2014 ONSC 865
Ontario Superior Court of Justice

McGillivary v. Toronto Police Services Board

2014 CarswellOnt 1425, 2014 ONSC 865, 119 O.R. (3d) 201, 237 A.C.W.S. (3d) 615, 61 C.P.C. (7th) 210

Anne McGillivary, personally, Anne McGillivary as estate trustee of the estate of the late Charles McGillivary, and Stephen Andrew McGillivary v. The Toronto Police Services Board, John Doe 1, John Doe 2, John Doe 3 and Chief of Police William Blair

Master R.A. Muir

Heard: February 3, 2014
Judgment: February 6, 2014*
Docket: CV-12-449995

Counsel: Spencer F. **Toole**, for Plaintiffs
Kevin McGivney, for Defendants
Eric Wagner, Emtiaz Bala, for Non-party, Special Investigations Unit

Subject: Civil Practice and Procedure; Constitutional; Employment; Public; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

XII Discovery
XII.2 Discovery of documents
XII.2.g Scope of documentary discovery
XII.2.g.ii Documents in possession of non-party
XII.2.g.ii.E Miscellaneous

Headnote

Civil practice and procedure --- Discovery — Discovery of documents — Scope of documentary discovery — Documents in possession of non-party — Miscellaneous

Police officers attempted to arrest plaintiff's son — Struggle ensued during which son stopped breathing and was pronounced dead at hospital — He had done nothing wrong and it was case of mistaken identity — Son was developmentally challenged as result of childhood accident, he was mute and had considerable difficulty communicating with others — Plaintiffs brought action for wrongful death, false arrest, negligence and discrimination under Human Rights Code — Plaintiffs required special investigations unit and coroner investigation files — Plaintiffs brought motion for order for production — Motion granted — Plaintiffs satisfied test with respect to almost all of documents requested from special investigations unit and met onus placed upon them under R. 10 of 30.10 of Rules of Civil Procedure — Plaintiffs were unable to obtain information they were

seeking from special investigations unit from any other source — When considering public policy exception, court must balance needs of moving parties for access to documents requested against interests of non-party and public — Requested documents were very important to plaintiffs' claims and family deserved to have their claims adjudicated in fair and just manner.

Table of Authorities

Cases considered by *Master R.A. Muir*:

Boucher (Litigation guardian of) v. Charles (2013), 2013 ONSC 3120, 2013 CarswellOnt 11142 (Ont. S.C.J.) — considered

Chiarella v. Simon (2007), 37 C.P.C. (6th) 215, 2007 CarswellOnt 609, 46 M.V.R. (5th) 257 (Ont. S.C.J.) — considered

G. (N.) v. Upper Canada College (2004), 2004 CarswellOnt 5239 (Ont. Div. Ct.) — referred to

Ontario (Attorney General) v. Ballard Estate (1995), 129 D.L.R. (4th) 52, 44 C.P.C. (3d) 91, (sub nom. *Ontario (Attorney General) v. Stavro)* 86 O.A.C. 43, (sub nom. *Ontario (Attorney General) v. Stavro)* 26 O.R. (3d) 39, 1995 CarswellOnt 1332 (Ont. C.A.) — followed

P. (D.) v. Wagg (2004), 2004 CarswellOnt 1983, 120 C.R.R. (2d) 52, 71 O.R. (3d) 229, 46 C.P.C. (5th) 13, 239 D.L.R. (4th) 501, 187 O.A.C. 26, 184 C.C.C. (3d) 321 (Ont. C.A.) — considered

Stafford v. Adams (2009), 2009 CarswellOnt 4571, 82 C.P.C. (6th) 294, 87 M.V.R. (5th) 125 (Ont. S.C.J.) — followed

Statutes considered:

Coroners Act, R.S.O. 1990, c. C.37
s. 42(1) — considered

Human Rights Code, R.S.O. 1990, c. H.19
Generally — referred to

Police Services Act, R.S.O. 1990, c. P.15
s. 113 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 1.04(1) — considered

R. 24.1 — considered

R. 30.10 — considered

R. 30.10(1) — considered

R. 30.10(3) — considered

MOTION by plaintiff for order for production.

