IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Swinimer, 2005NSSC55

Date: 20050310
Docket: SH 172728
Registry: Halifax

Between:

Paulette M. Swinimer, Michelle Swinimer, and Chantal B. Swinimer, as represented by her guardian *ad litem*, Michael McKinley

Applicant

v.

Her Majesty The Queen In Right of Canada (Minister of National Defence)

Respondent

Judge:	The Honourable Justice M. Heather Robertson
Heard:	April 20 and November 2, 2004, in Halifax, Nova Scotia
Final Written Submissions:	November 8 and 14, 2004
Written Decision:	March 10, 2005
Counsel:	Colin D. Piercey and Kendrick H. Douglas, for the applicant Cathy L. Dalziel and Jake Harms, for the respondent

Robertson, J.:

[1] Under *Civil Procedure Rule 20*, the applicant seeks to compel production of certain Human Resources Development Canada files and certain Department of National Defence files, as Part I of the Defendant's List of Documents. The respondent and defendant in this action, the Attorney General of Canada claims privilege over these documents and has provided a more detailed Part II List of the Documents sought.

[2] This matter arises out of a tragic and fatal accident at Canadian Forces Base Greenwood, where John Swinimer, a private contractor, fell from a borrowed ladder while working at the Annapolis Café.

[3] The condition of the ladder and whether it was safe for use has become the central issue in this litigation.

[4] The plaintiffs are the widow and children of John Swinimer. The Workers Compensation Board of Nova Scotia ("WCB") is subrogated to the rights of the plaintiffs in this action.

[5] The accident was investigated by the Department of National Defence ("DND" or "Military Police"), Human Resources Development Canada ("HRDC"), the Nova Scotia Workers Compensation Board ("WCB") and the Nova Scotia Department of Environment and Labour ("N.S. Labour").

[6] The investigators, particularly Mr. Thibeault of HRDC and Mr. Pelrine of the WCB exchanged information in the course of the investigation. Mr. Thibeault told Mr. Pelrine that the ladder did not meet CSA standards. Through these conversations the applicant became aware of the HRDC investigative report and seeks its full disclosure. A collateral issue is whether any privilege claimed respecting the HRDC file has been waived through Mr. Thibeault's communication with Mr. Pelrine.

[7] The respondent submits that s. 144(5) of the *Canadian Labour Code*, R.S.C. 1985, c. L-2 ("*Code*") creates a privilege against disclosure of the HRDC file and is supported by an ordinary interpretation of the section and the legislative scheme more generally.

[8] They argue that the *Code* was intended to create an integrated approach to labour matters. The investigation carried out by HRDC in the instant case fitting into that scheme. In setting out the powers of investigators (safety officers) and describing the investigative process, the respondent says Parliament turned its mind to the use that could be made of the fruits of an investigation under the *Code* in s. 144. Parliament saw fit to limit the use of investigation files to proceedings and prosecutions under the *Code* thereby excluding their use in civil suits.

> Information not to be published
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> 144 (5) No person shall, except for the purposes of this Part or for the purposes of a prosecution under this Part, publish or disclose the results of an analysis, examination, testing, inquiry, investigation or sampling made or taken by or at the request of an appeals officer or a health and safety officer under section 141.

[9] Therefore they submit the statute prohibits the disclosure of the results of an investigation required under it for the purposes of a parallel civil suit. This provision has not been judicially considered in a reported decision.

[10] The respondent relies on *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430, where the Supreme Court of Canada considered the confidentiality provision of the *Income Tax Act* and recognized its role within the scheme of the *Act.*

[11] In that case the court spoke of the balancing of interests, i.e., the privacy interests of the taxpayer versus the public interest in ensuring that relevant information is before the courts in the correct disposition of litigation.

[12] The respondent does not claim that the same balancing of interests was contemplated by Parliament in its drafting of s. 144(5) however, agrees that the statutory scheme should be recognized by this court.

[13] The respondent also relies on the *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)*, [1993] O.J. No. 25 wherein in s. 31 of the *Pay Equity Act* was considered, in a judicial review of the decision of the Pay Equity Tribunal. The hospital wished to examine a member of the Tribunal out of court to obtain evidence to tender at the review hearing.

