

CANADA / JUDGMENT

Henry v. British Columbia

2014 BCSC 1018

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1018 Henry v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Henry v. British Columbia,

2014 BCSC 1018

Date: 20140606

Docket: S114405

Registry: Vancouver

Between:

Ivan William Mervin Henry

Plaintiff

And

Her Majesty The Queen In Right Of The Province Of British Columbia, as represented by the Attorney General of British Columbia, City of Vancouver, William Harkema, Marilyn Sims, Bruce Campbell and the Attorney General of Canada

Defendants

BAN ON PUBLICATION:

Pursuant to the Court's inherent jurisdiction, no person shall publish, broadcast, or publicly transmit any information that could identify the Complainants, including the names of others that could lead to the identification of the Complainants.

Corrected Judgment: The text of the judgment was corrected on the front page on June 24, 2014.

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for Plaintiff:

A.C. Ward, M.E. Sandford

Counsel for Defendants, City of Vancouver Sims, and Harkema:

K.F.W. Liang, B. Quayle

Counsel for the Defendant, British Columbia (A.G.)

E.W. (Heidi) Hughes

Counsel for the Defendant, Canada (A.G.)

S.G. Pereira

Counsel for interested party, Vancouver Police Department and Chief Constable

D.Z. Hurwitz

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 7, 2014

Place and Date of Judgment:

Vancouver, B.C.

June 6, 2014

- [1] In 1983 the plaintiff was convicted of ten counts of sexual offences and sentenced to an indefinite period of incarceration. On October 27, 2010, the Court of Appeal quashed the convictions and entered acquittals on all counts: 2010 BCCA 462. In these proceedings he seeks damages for injuries allegedly suffered as a consequence of his conviction and subsequent imprisonment for some 27 years. He alleges that it was due to the wrongful acts and omissions of the defendants that he was charged, detained in custody, wrongfully convicted and imprisoned. The plaintiff claims damages for loss of liberty, pain and suffering, loss of enjoyment of life, subjugation to prison life and lost income.
- [2] The plaintiff's claims can be summarized as claims against three separate sets of defendants. His claim against the City of Vancouver, William Harkema, and Marilyn Sims (collectively "the City") is centred on the activities of the Vancouver Police Department (the "VPD") and its investigation of a series of sexual assaults that took place in Vancouver between November 25, 1980 and June 8, 1982, which the plaintiff alleges was negligently performed. At those times, the individual defendants Harkema and Sims were members of the VPD.

- [3] The plaintiff further alleges that the City was negligent in failing to disclose to Crown counsel certain sexual assaults that took place subsequent to the plaintiff's arrest, as these assaults may have had some similarities in nature to those for which the plaintiff was charged. In addition, the plaintiff alleges that the City breached his rights under ss. 7, 10 and 11(d) of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [the Charter].
- [4] The plaintiff's claim against the Attorney General of Canada concerns that defendant's consideration of the plaintiff's applications for review of his convictions.
- [5] The plaintiff's claims against Her Majesty the Queen in Right of the Province of British Columbia (the "Province") relate to the actions of Crown counsel through the course of trial and subsequent appeal processes which are alleged to have been negligent, undertaken maliciously and/or constitute a breach of the plaintiff's rights under the Charter.
- [6] The present application before me is for an order that, within a specified time period:
- a) the City prepare and deliver to the plaintiff an amended list of documents listing all documents that are or have been in the possession or control of the VPD and that could, if available, be used by any party of record at trial to prove or disprove a material fact (the "VPD Records"); or, in the alternative
 - b) the City produce an affidavit confirming that all of the VPD Records have been disclosed in accordance with the Supreme Court Civil Rules, B.C. Reg. 168/2009 [the Civil Rules].
- [7] The principle order sought tracks the wording of the requirements of Rule 7-1(1), which provides:
- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.
- [8] The City provided a single list of documents to the plaintiff, which included those documents in the possession or control of the two named former police officers. The plaintiff contends that the list should have included the VPD Records, and has demanded the inclusion of those records in the City's list of documents under subrules 7-1(10) or (11). The City contends that such records need not be listed, and has refused to do so. In the result, the plaintiff seeks an order pursuant to Rule 7-1(13) requiring the City to list the VPD Records. That Rule provides:

- [13] If a party who receives a demand under subrule (10) or (11) does not, within 35 days after receipt, comply with the demand in relation to the demanded documents, the demanding party may apply for an order requiring the listing party to comply with the demand.
- [9] The alternative order sought can be made, if appropriate, pursuant to Rule 7-1(8).

