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LITIGATION NOTES

Legal Decisions and Developments in Canada

Volume 9, Issue 1 — January 2014

Researcher-Participant Privilege Recognized

The Superior Court of the Province of Quebec recognizes the right of academic researchers to protect the confidentiality of participants in their research projects.

The Superior Court for the Province of Quebec recently accepted a claim for privilege which has never before been recognized in Canadian law. The privilege in question is the researcher-participant confidentiality privilege.

Dr. Colette Parent and Dr. Christine Bruckert are distinguished professors of Criminology at the University of Ottawa. Dr. Parent's research is in the area of feminism and criminology, violence against wives, sex work, feminist theory and alternatives to the penal system. Dr. Bruckert's research is in the area of sex work, erotic dance, release and reintegration of prisoners and criminological theory.

In 2007, Drs. Parent and Bruckert conducted a Research Project studying sex work from the perspective of the sociology of work. The Research Project involved interviewing 20 female escorts, 20 male escorts and 20 of their clients in Toronto, Ottawa and Montreal. The interviews were conducted on the basis that the participants would remain anonymous and that the content of the interviews would remain strictly confidential.

One of the participants was a male escort named Jimmy, who was interviewed by one of Dr. Bruckert's research assistants, Adam McLeod. McLeod had been thoroughly trained on the research protocol and on the critical importance of the promise of anonymity and confidentiality. The audio recording and paper transcript of the interview were in the possession of Dr. Bruckert.

In June 2012, Luka Magnotta was arrested for the murder of a young man, which had occurred the previous month. The circumstances of the murder were sufficiently gruesome to call into question Magnotta's sanity. Following the murder and prior to his arrest, Magnotta's name and photograph were circulated. On May 31, 2012, Adam McLeod, unbeknownst to Parent or Bruckert, notified the Montreal police service that Jimmy was in fact Magnotta and informed them about the existence of the interview materials. The Montreal police executed a search warrant and seized the tape and transcript from Dr. Bruckert. Drs. Bruckert and Parent ("The Petitioners") brought a certiorari application to quash the search warrant on the basis that the tape and transcript were protected by researcher-participant confidentiality privilege.

There are three kinds of privilege recognized in Canadian law, being constitutional privilege, class privilege and case-by-case privilege. Constitutional privilege was not claimed in this case. Examples of class privilege are solicitor-client privilege or police-informer privilege. The essence of a class privilege is that it is not the content of the communication that is being protected, but the type of relationship.

In this case, the Court observed that the Supreme Court of Canada has already rejected a journalistic-confidential source class privilege in the case of *R. vs. National Post*. However, the common law permits new privileges to be created "in new situations where reason, experience and application of the principles underlying the traditional privilege so dictate". The principles applicable to a claim for privilege are well recognized and derive from Wigmore's text on *Evidence in Trials at Common Law*. The Wigmore principles are:

1. The communications must originate in a confidence that they will not be disclosed.

2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

3. The relation must be one which in the opinion of the community ought to be sedulously fostered.

4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit gained for the correct disposal of litigation.

The Court went on to consider the applicability of the four Wigmore criteria to this case.

First Criterion: The communications must originate in a confidence that they will not be disclosed

It was clear that the communications originated in confidence and that the identity of the participants and the contents of the interview would not be disclosed. The Respond-

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ent Crown argued that McLeod did not feel bound by the promise of confidentiality because he had communicated Jimmy's identity and the existence of the material to the Montreal police. Also, the Crown argued, Jimmy had communicated his true identity to McLeod in email exchanges following the interviews and could therefore have had no expectation that confidentiality would be preserved. The Court was not persuaded. First of all, McLeod did not testify at the hearing of the application. The Court found that confidentiality was necessary to protect Jimmy's identity and to ensure that he would not suffer prejudice from his participation in the Research Project. McLeod could not unilaterally revoke the promise of confidentiality.

Second Criterion: This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties

The Court was satisfied that this criterion was met. The Research Project could not have been carried out without a promise of confidentiality. Sex workers are difficult to reach and recruit and "due to the risk of harm they face,…are reluctant to provide information about themselves, being a vulnerable population that works in a clandestine and stigmatized sector".

