SUPREME COURT OF NOVA SCOTIA

Citation: MacIntyre v. Cape Breton District Health Authority, 2008 NSSC 305

Date: 20021017
Docket: S.N. 225468
Registry: Sydney

Between:

Duncan F. MacIntyre

Plaintiff

v.

Cape Breton District Health Authority,
a body corporate

Defendant

D E C I S I O N

Judge: The Honourable Justice Gerald R P Moir

Heard: August 12, 2008 at Halifax

Counsel: Ms. Michelle C. Awad and Mr. Ian Dunbar for the plaintiff
Ms. Nancy G. Rubin for the defendant

Moir, J.:

[1] *Introduction.* In April, 2004, Dr. MacIntyre and his company took action against Provident Life and Accident Insurance Company for monthly benefits under a disability insurance policy. He alleges that he has been unable to perform his normal work of oral-maxillary surgery since April 2003.

[2] A few months later, Dr. MacIntyre started an action against the Cape Breton District Health Authority. He had practiced at a hospital operated by the authority and alleges that dust created during major renovations exposed Dr. MacIntyre to various harmful chemicals, which led to his ceasing practice in April 2003.

[3] Documentary disclosure was made by the insurer in the disability insurance action and Dr. MacIntyre was examined for discovery. There is no question that documents disclosed to him, and answers given by him at discovery, in the disability insurance action are relevant to the issues in the action against the hospital authority. The question is whether disclosure is precluded by the implied undertaking against collateral use of documents disclosed, or discovery given, under the compulsion of the *Civil Procedure Rules*.

[4] The hospital authority applies for an order for disclosure of relevant documents, including discovery transcripts, disclosed or created in the disability insurance action. Dr. MacIntyre objects to this disclosure on the grounds that it would offend the undertaking against collateral use. Mr. Scott C. Norton, counsel for the insurer, writes that the insurer "has no objection to the production of the discovery transcripts and documents".

[5] *The Implied Undertaking.* The Supreme Court of Canada recently commented on the implied undertaking in a case about whether it applies to evidence of criminal conduct. The decision is *Doucette (Litigation Guardian of)* v. *Wee Watch Day Care Systems Inc*., [2008] S.C.J. 8. Justice Binnie wrote for the Court, and he began by recognizing the rationale for the undertaking as protection of the privacy interests of the witness (para. 24). He went on to say at para. 25:

> The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy

> should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych* v. *Baker*, [1976] 1 S.C.R. 254 (S.C.C.). The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.

Justice Binnie commented on a “second rationale” for the undertaking at para. 26:

> There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery. This is of particular interest in an era where documentary production is of a magnitude (“litigation by avalanche”) as often to preclude careful pre-screening by the individuals or corporations making production. See *Kyuquot Logging Ltd.* v. *British Columbia Forest Products Ltd.* (1986), 5 B.C.L.R. (2d) 1 (B.C.C.A.), *per* Esson J.A. dissenting, at pp. 10-11.

At para. 27, he stated a conclusion, which included one way of formulating the undertaking:

> For good reason, therefore, the law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature).

[6] The rest of the judgment in *Doucette* gives an extensive commentary on the circumstances in which a court may give permission to use a document, or other information, despite the undertaking. Those circumstances are rather confined, and it is therefore important to note that Justice Binnie’s general statement of the undertaking in para. 27 of *Doucette* does not attempt to express the circumstances in which the undertaking simply does not apply.

[7] The most obvious example is a use the disclosing party ordinarily makes of a disclosed document. No one suggests that disclosure of a business’ financial statements precludes the business from also giving them to its banker without permission of the court. The undertaking cannot extend to such things. Those

kinds of use were not at issue in *Doucette*, they are outside the primary and secondary rationale for the undertaking, and the formulation in paragraph 27 cannot be taken as definitive.

[8] Mr. John B. Laskin formulated the implied undertaking this way in "The Implied Undertaking in Ontario" (1989-90), 11 *The Advocates' Quarterly* at p. 298:

> (1) ... There is an implied undertaking by a party to whom documents are produced that he or she will not use them for collateral or ulterior purposes; any such use of the documents is a contempt of court.
>
> (2) There is an implied undertaking by a party conducting an oral examination for discovery that the information so obtained will not be used for collateral or ulterior purposes; any such use is a contempt of court.

That formulation was adopted by the Nova Scotia Court of Appeal in *Sezerman* v. *Youle*, [1996] N.S.J. 172 (C.A.) at para. 6 and para. 75. See also, *Campbell* v. *Jones*, [2002] N.S.J. 450 (CA) at para. 283.

[9] In my opinion, the undertaking not to make collateral use of a document disclosed under compulsion of the *Civil Procedure Rules*, or evidence given on discovery under the Rules, is the undertaking of each party who receives disclosure, and not the party who makes disclosure.

