How Do We Think We Know What We Think We Know: Facts in the Legal System – Ethics and Evidence

CIAJ ANNUAL CONFERENCE – 2013

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Mitchell v MNR - Cultural Competence and Admissibility (Problem 4)

Halifax lawyer Lance Scaravelli resigns from practice

October 1, 2013 - 3:42pm **BY SHERRI BORDEN COLLEY STAFF REPORTER**

Prominent Halifax defence lawyer Lawrence (Lance) Scaravelli has resigned from practising law. On Sept. 27, the Nova Scotia Barristers' Society council accepted its complaints investigation committee's recommendation to approve Scaravelli's application to resign his membership. The resignation stems from a harsh court decision which prompted the society to scrutinize his conduct in 2011.

R v Fraser 2011 NSCA 70

- *Mitchell v MNR* [2001] 1 SCR 911 at para 30
  - "Rules of evidence should facilitate justice, not stand in its way"
    - SCC established a theoretical framework for the admissibility of evidence
  - Also incorporated the ethical principle of cultural competence into thinking about admissibility
    - Cultural competence and lawyering

(p value)

$$A = \frac{U + R2 + PV > PE}{CC}$$

“Underlying the diverse rules on the admissibility of evidence are three simple ideas.

First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case.

Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it.

Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.”

- Need to be culturally competent in applying these three animating principles:
  - "In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinct perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective."
    - Para. 34

- Problem 4(a)
  - Was the lawyer culturally incompetent for not raising race on the *Corbett* application?
- Jurisprudential support for developing evidentiary measures to protect against implicit bias/unconscious stereotyping
  - Section 276 and prior sexual history
- Need to think about a race shield lens to be used when deciding questions of admissibility such as the admissibility of a prior criminal record

- "… there can be no doubt that there exist[s] a realistic possibility that one or more potential jurors drawn from the Metropolitan Toronto community would, consciously or subconsciously, come to court possessed of negative stereotypical attitudes toward black persons."
  - *R v Parks* [1993] OJ No 2157 (CA) at paras. 54-55

- “ … Anti-black attitudes may connect blacks with crime and acts of violence. A juror with such attitudes who hears evidence describing a black accused as a drug dealer involved in an act of violence may regard his attitudes as having been validated by the evidence. That juror may then readily give effect to his or her preconceived negative attitudes towards blacks …”
  – *R v Parks* [1993] OJ No 2157 (CA) at para. 62

- “ … Racist stereotypes may affect how jurors assess the credibility of the accused. Bias can shape the information received during the course of the trial to conform with the bias …”
  - *R v Williams* [1998] 1 SCR 1128 at para. 28

- “We should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors. Rather, we should acknowledge the destructive potential of subconscious racial prejudice by recognizing that the post-jury selection safeguards may not suffice.”
  - *R v Williams* [1998] 1 SCR 1128 at para. 22

- *R v Lyttle* 2004 SCC 5 – good faith ethical obligation of lawyers in presenting evidence & making legal arguments
  - Problem 4(b) – was the Crown's question in compliance with *Lyttle*

Real Evidence Disclosure Obligation Post-*Murray* – Problem 1

Examples of Physical Evidence

Objects	Body materials	Impressions
Weapons	Blood	Fingerprints
Tools	Semen	Tire tracks
Firearms	Hair	Footprints
Displaced furniture	Tissue	Palm prints
Notes, letters or papers	Spittle	Tool marks
Bullets	Urine	Bullet holes
Vehicles	Feces	Newly damaged areas
Cigarette/ cigar butts	Vomit	Dents and breaks

- **What real evidence relevant to a crime in your possession has to be disclosed to the police/state/enforcement officials as per *R v Murray* (2000) 48 OR (3d) 544 (SCJ)?**
  - **Problem 1(a)-(g)**
  - **Problem 2(e)**
    - **How broadly or narrowly it is defined will determine the impact of the ethical rule on the search for truth and on the very foundations of the solicitor-client relationship**

Nature of the Evidence

- Instrumentalities/fruits of the crime/contraband
  - Gun
  - Drugs
  - Clothing worn/shoes
  - Original documents
    - Forged cheque
  - Property obtained by crime
  - Proceeds of crime
  - Illegal items not involved in crime

- Real evidence relevant to a crime
  - Documents (originals and not covered by privilege or implied undertaking rule [*Juman v Doucette* [2008] 1 SCR 157])
    - Client's diary
    - Tax returns
  - Electronic evidence
    - E-mails
    - Facebook postings
  - Third party cell phone photos/videos
- Evidence relevant to disciplinary misconduct or regulatory offence

Application of *Murray*

- No real guidance from *Murray* with respect to real evidence relevant to prove a crime
  - Focus is on instrumentalities of crime [paras. 109, 119-121]
- Should *Murray* apply outside of instrumentalities/fruits of a crime?
  - Is there a principled basis to distinguish?

