



Inquest into the Death of Kyle Tait

APRIL 28, 2008 - RULING ON APPLICATION FOR PRODUCTION BROUGHT BY NOEL TAIT

Mr. Cameron Ward, counsel for Noel Tait, has made an application in which he requests the coroner obtain and produce the following to all counsel:

- 1)
 - a) records relating to anger management counseling or other psychological or psychiatric counseling received by Todd Sweet;
 - b) records relating to the employment practices and/or policies of the New Westminster Police Service in relation to members who have committed or are alleged to have committed unlawful activities;
 - c) records relating to all complaints or allegations of misconduct in respect of Todd Sweet's conduct prior to August 23, 2005, including complaints by **[names subject to publication ban]**;
 - d) brief of materials filed on behalf of Todd Sweet at his sentencing hearing in *R.v. Sweet*;
 - e) RCMP Training video entitled "A Dangerous Tactic: Shooting at Vehicles";
 - f) audio recordings of all relevant police radio transmissions;
 - g) audio and/or video recordings of all relevant witness interviews, including the videotaped re-enactment(s) performed by Cst. Machesney and Cst. Blount;
 - h) Royal Columbian Hospital records relating to the treatment of Ian Campbell's injuries; and
 - i) Forensic identification or other schematic drawings of the homicide scene;
- 2) that the coroner require the following persons to attend the inquest and give evidence on oath or affirmation;
 - a) Lorne Zapotichny;
 - b) Joe Spindor;
 - c) Denny Crosato; and

d) George E. Raitt.

With respect to item 1 b), counsel for New Westminster Police has agreed to provide these policies to all counsel.

With respect to 1 f) and 1 g), I have agreed that all relevant police radio transmissions and audio and/or video recordings of all relevant witness interviews, will be provided to counsel. These witnesses are: Csts. Machesney, Blount and Sweet; Ashley Olson, Ashley Sinclair, Romi Singh, Ian Campbell.

With respect to 1 d), I have agreed to produce any Forensic Identification or other schematic drawings of the homicide scene.

With respect to request 2 b), Mr. Ward withdrew this request, accepting the affidavit evidence provided by Inspector Jones of New Westminster Police.

As noted in my previous ruling, all of the names in 1 c) are under a publication ban both before, during and after the inquest.

The above-mentioned requested items have been addressed and will not be further dealt with in this ruling.

Submissions of Counsel:

Mr. Ward:

Mr. Ward submits that the *Coroner's Act* confers broad investigative powers upon the coroner, including the power to compel the production of records, determine relevance and admissibility and to provide copies of those deemed relevant to participants. He asserts that while relevance is not defined in the *Act*, relevance and admissibility are more broadly construed in a coroner's inquest than in a civil court.

Mr. Ward seeks records related to anger management or other counseling taken by Cst. Sweet. He submits that Cst. Sweet was "angry and frustrated" when he assaulted Mr. W on June 19th, 2005, and that he then embarked on an anger management treatment program which was completed by February 2006. As part of his sentencing in the criminal matter concerning his assault on Mr. W in 2007, he was ordered to take further anger management counseling in a group setting, despite the fact that he was already participating in a psychological treatment and therapy program.

Mr. Ward submits that records relating to the treatment Cst. Sweet received for anger management or other psychological or psychiatric problems are relevant to assist the jury to determine what caused Kyle Tait's death and to any recommendations the jury may wish to make to ensure public safety is maintained and that similar deaths do not recur.

Mr. Ward submits that the records relating to all complaints or allegations of misconduct in respect of Cst. Sweet's conduct prior to August 23rd, 2005, as outlined in 1 c) of the Notice of Application, are relevant for the purposes of the inquest, as they pertain to the issue of why Cst. Sweet remained armed and on active duty on the date of the Tait incident.

With respect to 1 d), the sentencing brief filed in the criminal matter concerning Mr. W, Mr. Ward submits that the brief of materials filed with the Court as evidence of Cst. Sweet's good character and exemplary service, should be produced out of fairness.

With respect to 1 e), Mr. Ward submits that the RCMP Training Video entitled 'A Dangerous Tactic: Shooting at Vehicles' is relevant by the very nature of its title, and that members of the RCMP investigated the shooting and opined on the appropriateness of Cst. Sweet's use of force.

With respect to 1 h), Mr. Ward submits that the medical records concerning Ian Campbell's treatment at the Royal Columbian Hospital are relevant as they may serve to shed light on the circumstances in which Mr. Campbell suffered injury, including the trajectory of the bullets fired at him.

