CITATION: Chandra v. CBC, 2015 ONSC 3945
COURT FILE NO.: 06-CV-310261PD2
DATE: 20150703

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
RANJIT KUMAR CHANDRA	)	*Richard Bennett and Joseph Figliomeni*, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
CANADIAN BROADCASTING CORPORATION, CHRIS O'NEILL-YATES, CATHERINE MCISACCS, LYNN BURGESS, JACK STRAWBRIDGE and MEMORIAL UNIVERSITY OF NEWFOUNDLAND	)	*Christine Lonsdale and Elder Marques*, for the Defendants CBC, O'Neill-Yates, McIsaacs and Burgess
Defendants	)	
	)	
	)	**HEARD:** 17 June 2015

REASONS FOR DECISION

Ruling on the Admission of Evidence

MEW J.

[1] During the course of the evidence in chief at trial of Chris O'Neill-Yates, one of the defendants, an issue arose concerning the admissibility of written interrogatories delivered in an unrelated civil proceeding in the Supreme Court of Newfoundland and Labrador between the plaintiff in this action, Dr. Ranjit Chandra, and, *inter alia*, Marilyn Harvey (the "Newfoundland action").

[2] Marilyn Harvey features prominently in the broadcast which is the subject matter of this defamation action between Dr. Chandra and the CBC and certain of its employees (the "CBC defendants").

[3] In the broadcast, which consisted of a three-part, hour long documentary, it was alleged, among other things, that the plaintiff had fabricated research results which were then used as the

basis for published scientific studies and reports. In the broadcast, the CBC claimed to have "uncovered a pattern of scientific fraud and financial deception dating back to the [1980]s".

[4] The CBC documentary focuses on a number of studies which the plaintiff authored or co-authored, as well as studies conducted by others based on or purportedly replicating the plaintiff's findings.

[5] In the Newfoundland action, Dr. Chandra sued Ms. Harvey and her employer Health Care Corporation of St. John's, for allegedly removing data and other records relating to a research study (the "Vitamin 'A' Study") which had been conducted by Dr. Chandra. At the times material to that dispute, Ms. Harvey had been a nurse, employed by Health Care Corporation, but seconded to work with Dr. Chandra as a research nurse. The Newfoundland action was eventually discontinued or dismissed.

[6] Ms. Harvey has been characterised in the present lawsuit as a "whistleblower" who was associated with a complaint made to Dr. Chandra's employer, Memorial University of Newfoundland, calling into question whether Dr. Chandra had, in fact, conducted an allergy-related infant formula study in the manner described in articles authored by Dr. Chandra that appeared in two journals. The Vitamin 'A' Study is not related to that complaint.

[7] The CBC defendants wish to introduce the written interrogatories from the Newfoundland action to show that Dr. Chandra's claim against Ms. Harvey was based on a false premise.

[8] After hearing argument from counsel, I ruled that I would permit the CBC defendants to introduce the interrogatories, with reasons to follow. These, then, are my reasons.

[9] I would add that since I heard argument and made my ruling, counsel have brought to my attention the decision of the Supreme Court of Newfoundland and Labrador in *Power v Parsons*, 2015 NLTD(G) 87. I have considered it in formulating these reasons (it does not, however, change the result).

[10] The main objection to the introduction of this evidence is that it violates the implied undertaking rule, described by Adams J. in *Ring v. Canada*, 2000 NLTD 39 (CanLII) in the following terms (at para. 1 of his oral reasons):

> The implied undertaking rule is part of the law of Newfoundland and Labrador. It states that where a party to litigation obtains documents from an opposing party through the court-sanctioned compulsory process of documentary production and examination for discovery, the receiving party impliedly undertakes to the court not to use the information for a purpose outside of or collateral to the litigation in which it was produced without leave of the court or consent of the opposing party.

[11] Mr. Justice Adams continues, at para. 3 of his oral reasons:

> The Plaintiff is bound by that implied undertaking. The release of that information [documentary production made by the defendant] for the purposes of another matter in another court in another jurisdiction would in the absence of an order of this court relieving the Plaintiff from the burden of the undertaking constitute a breach of that undertaking.

[12] An immediate distinction between the circumstances in *Ring* and the present case is that the party seeking to use the documents that are said to be the subject of the implied undertaking to the Newfoundland and Labrador court is not a party bound by that undertaking (Ms. Harvey or Health Care Corporation) but, rather, the CBC defendants.

[13] Although at the time the motion was argued, there was no evidence before the court as to how the interrogatories from the Newfoundland litigation were obtained, I am asked to presume, and do so for the purposes of this ruling, that there has been no agreement of the parties to the Newfoundland action and no order from the Newfoundland court relieving Ms. Harvey or Health Care Corporation of their undertakings.

[14] The rationale for the implied undertaking rule was described by Binnie J. in *Guman v. Doucette* 2008 1 S.C.R. 157, at para. 25, in these terms:

> 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.

