Citation: ☼

Date: ☼
File No: 18393
Registry: Vancouver

(Criminal)

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

SCOTT PLUMMER

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE BROOKS

Counsel for the Crown:	Peter Juk Q.C.
Counsel for the Defendant:	Kevin Woodall
Counsel for Police Complaint Commissioner Lowe:	Brock Martland
Place of Hearing:	Vancouver, B.C.
Date of Hearing:	February 25 and 26, 2016
Date of Judgment:	March 21, 2016

[1] Commissioner Lowe seeks an order setting aside a subpoena *duces tecum* issued to him on December 7, 2015. The subpoena was issued on the basis that he had material evidence to give on a defence application. That application, dated November 16, 2015, alleges that Mr. Plummer's rights under sections 7 and 11 of the *Charter of Rights and Freedoms* were infringed and seeks a remedy under s. 24(1). In order to understand the arguments related to setting aside the subpoena, it is necessary to review, in a summary form, the basis of the *Charter* application.

THE BASIS OF THE CHARTER APPLICATION

[2] On February 17, 2014 Mr. Plummer was involved in a motor vehicle accident at the corner of Burrard Street and Dunsmuir Street in downtown Vancouver. At the time Mr. Plummer was on duty as a Vancouver City police officer and in a marked police car. Pursuant to s. 101 of the *Police Act* Mr. Plummer was compelled to provide a statement about the circumstances of the accident. In giving his statement, he explicitly stated that he was doing so pursuant to his statutory obligation to do so and did not consent to his statement being used for any purpose other than under the *Police Act*. His partner, Cst. Green, was similarly compelled to provide a statement and also did not consent to it being used for any other purpose.

[3] By letter dated December 4, 2014 Commissioner Lowe forwarded a Report to Crown Counsel (RTCC) on the basis that an offence contrary to the *Motor Vehicle Act* may have been committed. In doing so he was acting pursuant to s. 111 of the *Police Act*.

[4] The RTCC contained a summary of the statements of Mr. Plummer and Cst. Green as well as the statements themselves. Prior to the summary of Mr. Plummer's statement, the following was inserted into the RTCC:

> ***PLEASE NOTE* Constable PLUMMER was compelled to provide a written statement pursuant to section 101 of the Police Act. Section 102 of the Police Act states that this statement is inadmissible in evidence in court or any other proceeding.***

[5] On the basis of this sequence of events, the *Charter* argument is that, inter alia, the Commissioner violated the *Police Act* by forwarding the compelled statement to Crown Counsel for them to use in the charge approval process and in their trial brief.

[6] The Commissioner makes three arguments to set aside the subpoena. First, the *Police Act* provides that he is not a compellable witness. Second, he asserts that he has no material evidence to give on the defence application. Third, he submits that there is a common law public interest privilege that bars an inquiry into the issues to be explored in the defence application. Each of these arguments will be analyzed in turn.

IS THE COMMISSIONER NOT COMPELLABLE BY VIRTUE OF THE POLICE ACT?

[7] Reliance was placed on section 51.03(4) of the *Police Act* which provides as follows:

> (4) A protected individual and anyone acting for or under the direction of the protected individual must not give, or be compelled to give, evidence in court or

> in any other proceedings in respect of any records or information obtained in the exercise of powers or performance of duties under this Act.

[8] There is no question that the Commissioner is a protected individual. What is in question is the proper interpretation of the language of subsection (4). Counsel for the Commissioner, Mr. Martland, submitted that the subsection means that the Commissioner cannot take the witness stand. He says that on the basis of a proper interpretation subsection (4) in the context of the entire *Act*.

1. The Proper Interpretation of s. 51.03(4) based on the context of the entire Act

[9] Counsel says that the broad language of this section of the *Act* ought to be seen in the context of the entire *Act*. That context is that there is to be independent oversight of policing and police discipline. In order to properly carry out that oversight the Commissioner is given the power by s. 111 of the *Act* to refer matters to Crown Counsel. The Commissioner would do so on the information he receives pursuant to the *Police Act*. It was submitted that the *Act* requires the Commissioner to take an oath to keep information received in his office confidential: another example of how the *Act* protects information from being disclosed in Court. From this review of the *Act*, the submission is made that ss. (4) reflects a legislative intention that the Commissioner not be compellable to testify in circumstances such as the one in the case at bar.

