**SUPREME COURT OF NOVA SCOTIA**
**Citation:** Hernandez v. Purcell, 2013 NSSC 303

**Date:** 20130925
**Registry:** Halifax

**Docket:** Hfx. No, 353861

**Between:**

Joanne Hernandez

Plaintiff/Respondent

v.

Danielle Lynn Purcell

Defendant/Applicant

and

**Docket:** Hfx. No. 336133

**Between:**

Christina Phyllis Carroll

Plaintiff/Respondent

v.

Parks and Armour Transport

Defendant/Applicant

**Judge:** The Honourable Justice Cindy A. Bourgeois

**Heard:** September 12, 2013, in Halifax, Nova Scotia

**Counsel:** Christopher Madill for Geoffrey Machum, Q.C. for the Defendants/Applicants
Ali Raja for the Plaintiff/Respondent Purcell
Geoffrey J. Franklin for Gordon Proudfoot, Q.C.for the Plaintiff/Respondent Carroll
Alan J. Stern, Q.C. for the Board of Examiners in Psychology

**By the Court**:

## INTRODUCTION

[1] Two motions, both seeking the release of file materials of a psychologist and neuropsychologist, were heard simultaneously. The motions, advanced by the Defendants in two personal injury actions, seek release of the complete file materials of the professionals, including raw testing data from the application of standardized psychological tests. The plaintiffs acknowledge the material is relevant, and do not oppose its release, subject to whatever conditions the Court may find appropriate. The Board of Examiners in Psychology ("the Board of Examiners") was permitted to speak to the motions, and do not generally oppose the release of file materials retained by the professionals, but seek conditions on the release of the raw testing data.

[2] In the Hernandez matter, the plaintiff was treated by Mr. Farley MacLeod, Registered Psychologist. His name appears on the list of trial witnesses proposed by the plaintiff. The Court was advised that he provided his file at the request of Defendant's counsel, but provided raw test data in a sealed envelope. Mr. MacLeod did not appear at the hearing of the motion.

[3] In the Carroll matter, the plaintiff undertook a neuropsychological assessment at the request of her counsel with Dr. Erica Baker. The report was provided to the Defendants, who in turn requested a complete copy of Dr. Baker's file materials. Again, no objection was posed to the general release of the professional's file materials, except for the raw testing data, which was offered in a sealed envelope with the request that it only be viewed by a similarly qualified professional. Dr. Baker filed an affidavit in the motion, and at the hearing was granted permission to make oral submissions to the Court.

**POSITION OF THE PARTIES**

[4] The Defendants have moved for complete disclosure of the Baker/MacLeod file materials, relying on what is submitted as being the clear disclosure requirements contained in the Civil Procedure Rules. Given the material is relevant and not subject to a claim of privilege, it is asserted that all file material including the raw test data should be disclosed, as in the usual course.

[5] The Defendants further submit, in particular as it relates to Dr. Baker who may be presented by the plaintiff to give expert opinion evidence, that the full disclosure requirements contained within Rule 55 must be adhered to. Counsel submits that the restrictions on disclosure being sought by the Board of Examiners are unwarranted as the implied undertaking rule will serve to protect the raw test data from being disseminated or utilized inappropriately. The Defendants submit it would be an entirely unreasonable proposition to expect counsel to cross-examine an expert regarding their opinion, without having been given access directly to the full material upon which their opinion is based.

[6] The Board of Examiners as noted above, does not oppose a release of file information in the possession of its members, rather seeks conditions regarding the release of the raw data generated from standardized psychological tests utilized by them. Counsel for the Board articulated the issue before the Court and its position as follows in his written submissions:

> 4. The sole issue on this motion is whether the sealing of the raw data in accordance with professional standards and guidelines is justified or whether the data should be disclosed in the normal course.
>
> 5. The position of the Board is that this approach to production is necessary for the following reasons:

> a. Underlying data would be subject to misinterpretation by persons untrained in the interpretation of that data;
>
> b. Test materials is proprietary and subject to copyright. Accordingly, the interests of the publishers must be considered; and
>
> c. Dissemination of information about testing protocols may impact of (sic) the integrity of the test model, a result which could undermine psychological services and is, therefore, contrary to the public interest.

[7] It was submitted that registered psychologists must adhere to the Standards of Practice and Code of Ethics set by their governing body, and this includes a stated obligation to restrict the release of testing materials. Counsel further argued that the implied undertaking rule would be insufficient to guard against the improper and harmful dissemination of this sensitive material. It was submitted that without conditions on its release, raw test data could find its way into the public domain, most notably in Court files.

[8] For the most part, both plaintiffs maintained a "watching brief" in relation to the motions. In written submissions, the plaintiff Carroll expressed concern regarding the release of raw test data to a defendant expert who may not possess the appropriate qualifications to properly interpret and assess same.

[9] Dr. Baker submitted that although she understood why raw test data was being sought by the Defendants, she has a professional obligation to insure that the material is only released to another properly qualified professional for review. She underscored the importance of maintaining the integrity of these standardized, and widely used assessment tools.

