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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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	)	
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	)	CHRISTINE WILLIAMS
- and -	)	for the applicant
	)	
INDEPENDENT INVESTIGATION UNIT	)	
OF MANITOBA,	)	SAMUEL THOMSON and
	)	TAMARA EDKINS
respondent.	)	for the respondent
	)	
	)	
	)	TONI McLEOD agent for
	)	LIONEL CHARTRAND
	)	on watching brief
	)	for Constable Dumont-Fontaine
	)	
	)	
	)	JUDGMENT DELIVERED:
	)	March 29, 2021

PERLMUTTER A.C.J.Q.B.

INTRODUCTION

[1] Staff Sergeant Jared Hall, on behalf of the Royal Canadian Mounted Police (the "***RCMP***"), applies for an order pursuant to subsection 487.0193(1) of the ***Criminal Code***, R.S.C. 1985, c. C-46 (the "***Code***"), revoking an *ex parte* order

granted by a Judicial Justice of the Peace ("JJP"). The order granted by the JJP, under s. 487.014 of the ***Code***, requires Sgt. Hall to produce two reports (the "reports") authored by RCMP Constable Jeremiah Dumont-Fontaine to the Independent Investigation Unit of Manitoba ("IIU"). Subsection 487.0193 of the ***Code*** provides:

> (1) Before they are required by an order made under any of sections 487.014 to 487.018 to produce a document, a person, financial institution or entity may apply in writing to the justice or judge who made the order — or to a judge in the judicial district where the order was made — to revoke or vary the order.
>
> …
>
> (4) The justice or judge may revoke or vary the order if satisfied that
>
> (a) it is unreasonable in the circumstances to require the applicant to prepare or produce the document; or
>
> (b) production of the document would disclose information that is privileged or otherwise protected from disclosure by law.

[2] The RCMP asserts the reports are the "notes" of a "subject officer" within the meaning of s. 11 of ***Independent Investigations Regulation***, Man.Reg. 99/2015 (the "***Regulation***") that governs the IIU and thus, under the ***Regulation***, are prohibited from production. Accordingly, it is the RCMP's position that production of the reports comes within "information…otherwise protected from disclosure by law" under subsection 487.0193(4)(b) of the ***Code***, and the production order should be revoked.

[3] The IIU says the reports are not "notes" within the meaning of the ***Regulation*** and, in any event, Cst. Dumont-Fontaine, as the subject officer,

impliedly waived any privilege that might attach to the reports. Accordingly, it is the IIU's position that the application be dismissed.

BACKGROUND

[4] The IIU is established under ***The Police Services Act***, C.C.S.M. c. P94.5 (the "***PSA***"). It is responsible for the investigation of serious incidents involving police officers.

[5] On June 5, 2019, while on duty in Thompson, Manitoba, Cst. Dumont-Fontaine used physical force against a member of the public (the "incident"). Within four hours of the incident, on the same night on the same shift, in accordance with RCMP policy, Cst. Dumont-Fontaine prepared, electronically, the two reports in issue here - a "supplementary occurrence report" ("SOR") and a "subject behaviour – officer response report" ("SB/OR"). No handwritten notes were made by Cst. Dumont-Fontaine in his notebook.

[6] On June 21, 2019, the IIU was notified of the incident.

[7] On June 24, 2019, the IIU advised the RCMP that the IIU assumed conduct of the investigation into the incident and requested the RCMP's complete investigative file.

[8] Under the ***Regulation***, officers involved in an incident triggering an IIU investigation fall within one of two categories: an officer who, in the opinion of the civilian director of the IIU, may have caused a death or a serious injury to a person is designated as a "subject officer" and an involved officer who is not a subject officer is a "witness officer" (s. 1.1).

[9] On July 3, 2019, the IIU advised the RCMP that Cst. Dumont-Fontaine was designated as the subject officer.