Based on their experience, the Petitioners cited a number of risks of harm that sex workers would face if their identities became public:

a) exposing participants to risk of legal harm, such as Criminal Code charges or seizure of one's children;

b) exposing participants to risk of personal harm (discrimination, ostracism) by possibly endangering their relationship with family members, neighbors, service providers, employers, landlords, etc.;

c) exposing participants to safety hazard, especially if their names and personal information are disclosed to their clients;

d) exposing participants to financial risk or risk of not being able to continue to work as a sex worker, should their relationships with their clients, which forms the basis of their livelihood, dissolve, as discretion is the very foundation of the participants' work, and participating in interviews risks identifying clients;

e) exposing participants to risk of exclusion from the sex worker community for their failure to uphold the professional code of conduct, as participating in interviews often results in sharing information about other members of the industry; and

f) exposing male escorts to the risk of additional stigmatization based on homophobia.

Third Criterion: The relation must be one which in the opinion of the community ought to be sedulously fostered

An analysis of this criterion does not involve an evaluation of the content of the communication, which becomes relevant in analyzing the fourth criterion. At this stage it is the nature of the relationship in general which is considered. The Court found that confidentiality between researchers and their subjects should be protected. The Court stated that "academic freedom and the importance of institutions of higher learning and academic research are key components of a democracy that values freedom of thought and expression. Academic research would be seriously affected if confidentiality could not be promised. Research involving human subjects in the health and social sciences involves participants disclosing information that could cause serious harm or embarrassment, particularly when it involves vulnerable or marginalized communities."

Fourth Criterion: The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit gained for the correct disposal of litigation

This criterion "requires the weighing of the protection of the relationship in question with any countervailing public interest such as national security, public safety, or investigation of a particular crime. The balancing exercise relies on 'common sense and good judgment'. Elements to be considered at this stage include the probative value of the evidence sought to be obtained and the nature and seriousness of the alleged wrong-doing, measured against the public interest in respecting the promise of confidentiality established at the third criterion".

In this case the tapes and transcripts did not contain evidence of the crime with which Magnotta was charged. The interview materials pre-dated his offence by some five years. The Crown argued, however, that material on the tapes might be relevant with respect to a plea of not criminally responsible (NCR).

The Petitioners called the evidence of Dr. Scott Woodside, an eminent forensic psychiatrist, who indicated that the determination of a NCR defence requires the assessment of four specific elements:

1. the presence or absence of the diagnosis of a mental disorder in the individual;

2. the determination of the mental state of the individual at the time the alleged crime was committed (material time), or whether the presence or absence of a mental disorder led to the individual experiencing any psychiatric symptoms at material time;

3. the impact of the symptoms of the mental disorder on the individual's ability at the material time to appreciate the nature and quality of the acts or omissions that constituted the alleged crimes; and

4. the impact of the symptoms of the mental disorder on the individual's ability at material time to know the wrongfulness of the acts or omissions that constituted the alleged crimes.

Dr. Woodside's evidence was that the interview materials would be of no use in determining elements 2, 3 and 4 above, since they relate to the impact of the mental disorder at the time of the commission of the offence. The Court found that there may potentially be some information which would impact on element 1 and as a result chose to review the material. Having done so, the Court found that there was nothing in the material which was relevant to the determination of the NCR defence and that "this is a conclusion that can be made even by someone without any medical or psychiatric training".

In balancing the public interest in the suppression of crime as against the public interest in the promise of confidentiality, the Court found that the latter should prevail in this case. Nothing in the interview material would have any impact on Magnotta's defence and indeed much of the material was probably available through other sources. Consequently, the search warrant was quashed.

Parent vs. R., 2014 QCCS 132 (CanLII)

Good Faith in Space and Time

The Court of Appeal for Ontario allows a bad faith claim to proceed despite a number of serious obstacles.

In the September, 2012 edition of Litigation Notes, we reported on the case of *Ernst & Young Inc. v. Chartis Insurance Company of Canada*. It is a strange case which has gone on for more than 20 years in two jurisdictions.

International Warranty Company Limited ("International Warranty") was a company that sold extended warranties to car buyers. Premiums paid by car buyers were held in trust and withdrawn as needed to satisfy warranty claims. Central Guaranty Trust Company ("Central Guaranty") was the trustee.