[14] It was agreed in that case that s. 31 prohibited persons from giving testimony or producing records and that the legislation did so in clear and unambiguous terms.

[15] Justice O'Leary commented at page 11:

> I have no doubt that, generally speaking, the Legislature has that power. The issue is, can it in that way prevent a superior court from finding out whether or not a quasi-judicial tribunal acted beyond its jurisdiction, say where it is alleged the tribunal has not afforded natural justice to one of the parties or that a member of the tribunal has lost his decision - making independence.

[16] Justice O'Leary found that the Legislature cannot in that way effectively immunize an inferior tribunal from judicial review citing *Cravier v. A.G. (Quebec) et al*,[1981] 2 S.C.R. 220, Laskin, C.J. Justice O'Leary further commented:

> It is quite understandable that where persons acquire knowledge, or documents come into existence solely because of the requirement of a piece of legislation, that the legislative body can decree that such knowledge and documents are to be immune to disclosure even to a court, as long as the immunity does not prevent the court from enquiring into the question of excess of jurisdiction on the part of a tribunal created by the legislation.

[17] The issue I must decide, does not involve a s. 96 consideration as in Cravier nor a jurisdictional challenge as in *Glengarry*.

[18] Here the applicant seeks full disclosure of HRDC files to advance its litigation against the Crown and relies on our *Civil Procedure Rule* 20 to do so.

[19] I have considered the full legislative scheme of the *Canada Labour Code*, in particular ss. 141 through 145.

[20] The *Code* authorizes broad investigate powers by its safety officers including entering the premises of the employer, taking photographs of the premises and obtaining samples for analysis. These powers are set out in s. 141(1) of the *Code:*

> 141. (1) Subject to section 143.2, a health and safety officer may, in carrying out the officer's duties and at any reasonable time, enter any work place controlled by an employer and, in respect of any work place, may

> (a) conduct examinations, tests, inquiries, investigations and inspections or direct the employer to conduct them;
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> (b) take or remove for analysis, samples of any material or substance or any biological, chemical or physical agent;
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> (c) be accompanied or assisted by any person and bring any equipment that the officer deems necessary to carry out the officer's duties;
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> (d) take or remove, for testing, material or equipment if there is no reasonable alternative to doing so;
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> (e) take photographs and make sketches;
>
> (f) direct the employer to ensure that any place or thing specified by the officer not be disturbed for a reasonable period pending an examination, test, inquiry, investigation or inspection in relation to the place or thing;
>
> (g) direct any person not to disturb any place or thing specified by the officer for a reasonable period pending an examination, test, inquiry, investigation or inspection in relation to the place or thing;
>
> (h) direct the employer to produce documents and information relating to the health and safety of the employer's employees or the safety of the work place and to permit the officer to examine and make copies of or take extracts from those documents and that information;
>
> (i) direct the employer or an employee to make or provide statements, in the form and manner that the officer may specify, respecting working conditions and material and equipment that affect the health or safety of employees;
>
> (j) direct the employer or an employee or a person designated by either of them to accompany the officer while the officer is in the work place; and
>
> (k) meet with any person in private or, at the request of the person, in the presence of the person's legal counsel or union representative.

[21] The respondent has noted these powers far exceed the authority of civil litigants in the usual course and are even more robust than the powers granted under the *Anton Pillar* order available to litigants as a last resort. In light of these intrusive powers, they submit it is appropriate to limit the use that may be made of the fruits of an investigation.

[22] In addition to creating intrusive powers for investigators, including the authority to direct an employer or employee to respond to questions, the *Code* also compels all persons involved in a matter under scrutiny to assist with the investigation.

> 142. The person in charge of a work place and every person employed at, or in connection with, a work place shall give every appeals officer and health and safety officer all reasonable assistance to enable them to carry out their duties under this Part.
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> 143. No person shall obstruct or hinder, or make a false or misleading statement either orally or in writing to an appeals officer or a health and safety officer engaged in carrying out their duties under this Part.
>
> 143.1 No person shall prevent an employee from providing information to an appeals officer or a health and safety officer engaged in carrying out their duties under this Part.

[23] The respondent submits if persons interviewed by an investigator are reluctant to be candid, the investigation may be unduly frustrated thereby defeating the purpose of the administrative scheme.

