

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Independent Investigations Office of
British Columbia v. Vancouver (City)
Police Department,*
2020 BCCA 4

Date: 20200106
Docket: CA45719

Between:

**Independent Investigations Office of British Columbia
(Chief Civilian Director Albert Phipps)**

Respondent
(Petitioner)

And

**Cst. Mike Bains, Cst. Spencer Green, Cst. Scott Plummer,
Sgt. Pat Gormley, Cst. Beau Spencer, Cst. Dave Gooderham,
Cst. Thomas Dobranowski**

Appellants
(Respondents)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Dickson
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated
October 18, 2018 (*Independent Investigations Office of
British Columbia v. Vancouver (City) Police Department*, 2018 BCSC 1804,
Vancouver Docket S172705).

Counsel for the Appellant:

M.K. Woodall

Counsel for the Respondent:

M.E. Sandford, Q.C.
A. Tolliday

Counsel for the Intervenor,
British Columbia Police Complaint
Commissioner:

D.K. Lovett, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia
December 2, 2019

Place and Date of Judgment:

Vancouver, British Columbia
January 6, 2020

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Butler

Summary:

This is an appeal of certain declarations made by the Supreme Court as a result of considering the meaning of a police officer's duty to cooperate fully with the Independent Investigations Office when it is investigating a police incident involving death or serious personal injury. Police officers who were witnesses to a fatal shooting by the police demanded certain disclosure before submitting to an interview. Held: Appeal dismissed. The judge did not err in concluding that the terms of the interview process are to be determined by the Independent Investigations Office and an attempt by an officer to impose conditions on how and when the interview will be conducted is inconsistent with the duty to cooperate fully.

Reasons for Judgment of the Honourable Mr. Justice Harris:

[1] The issue on this appeal involves the interpretation of the duty of police officers to “cooperate fully” with the Independent Investigations Office of British Columbia (“IIO”), a civilian-lead oversight agency responsible for conducting investigations into police actions resulting in death or serious bodily harm. That duty is found in in the *Police Act*, R.S.B.C. 1996, c. 367 [PA]. The IIO is created and governed by Part 7.1 of the PA, which includes the following provision:

- 38.101 An officer must cooperate fully with
- (a) the chief civilian director in the chief civilian director's exercise of powers or performance of duties under this Act, and
 - (b) an IIO investigator in the IIO investigator's exercise of powers or performance of duties under this Act.

[Emphasis added.]

BACKGROUND

[2] The issue on appeal arises out of an incident on November 10, 2016, when a man was fatally shot by one of several officers who attended the scene of a robbery. The IIO began an investigation and the IIO directed the appellants, each of whom is a member of the Vancouver Police Department (“VPD”), to attend for compulsory interviews, as “witness officers” not “subject officers”. This distinction is of some practical significance because the officers were witnesses to the incident and were not being investigated for their potential role in causing the death.

[3] Prior to the interviews, counsel for the appellants asked the IIO for access to the following contemporaneous records of the incident specific to each appellant: (a) computer assisted dispatch records that record entries that the officer made or was able to see during the incident; (b) audio recordings or transcripts that record oral communications that the officer made or was able to hear during the incident; (c) incident video that shows events that the member participated in or observed during the incident. The IIO was not prepared to provide the witness officers with the requested pre-interview disclosure, but was prepared to provide some limited materials on the day of the interview, before the interview. When the IIO refused to provide the requested disclosure, the appellants declined to be interviewed. Although much of the record relates to the correspondence passing between the parties, I accept that the officers' request for disclosure was made on the basis of a good faith belief that they were entitled to the requested disclosure and the request was intended to be consistent with, and not frustrate, their duty to cooperate fully with the investigation.