With respect to item 2, Mr. Ward requests additional witnesses be summoned who have relevant evidence to offer. It is his position that New Westminster Police Chief Lorne Zapotichny has relevant evidence to provide, as he was briefed on the immediate circumstances of the shooting and, through the media, provided information to the public on how it occurred. According to Mr. Ward, Chief Zapotichny gave an explanation to the media as to why Cst. Sweet was still on active duty at the time of the Tait incident, and is the witness in the best position to explain the NWPS policies with respect to retaining members on active duty after they have committed criminal offences.

With respect to the request to summon Sgt. Denny Crosato, Mr. Ward submits that this officer was the internal investigator who would have the best evidence of Cst. Sweet's prior history of violence as documented in the records requested in 1 c), referred to above.

Mr. Ward submits that George Raitt was the dispatcher who made a number of relevant radio transmissions, including reporting over the radio that the SUV that the NWPS members were pursuing had not been reported stolen. Mr. Ward submits that Mr. Raitt can also offer relevant evidence on radio communications generally.

Mr. Harding:

Mr. Harding submits that the purpose of an inquest is to investigate the circumstances of August 23rd, 2005 which led to the death of Kyle Tait. He submits that Mr. Ward is attempting to detract from this purpose by seeking to focus on the employment history of

Cst. Sweet. He submits that with the exception of the W matter, documents relating to Cst. Sweet's past employment history are not relevant for the purposes of the inquest.

Mr. Harding refers to s. 38 of the *Coroners Act*, submits that it best articulates what the purpose of an inquest is, and that the evidence presented at inquest must be related to one or more of the criteria set out in this section. He notes that the employment history of Cst. Sweet would not assist in establishing answers to who, how, when, where and by what means Mr. Tait came to his death.

Mr. Harding submits that the purpose of the inquest is fact-finding, not fault-finding, and to produce documents related to Cst. Sweet's past employment history would be akin to fault-finding, as opposed to fact-finding.

Mr. Harding submits that the Coroner's authority to inspect, copy, seize, produce or rely upon documents must be guided by s. 38(1) of the *Act*, and that document production should be limited to the confines of the jury's purposes as set out in s. 38(1) and is not so broad as suggested by the Applicant. He rejects the submission that because relevance is not defined in the *Act* that it ought to be more broadly construed in an inquest than in a court of law. Mr. Harding submits that despite relaxed rules of evidence, "relevance" must still be guided in an inquest as per the purpose for the inquest in the first place, that is, to allow the jury to meet its obligations under s. 38(1).

Mr. Harding disagrees with the Applicant's submission that a Peace Officer's employment and disciplinary records are prima facie relevant in a civil proceeding related to an allegation of excessive use of force, and submits that the scope of document production is more limited at an inquest than in a civil proceeding.

He submits that all of the complaints against Cst. Sweet were investigated and that all of them, with the exception of the one involving Mr. W, are irrelevant for the purposes of the inquest. None of these complaints have led to any discipline against Cst. Sweet for excessive use of force.

Mr. Harding also submits that these third party complaints potentially involve significant issues of privacy and that there may be various reasons that the complainants may not want these matters disclosed in a public process. He cites s. 66.1 of the *Police Act* which specifically excludes the application of the *Freedom of Information and Protection of Privacy Act* to Part 9 *Police Act* complaints.

Mr. Harding argues that the overriding reason for NWPS to object to the disclosure of most of these documents is that they add nothing to the substance of the inquest and that they are irrelevant and would not assist the jury with its job under s. 38 of the *Coroners Act*. The disclosure of Cst. Sweet's employment history may instead lead the jury astray and into making a recommendation that is fault-finding.

With respect to the Applicant's request for witnesses, Mr. Harding submits that Chief Zapotichny was not in Vancouver during the Tait incident and that Insp. David Jones was

the Acting Chief. He argues that the Chief will have little to add to the factual details which the Applicant wishes to explore.

Mr. Harding's submissions regarding Sergeant Crosato and George Raitt is that the calling of both of these witnesses would be duplicitous and time-wasting; Insp. Jones can deal with any matters related to the internal investigation and the written transcripts of the NWPS radio communications have been produced for all counsel.

Mr. Butcher:

Mr. Butcher states that his client takes no exception to item 1 e) to i) in the Application. He opposes the production of 1 a) and c) and adopts Mr. Harding's submissions with respect to item 1 b) and item 2, the request for witnesses.

Mr. Butcher submits that the records sought are not relevant to any issue which the jury has to or can decide. He submits that rather it is an attempt by the Applicant to divert the attention of the jury from its true purpose, and to unfairly continue a campaign to vilify Cst. Sweet and to misrepresent his police history in a public forum.