Discussion

- [10] The plaintiff contends that in other litigation where the conduct of VPD officers was in issue, the City has obtained and listed the records of the VPD in its list of documents. I was not advised how the City obtained those records in other cases, nor advised of any case involving the City where the issue raised on this application was considered.
- [11] While I accept counsel for the plaintiff's characterization of the issue raised on this application as novel, I do not consider that the failure of the City to raise this issue in other, unrelated, litigation in any way estops the City from raising it before me now. As this novel point was not considered in the cases relied upon by the plaintiff, such as *Biehl v. Strang*, 2010 BCSC 1391, 96 C.P.C. (6th) 1, and *Baiden v. Argent*, 2003 BCSC 1341, 18 B.C.L.R. (4th) 161, they are of little assistance in resolving the plaintiff's application.
- [12] There is no question about the creation and maintenance of relevant records by the VPD. The VPD Records exist, and in fact have been provided to counsel for the Province by the VPD. Counsel for the Province has listed the records in her client's list of documents and provided copies of those documents to counsel for the plaintiff. For reasons relating to the proof of his case, the plaintiff wants the City to list the VPD Records on its list of documents.
- [13] I make no comment on the propriety of the listing of the VPD Records by the Province in its list of documents. The question before me is whether the records should be listed by the City in its list of documents.
- [14] At common law, police officers are not servants or agents of a municipality: *McCleave v. City of Moncton* (1902), 32 S.C.R. 106 at 108-109, 6 C.C.C. 219. Since 1974, the Police Act, R.S.B.C. 1996, c. 367 [the Police Act], has provided the legal framework for the establishment, governance and operation of all municipal police departments in British Columbia. The Police Act sets out the relationship between the municipality, the municipal police board and the police department by providing statutorily prescribed roles for each.
- [15] In essence, s. 15 of the Police Act requires a municipality with a population of more than 5,000 persons to:
- a) bear the expenses necessary to generally maintain law and order in the municipality and;
 - b) provide policing and law enforcement with a police force of sufficient size and adequately equipped for that purpose.

- [16] A municipality with a population of more than 5,000 persons must provide policing and law enforcement by means of one of the following:
- a) establishing a police board;
 - b) contracting with the provincial police force; or
 - c) by entering into agreements with other municipalities for joint provision of policing services.
- [17] The City of Vancouver is a municipality incorporated pursuant to the provisions of the Vancouver Charter, S.B.C. 1953, c. 55, with a population in excess of 5,000 persons.
- [18] Pursuant to ss. 20 and 21 of the Police Act, the City of Vancouver is liable for the negligence of officers of the VPD. The liability of the City of Vancouver for the torts of its police officers is thus statutory and not vicarious, as asserted by the plaintiff.
- [19] In *V.H. v. Attorney General of British Columbia et al.*, 2005 BCSC 139 at para. 140, [2005] B.C.J. No. 198, Mr. Justice Davies held, in part, that "police forces are not legal entities that can sue or be sued", relying on *Doern v. Phillips Estate* (1994), 2 B.C.L.R. (3d) 349, [1995] 4 W.W.R. 1 (S.C.); *Grassi v. WIC Radio*, 2000 BCSC 185, [2000] B.C.J. No. 170; *Dixon v. Deacon Morgan* (1989), 38 B.C.L.R. (2d) 318, 62 D.L.R. (4th) 175 (S.C.); and *Goodhead v. Law Society of British Columbia*, [1997] B.C.J. No. 1779, 1999 CarswellBC 1524 (S.C.).
- [20] Under s. 21 of the Police Act, no action lies against individual police officers unless they are guilty of dishonesty, gross negligence, or malicious and wilful misconduct. While there is thus no absolute prohibition against naming individual police officers in civil proceedings, unless it is reasonably necessary to join such officers as defendants, a plaintiff may be penalized in costs should they do so for only tactical reasons (such as to obtain useful information from their examinations for discovery) where other means of accomplishing the same end are available pursuant to the Civil Rules: see *Balden v. Vancouver (City)*, 2010 BCCA 375 at paras. 29-32, 9 B.C.L.R. (5th) 257.
- [21] To resolve the plaintiff's application, it is necessary to consider whether, in light of the legal background set out above, the City has either possession, control or power over records created and maintained by the VPD.
- [22] Possession of a document for the purposes of Rule 7-1(1) requires more than mere access to the document: *Lacker v. Lacker* (1982), 42 B.C.L.R. 188 at 192-94 [1982] B.C.J. No. 1514 (S.C.).
- [23] Control of a document for the purposes of the predecessor to Rule 7-1(1) has been held to be an enforceable right to a document and as such includes all documents which, though not in the party's possession, that party has a right to obtain from the person who has them: *Royal Bank v. Hale* (1960), 35 W.W.R. 236, [1960] B.C.J. No. 44 (C.A.); *Western Union Insurance Company v. Nihill*, [1972] 6 W.W.R. 241, 31 D.L.R. (3d) 124 (Alta. S.C.).