[10] I do not agree with this interpretation of the section. To explain that conclusion requires further statutory interpretation. I will refer to two canons of interpretation: discerning the legislative intent and, second, the plain language of the section.

a. Legislative intent of s. 51.03(4)

[11] There are a number of provisions in the *Act* which restrict the dissemination of records and information. For example, s. 95 prohibits the Commissioner from disclosing that there even is an on-going investigation in certain circumstances. At various points in the process the public and even the complainant is excluded from the process (see s. 120(2) and s. 123(9)). More to the point, when a Final Investigation Report is prepared, s. 112 provides that the complainant receives it. However the complainant does not receive what the police member receives, namely, the evidence and records referred to in the Final Investigation Report. These provisions highlight the existence of an overall legislative intent that information obtained by the Commissioner is to be closely monitored in its dissemination. That same legislative intent is what illuminates 51.03(4). Its main purpose is to restrict the dissemination of "records or information." It intends to keep those "records or information" from those who, for example, would use the Court process to obtain that information by joining the Commissioner as a party or subpoenaing him as part of a civil action. It is a section designed to protect the information not the Commissioner.

[12] I am strengthened in this conclusion by subsection (5) of the same section. There it is stated that protected individuals may be compelled to give evidence when there is an application for judicial review. Whereas the Commissioner submits that there is a complete bar to him giving evidence, subsection (5) makes it clear that there is no such bar in certain circumstances.

b. Plain reading of the section

[13] Counsel for the Commissioner submits that, "The words of s. 51.03(4) mean just what they say." I agree. However, I disagree with the Commissioner's reading of what the words say.

[14] The language of the section carefully delineates what must not become evidence. Although the use of the word "information" is broad it is only that which is "obtained in the exercise of powers or performance of duties under this Act." The words of subsection (4) make it clear that if the evidence is outside the scope of "records or information" then, subject to other issues discussed below, there is no bar to that evidence coming before the Court even through the Commissioner testifying.

[15] It ought to be borne in mind that if the interpretation of the Commissioner were to prevail, this section would have the effect of shielding all of the Commissioner's actions from *Charter* scrutiny. Such an extreme result ought to be arrived at only after the legislature has used the plainest and clearest language.

[16] In the case at bar, the Commissioner has not been subpoenaed in order to obtain "records or information". He has been subpoenaed because it is alleged that his conduct is outside the statutory authority that he has been given. While this allegation will be analyzed in more detail below, it is sufficient for present purposes to conclude

that the Commissioner's conduct is a topic outside the scope of the restriction created by s. 51.03(4). The section does not provide a basis to set aside the subpoena.

CAN THE COMMISSIONER PROVIDE MATERIAL EVIDENCE?

[17] Mr. Martland submitted that the Commissioner could not provide material evidence. The internal discussions that may have occurred in forwarding the RTCC to Crown Counsel are not material to the issue advanced by the defence. He relies on the proposition that the defence must satisfy the onus that the Commissioner will "likely" provide material evidence, not that he might. In that regard, he submits that it is extremely unlikely that the Commissioner will admit the bad faith that the defence is seeking. Finally, he also submits that this Court should be mindful of protecting a zone of confidentiality around the Commissioner's decisions and discussions within his organization. To fail to do so by giving an expansive view of what constitutes material evidence may, it is submitted, frustrate the laudable goals of his office. Each of these arguments will be dealt with in turn.

[18] As a first step in the analysis of this submission, it is necessary to set out the exact evidentiary question which the defence asserts the Commissioner can answer. I have already referred to the issue being the forwarding of a statement compelled under the particular provisions of the *Police Act*. It is alleged that that is contrary to the provisions of the *Act*. To pursue the submission of an abuse of process and a remedy, the defence maintains they require evidence of why the Commissioner forwarded the

compelled statement. Only he can explain why he did that. Only he can answer what steps, if any, his office took to remain within the statutory powers. It is said that his state of mind is relevant to the seriousness of the breach. It is also said that his evidence is necessary to locate where the decision to forward the statement falls on the spectrum from good faith to bad faith.

[19] I should make it clear that counsel for the Commissioner accepts none of the propositions on which the defence argument is built. So, for example, counsel maintains that s. 102 does not prohibit the Commissioner from disclosing what he did. If that is correct then there is no material evidence to be given. Unfortunately, I cannot pre-determine this issue. I must proceed on the basis that the defence may succeed on that initial point and others with which counsel for the Commissioner may take issue.

[20] It was submitted that it is highly unlikely that the Commissioner is going to admit to bad faith and therefore he has no material evidence to give. That is too narrow a view of the factual issues which are at stake. The defence says that the precise actions taken or not taken by the Commissioner will inform the conclusion as to whether there is a finding of good faith or of bad faith or somewhere in between. I agree with that submission. Indeed, this issue comes down to two simple propositions. The good faith or bad faith of the Commissioner is material to a *Charter* remedy. He is able to provide the answers to the questions that go to that determination. Accordingly, I conclude that the Commissioner has material evidence to provide on the issue before the Court.

[21] Mr. Martland submitted that the issue of material evidence should be interpreted in such a way as to protect a zone of confidentiality. The confidentiality would extend to the internal discussions of the Commissioner and his organization. Doing so would permit the Commissioner to have a more open dialogue within his organization about its practices and procedures. To have him testify on these subjects would inhibit that open discussion to the detriment of the laudable goals of his office.