[24] Although information gathered through compelled assistance pursuant to the *Code*, may be used in criminal prosecution under the *Code,* it explicitly excludes the use of the information through the testimony of a safety officer in civil suits except with the written permission of the Minister.

> 144. (1) No health and safety officer or person who has accompanied or assisted the officer in carrying out the officer's duties under this Part may be required to give testimony in a civil suit with regard to information obtained in the carrying out of those duties or in accompanying or assisting the officer, except with the written permission of the Minister.

[25] I am in agreement with the respondent's argument that the non-compellability of investigators must be interpreted with the prohibition against disclosure of their reports. These provisions combine to ensure that investigators are perceived as neutral by persons involved, particularly if the safety officers are to be given meaningful assistance in their investigations, *Murray Strong v. General Motors of Canada Limited and Ron Broad*, [1985] OLRB Rep. Decision Feb. 6.

[26] The legislative scheme creates an investigative neutrality as in the *Strong* case. In my view Parliament intended that these investigative reports would be used for a limited purpose, i.e., for criminal prosecution under the *Code* and for that purpose only.

[27] This does not however prohibit this court from having access to this information for the purpose of review of the materials to determine if the privilege claimed is warranted and there could be exceptional circumstances where an exception to the statutory privilege is made where public interest in the administration of justice requires.

[28] A concern I have expressed is whether the investigation by Mr. Thibeault might reveal any information that if not available to the court in these civil proceedings, would subvert the ends of justice.

[29] Such legislative prohibition was considered in *Jahnke v. Wylie* (1994), 119 D.L.R. (4th) 385 (Alta. C.A.) where s. 142 of the *Alberta Workers' Compensation Act* provided that "... books, records, documents and files of the Board and all reports, statements and other documents filed with the Board or provided to it are privileged and are not admissible in evidence in any action or proceeding without the consent of the Board."

[30] Kerans J.A., for the court, concluded that "actions in which the Board is a party are necessarily outside the scope of the provisions" *Jahnke, supra,* at pp. 388-389. The Board argued that the privilege was absolute; the court rejected this contention on the basis that it would permit the Board "to refuse to submit to discovery in a civil suit, for example, a suit by it to enforce a building construction contract." This situation was analogous to "other cases where an agent of the Crown would attempt to avail itself of the benefit of judicial process but avoid the burden ... ." This decision has been cited in the Canadian Encyclopedic Digest for the proposition that "[a] statute must expressly create an absolute privilege, because the courts are most reluctant to give up their common law discretion and to accord supremacy to the executive" *C.E.D. Evidence* 1110.

[31] On the other hand, in the course of distinguishing *Jahnke* in *Berkel v. Alberta Cancer Board* (1996), 185 A.R. 187 (Alta. Q.B.) at paras. 18 and 23 Master Funduk said:

> ... as Jahnke points out, the court does not have an overriding discretion to order production in the face of legislation which prohibits it. There is a constitutional division between the courts, the legislature and the executive (the Crown). Each plays a separate role in our constitution and that must be recognized. Valid legislation cannot be "overruled" by the courts simply because some might disagree with the legislation. It has been said many times that the wisdom of the legislation in not a matter for the courts.

[32] *Berkel* case involved a wrongful dismissal against by an epidemiologist against the Board in circumstances where the quality of his research was at issue. He sought production of research data that included patients' names, which was treated as confidential by the *Cancer Programs Act* and the *Hospitals Act*. It could not be released without consent. The legislation under consideration in *Jahnke* was "vastly different"; it provided a general discretion that did not exist in the legislation under review in *Berkel*. Further, it was not possible to read down this legislation, as had been done in *Jahnke*, to apply only where the Board, the Minister or the province were not parties to an action. *Berkel* at paras. 15-26. Ultimately, the court held that the patients had no interest in the action and that their statutory rights to confidentiality and privacy should be respected.