- [24] Power over a document for the purposes of the predecessor to Rule 7-1(1) has been held to be broader than mere control and to connote that the litigant has access to the documents: *Net1 Products (Canada) Ltd. v. Mansvelt and Belamant et al*, 2001 BCSC 906 at para. 14, [2001] B.C.J. No. 1282.
- [25] At first blush it might seem that records created and maintained by the VPD are within the possession, control or power of the City of Vancouver, which is liable for the VPD. Such a view might be supported by the fact that the VPD is not a legal entity, and can neither sue or be sued. However, after establishing the Vancouver Police Board, the City of Vancouver's only role in respect of policing and law enforcement is to pay the expenses of the VPD in accordance with the budgetary process prescribed in the Police Act.
- [26] Nonetheless, the plaintiff contends that while access to police records by a municipality may be unwarranted when police conduct is not in issue in civil litigation, that cannot be the case where police conduct is questioned. If it were, the plaintiff submits, counsel for the City would be unable to discharge their duties to the police officers whose conduct is at issue.
- [27] I am unable to agree. The practice that was followed in this case, whereby the City requested the police records from the Chief Constable, can be used by counsel for the City to obtain any necessary records. That the Chief Constable may well comply with such a request does not, however, mean that such records are in the possession or control of the City, or that it has power over them.
- [28] Indeed, in *Williams and Williams v. Stephenson et al.*, 2005 BCSC 1271, 46 B.C.L.R. (4th) 366, when counsel for the City of Vancouver obtained records and materials seized by the VPD in the course of a criminal investigation of the plaintiffs, Mr. Justice Goepel, then a Justice of this Court, held that in order to preserve public confidence in the administration of justice, the lawyer and the City of Vancouver's law department were disqualified from acting for the defendant police officer.
- [29] In *Reid v. Vancouver Police Board*, 2005 BCCA 418, 44 B.C.L.R. (4th) 49, female communications operators employed by the VPD sought pay equity with their mostly male peers at the fire department, who were employed by the City of Vancouver. Their application was dismissed by the British Columbia Human Rights Tribunal, who found that they were employed by the Vancouver Police Board, not the municipality. Mr. Justice Lowry, writing for the majority, recognized that there were three possibilities: that the petitioners were employed by the Board, the City, or both. He concluded that there was nothing unreasonable in the analysis the Tribunal undertook or the reasoning it employed in reaching the conclusion that the applicants were employed by the Vancouver Police Board and not the City of Vancouver.
- [30] In *Williams v. City of Vancouver et al*, 2005 BCSC 1868, [2005] B.C.J. No. 3028, Madam Justice Boyd considered a notice of intention to call a VPD officer as an adverse witness, served on the City of Vancouver. At paras. 6-9, she concluded:

- [6] Concerning the first issue, I am not persuaded that Beach may be called as a witness pursuant to the Notice delivered under Rule 40(17). There is no evidence to support the conclusion that Beach is an employee of the City, either in the narrow or even in the broadest sense. There is no respondeat-superior relationship as between the City and the police department. The connection between the Vancouver City Police Department and the City is outlined in detail in the decision of Kirkpatrick J., as she then was, in *Ribeiro v City of Vancouver*, 2005 BCSC 395, handed down March 18, 2005. In that decision at paragraph 49, Madam Justice Kirkpatrick notes:

There can be no question that the city's sole statutory duty in relation to policing matters after providing for the establishment of a police force is to bear the expenses generally necessary to maintain law and order in the city.