[4] The IIO brought a petition in the Supreme Court of British Columbia to compel the appellants to attend the interviews without the pre-interview disclosure they requested. That application succeeded: 2018 BCSC 1804. The judge granted an order in the nature of *mandamus* requiring the appellants to attend the interviews and respond in good faith to questions put to them by the IIO. In addition, the judge made the following declarations:

- (a) the duty on witness officers to fully co-operate with the IIO under s. 38.101 of the *PA* includes the duty to attend interviews related to IIO investigations as and when the petitioner directs;
- (b) attendance of witness officers' counsel and union representatives at IIO interviews is at the discretion of the IIO;
- (c) the providing of pre-interview disclosure to witness officers is at the discretion of the IIO; and

- (d) the appellants failed or refused to comply with their statutory duty under s. 38.101 of the *PA* to co-operate fully with the IIO.

[5] The appellants complied with the *mandamus* order and attended the interviews. Any issue arising in connection with *mandamus* is moot, and is not at issue in this appeal. The IIO investigation into the shooting incident was completed with no charges being brought.

[6] The appellants appeal only against the declarations. They seek to quash the declarations, but do not seek any declarations in substitution from this Court. The issues on appeal are whether the judge erred:

- (a) by declaring that the duty on witness officers to fully co-operate with the petitioner includes the duty to attend interviews related to investigations as and when the petitioner directs;
- (b) by declaring that providing pre-interview disclosure to witness officers is at the discretion of the petitioner; and
- (c) by declaring that the attendance of witness officers' counsel and union representatives at IIO interviews is at the discretion of the petitioner.

[7] The interpretative exercise is informed by the history and purpose of the establishment of the IIO and the powers conferred on it. Contextually relevant also is that the *PA* provisions are supplemented by a memorandum of understanding respecting investigations, which was entered into in January 2012 by the IIO and all of the police agencies in British Columbia and executed by the Chief Constable of the VPD in accordance with his powers under the *PA*. In addition, the Police Complaint Commissioner ("PCC") also plays a role in investigating complaints into police conduct. The role of the PCC is also governed by the *PA*. The following provisions, which existed before the IIO, are relevant to interpreting the section at issue:

- 101 (1) A member must cooperate fully with an investigating officer conducting an investigation under this Part.

- (2) Without limiting subsection (1), at any time during an investigation under this Part and as often as the investigating officer considers necessary, the investigating officer may request a member to do one or more of the following, and the member must fully comply with the request:
 - (a) answer questions in respect of matters relevant to the investigation and attend at a place specified by the investigating officer to answer those questions;
 - (b) provide the investigating officer with a written statement in respect of matters relevant to the investigation;
 - (c) maintain confidentiality with respect to any aspect of an investigation, including the fact of being questioned under paragraph (a) or being asked to provide a written statement under paragraph (b).
- (3) A member requested to attend before an investigating officer must, if so requested by the investigating officer, confirm in writing that all answers and written statements provided by the member under subsection (2) are true and complete.
- (4) Unless the discipline authority grants an extension under subsection (5), the member must comply with any request under subsection (2) within 5 business days after it is made.
- (5) If satisfied that special circumstances exist, the discipline authority may extend the period within which the member must comply with a request under subsection (2).

...

178 A member has a duty to cooperate with the police complaint commissioner in the police complaint commissioner's exercise of powers or performance of duties under this Act and with any deputy police complaint commissioner or other employee of the police complaint commissioner who is acting on behalf of the police complaint commissioner.

[Emphasis added].

[8] The issue, as framed by the judge, was: “as between the IIO and the respondents, who defines what ‘cooperate fully’ under s. 38.101 of the *Police Act* means?” The IIO’s position was that the duty to cooperate described in s. 38.101 did not confer discretion on the witness officers to determine the terms of their cooperation. The witness officers’ position was that s. 38.101 did not empower the IIO to unilaterally impose interview terms related to disclosure that are not acceptable to witness officers. Instead, the IIO and police officers must together determine what the process ought to be for IIO investigations. The witness officers

also argued that a dispute resolution clause in the memorandum of understanding revealed an intent to remove disputes from the jurisdiction of the court.