[33] In *Klassen v. Dachyshyn* (1998), 217 A.R. 191 (Alta. Q.B.) at para. 14 Lewis J. Held that "[I] in my view, this Court does not have the inherent jurisdiction to remove or waive a statutory privilege." The same point - that rules of production are subject to statutory privileges - is made in *Beale v. Nagra* (1998), 167 D.L.R. (4th) 140 (B.C.C.A.) at paras. 23-24 in the context of a plaintiff's request for disclosure of reports prepared for a medical disciplinary investigation that were subject to statutory privilege. Southin J.A., for the majority said:

> My reason for concluding that what is in issue here is purely a matter of statutory construction is simple. When the Legislature has addressed a question - promulgated what appears to be a code on the subject - the court should not be quick to find ways to undermine the legislative purpose. The plain purpose of s. 61 is to insulate, from the processes of civil litigation, the College and those engaged by it to assist in its processes concerning the quality of medical care in the Province. What the College does or does not do is not to be used in medical malpractice suits.
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> Whether it is in the public interest to so insulate the College was and is a matter for the Legislature.

[34] Thus, as it was stated in *Rafferty v. Power* (1993), 15 C.P.C. (3d) 48 (B.C.S.C.) at para. 17 while "the trend in litigation is toward greater disclosure ... that trend is in some instances halted by clear statutory language establishing a prohibition on disclosure."

[35] In *Sarmiento v. McDougall*, [1996] B.C.J. No. 2292 (B.C. Prov. Ct. - Civ. Div.) at para. 37 the court concluded that "[t]o the extent Parliament prohibits disclosure of particular classes of information, I have no jurisdiction to 'qualify' that prohibition, even for the purpose of balancing public confidence in the due administration of justice." That said, "[b]ecause the prohibition represents an exception to the general trend towards greater disclosure ... and because potentially it limits the rights of a litigant ... I should construe it narrowly." It would be an unacceptable result if the Minister were "insulated from accountability in the courts; the Minister could breach its contracts or act negligently and resist any court process... ." The court referred to a decision by the Federal Court of Appeal in which the court held that the confidentiality provision of the *Income Tax Act* that was under consideration "was not enacted for the purpose of helping the Minister out of a negligence claim that has been brought against him": *Diversified Holdings Ltd. v. Canada*, [1991] 1 F.C. 595 (F.C.A.) at para. 10.

[36] In the face of clear legislative intent the statutory privilege must stand. Section 144(5) of the *Code* is clear and concise in its prohibition against the publication of the results of the safety officer's investigation. The court does not have an overriding discretion to order production of these documents. Although Mr. Thibeault's report respecting his findings on the condition of the ladder, from which Mr. Swinimer fell to his death, cannot be produced, Mr. Harms has assured the court on behalf of the Crown that the ladder is securely held by the Crown and available for examination by the applicant's expert witnesses whose opinions will obviously be presented to the court at trial.

[37] The applicant has expressed the concern that if production of certain documents is not required and the Crown is not required to produce more than one witness for discovery examination, the result might well be the suppression of relevant evidence as to the cause of the accident.

[38] In the litigation process, all witnesses to the events surrounding the death of Mr. Swinimer are compellable witnesses at trial, with the exception of Mr.

Thibeault, the safety officer who conducted the HRDC investigation. In *Maplehurst Properties Ltd. v. Canada (Attorney General)* (1997), 34 C.P.C. (4th) 363 (S.C.) the court considered the plaintiff's right to examine an unlimited number of witnesses. In considering the *Crown Liability and Proceedings Act* R.S.C. 1985, c.C-50, s.27 and Crown Liability and Proceedings (Provincial Court) Regulation s. 7, Justice Tidman concluded that the plaintiff was not entitled to discover other additional Crown witnesses over and above the person designated by the Deputy Attorney General.

[39] This case can be distinguished from *Bryson v. R.* (1997), 166 N.S.R. (2d) 68 (S.C.) Moir J. a decision delivered 10 months following *Maplehurst, supra*, where Moir J. concluded at para. 16:

> I conclude that the interrelation of Rule 18 of our Civil Procedure Rules and s. 7 of the regulations produces the following results:
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> (1) A person suing the federal government in Nova Scotia is entitled to discover any Crown employee in possession of relevant information that is not privileged.
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> (2) A general restriction applies: the procedural right to discover more than one Crown employee is subject to the court's power to control abuse.
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> (3) A special restriction also applies: the Deputy Attorney General has the right to designate, in the first instance, which Crown employee or employees will be put up for discovery.
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> (4) After the Deputy Attorney General has exercised his or her power, the court may designate other or additional Crown employees to be produced as witnesses.

