# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Aitken v. Minister of Public Safety,* 2013 BCCA 291

Date: 20130619
Docket: CA039794

Between:

**Steven Aitken**
Respondent

(Plaintiff)

And:

**Minister of Public Safety and Solicitor General**

Appellant
(Defendant)

And:

**William Jeffrey Bethell, deceased**

Respondent
(Defendant)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Garson
The Honourable Mr. Justice Harris

On appeal from: The Supreme Court of British Columbia, February 22, 2012, (*Aitken v. Bethell*, 2012 BCSC 260, Nanaimo No. M48385)

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| Counsel for the Appellant: | D.C. Prowse, Q.C.<br>M.N. Weintraub |
| Counsel for the Respondent Aitken: | J.J. Murphy |
| Counsel for the Respondent Bethell: | G. Ritchey |
| Place and Date of Hearing: | Vancouver, British Columbia<br>April 4, 2013 |
| Written Submissions Received: | Vancouver, British Columbia<br>April 17, 23 and 24, 2013 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>June 19, 2013 |

**Written Reasons by:**
The Honourable Mr. Justice Groberman

**Concurred in by:**
The Honourable Madam Justice Garson
The Honourable Mr. Justice Harris

**Reasons for Judgment of the Honourable Mr. Justice Groberman:**

[1] The plaintiff was seriously injured while at work when the vehicle in which he was seated was hit by another vehicle. He alleges that the collision was caused, in part, by the RCMP, who were pursuing the vehicle that caused the collision. In this action, the plaintiff includes claims against the Minister of Public Safety and Solicitor General (the "Minister"). He sues under s. 11 of the *Police Act*, R.S.B.C. 1996, c. 367, which makes the Minister vicariously liable for the torts of provincial constables performing their duties. He also makes a direct claim against the Minister, contending that the Minister failed to formulate and implement a reasonable policy for police pursuits.

[2] The issue on this appeal is whether a provision of the *Workers Compensation Act*, R.S.B.C. 1996, c. 492 that bars actions by workers against employers applies to an action brought against the Minister in these circumstances.

## Factual Background

[3] In the early afternoon of November 8, 2004, William Bethell abducted his daughter from her school in Nanaimo. There was considerable concern that he might seriously harm or kill her, and the RCMP were dispatched to the school to intercept him. Unfortunately, when the police arrived, Mr. Bethell was in the process of placing his daughter in his van. The police attempted to block the van's exit from the parking lot, but Mr. Bethell evaded them by ramming another vehicle. The police pursued Mr. Bethell down Jingle Pot Road.

[4] Mr. Aitken was working as a landscaper that day, and was eating his lunch in a truck belonging to his employer that was parked on the side of the road near the intersection of Jingle Pot Road and East Wellington Road. A violent head-on collision occurred between Mr. Bethell's van and another vehicle, and one or both of the vehicles then struck the truck in which Mr. Aitken was sitting. Mr. Aitken was seriously injured.

[5] Mr. Aitken brought this action against Mr. Bethell's estate (Mr. Bethell was killed in the accident), two RCMP officers, a Nanaimo police dispatcher, and the Minister.

**The *Workers Compensation Act***

[6] Part 1 of the *Workers Compensation Act* establishes a comprehensive system of compensation for workers injured in the course of their employment. As part of the scheme, s. 10(1) provides that the compensation regime replaces the right of a worker to sue an employer or another worker, and bars actions by workers against such persons. Section 10(2) preserves the right of a worker to sue other persons in respect of injuries:

> 10(1) The provisions of this Part are in lieu of any right and rights of action, statutory or otherwise, founded on a breach of duty of care or any other cause of action, whether that duty or cause of action is imposed by or arises by reason of law or contract, express or implied, to which a worker, dependant or member of the family of the worker is or may be entitled against the employer of the worker, or against any employer within the scope of this Part, or against any worker, in respect of any personal injury, disablement or death arising out of and in the course of employment and no action in respect of it lies. This provision applies only when the action or conduct of the employer, the employer's servant or agent, or the worker, which caused the breach of duty arose out of and in the course of employment within the scope of this Part.
>
> (2) Where the cause of the injury, disablement or death of a worker is such that an action lies against some person, other than an employer or worker within the scope of this Part, the worker or dependant may claim compensation or may bring an action. If the worker or dependant elects to claim compensation, he or she must do so within 3 months of the occurrence of the injury or any longer period that the Board allows.

