were three ways in which the investigation of a complaint may be pursued after it has been summarily dismissed:

1. a complainant can ask for a review pursuant to s. 54(4) within 30 days;

2. the Police Complaint Commissioner can order a review on his own initiative within 30 days; or

3. if the Police Complaint Commissioner receives "new information", the Police Complaint Commissioner may order a further investigation.

[19] It is the third aspect which is at issue in these proceedings. The petitioners say that the Police Complaint Commissioner did not receive any new information within the meaning of s. 54(8).

[20] On November 12, 2010, the Police Complaint Commissioner issued an order for external investigation pursuant to s. 92(1) of the *Police Act* and Notice of Extension pursuant to s. 99(1) of the *Police Act.*

[21] That order included the following:

> On March 2, 2009, Inspector Mario Giardini, as the designated Discipline Authority for the Vancouver Police Department, issued his decision summarily dismissing the neglect of duty allegations against the members. A copy of Inspector Giordini's decision was sent to Ms. Rossette by way of registered mail, but remained unclaimed at the post-office.
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> Upon receiving the Discipline Authority's letter dismissing the allegations against Detective Bentley and Inspector Grywinski, my office requested a copy of the investigation conducted by the Professional Standards investigator. Following a review of the materials provided and further discussions with the investigator, it was discovered that documentation gathered in a separate "Code of Conduct" investigation conducted by Inspector Porteous of the Vancouver Police Department was not provided to the Professional Standards Section to assist in their *Police Act* investigation.

[22] The petitioners seek the documents in cross-examination on affidavit in this motion, because they wish to challenge the "new information" referred to in this

paragraph as a basis for extending the investigation after it was summarily dismissed.

[23] In my view, this application is premature.

[24] In *British Columbia (Ministry of Attorney General) v. New Denver Survivors Collective,* 2010 BCSC 1252 Madam Justice Adair said:

> [23] There is no real disagreement among the parties that, as a general rule, judicial review of preliminary or interlocutory decisions are appropriate only in limited circumstances. The general rule is that a tribunal should be permitted to complete its process and render its final decision before judicial review is entertained. The rule is founded in the time-honoured principle that a tribunal is established to fulfil the statutory functions it is assigned. The tribunal should be seen as the master of its own process, and that process should not be interfered with by the courts until a final decision is rendered, lest there be one court application after another, which would clearly frustrate the tribunal's mandate and its legislative purpose: see *Vancouver (City) v. British Columbia (Assessment Appeal Board, Assessor of Area No. 09-Vancouver)* (1996), 20 B.C.L.R. (3d) 79 (C.A.), at para. 26.
>
> [24] There are a number of reasons why the court will be reluctant to interfere with a tribunal's work by way of judicial review before the tribunal has completed its function, for example:
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> (a) Judicial intervention may fragment the tribunal's proceedings.
>
> (b) The tribunal may resolve the dispute to the party's satisfaction.
>
> (c) The court's decision may be rendered moot because of the tribunal's ruling on some other aspect of the proceedings.
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> (d) It is helpful for the court to have an evidentiary record and the tribunal's analysis of the dispute, especially in areas where the tribunal has special expertise.
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> (e) Courts avoid deciding constitutional or *Charter* issues on hypothetical facts or in a factual vacuum.
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> See: *Kelowna (City) v. British Columbia (Human Rights Commission)*, [1999] B.C.J. No. 1848 (S.C.), at para. 11.
>
> [25] However, the general rule is not an absolute one. While the general practice is that a court will not hear a judicial review petition before a tribunal has rendered its final decision, there are many situations in which demands of justice and efficiency will weigh in favour of early intervention by the courts. Prematurity is not an absolute bar to judicial review but a discretionary one. See: *Insurance Corporation of British Columbia v. Yuan*, 2009 BCCA 279, at para. 24.
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> [26] One of the situations where early intervention by the courts is or may be warranted is where a respondent to a complaint (in this case, the Province) challenges the jurisdiction of the tribunal. This type of situation is

described by Mr. Justice Joyce in *British Columbia v. Crockford*, 2005 BCSC 663, at paras. 64 and 65 (underlining added):

> [64] It is my opinion that where the respondent to a complaint challenges the Tribunal's jurisdiction on the ground that the actions do not fall within s. 8(1)(b) the Tribunal must determine the legal question whether those actions do or do not represent services available to the public. In my view, the Tribunal cannot defer that decision on the ground that it does not have a sufficient evidentiary basis. It is only if the actions meet the legal test that it may be necessary to consider evidence relating to the nature and extent of the custom before determining whether the actions complained of offend the section of the *Code*.
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> [65] In this case the Tribunal Member deferred the decision about jurisdiction not on the grounds that she lacked evidence relating to custom but on the ground that she lacked a sufficient evidentiary record to determine whether the activities of prosecutors constitute a "service". In my opinion that is a question of pure law, which the Tribunal Member lacked any discretion to defer. The petitioner having raised the question of law, the Tribunal Member was bound to answer it one way or the other and having declined to do so, this court is in just as good a position as the Tribunal to make that determination.

Mr. Justice Joyce's decision was appealed. However, on appeal, neither party raised any issue with respect to this aspect of his decision: see 2006 BCCA 360, at paras. 29 and 30.

[25] In this case, the petitioners challenge the Police Complaint Commissioner's finding of fact which founds his jurisdiction

[26] I accept the Police Complaint Commissioner's submissions that if the investigation ordered by him is allowed to proceed:

1. it will result in a final investigation report by the external investigative officer being provided to the designated discipline authority (s. 98(3));

2. the designated discipline authority will provide the applicants with a copy of the final investigation report along with the designated discipline authority's determination of whether the evidence referenced in the reports appears to substantiate the allegations and requires the taking of disciplinary or corrective measures - the designated discipline authority's determination that the evidence does not appear to

substantiate the allegations is final, unless the commission orders a review of the final investigation report or a public hearing (s. 112);

3. if the designated discipline authority determines that the evidence appears to substantiate the allegations, the member may request further investigation (s. 114);

4. if the designated discipline authority, including after there is further investigation, determines that the evidence appears to substantiate the allegations, the member may be offered a pre-hearing conference, which may also result in a final conclusive resolution of the matter, unless the Commissioner does not approve of that resolution (s. 120); and

5. only after a pre-hearing conference is not offered or, if a pre-hearing conference is offered, but the resolution is rejected by the commissioner, will the applicants find themselves facing a discipline proceeding.

[27] In my view it would be inappropriate to intervene in the tribunal's work:

1. judicial intervention will fragment the tribunal's proceedings;

2. the tribunal may resolve the dispute to the parties' satisfaction; and

3. the court's decision may be rendered moot because of the tribunal's ruling on some other aspect of the proceedings.

[28] The application is dismissed with costs to the respondent.