***Master R.A. Muir*:**

Background

1 On the evening of August 1, 2011, the plaintiff Anne McGillivary went for a walk with her son, Charles McGillivary. Ms. McGillivary lived on Pendrith Street in the City of Toronto, near Christie Pits Park. They walked along Bloor Street West almost to Bathurst Street at which point they turned around and headed back toward home along the south side of Bloor Street West.

2 At the same time a Toronto Police Services vehicle was travelling westbound on Bloor Street West. It came to a stop near the intersection of Grace Street. Two constables exited the police vehicle and approached Mr. McGillivary. They were Constables Paul Gribbon and Raymond Kang (the "Subject Officers"). A struggle ensued during which Mr. McGillivary stopped breathing. He was ultimately pronounced dead at Toronto Western Hospital at approximately 8:00 p.m. on August 1, 2011.

3 Mr. McGillivary had done nothing wrong. It was a tragic case of mistaken identity. The police were looking for someone else.

4 It is also important to note that Mr. McGillivary was developmentally challenged as a result of a childhood accident. He was mute and had considerable difficulty communicating with others.

5 The incident involving the police and Mr. McGillivary was immediately investigated by the Special Investigations Unit (the "SIU"). The SIU was created pursuant to section 113 of the *Police Services Act*, R.S.O. 1990, c. P.15. The purpose of the SIU is to carry out investigations into circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers.

6 Following its investigation of the circumstances surrounding Mr. McGillivary's death, the SIU concluded that there were no reasonable grounds to cause any criminal charges to be laid against the Subject Officers.

7 The Office of the Chief Coroner (the "Coroner") also conducted an investigation into Mr. McGillivary's death. Its investigation concluded that a coroner's inquest was warranted. I was advised by counsel that the coroner's inquest began on the day this motion was argued.

8 Mr. McGillivary's family now seeks a form of redress. This wrongful death action was commenced on March 28, 2012. The plaintiffs seek damages of more than $10,000,000.00. They allege that Mr. McGillivary's death was caused by the assault and battery committed by the Subject Officers. They also seek damages for false arrest, negligence and discrimination under the *Human Rights Code*, R.S.O. 1990, c. H.19.

9 The defendants deny the plaintiffs' allegations. They state that the officers involved held an honest and reasonable belief that Mr. McGillivary was the person they were looking for and that they had the lawful authority to arrest him. They also take the position that the force used was reasonably necessary under the circumstances and that they could not have been aware of Mr. McGillivary's alleged heart defect that apparently resulted in his death.

10 The plaintiffs bring this motion pursuant to Rule 30.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules"). The plaintiffs seek an order requiring the SIU and the Coroner to produce their complete investigation files. The defendants support the plaintiffs' position. The Coroner does not oppose this motion provided certain limited information is redacted from the documents it is required to produce. The SIU does not oppose an order for production of large parts of its files but it does oppose the production of witness interviews and statements along with an amateur video recording of the incident.[1]

Analysis

Rule 30.10

11 Rule 30.10(1) provides as follows:

> **PRODUCTION FROM NON-PARTIES WITH LEAVE**
>
> ***Order for Inspection***
>
> 30.10 (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,
>
> (a) the document is relevant to a material issue in the action; and
>
> (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

12 The parties agree that the leading authority on the test to be applied on a motion under Rule 30.10 is the decision of the Court of Appeal in *Ontario (Attorney General) v. Ballard Estate*, [1995] O.J. No. 3136 (Ont. C.A.). The key principle is that production from a non-party is the exception and not the rule. See *Stavro* at paragraph 13.