[7] Where a party alleges that s. 10(1) bars an action, questions may be referred to the Workers' Compensation Appeal Tribunal (the "WCAT") under s. 257 of the *Act*:

> 257(1) Where an action is commenced based on
>
> …
>
> (b) a personal injury ….
>
> the court or a party to the action may request the appeal tribunal to make a determination under subsection (2) and to certify that determination to the court.

> (2) For the purposes of subsection (1), the appeal tribunal may determine any matter that is relevant to the action and within the Board's jurisdiction under this Act, including determining whether
>
> (a) a person was, at the time the cause of action arose, a worker,
>
> (b) the injury, disability or death of a worker arose out of, and in the course of, the worker's employment,
>
> …, or
>
> (d) an employer was, at the time the cause of action arose, engaged in an industry within the meaning of Part 1.

[8] Sections 254 and 255 of the *Act* are privative provisions that make the determinations of the WCAT final:

> 254 The appeal tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined under this Part and to make any order permitted to be made, including the following:
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> …
>
> (c) all matters that the appeal tribunal is requested to determine under section 257;
>
> …
>
> 255(1) Any decision or action of the chair or the appeal tribunal under this Part is final and conclusive and is not open to question or review in any court.
>
> (2) Proceedings by or before the chair or appeal tribunal under this Part must not
>
> (a) be restrained by injunction, prohibition or other process or proceeding in any court, or
>
> (b) be removed by certiorari or otherwise into any court.

[9] In this case, counsel for the plaintiff applied to the WCAT to make the determinations. A vice-chair of the WCAT heard the matter, and certified that:

> 1. The Plaintiff, STEVEN AITKEN, was a worker within the meaning of Part 1 of the *Workers Compensation Act*.
> 2. The injuries suffered by the Plaintiff, STEVEN AITKEN, arose out of and in the course of his employment within the scope of Part 1 of the *Workers Compensation Act*.
> 3. [Mr. Aitken's employer] was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
> 4. The [dispatcher] was a worker within the meaning of Part 1 of the *Workers Compensation Act*.

> 5. Any action or conduct of the [dispatcher], which caused, the alleged breach of duty of care, arose out of and in the course of her employment within the scope of Part 1 of the *Workers Compensation Act.*
> 6. The CITY OF NANAIMO was an employer engaged in an Industry within the meaning of Part 1 of the *Workers Compensation Act*.
> 7. The Defendant, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, was not an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
> 8. The GOVERNMENT OF BRITISH COLUMBIA was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*.
> 9. Any action or conduct of the GOVERNMENT OF BRITISH COLUMBIA, or its servant or agent, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the *Workers Compensation Act*.

[10] As a result of these findings, the parties filed a consent dismissal order in respect of the claims against the dispatcher.

**The *Police Act***

[11] The plaintiff also acknowledged that s. 21 of the *Police Act* applied to the claims against the two RCMP officers:

> 21(2) No action for damages lies against a police officer … for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.

[12] An application by the two officers seeking dismissal of the claim against them was, in the result, unopposed. The chambers judge granted an order dismissing the action as against the officers. The judge found, as well, that only one of the officers had been in any way involved in the events of November 8, 2004, and he dismissed the claim against the Minister insofar as it related to the other officer.

[13] The only subsisting claims in the action, then, are those against Mr. Bethell's estate and those that remain against the Minister.

[14] The remaining claims against the Minister are brought on two bases. First, it is contended that, under s. 11 of the *Police Act*, the Minister is vicariously liable for the torts of the RCMP officer who was involved in the pursuit:

> 11(1) The minister, on behalf of the government, is jointly and severally liable for torts committed by
>
> > (a) provincial constables … if the tort is committed in the performance of their duties ….

[15] Mr. Aitken also claims that the Minister is independently liable for the accident on the basis that the provincial policy on police pursuits was improper. While that claim has not been abandoned, counsel for Mr. Aitken advised the Court that it is not the major focus of the action. The argument, accordingly, has concentrated on the claim under s. 11 of the *Police Act*.

