THE SOLICITOR GENERAL FOR CANADA ET. AL. v. THE ROYAL COMMISSION OF INQUIRY INTO THE CONFIDENTIALITY OF HEALTH RECORDS IN ONTARIO; OPENING THE FILES FOR THE R.C.M.P.

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In 1977, the Ontario government appointed Mr. Justice Horace Krever to head a Royal Commission of Inquiry into the Confidentiality of Health Records under the *The Public Inquiries Act*[1]. Pursuant to the terms of reference of the Commission, certain members of the Royal Canadian Mounted Police (R.C.M.P.) were called to testify. It was learned from these witnesses that both medical and non-medical personnel in Ontario hospitals had released confidential medical information to the R.C.M.P. without the consent of the patients involved.

However, these witnesses refused to disclose the names of the people who had supplied them with the patients' records. It was submitted on their behalf that there existed a police informer privilege which entitled them to refuse to disclose the names of their sources. The reasons cited for the existence of the privilege were, *inter alia*, that the information was given upon assurance of confidentiality and that disclosure of the sources would result in difficulties in obtaining information in the future.

Mr. Justice Krever ruled that the privilege was not applicable. In arriving at this conclusion, he noted that *The Health Disciplines Act*[2] and *The Public Hospitals Act*[3] both had provisions prohibiting the disclosure of medical records and information. Although not creating offences, the Acts established that the communications ought not to have been made. Thus, there was no right to conceal the identity of persons who wrongly supplied the information. Further, Mr. Justice Krever stated that he was unable to find any cases where a privilege existed where the informant was under a duty not to disclose.

The appeal to the Supreme Court arose out of a case stated by the Royal Commission for the Divisional Court of Ontario[4]. That court held that there exists no privilege in respect of those doctors and employees under the control of the Board of a hospital. However, the court was of the opinion that there exists a privilege with respect to physicians and other self-governing professions who do not act under the direction or control of a hospital Board. On appeal, the majority of the Ontario Court of Appeal (Dubin, Wilson, J.J.A. concurring, Brooke, J.A. dissenting) did not make the distinction between the two classes of informants and held that there was no privilege[5].

The question which finally came before the Supreme Court of Canada in 1980 was in broad terms, whether there exists a privilege prohibiting the disclosure of the identity of persons who breach their obligation of confidentiality by furnishing information to the police in the course of their duties.

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1. S.O. 1971, c.49.
2. S.O. 1974, c.47.
3. R.S.O. 1970, c.378.
4. 21 O.R. (2d) 402; 90 D.L.R. (3d) 576; 42 C.C.C. (2d) 564 (Ont. Div. Ct.).
5. 24 O.R. (2d) 545 (Ont. C.A.).

The Supreme Court (Laskin, C.J.C. and Dickson, J. dissenting) upheld the claim of police informer privilege and ruled that the statutory provisions "[did] not impose a legal duty not to communicate information regarding a patient to the police."[6] The judgments of Martland, J. for the majority and Laskin, C.J.C. for himself and Dickson, J. dealt largely with the issue as to whether or not a police informer privilege exists as a rule of law in all cases, for if a privilege exists, it would be applicable in this case as ss.7(1) and 11 of *The Public Inquiries Act* specifically preserve privilege in an inquiry.

Section 11 provides that:

> Nothing is admissible in evidence at any inquiry that would be inadmissible in a court by reason of any privilege under the law of evidence.