[9] First, the judge held that the memorandum of understanding is not intended to have legislative authority. The memorandum of understanding does not and cannot have the effect of ousting the court's jurisdiction to address the duties of witness officers under the *PA*. The memorandum of understanding does not assist in interpreting the obligations on witness officers to "cooperate fully" with the IIO.

[10] Second, the judge held that the witness officers have an obligation to cooperate fully with the investigation. Witness officers do not have discretion to determine the bounds of the interview process. The judge reached this conclusion by considering the common law duty of police officers to assist in law enforcement and police officers' duties as members of a self-governing profession to cooperate with their governing bodies. The judge also relied on the purpose of the legislative scheme to "provide an independent and transparent investigative body for the purpose of maintaining public confidence in the police and the justice system along with the minimum procedural requirements expected at the investigation stage."

[11] In short, the judge concluded: "it is the IIO, not the witness officers, who determine what 'cooperate fully' under s. 38.101 of the *Police Act* means."

ARGUMENT ON APPEAL

[12] The appellants contend that, properly interpreted, the legislature did not intend to confer on the IIO the unilateral power to determine the content of the duty to cooperate fully in an investigation. The content of that duty, they contend, does not include a right to withhold the kind of pre-interview disclosure they sought in this case, since to do so in the circumstances of this case is illogical, not supported by evidence and arbitrary. The duty to cooperate is not a duty to submit to arbitrary terms imposed by the IIO.

[13] In asserting these positions, the appellants contend that the kind of pre-interview disclosure they sought is consistent with and supportive of their duty to

cooperate fully with the investigation. In short, the purpose of the disclosure is to ensure that the information they would provide in the interview is the most accurate reflection of what happened, as they witnessed it, untarnished by misperception or faulty recollection. The specific disclosure of the contemporaneous recording of each particular officer's participation in the event is the best means of fulfilling the investigation's truth-seeking function, avoiding potential factual error, and promoting a scheme of investigation best able to ensure a transparent investigation capable of maintaining public confidence. In proceeding in this way, the potential prejudice inherent in committing to a mistaken version of events that can "follow" the witness in subsequent proceedings can be avoided. Neither the purpose nor the effect of such disclosure is to protect a police officer or to provide an opportunity to manufacture or manipulate evidence.

[14] In support of the argument that the legislature did not intend to confer on the IIO the unilateral power to determine the content of the duty to cooperate fully, the appellants point to the specific and detailed duty set out in s. 101 of the *PA*, dealing with complaints set out above, and the duty to cooperate regime found in the Ontario legislation that governs that province's Special Investigations Unit ("SIU"). The SIU is Ontario's equivalent of the IIO, and was evidently the model that the British Columbia legislature considered before amending the *PA* to create the IIO. The provisions found in the Ontario regulation that set out details of the duty to cooperate could have been, but were not, adopted in a similar form in s. 38.101. The implication to be drawn from this is that the legislature deliberately left the content of the duty to cooperate fully with the IIO to be worked out by the respective agencies, each of whom is expert in investigation techniques and capable of ensuring that proper arrangements are worked out to ensure effective and accountable oversight of police conduct causing death or serious personal injury. This conclusion is supported also, the appellants argue, by the existence of the memorandum of understanding which was entered into at the time the IIO was created to govern interactions, investigations, and which provided for a dispute resolution mechanism.

ANALYSIS

[15] I turn then to consider the arguments on appeal. The starting point is the commonplace recognition that the words of a legislative enactment are to be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, its objects, and the intention of the legislators.

[16] The plain terms of the statute impose the duty to cooperate on police officers. The duty is owed to IIO investigators. It is a duty to cooperate fully with those investigators. It is expressed as a mandatory, not a qualified, duty. Nothing in the wording of the statute supports the inference that police officers can withhold their cooperation with the investigation, if they disagree with the terms on which it is being conducted. I agree with the judge that at its most straightforward the issue is who, as a matter of statutory interpretation, decides what is required in order to cooperate fully with the investigation. I agree with her conclusion, that it is the IIO.