## The Judgment Below

[16] An application was made to have the claims against the Minister dismissed on the basis that s. 10(1) of the *Workers Compensation Act* was applicable. The Minister described the issue as being, "whether the statutory bar precludes a claim against the Minister." The judge, however, considered that to be, "too generalized" a description of the issue, and instead, at para. 44 of his decision, framed the issue by posing three questions:

> a) Has the question of whether the Minister is an employer within the meaning of s. 10(1) of the *Workers Compensation Act* been conclusively determined against the Minister by WCAT?
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> b) If not, then does the court have jurisdiction to determine whether the Minister is an employer for the purpose of s. 10(1) of the Act on a ground not decided by WCAT, or is that question within the exclusive jurisdiction of WCAT?
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> c) If the court has jurisdiction to decide the issue, then is the Minister an employer for the purpose of s. 10(1) of the Act, by reason of his powers and duties under the *Police Act*, and by reason of him (or the "office" of the Minister) being the designate or the agent of the government?

[17] Not surprisingly, in view of the privative provisions in the *Workers Compensation Act*, the judge found that the WCAT had conclusively determined that

the Minister was not an employer within the meaning of s. 10(1) of the *Workers Compensation Act*. He went on to hold that that finding was decisive:

> [52] The logical effect of WCAT's finding on the plaintiff's action is that his action against the Minister is not barred by s. 10(1) of the Act.
>
> [53] My conclusion on the first issue is that the court would be entrenching on the exclusive jurisdiction of WCAT if it embarked on an inquiry to determine whether the Minister had a status that WCAT has decided he did not have. Because the certificate has been filed, such an inquiry would also infringe the rule against entertaining an appeal from a judgment of this court.

[18] The judge found, further, that because the Minister, and not the Crown, was the appropriate defendant under s. 11 of the *Police Act*, the bar could not apply:

> [81] If the plaintiff had sued the Government of British Columbia (which would have to be named as "Her Majesty the Queen in Right of the Province of British Columbia": s. 7 of the *Crown Proceedings Act*), the finding of WCAT that the government was an employer within the meaning of the *Workers Compensation Act* could have the legal effect of entitling the government to the statutory bar in s. 10 of the Act (but only if the conduct of the government, or its servant or agent, was a cause of the injury, and that conduct "arose out of and in the course of employment"). But the plaintiff has not sued the government, nor could he have sued the government, in my opinion. I am not persuaded that the Minister should be accorded the status of an employer for the purpose of s. 10(1) of the Act, simply because the government is an employer and because the Minister is the designate, or is the agent of, the government for the purposes of the *Police Act*.

**Was the Issue Determined by the WCAT?**

[19] I am of the view that the judge erred in finding that the WCAT had effectively decided the issue of whether s. 10(1) of the *Workers Compensation Act* bars the action. While the WCAT had determined that the Minister was not *per se* an employer under the *Act*, it had not gone so far as to determine that the statutory bar was inapplicable. It rightly left that determination to the courts.

[20] In *Hunt v. T & N, plc* (1994), 96 B.C.L.R. (2d) 300 (B.C.S.C.), Thackray J. (as he then was), discussed the relationship between the jurisdiction of the Workers' Compensation Board and that of the courts in determining whether the statutory bar is applicable. He said:

> [11] The foundation upon which the statutory bar determination rests is within the exclusive jurisdiction of the Board. Section 96 [a provision

> corresponding to the current s. 254] provides that it is within the exclusive jurisdiction of the Board to determine whether persons are workers or employers within Pt. 1 of the *Act*.
>
> [12] If at trial these matters, and others within s. 96, need to be determined then the court would have no alternative but to request such a determination by the Board. The Board is then required by s. 11 [a provision corresponding to the current s. 257] to make the determination and pursuant to s. 96 it is *only* the Board that may make this determination.
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> …
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> [17] There may be cases where the court's function of answering the ultimate issue of a statute bar will require findings beyond those matters over which the Board has exclusive jurisdiction …. [W]here the issue, as here, is based solely on a determination of the employer/employee relationship, this court's function will be limited to pronouncing the legal result of the Board's determination.



[21] There have been changes to the administrative structure of the Workers' Compensation Board and related tribunals since *Hunt* such that the former jurisdiction of the Board to make certain determinations is now vested in the WCAT. The WCAT, in making its determinations in this case, was conscious of the limits of its jurisdiction. At p. 27 of its decision (WCAT-2008-01834), it said:

> Counsel for the Minister does not argue that the Minister is an employer (or a worker), in his own right. Rather, the argument is that the Government is an employer. Accordingly, the Minister should similarly be accorded the status of an employer, so that the Minister can claim the protection of the section 10 bar to a legal action. It seems to me that the submissions of counsel for the Minister are concerned with the effect of the WCAT certification for the legal action, rather than being restricted to questions as to the status of the parties.… I consider that WCAT must be mindful of the limits of its jurisdiction under the Act, and to refrain from addressing questions which may be reserved to the courts.