13 At paragraph 15 of *Stavro* the Court of Appeal identifies the following considerations to help guide the court's analysis on such motions:

> i) the importance of the documents;
>
> ii) whether production at the discovery stage of the process as opposed to production at trial is necessary to avoid unfairness to the moving parties;
>
> iii) whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether responsibility for that inadequacy rests with the defendants;
>
> iv) the position of the non-parties with respect to production;
>
> v) the availability of the documents or their informational equivalent from some other source which is accessible to the moving parties;
>
> vi) the relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation.

> Non-parties who have an interest in the subject matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true "stranger" to the litigation.

14 In my view, the plaintiffs have satisfied this test with respect to almost all of the documents requested from the SIU.[2]

15 I have reviewed the summaries of the witness statements prepared by the SIU as contemplated by Rule 30.10(3). In my view, the vast majority of the witness statements are highly relevant to matters in issue in this action and most importantly to the issue of the alleged negligence of the Subject Officers. They will form a very important component of the evidence necessary for the just resolution of this proceeding. All of the witness interviews were conducted between August and October 2011. These interviews recorded the evidence of important witnesses when the events of August 1, 2011 were still fresh in their minds. They provide significant detail regarding the interaction between Mr. McGillivary and the Subject Officers. They also provide background information regarding Mr. McGillivary's condition prior to the incident and information in relation to the individual the police were actually looking for on the evening of August 1, 2011.

16 In my view, it is also important that production of these witness interviews be made now rather than at trial. A mediation session is scheduled for May 2014. The Rule 1.04(1) requires that the Rules be liberally construed to secure the just, most expeditious and least expensive determination of civil disputes. The mediation requirement in Rule 24.1 is designed to do just that. In my view, the effective mediation of this dispute would be seriously impaired if these witness statements were not available to all parties and the mediator. The unfairness referenced in Rule 30.10 is not simply unfairness *at* trial. It also includes unfairness *in proceeding* to trial. It is my view that it would be unfair for the parties to proceed to trial without an effective mediation session. These witness statements are an important part of that process. As the Court of Appeal noted in *P. (D.) v. Wagg*, [2004] O.J. No. 2053 (Ont. C.A.) at paragraph 53 "[s]ociety has an interest in seeing that justice is done in civil cases as well as criminal cases, and generally speaking that will occur when the parties have the opportunity to put all relevant evidence before the court".

17 In addition, it appears from the evidence that these witness interviews are not available to the plaintiffs from any other source. The plaintiffs' lawyers have made attempts to locate witnesses by canvasing the neighbourhood. They have been unsuccessful. It appears that the defendants may be in possession of some of the witness statements but none have been produced to date.[3] It is true that all of the witness statements have been provided to the Coroner by the SIU for use at the inquest. However, it is important to note that Mr. McGillivary's family is not participating in the inquest. As well, section 42(1) of the *Coroners Act*, R.S.O. 1990, c. C.37, prohibits the use of evidence given at a coroner's inquest from being used in a civil proceeding.

18 The SIU suggests that the plaintiffs can simply issue summonses to these individuals to be witnesses at trial. However, until this motion was brought the SIU had not even provided the plaintiffs with a list of the names of the witnesses, despite a request from the lawyers for the plaintiffs in a letter dated July 31, 2013. The SIU has still not provided contact information for the witnesses. It is difficult for the court to understand how the plaintiffs can secure the attendance of these individuals at trial when they do not know where they live or how to contact them.

19 For all of these reasons, I am satisfied that the plaintiffs are unable to obtain the information found in the witness interviews from any other source.

20 I do, however, accept the argument that the SIU is a stranger to this litigation. Ordinarily, this factor would weigh against production. It is important that non-parties not be subject to overly intrusive and time consuming production orders. See *Stavro* at paragraph 12. However, it is my view that the importance of this factor is diminished when the non-party is an institutional organization such as the Crown, the police or, in this case, the SIU.

