CITATION: Catholic Children's Aid Society of Toronto v SSB, 2013 ONSC 4560

COURT FILE NO.: FS1218352 and FS1218346

DATE: 20130703

SUPERIOR COURT OF JUSTICE - ONTARIO

PUBLICATION BAN PURSUANT TO THE CHILD AND FAMILY SERVICES ACT

RE: Catholic Children's Aid Society of Toronto, Respondent in the Appeal, Applicant on the motion

AND:

Office of the Children's Lawyer, Appellant, Respondent on the motion

AND:

S.S.B., Appellant, Appellant, supporting position of the Office of the Children's Lawyer on the motion

BEFORE: MESBUR J.

COUNSEL: Fatima Husain, for the Catholic Children's Aid Society of Toronto

Caterina Tempesta, for the Office of the Children's Lawyer

Deidre Newman, for the mother, S.S.B.

HEARD: July 2, 2013

E N D O R S E M E N T

Overview:

[1] After a 22-day trial in the Ontario Court of Justice, Murray J. made an order finding the two children who were the subject of these proceedings in need of protection. The children are J., now 9 and T., now 4 ½. Both children were made Crown Wards. The order was silent as to access. Following the original order, Murray J made a further order providing for sibling access between the boys.

[2] During the course of the trial, Murray J made an order requiring the Office of the Children's Lawyer to provide legal representation for J. pursuant to section 38 of the *Child and Family Services Act. (CFSA).* The Catholic Children's Aid Society of Toronto (CCAST) opposed the order. Even after the order was made, the CCAST later moved to have the order set aside. Murray J declined to do so.

[3] The Office of the Children's Lawyer took on their task of legal representation with what is often called a "clinical assist". Caterina Tempesta, counsel at the OCL was appointed as J.'s lawyer. She was assisted by social workers in the employ of the Office of the Children's Lawyer, first Ms. Silvia Novak and later by Mr. Rashaad Vahed when Ms. Novak went on maternity leave.

[4] Both the Office of the Children's Lawyer and the mother have appealed the trial judge's order being silent as to access in relation to the older child, J., and take the position mother should have access to him. Mother has also appealed that finding in relation to the younger child. She has also appealed the findings in relation to both children.

[5] On April 30 of this year, mother moved in this court for interim access pending the appeal. The Office of the Children's Lawyer supported her motion. In reasons released May 7, Kiteley J dismissed the motion for "in person, supervised access". She did, however, grant mother leave "to exchange cards, letters and gifts" subject to the CCAST approving their contents.

[6] On this motion, CCAST moves under s. 74 of the *CFSA* for an order requiring the Office of the Children's Lawyer to disclose "all records (including all documents, and social work interview/observation/case notes) contained within the clinical/social work file of the Office of the Children's Lawyer." The Office of the Children's Lawyer opposes the motion on the basis that the material requested is protected by solicitor client privilege, and thus cannot be produced.

[7] The appeals are scheduled to be argued on July 15. The CCAST must deliver its responding material on the appeal by the end of this week. There is therefore urgency in my delivering these reasons promptly.

[8] For the reasons that follow, I dismiss the CCAST's motion.

The parties' positions:

[9] The CCAST's position, as I understand it, arises out of the OCL's motion to admit fresh evidence on the appeal. As is often the case, a long time has gone by since the original order in the Ontario Court of Justice. Much can change in a young child's life between the time of the judgment and the time when an appeal is heard. The OCL seeks to admit the fresh evidence in order to update the appeal court on J.'s situation now. Its motion record comprises an affidavit of Rashaad Vahed, sworn May 23, 2013, an affidavit of Silvia Novak, sworn April 24, 2013, and an affidavit of Pauline Clarke, sworn May 31, 2013.

[10] Mr. Vahed is a social worker employed by the Office of the Children's Lawyer as a clinical investigator. In that capacity he writes reports for the OCL pursuant to appointments under s. 112 of the *Court of Justice Act,* as well as assisting counsel who have been appointed by the court to provide children with independent legal representation. Mr. Vahed took on the role of assisting counsel when Silvia Novak, the original social worker assigned to this case began a maternity leave.

[11] Mr. Vahed's affidavit sets out various sources of information he reviewed, including the affidavit Ms. Novak had filed at the trial, and a transcript of her evidence at trial. He goes on to set out dates of interviews he had with J. and counsel, as well as meetings with J.'s

principal. Mr. Vahed concludes his affidavit by setting out the position of the Office of the Children's Lawyer as J.'s lawyer.