Mr. Justice Martland took the position that the police informer privilege is a rule of law in all cases and not a matter of discretion. In support of this position, Martland, J. relied substantially on *Marks* v. *Beyfus*[7] and *D.* v. *National Society for the Prevention of Cruelty to Children*.[8] *Marks* involved a civil suit for malicious prosecution. At issue was whether the Director of Public Prosecution was obliged to disclose the identity of his source. Lord Esher said that:

> ... the rule as to non-disclosure of informers applies, in my opinion, not only to the trial of the prisoner, but also to a subsequent civil action between the parties on the ground that the criminal prosecution was maliciously instituted ....[9]

Martland, J. disagreed that, as a result of that case, the privilege should be seen as limited to public prosecutions and civil proceedings arising out of a malicious prosecution. Without apparently analyzing the rationale of the rule he stated:

> If it is applicable in civil proceedings arising out of a malicous prosecution, there is no logical reason why it should not also be applicable in other civil proceedings. That public policy which gave rise to the rule is the same, no matter what form the civil proceedings take.[10]

In further support of his contention, Martland, J. cited Lord Diplock in the *NSPCC* case[11] where he referred to "the well established rule of law that the identity of police informers may not be disclosed in a *civil action* ..."[12] Diplock, L.J. cited *Marks* as authority for that proposition. However, the comment of Diplock, L.J. must be taken to be *obiter*. The *NSPCC* case was decided by analogy to the principle of police informer privilege and it was not necessary to decide whether the police informer privilege should be extended beyond the limits of *Marks*.[13]

The *NSPCC* case arose out of the plaintiff's claim against the *NSPCC* which had launched an investigation regarding the plaintiff's alleged mistreat-

6. (1981), 128 D.L.R. (3d) 193 at 226 (S.C.C.).
7. (1890), 25 Q.B.D. 494 (C.A.) (hereinafter referred to as *Marks*).
8. [1978] A.C. 171 (H.L.) (hereinafter referred to as *NSPCC*).
9. *Supra* n. 7, at 499.
10. *Supra* n. 6, at 220.
11. *Supra* n. 6, at 218.
12. *Supra* n. 8, at 218.

ment of her infant daughter. The investigation was commenced after the Society had received information from a complainant. In her action the plaintiff sought an order that the Society disclose to her the identity of the complainant.

The House of Lords affirmed the judgment of the trial judge and refused to order the disclosure. In so doing their Lordships laid down, *inter alia*, the proposition that in deciding whether or not to disclose the identity of informants, the court must balance between competing interests. Furthermore, the House of Lords was of the opinion that the law ought to develop by analogy to existing categories of privilege. Thus, the House of Lords recognized that the Society had to rely on informants to provide information so that it could carry out its function effectively and efficiently. To prevent sources from drying up, a privilege like that accorded police informers was essential.

Martland, J. further sought to establish that the privilege exists in all civil cases by noting that the *NSPCC* case was a civil proceeding "and not related to any criminal prosecution."[14] However, it is submitted that the *NSPCC* case is not relevant in determining whether the privilege is broad and extends to civil proceedings. Rather, the case establishes a judicial approach employed to ascertain whether or not certain communications ought to be protected by a privilege. Thus, Martland, J. appeared to be considering that point out of context. He concluded that "the immunity from disclosure which is accorded in relation to information furnished to the police in the course of the performance of their duties is general in its scope."[15]

Mr. Justice Martland next addressed the issue of whether or not *The Health Disciplines Act* and *The Public Hospitals Act* impose a duty of confidentiality and whether or not a breach of that duty by the informants destroys the privilege. He noted that the prohibition against medical doctors disclosing patient information is a regulation enacted by the Council of the College of Physicians and Surgeons pursuant to *The Health Disciplines Act* and in act is in sub-section 21 defining professional misconduct. This sub-section deals with:

> 21. giving information concerning a patient's condition or any professional services performed for a patient to any person other than the patient without the consent of the patient unless required to do so by law.

Martland, J. took the view that this sub-section does not "impose a legal duty not to communicate information regarding a patient to the police ... [although] [t]he medical doctor who does so may be guilty of professional misconduct ... [and] subject to disciplinary procedures provided in the Act."[16]

The Public Hospitals Act prohibits a hospital board from disclosing medical information about patients to others. Martland, J. stated that this only applies to hospital boards and not to employees of the Board.[17] This is a

13. *See* text at n. 20.
14. *Supra* n. 6. at 224.
15. *Supra* n. 6. at 224-225.
16. *Supra* n. 6. at 226.
17. *Supra* n. 6. at 225.

questionable position when one considers that the Board acts through its employees and is responsible for the acts of its employees.