[10] By July 16, 2019, the RCMP provided the IIU with its full investigative file relating to the incident, except for the reports. The reports were withheld by the RCMP on the basis their disclosure would contravene the ***Regulation***, which states:

> 11(1) A subject officer must fully complete his or her notes on a matter that is the subject of an investigation by the independent investigation unit in accordance with his or her duty.
>
> 11(2) The notes of a subject officer must not be provided by any other member of the police service to an investigator or the civilian director.
>
> 11(3) A subject officer may voluntarily provide his or her notes to an investigator or the civilian director but a subject officer has no duty or obligation to provide his or her notes to an investigator or the civilian director.

[11] On August 14, 2019, the IIU reviewed a statement prepared by Cst. Dumont-Fontaine.

[12] On January 7, 2020, Cst. Dumont-Fontaine was charged with one count of assault causing bodily harm.

[13] The RCMP conducted a "code of conduct investigation" into Cst. Dumont-Fontaine's actions pursuant to the ***Royal Canadian Mounted Police Act***, R.S.C., 1985, c. R-10. As part of its code of conduct investigation, the RCMP requested that a use of force report be prepared. This use of force report prepared by Sgt. Richard Pratch was based on, amongst other materials, the reports, including verbatim excerpts from the reports that were also reproduced in the use of force

report. The use of force report found that Cst. Dumont-Fontaine's actions were reasonable and in accordance with RCMP training and policy.

[14] On May 22, 2020, at Cst. Dumont-Fontaine's request and with his consent, the use of force report was provided to the IIU. Upon receipt of the use of force report, the IIU became aware of the existence of the reports. Following further communications between the IIU and the RCMP, the RCMP ultimately refused to disclose the reports to the IIU on the basis that Cst. Dumont-Fontaine did not consent.

[15] On November 20, 2020, the IIU obtained the production order for the reports which is the subject of this application.

ISSUES

[16] The issues are:

1. What is the standard of review to revoke the production order?
2. Would production of the reports disclose information that is protected from disclosure by law?
3. By consenting to the provision of the use of force report to the IIU, did Cst. Dumont-Fontaine impliedly waive any "privilege" that might attach to the reports?
4. Is there a discretion **not** to revoke the production order?

ANALYSIS

1. What is the standard of review to revoke the production order?

[17] Both counsel argue, on the basis of ***R. v. Vice Media Canada Inc.***, 2018 SCC 53, that a review of a production order is a *de novo* hearing. In ***Vice Media***, the court noted that there are two ways to review a production order: (1) by application under s. 487.0193(1) of the ***Code***, as was done in this case, or (2) by way of *certiorari*.

[18] In ***Vice Media***, the applicant sought *certiorari* to quash an order requiring it to produce to the RCMP text messages between one of its reporters and a person who was suspected to have joined ISIS. ***Vice Media*** argued the order interfered with freedom of the press. The court held that the review should be a *de novo* hearing. Moldaver J. explained (para. 73):

> However, it may be going too far to create a general rule entitling the media to a *de novo* review of *any* production order that was made *ex parte*. In my view, where the production order was made *ex parte*, the following test should be applied: if the media points to information not before the authorizing judge that, in the reviewing judge's opinion, could reasonably have affected the authorizing judge's decision to issue the order, then the media will be entitled to a *de novo* review. If, on the other hand, the media fails to meet this threshold requirement, then the traditional *Garofoli* standard will apply, meaning that the production order may be set aside only if the media can establish that - in light of the record before the authorizing judge, as amplified on review - there was no reasonable basis on which the authorizing judge could have granted the order. In applying the *Garofoli* standard in this context, reviewing judges should bear in mind that authorizing judges are required to give special consideration to the vital role of the media in a free and democratic society and to balance the state's interest in investigating and prosecuting crimes and the media's right to privacy in gathering and disseminating the news.

[19] While the review before me is a statutory review, the same considerations should apply. The production order in this case was issued *ex parte*. It does not

appear that the issuing JJP was aware of the regulation prohibiting disclosure of a subject officer's notes. As this information could reasonably have affected the decision to issue the order, the hearing before me should be *de novo*.