**THE "APPROACHES" TO PSYCHOLOGICAL DATA**

[10] The Court was presented with a number of case authorities where the release of psychological test data was considered. The approaches are varied. There appears to be only one reported decision from this Province which has addressed the release of such materials.

[11] In **S.S. v. D.S.**, 2008 NSSC 87, a parental capacity assessment had been undertaken in the context of a custody matter where allegations of sexually inappropriate conduct towards the child was made in relation to a parent. In addition to taped interviews with the child, the mother sought disclosure of the assessing psychologist's raw data and other material pertaining to the standardized tests utilized in conducting the assessment. The psychologist objected to the

release of the test materials for many of the same reasons advanced by the Board of Examiners in the present matter.

[12] Justice Legere-Sers ordered the release of the sought material subject to a number of conditions and limitations. The Court provided:

> 53. The videotaped interviews and the test results, raw data, and the full file shall be made available to counsel in the following manner:
>
> 54. 1. Counsel for Ms. Rule has agreed to make available the uncontested parts of the file as soon as possible, whether by copying the file or providing the file to counsel for the mother for copying.
>
> 55. 2. A copy of the interview and other test data, raw data and brochures shall be made available for review at the office of the Children's Aid Society for Inverness/Richmond or such other agreed upon site under the custody of counsel for Children's Aid Society for Inverness/Richmond. That is in close proximity to both counsel. They shall be able to view with their clients only, but not to copy the tape of the interview.
>
> 56. 3. There shall be no further copy of the tapes made and both parties are under a duty not to disclose, disseminate, copy, or otherwise replicate the tapes of the interview or use the contents for any other purpose other than preparation for this divorce proceeding.
>
> 57. 4. The written materials may be copied once only for each counsel. Counsel are not entitled to copy or replicate this material. Should an expert be retained to review the materials, the expert shall attend at the office of counsel for the purpose of reviewing the material in order to advise counsel. They shall maintain the copy in the office of their counsel only. As with all other material disclosed, it is to be used solely for the purpose of advising and obtaining instruction for this proceeding and for no other purpose.
>
> 58. 5. Breach of these conditions may result in contempt of court.

> 59. At the end of this proceeding, subject to appeal, the contested raw data and interview, subject to this motion shall be sealed only to be unsealed by court order.

[13] The Court was presented with a number of authorities from other jurisdictions, both in the realms of child protection and personal injury litigation. In reviewing the authorities, it is apparent that the legislative and procedural schemes in the particular jurisdictions are often referenced and utilized in terms of determining whether sought materials should be disclosed and if so, under what conditions. The authorities range from an unconditional release to counsel **(Stone v. Sharp**, 2008 NBCA 55); a release to counsel with specified conditions on release or use (**Davies v. Milne** [1999] B.C.J. No. 550; **Long v. Dundee Resort Development LLC**, 2012 ONSC 3201) to a prohibition against release to anyone other than a properly qualified professional **(McCormick v. Gerald Boychuk Professional Corporation** [2013] A.J. No. 396).

**THE CIVIL PROCEDURE RULES**

[14] There are a number of Civil Procedure Rules which bear upon the issue to be determined and which have been raised by the parties hereto, and considered by the Court.

[15] The motions before the Court have been brought pursuant to Rule 14.12, specifically 14.12(1) which provides:

> A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.

[16] There is a rebuttable presumption that full disclosure of relevant documents is "necessary for justice in a proceeding", and such applies not only to parties but those subject to motions pursuant to Rule 14.12 above - see Rule 14.08.

[17] Given that Dr. Baker will likely be called to provide expert opinion, the provisions of Rule 55 should also be considered. Rule 55.08 provides for the disclosure of material relied upon by an expert, as follows:

> 55.08 (1) A party who files an expert's report or a rebuttal expert's report must disclose, by supplementary affidavit of documents or the applicable method of disclosing electronic information, a document or electronic information considered by the expert that is in the control of the party.
>
> (2) The disclosure must be made no later than the day the report is filed.
>
> (3) The party must also disclose any real or demonstrative evidence considered by the expert that is in the control of the party.
>
> (4) The expert must provide a copy of the document or electronic information, or provide disclosure of another thing, that was considered by the expert and is in the control of the expert but not the party.

[18] Finally, Rule 14.03 addresses the use of disclosed materials, and recognizes the continuation of the implied undertaking rule. It provides:

> 14.03 (1) Nothing in Part 5 diminishes the application of the implied undertaking not to use information disclosed or discovered in a proceeding for a purpose outside the proceeding, without the permission of a judge.
>
> (2) The implied undertaking extends to each of the following, unless a judge orders otherwise:
>
> (a) documentation used in administering a test, such as test documents supplied to and completed by a psychologist;
>
> (b) all notes and other records of an expert;
>
> (c) anything disclosed or produced for a settlement conference.

**ANALYSIS**

[19] It is acknowledged that the material in dispute, the raw test data, is relevant. As such, there is a presumption that it should be disclosed in its entirety to the Defendants. A party, or non-party subject to a motion under Rule 14.12, must rebut that presumption. Further, as it relates to Dr. Baker's file material, if she will be presented as a Rule 55 expert, it is clear that she is obligated to provide a copy of all material "considered" by her. In my view, the raw test data clearly falls within this obligation.

