SCC reiterates discovery protections

Karen Weslowski says she's not aware of other cases that exam ine the issue of protection of discovery information during par allel civil-criminal proceedings.

BY ROBERT TODD
Law Times

The Supreme Court of Canada has reiterated the implied undertaking protection in civil court discovery hearings after refusing to give the B.C. attorney general access to a woman's pretrial testimony in a case involving the death of a child.

"It reinforces the importance to counsel to conduct themselves and remind their clients that matters that are learned during the examination for discovery process . . . must be kept confidential in the action and not leaked to third parties, which could result in some serious consequences," says Miller Thomson LLP lawyer Brian Ross, who along with colleague Karen Weslowski represented appellant Suzette Juman in case *Juman v. Doucette*.

The case involves Juman, who runs a daycare service from her Vancouver home. A negligence claim was filed against her after 16-month-old Jade Doucette suffered a brain injury and seizure while in her care, according to the unanimous Supreme Court of Canada decision written by Justice Ian Binnie.

Doucette's parents sued Juman, alleging negligence, while a Vancouver police investigation is ongoing. Juman argued that the child's injuries resulted from previous injuries suffered while not in her care.

Juman presented a motion before discovery in the case to stop the authorities from obtaining her discovery without a further court order, while the attorney general of British Columbia presented a cross-motion that would allow the authorities to use transcripts of the discovery. Juman, who relied on an implied undertaking for the information to be used only for the civil case, claimed protection from the Canadian and B.C. Evidence Acts and the Charter of Rights and Freedoms at discovery, wrote Binnie.

But the claim was settled before Juman's discovery was entered into trial evidence.

While the chambers judge decided that the implied undertaking could not be seized by the police via a search warrant, the B.C. Court of Appeal overturned that decision, finding that the im-

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plied undertaking rule "does not extend to *bona fide* disclosure of criminal conduct," wrote Binnie.

The chief constable of the Vancouver Police Department, the attorney general of Canada, and the attorney general of British Columbia, along with Doucette, are named as respondents in the SCC case.

The Supreme Court disagreed with the B.C. appeal court's decision and the province's attorney general's argument that an "implied undertaking" rule doesn't exist in B.C.

Binnie also noted that the police could obtain the discovery information using a subpoena or search warrant: "However, if at this stage they do not have the grounds to obtain a search warrant, it is not open to them to build their case on the appellant's compelled testimony," wrote Binnie.

"It would be quite wrong for the police to be able to take advantage of statutorily compelled testimony in civil litigation to undermine the appellant's right to silence and the protection against self-incrimination afforded her by the criminal law," wrote Binnie.

The court noted that there are times when the implied undertaking would be overridden, such as in the midst of "immediate and serious danger" to the public, or if contradictory testimony was given in other proceedings. The party seeking such an exemption would have to show that the public interest was greater than the need to defend the values that the implied undertaking stands for, which include privacy, protection against self-incrimination, and the efficiency of civil litigation.

Binnie wrote that the B.C. attorney general's application to alter the implied undertaking aimed to "sidestep the appellant's silence in the face of police investigation of her conduct. The authorities should not be able to obtain indirectly a transcript which they are unable to obtain directly through a search warrant in the ordinary way because they lack the grounds to justify it."

Weslowski says she's unaware of any other cases that ponder how to deal with the issue of protection of discovery information in the midst of parallel civil-criminal proceedings.

"It's a novel point — I think one of the first times the Supreme Court of Canada has considered this issue," says Weslowski. "It dealt with the issue of the undertaking before, but they've not dealt with it in the context of disclosing discovery transcripts to the police."

Ross says the case forced the Supreme Court to perform a complex balancing act.

"On the one hand you've got the privacy rights of individuals involved in civil proceedings, together with the object of efficacy in civil proceedings to have expeditious and fair resolution of civil proceedings . . . On the other hand you've got to balance the rights of the state to investigate matters of alleged serious criminal conduct.

"It's a question of where you draw the line, and in this case, this is the first time the courts have addressed that drawing of the line," says Ross.

Michael Morris, lead counsel on the case for the attorney general of Canada, says he was glad to see the court inserting a number of important caveats around the limitations on implied undertaking.

"There are circumstances when the public interest and public safety remains paramount," says Morris. "We think that's an important limitation put on the court.

"Any lawyer that's involved in civil discovery where there are issues potentially involving criminal conduct are going to have to be aware of this decision, because it clearly is going to be the law, in respect of what the scope of the implied undertaking is, for some time."

Morris says implied undertakings are codified in Manitoba, Prince Edward Island, and Ontario, while all other jurisdictions in Canada rely on the common law for the protection.

"You have a lot of development within those jurisdictions, and not a lot of certainty with respect to the scope of the implied undertaking," he says. "This judgment, I hope, will bring some consistency with respect to what that rule, of relative recent vintage, is in an important context." LT