2. Would production of the reports disclose information that is protected from disclosure by law?

[20] It is the RCMP's position that the reports are "notes" within the meaning of s. 11 of the ***Regulation*** as they were made by Cst. Dumont-Fontaine in accordance with the applicable RCMP policies on investigative notes which reflect both the common law duty on a police officer to make notes and the case law on the meaning of "notes". In taking this position, the RCMP says that also under s. 11(1) of the ***Regulation***, as the subject officer, Cst. Dumont-Fontaine was compelled to make notes about the incident (in the form of the reports) and it follows that production of the reports to the IIU is prohibited by s. 11(2) of the ***Regulation***.

[21] The IIU agrees with the RCMP that the notes which a subject officer must complete under s. 11(1) of the ***Regulation*** codifies a subject officer's common law duty to make incident notes. However, it is the IIU's position that applying the modern approach to statutory interpretation - the "words of an Act are to be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (***Bell ExpressVu Limited Partnership v. Rex***, 2002 SCC 42, para. 26) – the word "notes" in the ***Regulation*** is to be interpreted as a police

officer's contemporaneous entries in his or her notebook or electronic analog for the purpose of assisting the officer to recall material events at a later date so that accurate testimony can be given. The IIU asserts that in the policing context, the word "notes" has long meant the physical entries made by a police officer in his or her notebook, contemporaneous – or close to contemporaneous – to observed incidents, for the purpose of refreshing memory and giving accurate testimony. Based on this definition of "notes", the IIU argues the reports are not notes and therefore not subject to the prohibition on disclosure under s. 11(2) of the ***Regulation***. Accordingly, there is no privilege or other protection from disclosure that could meet the test for revocation of the production order.

[22] It is clear that s. 11(1) of the ***Regulation*** requires the subject officer to make notes "in accordance with his or her duty" even when the matter is subject to an investigation by the IIU. Moreover, RCMP policy requires officers to make notes:

> Members **must** make written and/or electronic notes, as soon as practicable, in order to prepare accurate, detailed, and comprehensive notes articulating observations made and actions taken during the course of their duties.
>
> [Emphasis added]

[23] This RCMP policy specifically references ***Wood v. Schaeffer***, 2013 SCC 71, where the Supreme Court of Canada, when considering the Ontario equivalent regulation (as it then was) to the (Manitoba) ***Regulation***, stated (para. 67):

> Against that background, I have little difficulty concluding that police officers do have a duty to prepare accurate, detailed, and comprehensive notes as soon as practicable after an investigation.

> (See also for example, ***R. v. Mascoe***, 2017 ONSC 4208, paras. 112 and 115.)

[24] The Supreme Court of Canada also explained in ***Wood*** that this duty requires that the focus of an officer's notes is "the rather mechanical recitation of *what* occurred" (para. 77).

[25] It is also clear that the "notes" which the officer is required to make cannot be provided to the IIU unless the subject officer voluntarily does so (ss. 11(2), 11(3)).

[26] Both counsel agree those "notes" which are prohibited from production under s. 11(2) of the ***Regulation*** would be "protected from disclosure by law" under s. 487.0193(4) of the ***Code***. The contentious issue is what is included in "notes" under the ***Regulation***.

[27] The RCMP says "notes" includes the two reports in issue here. The IIU says this term only applies essentially to those notes made at the scene, or soon after attending the scene, to record the particulars of the event and that neither of the two reports are "notes".

[28] While it is my view that the SOR does fall within the meaning of "notes", the SB/OR does not.

[29] Both counsel agree, as do I, that the interplay between the obligation of the subject officer to complete his or her notes under s. 11(1) of the ***Regulation*** and the prohibition under s. 11(2) of the ***Regulation*** on the provision of a subject officer's notes to the IIU reflects a legislative balancing of the public interest in investigating police conduct, the duty of police to investigate crime and the rights

of a subject officer facing potential criminal jeopardy. The rights of the subject officer include the principle against self-incrimination guaranteed by s. 7 of the ***Canadian Charter of Rights and Freedoms*** (the "***Charter***") which protects against the use of information compelled by law (***R. v. White***, [1999] 2 S.C.R. 417).