21 In addition, the SIU places great emphasis on three decisions of this court. Those decisions are *Chiarella v. Simon*, [2007] O.J. No. 401 (Ont. S.C.J.); *Pelletier v. HMQ*, unreported, May 21, 2013, Newmarket (S.C.J.); and *Boucher (Litigation guardian of) v. Charles*, 2013 ONSC 3120 (Ont. S.C.J.).

22 In my view, all of these cases are distinguishable from the facts before me on this matter. In *Chiarella*, the court made an express finding that the plaintiffs were already in possession of much of the information they were seeking from the SIU. See *Chiarella* at paragraph 10. That is not the case on this motion. The SIU placed great emphasis on the comment of Justice

Matheson in *Chiarella* that the SIU is not a collection agency for parties involved in civil actions. I agree. However, the plaintiffs are not using the SIU in this fashion. They have tried to find these witnesses. They have not received the documents from other sources. The SIU is their only option.

23 In *Pelletier*, the court found that it would not be unfair for the plaintiff to proceed to trial without the witness statements requested and refused to order production. I note that there were only a handful of witness statements in issue on that motion. In addition, it is not possible to gain a full understanding of the evidence before the court on that matter from Justice Boswell's brief endorsement. For these reasons, I do not find *Pelletier* particularly helpful but I do note the court's comment that there may be circumstances where production would be appropriate.

24 Finally, in *Boucher* the court made a finding that the documents requested were not important to the litigation. See *Boucher* at paragraph 22. Moreover, the plaintiffs in *Boucher* had already obtained copies of the civilian witness statements given to the police along with copies of notes prepared by the police witnesses. See *Boucher* at paragraph 3. The facts before the court on this motion are very different, as I have indicated above.

25 In my view, this case is similar to the decision of Justice Stewart in *Stafford v. Adams*, [2009] O.J. No. 3263 (Ont. S.C.J.). In that decision, Justice Stewart ordered production of the SIU witness statements after concluding that the statements were squarely relevant and that it would be unfair to require the plaintiff to proceed to trial without the SIU production. Of particular importance is her observation that the defendants in that action had not defended and would probably not attend discovery thereby depriving the plaintiffs of key information. Although the defendants in this action have been examined for discovery, I have found that the plaintiffs are still unable to obtain the information they are seeking from the SIU from any other source. I also note that *Stafford* was relied upon by Justice Patterson in *Stein v. Windsor Police Services Board*, 2012 ONSC 4521 (S.C.J.) where SIU witness statements were ordered to be produced.

26 In any event, none of the case law cited by counsel establishes a principle that SIU witness statements can never be produced and nor does it establish the principle that they must always be produced. Their disclosure is a matter of discretion having regard to the facts of each particular case.

27 I have therefore concluded that the plaintiffs have met the onus placed upon them under Rule 30.10 and the requested documents should be produced by the SIU on that basis.

The Public Interest

28 However, that conclusion does not end the court's consideration of this matter. This court has held that the public interest is an important factor to consider within the context of the Rule 30.10 "fairness" criterion. See *G. (N.) v. Upper Canada College*, [2004] O.J. No. 1011 (Ont. Div. Ct.) at paragraphs 11 and 14.

29 The SIU takes the alternative position that the witness statements should not be released for reasons of public policy. All of the civilian witnesses, and most of the police witnesses, were given an assurance of confidentiality before they provided their statements. That confidentiality promise provided, in part, that the information the witnesses provided to the SIU would be "kept confidential by the SIU, unless [the witness] consents to its release or unless [the SIU] has to release it by operation of law". Only a few of the witnesses have provided their consent. A few have refused. Most have not responded to the SIU's inquiries.

30 The SIU argues that the confidentiality assurances are necessary in order to secure the cooperation of the public in connection with SIU investigations. It submits that a certain level of fear and distrust prevails when alleged police wrong-doing is being investigated. Many civilian witnesses may fear reprisal from the police if the fact that they were cooperating with the SIU was widely known. They may also fear that they may incriminate themselves.

