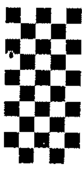

DATE: November 20, 2007

IN THE MATTER OF *THE PUBLIC INQUIRIES ACT*, R.S.O. 1990, c. P.41

AND IN THE MATTER OF THE INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO

AND IN THE MATTER OF THE CERTAIN DOCUMENTS WHICH THE KINGSTON POLICE SERVICE OBJECTS TO PRODUCING

Jennifer McAleer and Tina Lee for the Commission

David Migicovsky for the Kingston Police Service

Daniel Bernstein for the Affected Families Group

Heard: November 15, 2007

RULING

[1] To fulfill its mandate, The Commission for the Inquiry into Pediatric Forensic Pathology in Ontario received various documents from the Crown Law Office (Criminal and Civil). The Kingston Police Service brought a motion for a declaration that two documents relating to the prosecution of Louise Reynolds are protected from disclosure by a claim of privilege.

[2] The first document is a memorandum, dated April 18, 2000, from one of the investigating officers to the Crown Attorneys prosecuting the case ("Document Number One"). The second is a note of a meeting, dated July 7, 2000, between the investigating

officers and the Crown Attorneys relating, in general terms, to a number of matters that needed to be addressed in preparation for the then upcoming trial of Ms. Reynolds ("Document Number Two").

[3] The Kingston Police Service bases its claim of privilege on three grounds: solicitor/client privilege, litigation privilege, and the Wigmore case-by-case privilege.

[4] Neither the Attorney General of Ontario nor the Crown Attorneys involved in the communications claim privilege with respect to either of the documents.

Solicitor/Client Privilege

[5] For purposes of this ruling, I accept that in some circumstances communications between a Crown Attorney and police officers can give rise to a claim of solicitor/client privilege. However, solicitor/client privilege only arises when the communication is made for the purposes of obtaining or providing legal advice. As the Supreme Court of Canada stated in *R. v. Campbell*, [1999] 1 S.C.R. 565 at paras. 49 and 50:

> It is of great importance, therefore, that the RCMP be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings.... Whether or not solicitor-client privilege attaches...depends on the nature of the relationship, *the subject matter of the advice* and the circumstances in which it is sought and rendered." [Emphasis Added.]

[6] In my view, the record on this motion demonstrates that the communications in issue were not for the purposes of obtaining or providing legal advice. This conclusion is based on three facts. First, on their face, the documents do not support the argument that

legal advice was being sought or delivered. Second, the affiants for the Kingston Police Service do not say that they were seeking or receiving legal advice in either case; rather, the officers merely state, "[w]e seek legal advice and direction regularly from the Crown." Third, Mr. Bradley, the senior Crown Attorney responsible for the Reynolds prosecution, states in his affidavit that legal advice was not sought nor given on either occasion.

[7] Mr. Migicovsky, counsel for the Kingston Police Service, argues that what constitutes legal advice should be given a broad interpretation in the context of a claim for solicitor/client privilege. He relies on several Supreme Court of Canada decisions for this proposition, including *Blank v. Canada*, [2006] 2 S.C.R. 319 at para. 24 and *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860. In his factum, Mr. Migicovsky cites *Descôteaux* as follows:

> Whether communications are made to the lawyer himself or to employees, and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the problem, all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality.

[8] I agree with Mr. Migicovsky's submission to the extent that he suggests that a broad range of materials may be privileged; however, *Descôteaux* makes it clear that the materials must be given "in order to obtain legal advice" before the privilege attaches. The communications in issue do not satisfy this requirement.

[9] Thus, I conclude that the claim for solicitor/client privilege must fail.

Litigation Privilege

[10] All the parties accept that the documents in issue were protected by litigation privilege up to the point when the Crown withdrew the charge against Ms. Reynolds. Thus, it is clear that the Crown would not have been required to disclose these documents to the defence as part of its *Stinchcombe* obligations. The question arises, however, whether that litigation privilege survived the termination of the criminal proceedings.

[11] The law of litigation privilege is that the privilege "comes to an end, absent closely related proceedings, upon the determination of the litigation that gave rise to the privilege" (*Blank, supra,* at para. 36). In other words, the privilege ends when the litigation ends or when closely related proceedings end, whichever is the latter.

[12] The Kingston Police Service makes two arguments in support of its claim for litigation privilege. First, it argues that the criminal litigation has not ended because the charge against Ms. Reynolds was withdrawn, and that, as a result, it could be re-laid some time in the future. While I suppose this scenario is theoretically possible, it is, to say the least, extremely improbable. The charge was withdrawn almost seven years ago (on January 25, 2001), and the case has been thoroughly investigated. I do not think that the theoretical possibility of a future charge in the circumstances of this case is sufficient to support a claim for the continuation of a litigation privilege.