- [7] Here, by virtue of s. 20(1)(a) of the Police Act, the City is statutorily liable for any tortious liability which is found on the part of the police officers. However, it remains the case that there is no relationship per se, and certainly no respondeat-superior relationship, between the City and the defendant police officers.
- [8] This, however, leaves open the more general question of whether Beach is possibly an agent of the City within the meaning of Rule 40(1)(b). In this regard, there is no evidentiary foundation for me to conclude that Beach had neither the actual nor the ostensible authority of the City to participate in a press conference in December of 2002. Nor is there any evidentiary foundation for any inference to be drawn that in so appearing at the press conference, he had the authority to speak on behalf of the City. Given the realities of the statutory scheme which is reviewed in *Ribeiro*, I very much doubt that that would be the case. However I note in any event that there is no evidence here before me on that matter.
- [9] In the end result, I am not persuaded Beach may be called as an adverse witness. Beach may, of course, be required to attend as an ordinary witness pursuant to the subpoena which has been served. It would then be up to the plaintiffs' counsel to establish that he is a hostile witness before having the opportunity to conduct any cross-examination of him.
- [31] The case which the City contends is the closest to this one is the decision of the Alberta Court of Appeal in *McAllister v. Calgary (City)*, 2012 ABCA 346, 69 Alta. L.R. (5th) 242. In that case, a man who had been assaulted at a C-train station sued the City of Calgary for failing to implement adequate security measures at C-train stations. Police conduct was not in issue in the case. The municipality was ordered by a Master of the Alberta Court of Queen's Bench to produce the Calgary Police Service records to the plaintiff, based upon the reasoning in *Hunter v. Eck* (1977), 7 Alta. L.R. (2d) 291, 8 A.R. 508 (C.A.), affirming 1 Alta. L.R. (2d) 319, 75 D.L.R. (3d) 101 (Q.B.). The City of Calgary appealed from the order of the Master to a Justice of that Court, who considered herself bound by the appellate decision in *Hunter*. The municipality appealed that subsequent decision.
- [32] In allowing the appeal, Madam Justice Paperny, for the Court, reasoned at paras. 20-28:

- [20] Although the basic structure of the legislation has not greatly altered, some changes to the Police Act since *Hunter* was decided indicate a legislative intent to further distance municipal councils from the operation of their police forces. For example, s. 27 of the 1973 Police Act, relied upon in *Hunter*, provided that a council may obtain any information necessary to assess the efficiency of the police force. The equivalent provision in the new Police Act, RSA 2000, c. P-17 is more limited. Section 29(2) provides that a council may obtain such information only from the commission and only for the purpose of developing a budget.
- [21] The new Police Act draws a very clear separation between a municipal council and its police service, with the police commission acting as a mandatory (not a discretionary, as in the 1973 Police Act) buffer between the two bodies. The responsibilities of municipal councils and police commissions are clearly set out in the new Police Act and they do not overlap. Council is responsible to establish a municipal police service (s 4(5)), and is required to establish and fund a police commission and appoint members to the commission (s 28). The council receives estimates and plans for required police services from the commission, may obtain such information from the commission as is necessary to develop a budget, and establishes the total budget for purposes of the police service (s. 29). The commission, not the council, is responsible for allocating the funds: s 29(3). This latter separation of responsibilities was not expressly set out in the 1973 Police Act.
- [22] The commission, on the other hand, is responsible for overseeing the police service and, specifically, for allocating funds provided by council, establishing policies for efficient and effective policing, issuing instructions to the chief of police, and ensuring that sufficient persons are employed for the police service: s 31(1). Section 31 also contains a new express prohibition that council shall not "perform any function or exercise any power in respect of the police service that the commission is empowered to perform or exercise": s. 31(5)(a). Nor can council issue any instructions to a police officer: s 31(5)(b).
- [23] The commission is also responsible to appoint the chief of police (subject to ratification by council): s 36(1). The chief of police is accountable to the commission for the operation of the police services, the manner in which the chief carries out his or her responsibilities, the administration of finances, and for reporting to the commission any complaint made against the police service and the progress of investigation into such complaints: s 41(3).
- [24] The chief must also give the commission any information concerning the activities of the police service that the commission may request, except information concerning individual investigations: s 41(3)(d). There was no equivalent provision in the 1973 Police Act. If the decision in *Hunter* were permitted to stand, the City would have greater access to police investigative files than the police commission, the body taxed with general oversight of the police service. This cannot have been the legislature's intent.