[12] Ms. Novak's affidavit sets out the history of her involvement providing the initial clinical assist to J.'s counsel. This includes a copy of the affidavit she filed at trial, a transcript of her evidence at trial, and a brief outline of how additional evidence was adduced at trial. Ms. Novak's affidavit goes on to set out her and counsel's meetings with both their client and the CCAST after Murray J. released her decision. She also sets out some of the views J. expressed in their meetings with him since the trial decision.

[13] Pauline Clarke is employed by the Office of the Children's Lawyer as an assistant to J.'s counsel. Her affidavit simply sets out the requests counsel has made for updated disclosure from the CCAST, and its response.

[14] Because of this motion to introduce fresh evidence, the CCAST seeks disclosure of what it describes as all clinical notes and records of the Office of the Children's Lawyer. It frames its position as requiring disclosure of the foundational documents upon which the clinical investigators have formulated their opinions.

[15] In response, the Office of the Children's Lawyer takes the position it has disclosed notes and records it has in relation to its dealings with third parties. It declines, however, to produce any clinical investigator's notes and records of the meetings that took place between counsel, the child and the clinical investigator. The OCL says that any meeting between the clinical investigator and the child was conducted in the presence of the lawyer as well. The OCL takes the position that notes and records of these meetings are protected by solicitor client privilege, and cannot be produced. It goes further and says in any case, the affidavits do not put forward any opinion or recommendation, and rather simply state the position the OCL takes on behalf of its client.

[16] The mother supports the Office of the Children's Lawyer's position.

Discussion:

Legal framework of the motion

[17] CCAST has chosen not to cross-examine any of the affiants on their affidavits. CCAST has not chosen to require the Office of the Children's Lawyer to produce an affidavit of documents. Instead, CCAST moves under s. 74 of the *CFSA* which permits the Society to make a motion at any time for an order under subsection (3) or (3.1) for the production of a record or a part of a record.

[18] In order for the court to make such an order it must be satisfied that the record contains information that may be relevant to a proceeding, and the person under control of the record has refused to produce it. Section 74(4), however, says that nothing in the section abrogates any privilege that may exist between a solicitor and his or her client.

[19] The Office of the Children's Lawyer and the mother take no issue with the requirement for full disclosure. They do not suggest the clinical investigators' notes are not

"records" within the meaning of section 74. They do not even suggest the information in the notes might not be relevant. Instead, they rely on the saving provision of s. 74(4) and say the requested information is covered by solicitor client privilege, or, at the very least, by litigation privilege. The OCL goes further, and says that even if solicitor client privilege or litigation privilege do not apply, the Wigmore test has been met, and the information remains privileged on that basis.

The privilege issue

[20] The OCL's duty and status when representing a child is to advocate a position on behalf of a child. In doing so, counsel obtains the child's views and preferences. It does not represent the child's "best interests". It is the child's legal representative. The relationship between counsel and the child is a solicitor/client relationship.[1]

[21] When it takes a position on behalf of a child, child's counsel will ascertain the child's views and preferences. In doing so, it will consider the independence, strength and consistency of the child's views and preferences; the circumstances surrounding those views and preferences, and all other relevant evidence about the child's interests.[2] It is in this context the OCL relies on a clinical investigator to assist counsel in determining those views and preferences so that it can advocate a position on behalf of the child. Essentially, the clinical investigator assists counsel in ascertaining its client's reasonable instructions; that is, the position to be taken on behalf of the child. The background information through which a client formulates instructions to his or her counsel cannot be subject to production. A child-client should be in no different position.

[22] In fact, a child-client is far more vulnerable than an adult client. For that reason, the court should be even more vigilant in protecting that client's right to communicate confidentially with counsel, even where that communication is facilitated through a third party – namely, the clinical investigator.

[23] Communications between a solicitor and client are protected by absolute privilege. Murray J appointed the OCL to provide independent legal representation to the child, J.. The OCL's method of service was legal representation. Thus, the OCL's file is a legal file, as opposed to a "clinical/social work" file. The service the clinical investigator provides is to "assist" counsel in providing that legal representation.

[24] The clinical investigator does not meet independently with the child, as it does when it is appointed under s. 112 of the *Courts of Justice Act.* Instead, in a legal representation situation under s. 38 of the *CFSA*, the clinical investigator meets with the child only in the presence of the lawyer assigned to represent the child. As I see it, any notes the clinical investigator takes in those meetings is protected by solicitor client privilege, since the investigator is a third party who serves as a "channel of communication between the client and solicitor". In those cases, it has been held communications to or from the third party by the client or solicitor will be protected by the privilege as long as those communications meet the criteria for the existence of the privilege.[3]