[22] After finding that the Minister was not an employer and that the government of British Columbia was an employer under the *Act*, the WCAT continued at p. 28:

> I would comment, by way of *obiter dicta* which is not necessary to my decision, that it appears that the thrust of the argument by counsel for the Minister is that the Minister should be equated with the Government. It appears to me that such an argument is more properly considered by the court than by WCAT, given the limitations on WCAT's jurisdiction. I appreciate that an ambiguity arises in relation to the finding that any action or conduct of the Government, or its servant or agent, which caused the alleged breach of duty of care, arose out of and in the course of employment within the scope of Part 1 of the Act. Obviously, this finding can only refer to action

> or conduct of the employer, or a worker, in connection with a relationship of employment within the scope of Part 1 of the Act, and the Minister is neither a worker nor an employer in his own right. In relation to the question as to the role of the Minister as a putative agent of the Government, this would appear to get back to the question as to whether the Minister should be equated with the Government for the purpose of considering the effect of the section 10 bar to a legal action. It seems to me that this issue is one which would be within the jurisdiction of the court to address.

[23] The tribunal, then, was careful to emphasize that its determination that the Minister was not an employer was not intended to amount to a finding that the statutory bar was inapplicable. It expressly recognized that that was a question for the court.

**Interpreting s. 11 of the *Police Act***

[24] In my opinion, the judge erred in finding that because the Minister is the named defendant in this action, and because the Minister is not, *per se*, an employer under the *Act*, the statutory bar is inapplicable.

[25] When a claim is brought under s. 11 of the *Police Act*, the Minister is named "on behalf of the government". The Minister is a mere nominal defendant; the claim is one that is brought against the government of British Columbia.

[26] The naming of the Minister as a defendant is a statutorily-mandated anachronism. In order to explain the language of s. 11, it is necessary to trace the history of police liability in tort, and the history of the *Police Act*.

[27] It is well-established that police officers must, in the execution of their duties, have a high degree of independence from government. That independence was seen as a reason not to impose vicariously liability for their torts on the municipalities that employed them: *Fisher v. Oldham*, [1930] 2 K.B. 364. While police officers were seen as acting directly on behalf of the Crown, courts were also reluctant to treat them as mere employees of the Crown – see, for example, *A.G. for New South Wales v. Perpetual Insurance Trustee Co. Ltd.*, [1955] A.C. 457 and *Friedmann v. A.G.B.C.* (1985), 64 B.C.L.R. 335.

[28] Absent statutory reform, a person who was injured by the tort of a police officer could sue only the officer. No entity was subject to vicarious liability for those torts. By 1964, the law had been modified in England, with s. 48 of the *Police Act 1964* (c. 48) making the chief constable of a police force vicariously liable for the torts of officers acting in the performance or purported performance of their functions. Reform came later in Canada, though it was widely seen as necessary: see, for example, Lorne Giroux, "Municipal Liability for Police Torts in the Province of Quebec" (1970) 11:3 Les Cahiers de droit, 407.

[29] The predecessor of s. 11 of the B.C. *Police Act* was first enacted as s. 53 of the *Police Act*, S.B.C. 1974, c. 64 (the "1974 *Police Act*"). It was in virtually the same terms as the current provision. Another provision of that statute made municipalities jointly and severally liable for the torts of municipal police officers.

[30] It would have been cumbersome, when the 1974 *Police Act* was passed, to make the government of British Columbia vicariously liable for the torts of provincial police officers. At that time, the *Crown Procedure Act*, R.S.B.C. 1960, c. 89 governed lawsuits against the Crown. A person who wished to sue the Crown was required to first obtain the Crown's permission to do so, by seeking a fiat. The practice was that fiats would be denied in tort cases (see Law Reform Commission of B.C. Working Paper No. 7 – "Legal Position of the Crown", 1972).

[31] While the *Crown Proceedings Act*, S.B.C. 1974, c. 24, enacted in the same legislative session as the 1974 *Police Act*, reformed the procedure for claims against the Crown and opened the way for the making of tort claims, it was not retroactive. Section 16(2) of the *Crown Proceedings Act* provided that, for claims that arose before it came into force, the *Crown Procedure Act* continued to apply (see *Arishenkoff v. British Columbia*, 2005 BCCA 481 for a discussion of issues relating to the transition between the two regimes).