[22] At this stage I will treat that submission as a general proposition. I will return to it as a more specific concern later in these reasons.

[23] As in many areas this is one where a balance must be struck. While the Commissioner ought to be able to avoid its internal workings in all its minutiae being open for public scrutiny, there are objectives which tend in the other direction. First, it is imperative that all state actors be subject to an assessment of their conduct by the Courts. To insist on that is no more than to insist on the rule of law. Second, the oversight function of the office of the Commissioner must be fully accountable. As a general proposition, confidentiality is an important aspect of the work of the Commissioner. But its importance does not change what constitutes material evidence.

I am satisfied that the Commissioner has material evidence to give.

IS THERE A PUBLIC INTEREST PRIVILEGE TO THE EVIDENCE SOUGHT?

[24] Counsel for the Commissioner submits that a public interest privilege applies to bar the introduction of the evidence sought. Accordingly, any subpoena to obtain that evidence ought to be set aside.

The privilege relied on is applied on a case by case basis. The four fundamental conditions necessary are to be applied to the facts of a particular case. Those four conditions are:

1. The communications must originate in a confidence that they will not be disclosed;
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered;
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

R. v. Delong, (1989) 47 C.C.C. (3d) 402 at 420.

[25] I intend to analyze the case at bar in accord with those conditions while, at the same time, considering the interests at play with this privilege as referred to by Mr. Justice Watt: *Watt's Manual of Criminal Evidence* (2015) at p. 163.

[26] To repeat, the communications in issue in the case at bar are those the Commissioner had in arriving at the decision to include the compelled statement in the RTCC forwarded to Crown. I emphasize this as much of the submission on behalf of Mr. Plummer focused on whether this Court could review the disclosure of compelled statements as an abuse of process. That is not the precise question for me to resolve at this time. The precise question is whether, as part of that review, the steps taken (or not taken) prior to disclosing the compelled statement ought to be subject to a public interest privilege. I take that to be the question to be answered if the privilege is to be applied on a case by case basis.

[27] With that in mind, I turn to the four conditions for a finding of the public interest privilege.

[28] First, it is clear that the communications within the Commissioner's office originated in a confidence that they will not be disclosed. The only reasonable inference is that the communications, if they occurred, would occur as a type of management discussion. The discussions would be exactly the type that are internal to an organization and intended to be considered in that way.

[29] Counsel for Mr. Plummer argues that the decision is very much an administrative one and therefore no confidentiality ought to apply to it. I disagree with that characterization. The decision is one which necessarily has many policy and practical

aspects to it. It is not akin to the decision made by the Commissioner which was subject to review in *Florkow v. BC (Police Complaint Commission)* 2013 BCCA 92.

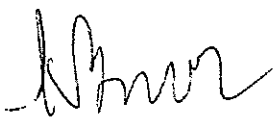
[30] Second, confidentiality is essential in the sense that the organization must be able to discuss matters such as disclosing compelled statements. A healthy debate must be encouraged in order to improve the quality of the decision made. It is not just the organization but the public interest which benefits from the quality of the decision. However, I do not accept the analogy drawn by counsel for the Commissioner from the decision in question here to decisions of a judge or of Crown Counsel. Such an analogy is not 'inexact', it is misguided. Nor do I conclude that there is some broad zone of confidentiality attaching to all the Commissioner's decisions. I am simply proceeding on the basis of an analysis of the facts in the case at bar.

[31] Third, I am satisfied that the relation within the Commissioner's organization required to make this decision is one that the community would want to foster. In this regard, I frame the concern as one engaging the public perception of the administration of justice. I conclude that, while the public would expect that the actions of a statutory decision maker are not shielded from review, it would also accept that not every step of the decision making process need be pored over. A reasonable well-informed public would expect the administration of justice to grant some leeway to organizations without compromising its ability to arrive at appropriate judicial decisions. In coming to this conclusion, I take into account that the decision sought on the good or bad faith of a participant is one that Courts are often asked to make. They do so on the basis of the

information available even when that information is not as complete as it could be. Even from what has been heard to this point, there is information from which an inference of good faith or bad faith may be drawn. I mention this, not to suggest that I have drawn any inference at all, only to suggest that the probative value of the evidence sought is not high.

[32] The point just made applies equally to the fourth condition. I take this condition to be one which invites a cost/benefit analysis of the impact on the relationship versus the value to a just determination of the issue. I am of the view that the relationship required to make important policy decisions such as this one is very important for reasons which I have already attempted to express. I am also of the view that the determination of the existence of an abuse of process and the remedy available can all be appropriately determined without recourse to the evidence sought from the Commissioner.

[33] In the totality of the circumstances, I am satisfied that there is a public interest privilege attaching to the evidence sought to be adduced. I conclude that solely and exclusively on the particular facts of this particular case. It is on that basis and that alone that I set aside the subpoena directed to the Commissioner.



A.F. Brooks
Provincial Court Judge