[17] It is clear that the exercise of a statutory power must be exercised in a manner consistent with and to further the purposes of the statute. While the power to define the cooperation required of police officers in an investigation cannot be exercised for a purpose collateral to the statutory objective, I can see nothing in the record before us that could support the inference that the demands made by the IIO were arbitrary or capricious. Rather, the conflict between the parties reflects a disagreement about the best, most reasonable, or most efficient means of investigating this particular incident. Should demands be made, in other circumstances that are properly viewed as arbitrary because they are inconsistent with the objectives of the legislation, a remedy would lie.

[18] In my opinion, the broad and general definition of the duty to cooperate fully in s. 38.101, by contrast with the more prescriptive and specific articulation of the duty to cooperate elsewhere in the *PA* and other legislation, does not support an inference that the legislature intended that the scope and content of the duty to cooperate would be resolved by discussion among interested parties and perhaps included in a memorandum of understanding. To the contrary, the broad definition

discloses a legislative intention to confer on the IIO a broad power to determine the terms on which an investigation will be conducted and to define what is required of police officers in discharging their duty to cooperate fully with an investigation as part of civilian oversight of investigations into police conduct.

[19] Moreover, although the duty to cooperate fully is more specifically outlined in s. 101 of the *PA* in relation to police complaints, I am not persuaded that the specificity in this latter section assists in defining a limited scope or content of the duty to cooperate fully in s. 38.101. In my opinion, it does not provide a basis for inferring that the duty in s. 38.101 is more limited or circumscribed than that found in s. 101.

[20] This interpretation is consistent with the objects of the legislative scheme. The purpose of the scheme is to ensure civilian oversight of investigations into police conduct causing death or serious personal injury. The mechanism to achieve this is the IIO. The IIO is a product of, and a response to, public inquiries into alleged police misconduct involved in the deaths of Mr. Frank Paul and Mr. Robert Dziekanski; the Davies Commission Inquiry and the Braidwood Inquiry. Both reports recommended the establishment of an independent investigation office to avoid the appearance of the police investigating the police. It is instructive that Mr. Braidwood recommended that witness police officers “must promptly” make themselves available for IIO interviews. It is common ground that an important objective of an independent and transparent investigative body is the maintenance of public confidence in the police and the justice system as a whole.

[21] Josiah Wood, Q.C., in his February 2007 Report on the Review of the Police Complaint Process in British Columbia, also expressed a concern that police witnesses promptly submit to interviews and that they cooperate with investigations to ensure public confidence in a transparent and accountable process: see paras. 165 to 167 inclusive. Similar concerns were also expressed the 2005 Police Act Reform White Paper, at page 12.

[22] I agree with the judge’s conclusion that the officers’ public legal duty to cooperate fully with the IIO is part of a legislative scheme that is intended to provide an independent and transparent investigative body for the purpose of maintaining public confidence in the police and the justice system, and that only minimal procedural requirements can be expected at the investigation stage: para. 144. I also agree that witness officers fail to comply with their duty to cooperate by demanding certain conditions — such as pre-interview disclosure, the presence of counsel, the presence of union representatives, assurances that there will be no derivative use of their accounts, and that the interview be scheduled to accommodate annual leave, weekly leave, particular shifts or on some other basis — as a pre-condition to their cooperation: para. 144.

[23] I believe the judge summarized the point well when she said:

[145] Whether or not the witness officers were acting in good faith or making up excuses about their non-attendance for interviews is not a consideration. The IIO has the obligation to investigate the Canadian Tire incident and the witness officers have an obligation to cooperate fully with that investigation. The witness officers do not have the discretion to determine the bounds of the interview process.

[146] To address the issue as described by counsel for the respondents: it is the IIO, not the witness officers, who determine what “cooperate fully” under s. 38.101 of the *Police Act* means.

[24] In the result I would dismiss the appeal and decline to quash the declarations. In the circumstances, it is unnecessary to comment further on the declarations set out in the order.

“The Honourable Mr. Justice Harris”

I agree:

“The Honourable Madam Justice Dickson”

I agree:

“The Honourable Mr. Justice Butler”