[30] Sgt. Hall deposed that the reports were prepared electronically the same night and on the same shift as the incident and there were no handwritten notes made by Cst. Dumont-Fontaine in his notebook. The reports were completed within four hours of the incident, with the SOR being completed prior to the SB/OR. The reports represent the entirety of the notes made by Cst. Dumont-Fontaine relating to the incident.

[31] Sgt. Hall deposed that an SOR is an electronic note entered into the RCMP computer system that contains similar information to what would be found in a member's notebook, specifically an officer's observances of an incident and a record of the steps that they took in response. These records are expected to be made as contemporaneously as possible and practical given the specific situation. Sgt. Hall deposed that the SOR sought by the production order in this specific case reflects information that in the past would normally have been recorded in a traditional notebook. That is to say, the SOR is essentially the notes of the incident that are routinely recorded by officers attending the scene as described in ***Wood***.

[32] Pursuant to RCMP policy, when an RCMP officer's intervention results in an injury to another person, that officer is required to complete an SB/OR report

describing his or her actions. The RCMP policy provides that the SB/OR is a method to "explain the intervention strategies that an officer chose to manage an incident" and this "explanation, referred to as legal articulation, is the process by which an officer can explain clearly, concisely, and effectively the events that occurred before, during and after an intervention". This would suggest the SB/OR contains more than a record of the event and includes explanation or justification. The IIU points out the RCMP policy itself provides that an SB/OR is a "supplement to [the officer]'s notes".

[33] In my view, the RCMP policy description of an SB/OR and the fact the SB/OR goes beyond the subject officer's simple description of what occurred takes it outside the meaning of notes. While the SOR and SB/OR were both prepared soon after the event, they served very different purposes. The purpose of the SOR is not clearly described in the RCMP policy extracts in evidence but it is obvious from its name that it is simply a report on the "occurrence" which the RCMP were investigating. It is not prepared only in relation to incidents involving an RCMP "intervention". By comparison, RCMP policy requires an SB/OR to **explain** an intervention. So, for example, an officer who attends the scene of a robbery would prepare notes about the robbery which may include an SOR. If, during his or her investigation, he or she uses force with a suspect resulting in injury to this suspect, he or she would prepare an SB/OR. That is to say, the SOR and SB/OR relate to two separate, albeit related, investigations.

[34] In ***Wood***, the Supreme Court of Canada distinguished notes by an officer as soon as practicable after an investigation describing what occurred from an explanation or justification of the events (para. 76):

> …The purpose of notes is not to explain or justify the facts, but simply to set them out...

[35] In my view, the purpose of s. 11(2) of the ***Regulation*** is to ensure that the subject officer will not avoid making a detailed account of the incident (for example, the robbery) for fear of incriminating himself or herself. While the SB/OR is not protected from production under s. 11(2) of the ***Regulation***, the fact that it is subject to a production order does not allow its use at trial if the subject officer is charged (see s. 487.0196 of the ***Code***).

[36] In ***R. v. Wighton*** (2003), 176 C.C.C. (3d) 550 (OCJ), the issue was the admissibility of a use of force report against the accused officer who completed the report. The use of force report related to the incident that led to the charge against the accused officer. Based on the principles articulated by the Supreme Court of Canada in ***White***, Weinper J. wrote as follows (50-51):

> In my view, the underlying concerns in White, supra, have application here. A Use of Force Report may not represent the "spontaneous utterances" of the officer. However, unlike the statistical information represented by a fisher's hail reports or logs, **the contents of the Use of Force Report contained a personal narrative of the relevant events, presumably including the decision made as to the use of force and why**. **The contents of the Use of Force Report are likely to address, directly or by implication, the author's state of mind and his view as to the justification for the use of force.** Clearly a privacy interest attaches to these statements. Indeed, section 14.5(3.1) of the Regulation represents an acknowledgement of an officer's privacy interest in the Use of Force Report.

> In summary, **the statements contained in a Use of Force Report do fall within the types of communication that the principle against self-incrimination is designed to protect**.
>
> [Emphasis added]

[37] Like contemplated in the SB/OR, the use of force report in ***Wighton*** included the officer's view as to the justification for the use of force.