[40] This decision was appealed to the Court of Appeal *Bryson. v. R* (1998), 168 N.S.R. (2d) 351 (C.A.) where leave to appeal was not given however the comments of Clarke C.J.N.S. were to the effect that "the views expressed by the Chambers Judge appear to us to be *obiter dicta* more for his own use than the parties."

[41] *Maplehurst, supra,* was approved by this court in *Office Pavilion Interior Resources Ltd. v. Force Construction Limited and the Attorney General of Canada* SH No. 136684, February 18, 1999.

[42] In the circumstances of this case statutory privilege has been established with respect to the HRDC documents. As well the production of one designated

witness, Captain Rebecca Louise Richards follows the statutory regime under the *Crown Liability and Proceedings* legislation.

[43] With respect to the issue of waiver of privilege by Mr. Thibeault's actions in discussing the result of his investigation with Mr. Pelrine of the WCB, i.e., that the ladder did not meet CSA approval, I do not find that this constituted a waiver of privilege.

[44] The information was provided to the WCB for the limited purpose of assisting in the WCB investigation. It was not intended to, waive HRDC's privilege as potential civil litigants. Only the Minister under this legislative scheme could waive privilege.

[45] Mr. Thibeault assisted the WCB units work as an investigative agency. These agencies investigate accidents in the workplace and do so with statutory authority. Co-operation between safety officers under the HRDC and WCB investigators is important. It would have a chilling effect on this co-operation, if any communication between them resulted in a waiver of statutory privilege for future litigation purposes.

[46] With respect to the DND files for which the applicant seeks production, I have had the opportunity to review these documents and am in a position to say that these documents fall under the umbrella of solicitor client privilege.

[47] Many of the specific documents identified in the affidavit of Crown counsel Paula Taylor relate to written discussion between HRDC employees and Department of Justice counsel respecting the possible Crown v. Crown prosecution of the case.

[48] They are inherently of the nature of legal advice being sought and opinions given as to likelihood of prosecutorial success. I agree that these documents are protected as they deal with prosecutorial discretion.

[49] Justice L'Heureaux-Dubé, in *R. v. Power* [1994] 1 S.C.R. 601 at para. 39 stated:

> The judicial review of prosecutorial discretion may also involve disclosure by the Crown of precise details about the process by which it decides to charge, to

> prosecute and to take other actions. Such a procedure could generate masses of documents to review and could eventually reveal the Crown's confidential strategies and preoccupations. For example, the confidential nature of the charging process serves important institutional functions, including rehabilitative goals and the goal of increasing general deterrence. The latter is met only by preventing the public from knowing which crimes will be given emphasis in enforcement. Professor Richard S. Frase ("The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion" (1979-1980), 47 U. Chi. L. Rev. 246) points to further elements which militate against the review of prosecutorial discretion, at p. 297:
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> ... (3) publication [in a judicial review, of the Crown's guidelines or policies] inevitably would result in more frequent attempts to invoke judicial review of prosecution policy and decisions, and such review would further clog an already overburdened criminal court system; and (4) if prosecutors knew that their policy would be published, they would be reluctant to formulate it, or to change it once it was formulated.
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> Indeed, confidentiality permits prosecutors to employ flexible and multifaceted enforcement policies, while disclosure promotes inflexible and static policies which are not necessarily desirable.

[50] Similarly I have reviewed the documents referred to in the affidavit of Suhanya Edwards, over which the Crown claims privilege. This affidavit was helpful to me in identifying who the correspondents were, their official titles and the reason for the correspondence. The correspondents were the client representatives or DND. They corresponded with their legal representatives and sough legal advice.

[51] I accept that these documents fall within the litigation privilege. Ms. Edwards' affidavit refers to documents in which client representatives had communications with counsel acting on their behalf, seeking legal advice on confidential matters. These are covered by solicitor client privilege. Ms. Edwards' affidavit refers to specific documents prepared in anticipation of litigation, and at a time when litigation was certain as the statement of claim had been filed in July, 2001. I accept that these documents relate to litigation strategy and preparation for that litigation and are also privilege.

[52] In the result, the application for production is dismissed.

Justice M. Heather Robertson