[15] Binnie J. continued:

> 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 (para. 26)…
>
> For good reason, therefore, the law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents for 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). (Para. 27) …
>
> The need to protect the privacy of the pre-trial discovery is recognized even in common law jurisdictions where there is no implied undertaking (para. 28) … Breach of the undertaking may be remedied by a variety of means including a stay or dismissal of the proceeding, or striking a defence, or, in the absence of a less drastic remedy, contempt proceedings for breach of the undertaking owed to the court (para. 29).

[16] In the *Ring* action, Adams J. declined to relieve the plaintiff, who wanted to use the disclosed documents in relation to a parallel proceeding in Saskatchewan, from his implied undertaking to the Newfoundland and Labrador court.

[17] The plaintiff in the present case submits that if the interrogatories from the Newfoundland action are permitted to enter the evidentiary record in the present case, this court would be subverting the purpose for which the implied undertaking rule exists (a rule which is as applicable in Ontario as it is in Newfoundland and Labrador: see Rule 30.1.01 of the *Rules of Civil Procedure*).

[18] Against this, the CBC defendants point to the general inclusionary rule that the matter in which evidence is obtained, no matter how improper or illegal, is not an impediment to its admission at common law (Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (4th ed.) (Markham: LexisNexis, 2014) at §9.1 *et seq*.). The rationale for the general inclusionary rule has been stated as follows:

> The trier of fact should have the benefit of all relevant evidence, irrespective of how it was obtained. If illegal or improper acts committed in the acquisition of evidence do not affect its probative value, they should not distract the court from its primary task of fact finding. (Sopinka, Lederman & Bryant at §9.3).

[19] The interrogatory documents which the CBC defendants now seek to introduce into evidence have not suddenly appeared out of the conjuror's hat. They have been part of the CBC defendants' productions for some time. If the plaintiff wished to object to the inclusion of these documents from the Newfoundland proceedings in the CBC's productions in the current action, it seems to me that the appropriate course would have been for the plaintiff to seek the assistance of the Newfoundland and Labrador court. That, after all, is the court to which the undertaking is owed.

[20] In *Power v Parsons*, Thompson J. quoted the following, apposite, passage from the decision of Hobhouse J. in *Prudential Assurance Co Ltd v . Fountain Page Ltd* [1991] 1 WLR 756 at p.764:

> Treating the duty as one which is owed to the court and breach of which is contempt of court also involves the principle that such contempt of court can be restrained by injunction and that any person who knowingly aids a contempt or does acts which are inconsistent with the undertaking is himself in contempt and liable to sanctions: see *Distillers Co (Biochemicals) Ltd v . Times Newspapers Ltd* [1975] QB 613.

[21] No attempt has been prior to the present action to engage the assistance of the Newfoundland court, despite ample time to do so.

[22] Furthermore, whether or not the CBC should have been in possession of the interrogatories from the Newfoundland action, the fact is that the CBC defendants did have these documents. The CBC defendants raise the defences of fair comment and responsible journalism

in response to Dr. Chandra's defamation claim. The credibility of Dr. Chandra and Ms. Harvey will no doubt be significant issues for the finder of fact to consider at the end of the trial when considering those defences. To the extent that these interrogatories reflect on issues of credibility of important players in the current litigation they would appear to be relevant.

[23] Aside from any issue of relevance, the interrogatory documents are admissible because the parties seeking to introduce them are not bound by the implied undertaking to the Newfoundland court and because, even if, as I have been asked to assume, the use of these documents is a violation of the implied undertaking rule, the proper application of the general inclusionary rule should result in these documents being admitted.

[24] Even if I am wrong about that, however, in *Guman v. Doucette*, Binnie J. recognized that while the undertaking is imposed in recognition of the examinee's privacy interest, and the public interest in the efficient conduct of civil litigation, those values are not absolute. They may be trumped by more compelling public interest. In para. 34 of *Guman v. Doucette*, Binnie J. points to the codified formulation of the common law implied undertaking rule in Rule 30.1.01 of the Ontario Rules:

> If satisfied that the interests of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that [the implied or "deemed" undertaking] does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

[25] Although Ms. Harvey is not a party to the current litigation, she is a key witness. And while the subject matter of the present action deals with different clinical studies to the one in the Newfoundland action, the allegation has nevertheless been made in the current action that the Newfoundland action was a retaliatory measure by Dr. Chandra as a result of Ms. Harvey's whistleblowing role. Whether or not there is any credence to that allegation remains to be seen. However, it would do violence to the overall interests of justice, assuming that the interrogatories in the CBC defendants' possession are otherwise relevant to the issues between the parties in the current litigation, for them to be denied the opportunity to place this evidence before the court.

Mew J.

Released: 03 July 2015

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SUPERIOR COURT OF JUSTICE

BETWEEN:

RANJIT KUMAR CHANDRA

Plaintiff

– and –

CANADIAN BROADCASTING CORPORATION, CHRIS O'NEILL-YATES, CATHERINE MCISACCS, LYNN BURGESS, JACK STRAWBRIDGE and MEMORIAL UNIVERSITY OF NEWFOUNDLAND

Defendants

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