- [25] For all of these reasons, the broad principle set out in *Hunter* is no longer good law, if it ever was. It is inconsistent with the intention of the legislature in creating distance between municipal councils and the police services they are required to establish, an intention borne out by the mandatory creation of police commissions and the vesting of those commissions with operational oversight of police services. The role of the municipal council is largely limited to budgetary matters.
- [26] This interpretation is also consistent with the broader concern in the law to protect the privacy of records, as enshrined in both federal and provincial privacy legislation. The legislative intent to separate municipal councils and police services may also be seen in Alberta's Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25, which classifies the two as separate public bodies, to which separate Freedom of Information requests must be made.
- [27] The policy behind this structure is sound, and is concisely set out in the following excerpt from Paul Ceyssens, *Legal Aspects of Policing*, loose-leaf (Update 15 - September 2002), (Earlscourt Legal Press, Inc., 1994) at p 4-13:

Various justifications exist for inserting a police board between the municipal council and the police force. The most prominent reason relates to insulating the police from direct control from municipal politicians. In *Bruton v. Regina City Policemen's Ass'n Loc. 155*, [1945] 3 D.L.R. 437 (Sask CA), the Chief Justice of Saskatchewan offered the following analysis:

In providing such a body to administer the police force, I am of the opinion that it was the intention of the Legislature to ensure a just and impartial carrying out of the duties which devolve upon constables and peace officers and to place the chief of police, the officers and the constables of the force in a position where they are removed from the influence of persons who may attempt to interfere with the due performance of police duties such as the detention and arrest of offenders, the preservation of the peace, the enforcement of laws, and other similar duties with which police officers are entrusted by law.

- [28] A similar legislative intent to insulate the police force from improper influence is apparent in the structure created by Alberta's Police Act. It would undermine that intent to give municipalities a special legal right to access all records kept by their police forces, for any purpose. Of course, a municipality, like any other person, can obtain such records through appropriate channels, such as a request under Freedom of Information legislation.
- [33] It should be noted that in Alberta, s. 39 of the Police Act, R.S.A. 2000, c. P-17, states that the chief of police, as opposed to the relevant municipality, is liable for any tortious acts committed by police officers in carrying out their duties. Nonetheless, in my opinion the legislative scheme for police in British Columbia conforms with the description of the Chief Justice in *Bruton v. Regina City Policemen's Ass'n Local No. 155*, [1945] 3 D.L.R. 437 at 448-49, [1945] 2 W.W.R. 273 (Sask. C.A.), and I respectfully agree with the reasoning of Paperny J.A. in *McAllister*. For the reasons that she expressed in the paragraphs to which I have made reference, I find that the legislative intent of the British Columbia Legislature in insulating

the VPD from the influence of the City of Vancouver results in the City lacking possession, control or power over the VPD Records. This conclusion is bolstered by the fact that the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, treats a police service as a separate public body from a municipality for the purpose of records access.

- [34] The plaintiff's contention that he will be hampered in securing appropriate document agreements and in otherwise advancing his claim at trial if the City is not obliged to disclose and list the VPD Records is answered in part by the fact that he already has them. He is free to cross examine on the VPD Records, and I was advised that he has already done so through his examinations for discovery of the defendants William Harkema and Marilyn Sims. He is similarly free to pursue document agreements and otherwise seek to advance his claims at trial.
- [35] In the result, I conclude that while the VPD is not a legal entity, and cannot be sued, its records are not within the possession, control or power of the City of Vancouver so as to generally require their listing by the City on its list of documents, subject to one exception which I will now discuss.
- [36] Counsel for the plaintiff advised me that he obtained admissions with respect to the authorship of some of the VPD Records from the defendants Harkema and Sims. Given that such admissions were obtained, the City is, in my opinion, obliged to amend its list of documents, where appropriate, to reflect those admissions. In the event the City fails to do so within 14 days, the plaintiff will have liberty to renew its application for the alternative order set out above.
- [37] The plaintiff's application is therefore dismissed.

"C.E. Hinkson CJSC"

The Honourable Chief Justice Hinkson

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