[25] J. has permitted his counsel to disclose some of the information he has provided to his counsel and the clinical investigators. To the extent he has done so, he has waived his privilege, which is only his to waive. When the OCL meets with its child-clients, it provides

them with assurances that their communications with their lawyer will remain confidential, except to the extent the child wishes, or is comfortable with the OCL sharing any information they provide. Here, the communications with the clinical investigator were made only in the presence of counsel, and where counsel clearly reinforced the confidential nature of their communications. As a result, I must conclude any information J. provided to the clinical investigator originated in confidence. In order to maintain a full and satisfactory relationship between the child and the clinical investigator and counsel, confidentiality is essential – without the promise of confidentiality, a child might refuse to communicate at all. The relationship between the child and counsel, with the assistance of the clinical investigator, is a relationship that must be "sedulously fostered". Finally, the injury to the relationship between the child and counsel and the clinical investigator outweighs any benefit to be gained by disclosure of confidential information. I therefore conclude the "Wigmore" test for privilege has also been met.[4]

[26] To require the clinical investigators to disclose their notes without J.'s consent, as the Society requests, would constitute a breach of the trusting relationship the OCL has developed with its client. I can only conclude it would cause harm to the relationship J. has with his counsel. I fear such an order would have a chilling effect on the OCL's future relationships with other clients, since they would not be able to provide assurance of confidentiality to a child. In those circumstances, a child might decide not to communicate freely with counsel, thus impairing the OCL's ability to carry out its mandate of independent representation.

Abuse of process?

[27] CCAST has made three attempts to obtain this kind of information from the OCL before. First, it moved during the course of the trial for disclosure of all the clinical investigator's notes and records in existence at that time. This motion related to Ms. Novak's first affidavit, which is appended, for convenience, to Mr. Vahed's recent affidavit. After the issue was fully argued, the CCAST withdrew its motion, electing to proceed without the requested information. Instead, it successfully moved to strike many paragraphs of Ms. Novak's affidavit filed on behalf of J.. It argued these statements were inadmissible hearsay. After the hearsay was struck, counsel agreed that individuals who had given information to the clinical investigator could set out in a written statement the information they had given to Ms. Novak. These statements were admitted into evidence, and the people then testified and were subject to cross-examination, as was Ms. Novak.

[28] As I see it, the Society had ample opportunity at trial to seek any admissible foundational documents supporting Ms. Novak's statements. It also had ample opportunity to do the same with the people who provided information to the OCL. It cross-examined extensively. It chose not to proceed with its mid-trial motion for disclosure, even though it had been fully argued. In these circumstances I see it as manifestly unfair for the Society to make another attempt at obtaining information it could have sought a year ago, rather than on the eve of the appeal. Attempting to re-litigate issues that were already before the court is tantamount to an abuse of process. As has been said, a person should be "vexed" only once in the same cause.[5]

[29] Next, when mother and the Office of the Children's Lawyer moved for interim access pending the appeal, the CCAST again requested clinical notes and records from the Office of the Children's Lawyer. The Office of the Children's Lawyer has provided notes of interviews

with collateral sources, but has declined to provide the clinical investigator's notes of any interviews with their client, citing solicitor client privilege, since all these interviews were conducted with counsel in attendance. In the face of the OCL's position before the access motion, the Society could easily have sought disclosure, if it were critical to the issues on the motion. It did not. The CCAST prevailed on the motion in any event. Again, the Society saw the requested information as relevant to the issue of access pending the appeal. It chose not to pursue its disclosure request at that time. Since the issue has been adjudicated I fail to see how the Society can try to seek the identical information again.

[30] Now, on the eve of the appeal, CCAST moves again for release of information, not just relating to current statements, but also in relation to all the original evidence before Murray J. CCAST takes the position that since the Office of the Children's Lawyer relies on this "evidence" as part of its motion to introduce fresh evidence, it must disclose all the foundational information and sources of the evidence, whether new or not.

[31] When I look at the OCL's motion to adduce fresh evidence, what is really "fresh" is the information relating to events since Murray J rendered her decision. Prior evidence is included to give the fresh evidence context. The information relating to these new circumstances, including J.'s wishes, is relatively limited. The OCL has already disclosed its notes of recent meetings with collateral sources. This is appropriate and proper. What remains is the OCL's information or evidence concerning its client's wishes and preferences. These are not "recommendations" in the sense of a s. 112 assessment. They are not "opinion" in the sense of an expert's report. Instead, they are akin to "instructions" given by a child-client. I do not see the notes as "clinical notes" in the sense of a clinical investigator providing a clinical opinion to the court. As such, I do not see them as producible on this basis, either.

Conclusion:

[32] A child-client's right to a confidential relationship with counsel must be guarded with more vigilance than that accorded to an adult client, not with less. The Society's motion is dismissed.

MESBUR J.

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