Mr. Butcher cites several sections of the *Act* in his submissions. Section 26 of the *Act* addresses the coroner's discretion in production and release of records and admissibility at inquest. Section 33 provides that the coroner may examine all persons who have knowledge about the death or whom the coroner thinks it advisable to examine. Section 34 provides that the coroner may admit any evidence he or she considers relevant as well as exclude anything that is repetitious, irrelevant or unnecessary. He also cites the case of *Bagnell v. HMTQ*, 2005 BCSC 1328 in which the Court dismissed an application for production of documents and said (para. 33):

Administrative bodies are free to control their own procedures as long as the procedure is consistent with the statute and the principles of natural justice.

Mr. Butcher cites s. 38 of the *Act* which he submits reflects the object and purpose of a Coroner's inquest, and refers me to several cases during his submissions.

Mr. Butcher takes the position that none of the files sought in 1 c) are relevant to the inquest and they should not be disclosed. None, other than the W case, involve a legal finding that Cst. Sweet has used excessive force. He proposes that if the subject matter of the complaints were to become an issue at the inquest, it would be derailed into a series of mini-trials about the appropriateness of the level of force used in each situation. That would be entirely outside the scope of the inquest.

Mr. Butcher submits that a review of the materials establishes that there is no basis to the assertions made by the Applicant that Cst. Sweet has "an apparently lengthy history of violence, emotional problems and criminal conduct while on duty". He submits that there is nothing in the records that could assist the jury in carrying out its task.

Mr. Butcher opposes the request for Cst. Sweet's anger management related records. He states that the inquest is about the death of Kyle Tait, not about Todd Sweet and not about the circumstances of the W incident.

Ruling

The issue before me is one of relevance. The following definition of relevance in the context of a criminal case was accepted as applying to a Coroner's inquest in the case of *Gentles v. Gentles Inquest (Coroner Of)* [1998] O.J. No. 3927 (Div. Ct):

Evidence will be relevant if it has the tendency to make the existence of any fact that is of consequence to the determination of the prosecution more or less probable than it would be without the evidence (at para. 55)

Applying that definition to this case, the question before me is will the requested documents and witnesses make the existence of any fact that is of consequence to the determination of the inquest (keeping in mind the purpose of an inquest, as set out in s. 38), more or less probable than it would be without that evidence?

Put another way, and perhaps more broadly, the question is how will the production of documents and ordering certain witnesses to testify, assist in furthering the purposes of the Inquest?

The following sections of the *Coroners Act* provide guidance and direction with respect to my authority to determine this Application:

Powers of investigation

11 (1) If a coroner has reason to believe that a person died in any of the circumstances described in Part 2, the coroner may do one or more of the following as necessary, in the opinion of the coroner, to investigate the facts and circumstances relating to death:
(f) seize anything that the coroner has reason to believe is relevant to the investigation

Disclosure of records

26 (1) At any time before or during an inquest, a coroner may
(a) determine which records are relevant to and admissible in the inquest, and
(b) in his or her discretion, provide copies of those records to one or more participants

Examination of witnesses

33 (1) The coroner may examine on oath or affirmation all persons
(a) who submit evidence or have knowledge about the facts concerning the death, and
(b) whom the coroner thinks it advisable to examine.

Power to accept information

34 (1) Subject to subsections (3) and (4), a coroner may receive and admit as evidence information that he or she considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law, and may comment on the weight that ought to be given to any particular evidence.

(2) A coroner may exclude anything that, in the opinion of the coroner, is unduly repetitious, irrelevant or unnecessary to the inquest.

(3) Nothing is admissible in evidence at an inquest that would be inadmissible in a court because of any privilege under the law of evidence.

(4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to which or purposes for which any oral testimony, records or things may be admitted or used in evidence.

Jury's verdict

38 (1) After hearing the evidence, the jury must certify in writing, so far it has been proved to them, any findings of fact respecting

(a) who the deceased was,

(b) how, when, where and by what means the deceased died, and

(c) any other matter concerning the deceased that the coroner is required to report under section 17 (2) (f) [*particulars of deaths*] of the *Vital Statistics Act*.

(2) A finding of the jury need not be unanimous, but may be returned by a majority of the jurors.

(3) The jury must not make, and the coroner must not accept, any finding of legal responsibility or express any conclusion of law.

Both the Applicant and the Respondents have cited cases to support their submissions on the issue. While the cases were instructive, they were not determinative of the issue of relevance. I will therefore rely on the authority that is granted to me in the *Coroners Act* and the definition of relevance provided in the *Gentles* case to guide me in my decision.

Section 38 of the Act sets out the purpose of an inquest, which is to examine who, how, where, when and by what means the decedent came to his death. As with any investigation the coroner undertakes in a sudden, unexpected death, careful consideration must be given to whether or not any recommendations can be made that may prevent a death of similar nature from recurring. With respect to an inquest, the jury has the ability to make recommendations to prevent future loss of life under similar circumstances. The recommendations in both of these instances must be reasonable, practical and must not make any findings of legal responsibility or express any conclusion of law.