[10] My conclusion is inconsistent with that of Master Funduk in *Elder* v. *Kadis*, [2002] A.J. 924 (QB) to which Ms. Awad made reference. Master Funduk relied on the decision of the Supreme Court of Canada in *Lac d'Amiante du Québec Ltée. c. 2858-0702 Québec Inc.*, [2001] S.C.J. 49 (SCC). However, that decision found a civil law duty of confidentiality owed by a discovering party to the party being discovered. Master Funduk does not explain the expansion to allow the party being discovered to avoid disclosure obligations owed in a subsequent suit.

[11] My conclusion is also inconsistent with another decision to which I am referred by Ms. Awad: *Peak Energy Services Ltd*. v. *Douglas J. Pizycki Holdings Ltd*., [2007] F.C.J. 1080. The Federal Court upheld a prothonotary's refusal to order disclosure of discovery evidence given on behalf of the plaintiff in an earlier proceeding by the inventors of a patent.

[12] Although the discovery answers were given on behalf of, not received by, the plaintiff, the prothonotary gave the implied undertaking as a secondary reason for the refusal. (The primary reason was lack of relevance.) Justice Phelan summarized the defendants' argument this way at para. 20:

> The Defendants have taken the position that the implied undertaking does not operate or should not operate because the principle is meant to prevent the receiving party (the "questioner") from using the transcripts outside the litigation. The Defendants say that the implied undertaking is not designed to protect the answering party and in that regard relies on the decision of the Ontario Court of Appeal in *Tanner* v. *Clarke* (2003), 63 O.R. (3d) 508 (Ont. C.A.).

[13] Like Master Funduk, Justice Phalan was of the view that *Lac d'Amiante* recognized a duty of confidentiality binding the parties giving, as well as the parties receiving, information through compulsory disclosure or discovery. He acknowledged, at para. 26, that *Lac d'Amiante* did not involve subsequent use by the party providing information. However, he was of the view that "the same principle of protection is equally applicable".

[14] My conclusion is supported by *obiter dicta* of Justice Wright in *Gay* v. *UNUM Life Insurance Co. of America*, [2003] N.S.J. 442 (SC) at para. 32 where he says:

> Moreover, it is not the plaintiff who now seeks to utilize these expert reports, but UNUM in seeking to ascertain the cause of the plaintiff's injury. That cannot be categorized as the sort of collateral or ulterior purpose which the rule was designed to prevent.

[15] In my assessment, *Kitchenham* v. *AXA Insurance (Canada)*, [2007] O.J. 3477 (OSCJ, DC) supports the view that the common law undertaking is restricted to the recipient of information. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R.30.1.01(3) provides:

> All parties and their counsel are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

The Divisional Court in *Kitchenham* recognized that this changed the common law undertaking by expanding it beyond the parties who receive information. It said at para. 13:

> We further agree with the motion judge that Rule 30.1.01 is not a mere codification of the common law. The most important distinction for the purpose of the present appeal is that sub-rule 30.1.01(3) imposes an undertaking on "all parties and their counsel", which is an obvious reference to the party disclosing the evidence and the party receiving it, as well as their respective counsel.

[16] In Nova Scotia the implied undertaking remains in its common law state. An undertaking is implied against, or imposed upon, the party who receives information, not the party who gives it. There are, in my view, solid reasons for this in addition to the positivistic one that this is in the present state of the law in our province.

[17] To extend the undertaking to the party who gives disclosure is really to convert this into a general privilege. Further, it diminishes the disclosure obligation and undermines the rationale by putting the protection for privacy, the undertaking, ahead of the obligation to make full disclosure in the present proceeding.

[18] Therefore, a party who produces relevant documents, or creates a relevant document in the form of a discovery transcript, under compulsion of the *Civil Procedure Rules* should be under no less an obligation in a related proceeding and should receive the same protection, the undertaking backed by the contempt power. In my opinion, Dr. MacIntyre's disclosure obligations in this proceeding are qualified only by his obligation to the disclosing party in the related proceeding and he does not get a privilege just because someone else has protection under the implied undertaking.

[19] *Conclusion.* Dr. MacIntyre is not subject to any undertaking about his discovery in the disability insurance action. The disability insurer is taken to have promised the court that it will not make collateral use of the transcript, and it cannot, without permission, deliver a copy to the health authority for use in this action. Dr. MacIntyre, on the other hand, is not taken to have made any such promise. Rather, his disclosure obligations under Rule 20 compel him to produce

records of his own prior relevant statements, including answers on discovery in the disability insurance action.

[20] Dr. MacIntyre did impliedly undertake not to disclose, outside the disability insurance proceeding, documents produced by the insurer in the course of that proceeding. However, in the face of the insurer's consent there is nothing that justifies retention.

[21] Consequently, I will order that Dr. MacIntrye produce copies of the transcripts and documents. The order may provide for either party to make a motion to me for an order for further enforcement or assurances.

[22] The health authority will have costs in the amount of $1,500 plus disbursements in any event of the cause but payable at its conclusion.

J.