Even if he had decided that there was a duty not to disclose the information, it is unlikely that it would have had much impact on Martland, J.'s decision. His Lordship pointed out that the privilege is that of the R.C.M.P. and not of the informants and that misconduct on the part of the informants does not destroy the privilege. On this issue, Dubin, J.A. in the Onatrio Court of Appeal stated that "the patient's right to privacy would be an illusory one only, if the privilege were recognized under such circumstances."[18] In support of his position, Martland, J. pointed out that the informant in the *NSPCC* case was under a duty not to publish defamatory material about the plaintiff. That the informant did so did not destroy the privilege.

However, there appears to be a distinction on the facts of the *NSPCC* case and the present case. Here, the R.C.M.P. actively sought information from hospital employees and doctors knowing full well that employees and doctors were under a statutory obligation not to provide that information. This was wholesale divulgence of information contrary to statutory provisions. Martland, J.'s point may well have been sustainable if an employee or doctor volunteered information to the R.C.M.P. and the R.C.M.P. accepted it not knowing there was a breach of an obligation.

Thus, as the statutes did not preclude the right of the R.C.M.P. to resist compulsion to disclose the names of its informants to whom assurances of confidentiality had been given, and as *The Public Inquiries Act* preserved the privilege, the names of the informants would not be disclosed.

In his dissenting judgment, Chief Justice Laskin took an approach quite different from that of Martland, J. He noted that the important question concerned the limits of police informer privilege. He adopted a three step approach to determine the limits: (1) what must be shown to support it? (2) does the privilege extend to other than criminal proceedings or criminal-related proceedings? and (3) even if it does extend beyond such proceedings, may it be asserted in breach of a confidence arising out of a doctor-patient relationship or a hospital-patient relationship which is fortified or rests upon legislation?[19]

Dealing with the second and third points first, Laskin, C.J.C. noted that the leading case of *Marks* was a civil action for malicious prosecution. The Chief Justice took the position that the case establishes that privilege arises for consideration in public prosecutions. In considering Lord Diplock's statements in the *NSPCC* case which purports to extend the police informer privilege to civil actions, Laskin, C.J.C. appeared to be of the opinion that Lord Diplock went too far. He stated:

> It may be that he [Lord Diplock] intended to loosen the limitation on non-disclosure evident in *Marks* v. *Beyfus*. Certainly, the *NSPCC* case called for only an analogical consideration of the police informer privilege and was disposed of on a balancing test ....[20]

18. *Supra* n. 5. at 565.
19. *Supra* n. 6. at 207.
20. *Supra* n. 6. at 213.

Chief Justice Laskin dealt with two other House of Lords cases which appear to offer support for a wider application of the police informer privilege. In *Rogers* v. *Secretary of State for the Home Department*[21] the plaintiff sought disclosure of a letter written in confidence to the Gaming Board of Great Britain. The Board had a duty to investigate the character of applicants for gaming licenses before giving its consent. The letter had been written by a police officer. Lord Reid refused disclosure in the public interest, holding that to do so would impede the function of the Board. Although a police officer was involved, the case did not deal with police informer privilege. The second case, *Alfred Crompton Amusement Machines Ltd.* v. *Customs and Excise Commissioners (No. 2)*,[22] similarly did not involve police informer privilege, but rather Crown privilege. Laskin, C.J.C. did note, however, that the case "deserves mention in affirming that confidence is not in itself a basis for a claim of privilege but is relevant to a determination whether in the public interest disclosure should be refused."[23]

In further distinguishing those two cases from the one before him, Laskin, C.J.C. pointed out that in the cases before the House of Lords, statutory authorities were eliciting information to enable them to carry out their administrative duties. On the other hand, this case dealt with a judicial body examining issues which directly involved the identity of those who have improperly disclosed medical informaion.[24] That is, the function and scope of the tribunals were not at all similar.