31 The SIU also expresses a concern about cooperation from witness police officers, citing police culture and peer pressure, even despite the statutory obligation on the members of the police service to provide such cooperation.

32 The SIU submits that its ability to carry out its statutory functions would therefore be impaired if witness statements were routinely released.

33 The evidence submitted by the SIU in support of this proposition comes from Joseph Martino. Mr. Martino is legal counsel to the SIU. Part of his evidence comes from his own experience with the SIU since 1999 and part of it is based on information and belief. Only one of the sources of his information and belief is identified. That person is James Harding, a former member of the Task Force on Race Relations and Policing and a former executive officer with the SIU. As part of his evidence, Mr. Martino makes reference to discussions with SIU investigators and senior staff, but none of those persons is identified. More importantly, none of the SIU's evidence comes from witnesses past or present. Not one witness has provided evidence that he or she would be less likely to cooperate with the SIU if the confidentiality assurance were not provided. None have given evidence that disclosure would somehow place him or her in a position of jeopardy.[4] Overall, the evidence provided is very general in nature and lacking in detail.

34 Having concluded that the plaintiffs have a *prima facie* right to this production under Rule 30.10, it is my view that the public policy evidence from the SIU would need to be much more robust than what has been provided if it wishes to deny the production on this basis. I am simply unable to conclude from the evidence that the efficacy of SIU investigations hinges on a qualified assurance of confidentiality.

35 I also note that the SIU has turned over all of its files relating to Mr. McGillivary to the Coroner in response to a summons, without objection. That evidence will most likely be made public as part of the inquest.

36 It is also curious, in my view, that as of September 2011, the SIU discontinued its practice of providing a confidentiality assurance to witness officers but, as of today, still insists on obtaining their consent before their statements are released. The reason for discontinuing this practice is set out in Mr. Martino's affidavit. He states that "[t]he change was made because it was thought, by that point in the history of the SIU, that the assurance was no longer necessary to secure a witness officer's full cooperation in light of their statutory duty to cooperate". If the assurance is no longer necessary then why does the SIU insist on maintaining its effect, at least in practice? The SIU's position on this issue makes no sense to me.

37 When considering a public policy exception, the court must balance the needs of the moving parties for access to the documents requested against the interests of the non-party and the public. See *N.G.* at paragraphs 11 and 14. The requested documents are very important to the plaintiffs' claims. Mr. McGillivary's family deserves to have their claims adjudicated in a fair and just manner. The defendants need to be able to mount a full defence. These are important principles of our system of justice. They need to be protected. In my view, the balance clearly favours the moving parties. The evidence provided by the SIU is simply insufficient to justify the non-disclosure of documents to which the plaintiffs are otherwise entitled under Rule 30.10.

38 I appreciate that the witnesses were promised confidentiality. However, that promise was not absolute. It was subject to the operation of law. That much is obvious by the fact that the SIU has provided the documents to the Coroner without objection. The inquest is important. So is this action. It is also important to emphasize that the witnesses will still be able to avail themselves of the protection provided by the deemed undertaking rule in the event of any improper use of the information produced by the SIU.

Order

39 The relief requested by the plaintiffs at paragraphs (a) and (b) of their notice of motion is hereby granted, subject to the following terms:

(a) the SIU files shall be redacted to omit the witness interviews and other related documents involving the officer witnesses Mark Frendo-Jones and Diogo Rodriges Nunes;

(b) the Coroner's files shall be produced without any of the documents the Coroner may have received from the SIU; and,

(c) the Coroner's files shall also be redacted to remove all personal or private information of third parties and any information over which privilege is claimed, subject to the right of the plaintiffs to challenge such redactions by motion

to this court.

40 Counsel for the SIU shall contact me by email and arrange for the return of the SIU files in the possession of the court.

41 The requested documents shall be provided to counsel for the plaintiffs by the SIU and the Coroner within 30 days.

42 If the parties are unable to agree on the issue of the costs of this motion, they shall provide the court with brief submissions in writing by no later than February 28, 2014.