[20] The Board of Examiners submits that this Court has the inherent authority to impose conditions upon disclosure. While agreeing generally with that proposition, a Court must be careful not to expand that authority too broadly. In my view, there is guidance in both the Rules and case authorities as to how such a request should be approached.

[21] Although the Court raised with Counsel at the outset of the motion hearing what significance, if any, they placed upon Rule 14.03 and the specific reference

therein to psychological test materials, this provision was referenced only in passing, or not at all, in submissions. In my view, it is significant.

[22] As noted above, that provision not only recognizes that the implied undertaking rule is alive and well in terms of information disclosed in the litigation process, but "special mention" is given to the very type of material which is at the heart of this motion. Why were three specific types of information specifically referenced in Rule 14.03(2)? In my view, a likely rationale for the provision, is to signal that the implied undertaking attaching to the disclosure of ALL material in the course of litigation, will be adequate in relation to the three specified types of material, unless a judge orders otherwise.

[23] Based on the above provisions, the burden is clearly upon the Board of Examiners to establish that the implied undertaking attaching to the release of the raw test data is inadequate.

[24] In considering whether conditions on disclosure of the material in addition to the implied undertaking is warranted, I have found instructive the decision of Hood, J. in **TransCanada Pipelines Ltd. v. Nova Scotia (Attorney General)**

(1999), 179 N.S.R. (2d) 364. Although dealing with a motion for a blanket confidentiality order over material disclosed in the course of litigation, the court considered not only the implied undertaking rule, but the obligation on a party who asserted the rule was inadequate to protect material to be disclosed in the course of litigation.

[25] After reviewing a number of authorities, and concluding the implied undertaking rule was well established in this Province, her Ladyship set out the following test:

> 47. In my view, the general rule that there is an implied undertaking is sufficient unless there is a "real risk" that documents would be used for a collateral purpose.
>
> 48. There is no evidence before me that these documents deal with trade secrets or manufacturing formulae or processes as was the case in *Big Country Gas* and *Bow Valley Husky*. The *Miller* case is not of much assistance because of the lack of detail about "the nature and relationship between the parties" or about the "evidence and argument presented by counsel".
>
> 49. Even in cases where there are "special circumstances such as patent processes, trade mark rights, sensitive or personal information, or in highly competitive industries" (*Wirth*), there must be "real risk".50. I conclude that there is a two-step test which must be met. The first is to show that the nature of the documents is such that it is necessary to consider conditions on disclosure, and second , to show that there is a "real risk" of the document being used for an improper or collateral purpose by a particular person or persons or a particular group.

[26] I adopt the above test.

[27] The Court has before it the affidavit of Dr. Baker. It describes her efforts, and that of Ms. Carroll's counsel to explain to the Defendant why the raw test data was being provided in a sealed envelope, and the professional and ethical constraints she was under in terms of its release. There is no specific evidence before the Court as to the nature of the psychological tests in question, although in submissions, there appears to be a broad acknowledgement that the tests are standardized testing instruments which are copyrighted. This is consistent with my own knowledge and experience both as a judge and lawyer.

[28] As to the first prong of the test, I am satisfied that the materials in question, are such that special considerations on release should be considered. Although I recognize the existence of copyright, and the professional obligations of the professionals involved as considerations, it is the sensitivity of the test materials to dissemination which is the most pressing concern. Standardized psychological testing instruments are used widely for the diagnosis and assessment of individuals with a host of difficulties, and it is important that the integrity of the results be protected. It is a legitimate concern that if testing protocols, questions and

answers entered into the public domain, the tests may become less reliable and ultimately, those who benefit from these materials would be negatively impacted.

[29] In the second prong, the Court must be satisfied, based upon the evidence before it, that there is a "real risk" that without added protections beyond the implied undertaking, that the testing material would be used for improper purposes. The Board of Examiners raises several concerns with respect to how the testing material, if provided directly to counsel for the Defendants, could find itself either in the public domain, or in the possession of an individual lacking in the education and training to properly interpret it. Mr. Stern pointed to information being left in counsel's files after the litigation ends, as well as material finding its way into Court files as possible means of the raw data becoming available for inappropriate consumption.

[30] Although I am prepared to acknowledge that the concerns raised by the Board of Examiners are possible risks, I am unable to conclude, based upon the evidence before me, that they are "real risks" which would justify placing restrictions upon the disclosure of the material, other than those already inherent within the implied undertaking rule.

[31] There may be circumstances where, based on evidence, a court may find a "real risk", and thus a need to impose conditions or restrictions on the release of raw test data. Further, in appropriate circumstances, a court may consider a motion brought under Rule 85.04 to seal material within a court file. Neither apply in the present motions.

**CONCLUSION**

[32] Based upon the above, the motions brought by the Defendants for the release of the entire file materials of Mr. Farley MacLeod and Dr. Erica Baker, including raw testing data, are granted.

[33] If required, I will hear submissions from the parties and Board of Examiners with respect to the issue of costs.

J.