[32] While s. 53 of the 1974 *Police Act* was not, as it turned out, brought into force until April 30, 1975, some months after the *Crown Proceedings Act*, it appears that the intention was for the vicarious liability provisions of the *Police Act* to have effect

for torts committed after July 1, 1974 (see s. 57 of the 1974 *Police Act*), a date one month prior to the coming into force of the *Crown Proceedings Act*.

[33] The mechanism for making a claim against the Crown in s. 53 of the *Police Act* – that of naming the Minister "on behalf of the Crown in right of the Province" – appears to have been designed to avoid the difficulties in making tort claims directly against the Crown. By making the Minister the nominal defendant "on behalf of the Crown", the statute avoided the difficulties and uncertainties of the *Crown Procedure Act*. That mechanism has long outlived its usefulness. There is, now, no difficulty in bringing an action directly against the Crown. Requiring the Minister to be named as a defendant has led to significant confusion (see, for example, *Hill v. Hurst*, 2001 BCSC 1191 and *Sulz v. British Columbia (Minister of Public Safety and Solicitor General)*, 2006 BCCA 582).

[34] It is unfortunate that s. 11 of the *Police Act* has not undergone modification since its original enactment. The requirement of the statute that a claim be brought against the Minister on behalf of the Crown, rather than against the Crown directly, no longer has a rationale. The section is also confusing in that it describes the Minister as being "jointly and severally" liable for the torts of provincial constables. While that language was accurate when it was included in the 1974 *Police Act*, it ceased to be accurate when the statute was repealed and replaced by the *Police Act*, S.B.C. 1988, c. 53. The 1988 statute included a provision absolving constables from personal liability for torts committed in the purported performance of their duties. Thus, there is generally no one with whom the Crown can be said to be "jointly and severally liable".

[35] While the language of a statute is, of course, a matter for the legislature, I would respectfully suggest that s. 11 ought to be reviewed with a view to eliminating the anachronisms that pervade the section.

[36] The issue before us – that of whether s. 10(1) of the *Workers Compensation Act* bars the action against the Minister – turns on the identity of the true defendant in the action. In my view, the statute's interposition of the Minister as a nominal

defendant does not alter the fundamental nature of the claim – it is the Crown that is vicariously liable for the torts of members of the provincial police force. As the Crown is an "employer", s. 10(1) serves to bar an action under s. 11 of the *Police Act* where the injured party is a worker.

[37] The certified findings of the WCAT establish the facts necessary for the Court to determine that the claim under s. 11 is barred by s. 10(1) of the *Workers Compensation Act*: The plaintiff was a worker under Part 1 of the *Workers Compensation Act*; his injuries arose out of and in the course of his employment; the Crown was an employer engaged in an industry within the meaning of Part 1 of the *Workers Compensation Act*; and any conduct of the Crown or the RCMP constable (the Crown's agent), which caused the alleged breach of duty of care arose out of and in the course of employment.



**The 'Direct' Claim Against the Minister**

[38] The only remaining question on this appeal is whether the statutory bar applies, as well, to Mr. Aitken's claim that the Minister is responsible for failing to formulate and implement a reasonable policy for police pursuits. As I have indicated, this direct claim has, to date, not been the primary focus of the litigation.

[39] It does not appear to me that the claim is one that can be properly pursued against the Minister. Any responsibility that the Minister may have is a responsibility arising in the Minister's official capacity, and is a responsibility owed to the Crown in right of the Province. If the plaintiff has a cause of action against a person for negligent policy-formulation and implementation (an issue on which I express no opinion), the claim must be one against the Crown rather than against the Minister. The statutory bar would apply to such a claim.

**Section 11 of the *Crown Proceeding Act***

[40] While the parties have not specifically referred to s. 11 of the *Crown Proceeding Act*, R.S.B.C. 1996, c. 89 in their arguments, it may provide an

alternative basis for applying s. 10(1) of the *Workers Compensation Act* to this claim. The *Act* provides:

> 1. In this Act:
>
> …
>
> "officer of the government" includes a minister of the government and an employee of the government;
>
> …
>
> 11(4) In a proceeding, the court
>
> (a) must not … make an order against an officer of the government if the effect of … making the order would be to give relief against the government that could not have been obtained in proceedings against the government ….

[41] As the parties have not addressed this provision, however, I prefer not to rest my decision on this alternative basis.

## Disposition

[42] I would allow the appeal and declare that s. 10(1) of the *Workers Compensation Act* bars the action as against the Minister. I would, in the result, also dismiss the action as against the Minister.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Mr. Justice Harris"