In 1987, International Warranty was placed in receivership and Ernst & Young Inc. ("Ernst & Young") was named as receiver. At the time, there was not enough money held in trust to satisfy International Warranty's obligations.

In 1992, Ernst & Young sued Central Guaranty in Alberta. Shortly after the action was commenced, Central Guaranty went into liquidation and the action was stayed.

In 1993, Ernst & Young applied to an Ontario Court to have the stay lifted. Justice Houlden lifted the stay and said that the liquidator of Central Guaranty was not required to defend the action in Alberta but that Chartis Insurance Company of Canada (formerly AIG), as a liability insurer of Central Guaranty, could defend the action. Justice Houlden also said that "any proceeds from insurance coverage arising out of a judgment or a settlement of the [Alberta] Action belonged to [Ernst & Young] and are free from any claims by the Provisional Liquidator [of Central Guaranty]".

Chartis defended the Alberta action and in first instance the claim was dismissed on the basis that the trusts were invalid. This decision was set aside by the Court of Appeal and a new trial was ordered. At the second trial, judgment was rendered in favour of Ernst & Young for an amount in excess of $3 million, which with pre-judgment interest and costs amounted to over $10 million.

Chartis refused to pay the judgment on the basis that the claim was excluded by the terms of the policy. Ernst & Young brought a motion for summary judgment, which is the decision that was discussed in the September, 2012 Litigation Notes.

One of the hurdles facing Ernst & Young was the decision of the Ontario Court of Appeal in *Perry v. General Security Insurance Co. of Canada*. Ernst & Young's action would normally be based on section 132(1) of the *Insurance Act of Ontario* which provides that where a person incurs a liability for "injury or damage to the person or property" of another, and is insured for that liability, the judgment creditor has a direct cause of action against the person's insurer, "subject to the same equities as the insurer would have if the judgment had been satisfied". However, the *Perry* decision established that section 132(1) does not permit a direct cause of action against an insurer under a policy of lawyers' professional indemnity insurance and the case has been interpreted to mean that the section does not apply to any claim for economic loss unrelated to loss or damage to persons or property.

The motion judge got around this problem by concluding that Ernst & Young did not need to rely on section 132(1) because the right to receive an indemnity under an insurance policy is a *chose in action*, capable of being assigned. Justice Houlden's order had the effect of assigning the right to receive an indemnity under the Central Guaranty policy from Central Guaranty to Ernst & Young. However, the motions Judge also found that the dishonesty exclusion in the policy applied and that there was no coverage available.

Ernst & Young appealed to the Court of Appeal for Ontario. Ernst & Young argued that the motion judge had erred in relying on findings made in the Alberta action to determine that the claim was excluded from coverage. In that action Chartis had admitted that it was denying coverage based on fraud and Ernst & Young therefore argued that it could not rely on other grounds for exclusion, such as dishonesty, criminal and malicious acts or omissions, conflict of interest, acting in bad faith, etc..

Ernst & Young also argued that Chartis could not rely on findings in an action in which it allegedly breached its duties to the insured and "steered" the defence in order to avoid coverage.

The Court of Appeal found that the motion judge was entitled to rely on all aspects of the exclusions. There had been evidence in the Alberta action sufficient to establish a dishonest breach of trust by Central Guaranty. Issue estoppel applied and the issues could not be re-litigated in the summary judgment motion. Consequently, the dishonesty exclusion applied and there was no coverage available under the policy.

The Court then went on to consider whether Chartis had breached its duty of good faith by steering the defence to avoid coverage. Chartis conceded that it owed a duty of good faith to its insured (Central Guaranty) but not to Ernst & Young. Any claim for bad faith was vested in the liquidator of Central Guaranty, which could have exercised it at any time between 1993 and 2010. Ernst & Young might have purchased that right, but it did not.

Chartis also submitted that Justice Houlden's order did not have the effect of vesting the cause of action in Ernst & Young. The Court of Appeal agreed. The Court said that the term "proceeds from insurance coverage" used by Justice Houlden referred to a particular type of assignment, which is to be distinguished from an assignment of the insurance contract itself:

"Because 'proceeds payable' under an insurance policy are distinct from a cause of action for breach of duty of good faith, assignment of the 'proceeds of insurance' does not, in my view, include damages for breach of the independent contractual duty of good faith owed to an insured. Accordingly, [Ernst & Young] did not obtain a cause of action for any breach of the duty of good faith Chartis owed to [Central Guaranty]."