[13] The Kingston Police Service's second argument is that it is a party to "closely related proceedings". The Kingston Police Service is a defendant by way of cross-claim in a lawsuit brought by Ms. Reynolds relating to her prosecution. The argument is that this civil lawsuit is a "closely related proceeding" to the Reynolds prosecution and, thus, the litigation privilege continues until the civil proceedings against the Police Service have been completed.

[14] I do not accept this argument. For practical purposes, it appears that the cross-claim against the Kingston Police Service will be terminated in the very near future. Ms. Reynolds has dropped her lawsuit against the Kingston Police Service and in doing so has delivered to the Kingston Police Service a full and final release. As the Kingston Police Service's motion for dismissal states:

> The plaintiff [Louise Reynolds] has consented to a dismissal of the action as against these defendants [the Kingston Police Service et al.] and has provided these defendants with a full and final release with respect to all claims that are the subject of these proceedings. The plaintiff has also provided written confirmation that she is restricting her claims against the other defendants [Dr. Charles Smith et al.] to damages for which the other defendants may be directly liable and is not claiming against the other defendants for any portion of her damages which the Court may find to be attributable to fault on the part of these defendants.

[15] While Mr. Migicovsky informed me by letter following the hearing that the Kingston Police Service must participate in the discovery process and testify at trial, there is no indication that the Kingston Police Service will be held liable for any damages

awarded to Ms. Reynolds. In the face of the release, there is no basis for a continued claim against the Kingston Police Service and, thus, no longer a need for the continuation of the litigation privilege in its favour.

[16] In any event, I am satisfied that the outstanding cross-claim against the Kingston Police Service does not constitute "closely related proceedings" for the purposes of the continuation of the litigation privilege arising from the prosecution. In *Blank*, *supra*, at para. 43, the Supreme Court of Canada held, "[t]he Minister's claim of privilege thus concerns documents that were prepared for the dominant purpose of a criminal prosecution relating to environmental matters and reporting requirements. The respondent's action, on the other hand, seeks civil redress for the manner in which the government conducted that prosecution. It springs from a different juridical source and is in that sense unrelated to the litigation of which the privilege claimed was born."

[17] Thus, I do not accept that the documents in issue are subject to a litigation privilege in favour of the Kingston Police Service.

The Wigmore Privilege

[18] The so called Wigmore privilege was adopted in Canadian jurisprudence by the Supreme Court of Canada in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. The onus is upon a party claiming the benefit of this privilege to establish the following four criteria:

(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 thereby gained for the correct disposal of litigation.

[19] While I have some concerns with whether the Kingston Police Service has satisfied criteria one to three,[1] I do not find it necessary to decide these issues as I find that the Kingston Police has failed to satisfy criteria four. The Kingston Police Service has not satisfied me that the deleterious effects that disclosure could have on the relationship between the investigating police force and the prosecuting Crown outweigh the benefits of disclosure and the "correct disposal" of the Inquiry's mandate.

[20] The Commission's mandate is to report on, *inter alia*:

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[1] My concerns with the first three criteria are as follows: (1) I question whether Document Number One can be said to have originated in a relationship of confidence since the evidence suggests that only one party had an expectation of confidentiality; (2) I question whether confidentiality is essential to the relationship between the police and Crown counsel because these parties must of necessity work together to prosecute criminal behaviour; and (3) I question whether the community should sedulously foster the relationship given that public officials are held to a higher standard, and that claims of malicious prosecutions should not be curtailed.

> [T]he policies, procedures, practice, accountability and oversight mechanisms, quality control measures and institutional arrangements of pediatric forensic pathology in Ontario from 1981 to 2001 as they relate to its practice and use in investigations and criminal proceedings ... in order to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings.

[21] There is a strong public interest in having the Commission consider all reasonably relevant information pertaining to the subject matter of the Commission. As Justice Howland stated in *Re Bortolotti et al. and Ministry of Housing et al.* (1977), 15 O.R. (2d) 617, "[a] full and fair inquiry in the public interest is what is sought in order to elicit all relevant information pertaining to the subject-matter of the inquiry."

[22] The contents of these two documents appear to be very relevant to the mandate of this Inquiry.

[23] Pediatric forensic pathology played an essential role in the investigation into and criminal prosecution of Ms. Reynolds. The Commission submits that the documents will assist the Commission in fulfilling its mandate. In particular, the documents will assist in identifying and giving factual context to systemic issues, including:

a) The interaction between the police, Crown counsel and expert forensic pathologists;

b) The use of pediatric forensic pathology in criminal investigations and proceedings;

c) The risk of "tunnel vision" in criminal investigations and prosecutions where pediatric forensic pathology forms a significant part of the criminal prosecution; and

d) Whether police, Crown and/or defence counsel should have specialized training in pediatric forensic death investigations.