[38] Having carefully considered all of the relevant circumstances, including the description of the reports, the timing of their preparation, and the related RCMP policies, for the reasons I have explained, I am satisfied the SOR are "notes" within the meaning of s. 11 of the ***Regulation***. Accordingly, both counsel agree, as do I, production of the SOR is protected from disclosure by law under s. 11(2) of the ***Regulation***. However, as the SB/OR does not fall within the meaning of "notes", it is not protected.

3. By consenting to the provision of the use of force report to the IIU, did Cst. Dumont-Fontaine impliedly waive any "privilege" that might attach to the reports?

[39] It is the IIU's position that by reason of Cst. Dumont-Fontaine's request and consent to provide the use of force report to the IIU, which contained verbatim extracts from the reports, Cst. Dumont-Fontaine impliedly waived any "privilege" attaching to the reports. The IIU says it has been provided with an exculpatory use of force report without the key documents (the reports) relied on to prepare it and that fairness and consistency suggest implied waiver. In support of its position, by analogy, the IIU relies upon the following quotations from cases where the principles covering waiver of solicitor-client privilege were canvassed:

> Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require…
>
> …
>
> …In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency, it must be entirely waived…
>
> (***S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.***, [1983] 4 W.W.R. 762, paras. 6 and 10; ***Canada (Citizenship and Immigration) v. Mahjoub***, 2011 FC 887, para. 10.)

[40] It is the RCMP's position that it was open to Cst. Dumont-Fontaine to make only partial disclosure of the reports in the form of the use of force report and fairness does not require disclosure of the entire reports. In this regard, the RCMP argues that with a charge already laid, the IIU has no use for the reports and in fact, the IIU is better off as Cst. Dumont-Fontaine could have instead waited until the close of the Crown's case at his criminal trial to provide the use of force report.

[41] In my view, the case law relied upon by the IIU regarding a waiver of "privilege" does not extend to the present circumstances. This case law deals with the waiver of solicitor-privilege, where there were not the same considerations to be balanced as in the case at hand. In particular, those cases did not consider the ***Charter*** protection against self-incrimination (that includes the constitutional right to silence) which is significant in the present case. In my view, by reason of the purpose of s. 11(2) of the ***Regulation***, to the extent there is a waiver argument, the test for waiver is closer to the waiver required of a ***Charter*** right. With this framework, it is my view that any waiver must be an informed waiver. Here, there

is no evidence that when Cst. Dumont-Fontaine gave his consent to provide the IIU with the use of force report, he was informed that his consent extended to the reports. Simply, I do not see why Cst. Dumont-Fontaine's consent to disclose a third party report (the use of force report prepared by Sgt. Pratch) would imply that consent to disclose his statements.

[42] For these reasons, I find that by consenting to the provision of the use of force report to the IIU, Cst. Dumont-Fontaine did not impliedly waive any privilege that might attach to the reports.

4. Is there a discretion not to revoke the production order?

[43] Both counsel argue that the use of the word "may" in s. 487.0193(4) of the ***Code*** suggests a discretion. Judicial officers cannot override a clear legislative provision. Where production of a document would disclose information that is protected from disclosure by law, based on s. 487.0193(4)(b), it follows that production of the document not be ordered. For example, if the JJP ordered production of a lawyer's file (protected by solicitor-client privilege), I question whether a reviewing justice would have discretion to determine the production order could stand. In this sense, it is my view that the word "may" is used in s. 487.0193(4) of the ***Code*** to reflect only a discretion under subsection (a) – in considering whether "it is unreasonable in the circumstances to require the applicant to prepare or produce the document".

[44] Here, given that the SOR are "notes", the SOR cannot be produced to the IIU under s. 11(2) of the ***Regulation*** which is grounded in the ***Charter*** protection

against self-incrimination. As such, the JJP's order is varied to remove the requirement to produce the SOR. However, given my finding that the SB/OR are not notes, the SB/OR is to be produced.

CONCLUSION

[45] In conclusion, I am varying the production order to remove the requirement to produce the SOR. Accordingly, Sgt. Hall is to produce the SB/OR.

_____ A.C.J.