Thus, the Chief Justice was of the opinion that the cases did not support a broad application of the privilege. Rather than suggesting that the privilege be extended, he stated that it should be confined to public prosecutions and criminal-related proceedings. He adds:

> Apart from these, I would not agree that it be an inexorable rule to recognize a privilege in other types of proceedings because the police are involved and have been gathering information in the regular course of their police duties.[25]

He further stated that depending on the nature of the proceedings, the Courts must have a discretion whether and to what extent there should be disclosure. He suggests:

> This would involve . . . balancing the public interest in the disclosure . . . that would assist in the proper determination of issues arising in the particular proceedings and with all due regard to the character of proceedings and assessing whether there is a countervailing public interest against disclosure in the particular proceedings.[26]

His Lordship adopted Lord Hailsham's approach in the *NSPCC* case where he stated, in essence, that the Court should not permit any party to a proceeding to withold relevant evidence, and that any attempt to do so must be justified.[27]

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21. [1973] A.C. 388 (H.L.).
22. [1977] A.C. 405 (H.L.).
23. *Supra* n. 6. at 211.
24. *Supra* n. 6. at 213.
25. *Supra* n. 6. at 213-214.
26. Supra n. 6. at 214.
27. *Supra* n. 8. at 233.

The conclusion reached by Laskin, C.J.C. is that the rationale for the privilege in criminal prosecutions or criminal-related proceedings "cannot apply to situations where there is no right to use an informer because a breach of the law would be involved in so doing."[28] It should be noted that Laskin, C.J.C. does not appear to directly confront the issue as to whether there has been a breach of the law. He seems to assume that as there is some statutory prohibition against disclosing patient information, there must be a breach of the law if the disclosures are made.

Conclusion

The far-reaching implications and potential effect of the case on, *inter alia*, police investigations, the sanctity of legally recognized confidential relationships, and the law of evidence in general, could not have been denied at any time. It is with cases like this that one would hope that the Supreme Court would take a cautious approach in arriving at a decision. Unfortunately, the majority of the Court has thrown caution to the wind. The result is a judgment which is so wide that it effectively makes any question regarding police informer privilege a non-issue in future cases.

In his judgment, Martland, J. appears to have ignored the broad public policy considerations which arise in the case. Although quite aware of the public policy reasons which support the police informer privilege, he does not address himself to the countervailing public interest in favor of disclosure. The approach taken by Mr. Justice Martland allows him to avoid dealing with the wider public policy considerations involved. That is, by taking the position that the police informer privilege exists in all cases, there arise no public policy considerations.

In arriving at the conclusion that the privilege exists at large in all cases, His Lordship provides an analysis of the cases which is, at least, questionable. One of his reasons for saying that *Marks* is applicable in all civil proceedings is that "there is no logical reason why it should not" be. He than repeats his error by relying on Lord Diplock in the *NSPCC* for the same proposition. Unfortunately, the statement of Lord Diplock's is *obiter* and not supported by either reason or authority.

On the other hand, Chief Justice Laskin takes a more cautious approach to the question. His judgment shows that he was much more cognizant of the competing public policy considerations than was the majority. In analyzing the cases, Laskin, C.J.C. is thorough and does not fall into the trap of allowing cases to stand for propositions for which they do not stand.

Furthermore, the result reached by the Chief Justice is, in this writer's view, to be preferred over that of Martland, J.. Establishing that the police informer privilege should be a matter of discretion for the court allows more control over the evidence which is to be excluded as well as offering more protection to confidential relationships. A recognition that there are competing public interest considerations which need to be balanced in each situation,

28. *Supra* n. 16, at 28.
29. *Supra* n. 5, at 565.

illustrates that the blanket approach taken by Martland, J. might well lead to cases in which the privilege protects a communication which, in the public interest, ought to be disclosed. Although the Chief Justice takes the view that the informers in this case were in breach of the law when they supplied the information contrary to the legislation, it is unfortunate, in light of the significance of the issue, that he did not give more detailed reasons for so deciding.