43 Finally, I wish to thank all counsel for their very helpful submissions.

Motion granted.

Footnotes

[*] Additional reasons at *McGillivary v. Toronto Police Services Board* (2014), 2014 CarswellOnt 2609, 2014 ONSC 1418 (Ont. S.C.J.).

[1] The parties referred to the disputed documents in general terms as witness statements. In fact, the documents in question are videotaped interviews with the witnesses, along with summaries of their evidence prepared by the SIU. An amateur video taken by one of the civilian witnesses is also included as part of the umbrella request for production of witness statements.

[2] Two of the officer witnesses (Mark Frendo-Jones and Diogo Rodriges Nunes) were only involved in directing traffic between the scene of the incident and Toronto Western Hospital and transporting one of the subject officers. They had no discussions regarding the incident with any of the parties involved. None of their evidence is relevant to the matters in issue in this action. The extent of relevant evidence contained in the other witness statements varies. However, it is my view that all of the other witnesses possess information that may be of at least some relevance.

[3] In fairness to Mr. McGivney, I should note that the submission by counsel for the SIU that several of the witness statements had been provided to the Toronto Police Service came as a surprise to him.

[4] I note that the SIU has already disclosed the names of the witnesses in a public document, namely its responding motion record.

History (2)

Direct History (2)

H 1. McGillivary v. Toronto Police Services Board
2014 ONSC 865 , Ont. S.C.J. , Feb. 06, 2014
Judicially considered 1 time

Additional reasons in

H 2. McGillivary v. Toronto Police Services Board
2014 ONSC 1418 , Ont. S.C.J. , Mar. 04, 2014

Non-appeal Court or Board or Tribunal

Citing References (4)

Treatment	Title	Date	Type	Depth
Referred to in	1. Marshall v. Gladders Estate 2014 ONSC 2821 (Ont. S.C.J.)	May 14, 2014	Cases and Decisions	
—	2. Legal Memoranda 8721, When will the courts order for production documents in the possession of a third party?	2014	Secondary Sources	—
—	3. Holmested & Watson, Ontario Civil Procedure R. 24.1§12, Timing of Mediation Session	2005	Secondary Sources	—
—	4. Watson & McGowan, Ontario Civil Practice Case Law 30.10, Case Law	2005	Secondary Sources	—

Legal Memos (1)

Title	Date/Jurisdiction	Author	Classification
1. When will the courts order for production documents in the possession of a third party? MemoPoLSumm 8721 **Fact Scenario :** Counsel represents an employee who was fired from her position at a large accounting firm for writing cheques to a fake business; the funds were eventually deposited into her personal account. The firm filed a complaint and the ...	June 1, 2014 British Columbia	TVA The Legal Outsourcing Network **Memo Size :** Small	Civil practice and procedure—Discovery—Discovery of documents—Scope of documentary discovery—Documents in possession of non-party—Miscellaneous

Court Documents (6)

Title	Court	Date	Type
1. Claim or Originating Document; Defence or Responding Document 2014 CarsPleadingW 22482	Ontario Superior Court of Justice	March 28, 2012	Pleading Collection
2. Claim or Originating Document | Statement of Claim 2014 CPCPleading 76646	Ontario Superior Court of Justice	March 28, 2012	Pleading Document
3. Defence or Responding Document | Statement of Defence of the Defendants, Toronto Police Services Board and Chief of Police William Blair 2014 CPCPleading 76647	Ontario Superior Court of Justice	May 9, 2012	Pleading Document
4. Motion for Production of Documents from Non-parties; Factum 2014 CarsMotionW 61662	Ontario Superior Court of Justice	December 27, 2013	Motion Collection
5. Motion for Production of Documents from Non-parties 2014 CPCMotion 85846	Ontario Superior Court of Justice	December 27, 2013	Motion Document
6. Motion Factum 2014 CPCMotionF 47921	Ontario Superior Court of Justice	January 14, 2014	Motion Document