The focus of this inquest is on the circumstances that led to the death of Kyle Tait on August 23, 2005.

Keeping the above in mind, my ruling on each of the items sought in the Applicant's Motion is as follows:

With respect to 1 a), the request for records relating to anger management counseling or other psychological or psychiatric counseling received by Todd Sweet, this request is denied. Therapeutic or counseling records have been recognized by the Courts as being intensely private and not to be produced in the absence of a specific procedure set out in the case of *R. v. O'Connor* [1995] 4 S.C.R. 411. In any event, these records are irrelevant as there is no evidence that Cst. Sweet discharged his firearm in a state of anger, or that he acted in any way other than in accordance with his training as a police officer on August 23, 2005.

With respect to 1 c), records relating to all complaints or allegations of misconduct in respect of Todd Sweet's conduct prior to August 23rd, 2005, this request is denied. These documents were obtained and reviewed by myself. The allegations contained in these documents were fully investigated and most of these cases received a further review by the Office of the Police Complaints Commissioner. With the exception of the case involving Mr. W, in none of the investigated cases was there any finding that Cst. Sweet used force inappropriately.

An examination of these past incidents will not be permitted. To do so would not assist the jury and furthermore, they are not relevant to the purposes of the inquest. Similarly, this inquest will not be an examination of how NWPS or the OPCC investigate complaints against a police officer. There is no reason to believe that each of these matters was not investigated thoroughly and dealt with appropriately. Beyond the fact that delving into these matters would be well beyond the scope of this inquest which is to examine the circumstances into the shooting death of Kyle Tait, granting this request could open up the jury to making fault-finding recommendations which is not acceptable. These documents are irrelevant for the purposes of the inquest.

Materials pertaining to the W Case are still pending and therefore have not been reviewed by me. Once I have reviewed them, I may decide to produce additional materials to the participants relating to that case.

With respect to 1 d), the brief of materials filed on behalf of Todd Sweet at his sentencing hearing, it is important to note that I do not have this material in my possession, and do not know what is in it. However, the Applicant has failed to convince me that it contains anything of relevance to the purposes of the inquest that would warrant my seeking it out and ordering it produced to all counsel. This part of the Application is denied.

With respect to 1 e) the RCMP Training video entitled "A Dangerous Tactic: Shooting at Vehicles", I have obtained and viewed this video. The video instructs that shooting at a moving vehicle in an attempt to disable it is a dangerous and futile practice. The video instructs that this is only acceptable when a person's life is at risk. Keeping in mind the test of relevance, it may be that this video would be of assistance to the jury with respect to furthering the purposes of the inquest. At this time, I will provide copies of the video for all counsel and I am prepared to hear arguments from counsel with respect to its relevancy and admissibility at inquest.

With respect to 1 h), the Royal Columbian Hospital records relating to the treatment of Ian Campbell's injuries, this part of the request is denied. Medical records are intensely private and require the utmost protection. Mr. Campbell has been subpoenaed as a witness and the Applicant will be able to examine him fully regarding his injuries or any other details surrounding the incident. I have not been convinced that the records contain anything sufficiently probative to warrant overriding the presumed invasion of Mr. Campbell's privacy that would be occasioned by providing this confidential medical information to the participants.

With respect to the question of summoning further witnesses, I deny this portion of the Application as well. How the previous complaints involving Cst. Sweet were investigated is not relevant; therefore, retired NWPS internal investigator Sergeant Crosato has no relevant evidence to provide to the jury. An audio recording of the 911 calls will be produced to all participants to accompany the transcript already in their possession. Therefore, evidence from the dispatcher George Raitt will not be required as there is no evidence that issues with the radio system or radio transmissions played any role in the death of Kyle Tait. Should an issue arise during the inquest about the accuracy of the radio transmissions or the transcript, then the issue of calling witnesses to clearing up this issue can be addressed at that time.

With respect to Chief Zapotichny, we are advised that Insp. Jones was the acting Police Chief at the relevant time. Insp. Jones will testify at the inquest about NWPS practice and policy issues, including, why Cst. Sweet was on duty on August 23rd following a serious incident 2 months prior. If after Insp. Jones testifies I am not satisfied with the evidence obtained, I will consider counsel's request to call Chief Zapotichny.

Disposition

I rule that the items mentioned at the outset as well as item 1 e) are potentially relevant and therefore producible to the participants. The remainder of the items on the Application are dismissed.

Dated at Burnaby, this 28th day of April, 2008.



Liana Wright
Presiding Coroner