[24] Document Number One may help shed light on the dangers of "tunnel vision" in criminal investigations and prosecutions where pediatric forensic pathology plays an integral role in proving the case, particularly where there is disagreement among the experts or the experts are revising their opinions. In my view, the contents of Document Number One are very informative about the interaction of police and prosecutors in this context.

[25] Similarly, Document Number Two is important to the Commission in identifying how the Crown and police were approaching the complex and changing pathology evidence in preparation for trial. It appears, from the notes themselves, that the prosecution team was preparing other forensic evidence to demonstrate the possible role of the dog.

[26] The fact that the government has chosen to call a public inquiry into the matters to which these documents are relevant speaks to the general public interest in their disclosure. Of significance also is the fact that the Kingston Police Service itself has

recognized the public interest in having public disclosure of this type of information. Chief S.J. Closs of the Kingston Police has gone on record and called for a full public inquiry into the investigation and prosecution of Louise Reynolds:

a) On February 20, 2001, Chief Closs wrote to Premier Michael D. Harris requesting a public inquiry into the circumstances of Sharon's death and the resulting criminal investigation and public prosecution. In this letter, Chief Closs stated that a public inquiry was necessary to "restore public confidence in the administration of justice". Copies of this letter were sent to the Solicitor General and Attorney General.

b) Also on February 20, 2001, Chief Closs wrote to the Editor of *The Kingston Whig-Standard*, emphasizing the fact that a full and independent public inquiry into the death of Sharon Reynolds was needed to provide the public with a "full accounting of the circumstances of this investigation and prosecution".

c) On August 14, 2006, Chief Closs wrote to Dr. Barry McLellan, Chief Coroner for Ontario, regarding the Chief Coroner's Review. Chief Closs stated that the Kingston Police Service would co-operate fully with the review. Further, he indicated that the Review should have considered a broader range of materials from the case.

[27] Each of these letters demonstrate that the Chief of Police of the Kingston Police Service was concerned, quite properly and responsibly, about the public's perception of

the administration of justice, and a corresponding concern that any inquiry into Sharon Reynolds' death be given broad powers of investigation.

[28] While the public inquiry presently underway is not as extensive as that called for by Chief Closs, it nonetheless addresses some of the issues he raised relating to public accountability. The point is that there is a strong interest in the disclosure of information relating to the investigation of the Reynolds case, including, in particular, disclosure of information that would further the Inquiry's mandate.

[29] Weighing against disclosure of these documents under the fourth Wigmore criterion are the statements of the two investigating police officers that should the documents be disclosed there will be a chilling effect in future upon the relationships between police officers and Crown Attorneys. Police officers will no longer feel free to communicate openly with Crown Attorneys, which will have a detrimental effect on prosecutions of criminal offences in this country.

[30] With due respect to the officers, I think this concern is overstated. To start, there is nothing in this ruling to suggest that the documents would have had to have been disclosed during the course of the criminal prosecution. On the contrary, it is accepted that the documents in issue would not have formed part of the Crown's obligation of disclosure pursuant to *Stinchcombe*. Moreover, the disclosure that will take place in this case is occurring in rather unusual circumstances. The Government of Ontario has called

a public inquiry because of the significant public interest in determining what went wrong, if anything, with respect to the introduction of forensic pathological evidence in several criminal cases.

[31] Finally, as to the so called chilling effect of disclosure, there is nothing in the documents, with one exception,[2] that is particularly embarrassing or compromising. I do not think that police officers, even if concerned about the possibility of disclosure at future public inquiries (however remote that might be), would be deterred from engaging in these types of communications.

[32] As to the one exception, I am satisfied that the disclosure of the one comment is not sufficiently deleterious to the police-Crown relationship to outweigh the advantages of disclosure. Indeed, one might reasonably say it would be better if these types of comments were not made at all.

[33] In summary, the Kingston Police Service has not persuaded me that the concerns it expresses about disclosure outweigh the public interest in having these documents made public through the process of the inquiry.

Fairness Issues

[34] During the course of his submissions, Mr. Migicovsky raised concerns about the process by which the two documents may be disclosed to the public. These concerns

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[2] Here I refer to the last paragraph of page 1 and the top twp paragraphs of page 2 in Document Number One.

centered on questions of fairness to various individuals as a result of Document Number One. Put shortly, his concern was that the release of the documents, without providing the context and explanations relating to their contents, could generate an enormous amount of publicity that could damage unfairly the reputations of two individuals.

[35] In my view, these concerns about the process by which documents may be released by the inquiry are not relevant to the issues that I am called upon to decide on this motion. I indicated to Mr. Migicovsky that, should I not accept his arguments that the documents are privileged, his concerns about fairness in the process by which the documents would be disclosed publicly should be raised with the Commission.

Disposition

[36] In the result, the motion of the Kingston Police Service for a declaration that Documents Number One and Two are subject to privilege is dismissed.

November 20, 2007

A.C.J.O.