However the Court went on to say that this did not mean that Chartis was entitled to "flaunt the purpose of the Houlden Order" or to steer the defence of the Alberta action in a manner designed to avoid its insurance obligations:

"If there is any evidence that Chartis intentionally misled the court or subverted the course of justice, there are remedies available, subject to any defences Chartis may have, including potential limitation defences. It is open to [Ernst & Young] to move for appropriate relief, including perhaps the variation of the Houlden Order to include an assignment of [Central Guaranty's] cause of action for a breach of the duty of good faith. Alternatively, [Ernst & Young] might have a claim for abuse of process on the basis of a collateral attack on a Court Order…Abuses of the Court's process are actionable in tort….In addition, although perhaps not available in these circumstances, an action for civil contempt might be available for the strict terms of the Court Order."

Ernst & Young Inc. v. Chartis Insurance Company of Canada (AIG Commercial Insurance Company of Canada), 2014

Criteria for Suspending an Absolute discharge

In Canada, when an offender is found not criminally responsible of an offence by reason of mental disorder, he becomes subject to the jurisdiction of a provincial review board. In Ontario, it is known as the Ontario Review Board. The Board holds a hearing annually to determine if the accused continues to represent a significant threat to the safety of the public. If the significant threat threshold is met, the accused continues to be detained in hospital or may be discharged subject to conditions. If he does not continue to represent a significant threat, he must be absolutely discharged.

Any party may appeal a Board's disposition and section 672.75 of the *Criminal Code* provides that an appeal filed against an absolute discharge suspends the application of the absolute discharge pending the determination of the appeal.

In the case of *R. v. Kobzar*, the Court of Appeal of Ontario ruled that the automatic suspension provision of article 672.75 offended sections 7 and 9 of the Charter and were not saved by section 1. Although the declaration of invalidity was suspended until March 31, 2014, the Court ordered that when an appeal is brought in the interim, the appellant should seek leave to suspend the disposition pending appeal.

In this case, the Court had the first opportunity to consider the conditions which should apply to such a leave application.

The accused, Mr. Furlan, was granted an absolute discharge by the Ontario Review Board in April, 2013. Unfortunately, he immediately resumed his use of cocaine and cannabis and became increasingly psychotic, hostile, aggressive and destructive. He was eventually taken into custody by police and delivered to hospital pursuant to the provisions of the *Mental Health Act*. He was eventually returned to the Centre for Addiction and Mental Health (CAMH) where he had previously been detained.

CAMH served him with a Notice of Appeal seeking to set aside the absolute discharge and to substitute it with a conditional discharge. The Crown brought an application, pursuant to section 672.76 of the *Criminal Code* to have the absolute discharge suspended pending the determination of the appeal. The Court of Appeal set out the principles which should be applied on such an application: 1) The principal purpose of section 672.76 is to suspend the application of dispositions as a result of changes in the circumstances which may make compliance with the disposition pending appeal inappropriate. 2) The applicant bears the onus under section 672.76 to demonstrate that there are compelling reasons to doubt the validity or soundness of the disposition made by the Board that relates to the mental condition of the accused. The provisions of section 672.76 should only be invoked in extraordinary circumstances. 3) The remedies available under section 672.76 are not limited to cases in which a change in circumstances has occurred between the dates on which the disposition under appeal was made and the time at which the application under section 672.76 has been brought. 4) The decision on an application under section 672.76 is influenced by contextual considerations including all the provisions of Part XX.1, the specific provisions under consideration and the extent of the authority of the Board.

The Court went on to apply these principles to this case. The Court observed that the Crown necessarily had to rely on evidence collected since the absolute discharge to demonstrate compelling reasons to doubt the correctness of the decision. The Court said that where fresh evidence is introduced on such an application, the Judge should be satisfied that the evidence would qualify for admission on appeal. The Court said that the material submitted in this case would qualify for an admission as fresh evidence on the appeal against the absolute discharge. Clearly it had not been obtained with the exercise of due diligence at the ORB hearing.

Consequently, the disposition was suspended pending the hearing of the appeal.

Furlan (Re), 2013 ONCA 618 (CanLII)

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