Framework - Relevant Considerations

- **Purpose of possession**
  - First question should be – what is the purpose of taking/maintaining possession?
    - Stephen Gillers, "Guns, Fruits, Drugs, and Documents: A Criminal Defense Lawyer's Responsibility for Real Evidence" (2011), 63 *Stan L Rev* 813
  - If purpose is to conceal/destroy/thwart current or possible future charges then clearly unethical to possess or counsel to destroy or conceal
    - *Murray* approach [para. 107]
      - But see – ABA Defense Function – Standard 4 – 4.6 Physical Evidence
    - In almost all cases it would amount to obstruction of justice or other *Criminal Code* offence

- Ethical dilemma most pronounced where the purpose is for the giving of legal advice or to advance full answer and defence of a client charged with a criminal offence
  - What is the nature of the evidence?
  - What is the nature of the full answer and defence use?

- **Nature of the evidence – exculpatory/inculpatory or mixed**
  - *Murray* leaves this open [paras. 114, 117]
    - Characterizes tapes as "overwhelmingly inculpatory"
  - Broad Alberta disclosure obligation only applies to inculpatory evidence
    - Commentary – Rule 4.01(9)(d)
  - Proulx & Layton, *Ethics and Canadian Criminal Law* (2001) at 523 [no duty of disclosure with purely exculpatory evidence]

- But what about evidence that proves your client's innocence but nevertheless is evidence of a crime or where there is some question about whether your client's action were in self-defence? (**Problem 1(a)**)
- In our scenario, the evidence is exculpatory vis a vis the client but evidence of a crime by the police officer

- **Nature of Defence Use**

  Taking Possession to Prevent a Wrongful Conviction

  – Cross-examination - where value lost if disclosed in advance of trial

    - Proposed but not enacted LSUC Rule
    - Proulx & Layton, *Ethics and Canadian Criminal Law* (2001) at 523

  – **Problem 1(a)**

Testing

– *Murray* at paras. 122-123 [does not foreclose this possibility of retention for testing]
– Proulx & Layton, *Ethics and Canadian Criminal Law* (2001) at 509
– Does it depend on whether possession of item is itself illegal?
– What do you do with the item?
  - Return it to its source?
  - Disclose it to the authorities?

The Giving of Legal Advice

– Only after reviewing the documents does the lawyer conclude that the client was guilty of tax evasion
– Lawyer’ ethical obligation should be to return the documents to the client and persuade him to voluntarily disclose

- **Nature of the proceedings – civil action (Problem 1(f)-(g))**
  - Rules of Civil Procedure requires disclosure of all relevant evidence to the action
    - This would include information on client’s social media sites even if protected by privacy settings
      - *Stewart v Kempster*, 2012 ONSC 7236
      - *Leduc v Roman*, [2009] OJ No 681 (SCJ)
      - Ronald Podolny, “When ‘Friends’ Become Adversaries: Litigation in the Age of Facebook” (2009) 33 *Man LJ* 391

- What advice can a lawyer give a client about their social media site? What can a lawyer do with a particular site?
  - Destroy incriminating material?
- How far can a lawyer go in attempting to access a witness or the other party's social media site in an effort to secure evidence? Trickery?
  - LSUC Rule 6.03(7) – Communications with a represented person

Using the Crown Disclosure Brief - BC v ONT (Problem 2(a)-(b))

- *R v Henry* 2012 BCSC 1878/*R v Basi* [2011] BCJ No 420 (SC)
- *DP v Wagg* (2004) 71 OR (3d) 229 (CA)
  - Is there any real difference in the approach taken?
  - Is there a need for guidance from the SCC?

Privilege, Disclosure and the Crime-Fraud/Inadvertence Exceptions (Problem 2(c)-(d))

- Application of crime-fraud exception
  - Relevant case law
    - *Brome Financial Corp. v Bank of Montreal* 2013 ONSC 4816
    - *1784049 Ontario Ltd v Toronto (City)*, 2010 ONSC 1204
- What about inadvertent disclosure?
    - *Chan v Dynasty Executive Suites Ltd* [2006] OJ No 2877 (SCJ)

Privilege, Disclosure, Public Safety and *R v Butt (*Problem 2(e))

- *R. v. Butt* [2012] OJ No 3553 (SCJ)
  - Butt was convicted of sexual interference (oral sex) on a young boy
    - Sentenced to 14 days
      - Crown appealed
    - Between the sentencing and appeal, Butt testified positive for HIV
  - Unclear whether appellate lawyer disclosed this to the Court pursuant to the client's consent or under the public safety exception (Rule 2.03(3))

- Assume it was under public safety/future harm exception – case raises a number of issues
  - Is the exception triggered? What constitutes "risk"?
  - Procedure – What advice do you give your client? When do you disclose? Do you get a court order? Is there immunity protection for the client?

- Is the exception triggered? What constitutes "risk"?
  - Assessing likelihood of transmission
  - Realistic possibility of transmission amounts to a significant risk of serious bodily harm
    - *R v Mabior*, 2012 SCC 47
      - » Not met where there is a low viral load and a condom used

- Procedure
  - What advice do you give the client?
    - Information protected by SCP
    - Disclosure is discretionary
    - Seek independent legal advice?
  - Do you get a court order?
    - Recommendation of *Smith v. Jones* [1999] 1 SCR 455
    - “where practicable” – LSUC , Rule 2.03(3)
    - Federation Rule also recommends seeking advice from the local law society

- Immunity?
  - Disclosure may impact criminal liability and/or sentencing
  - Inconsistent answers with *Smith v. Jones* [1999] 1 SCR 455 and *R v Brown* [2002] 2 SCR 185
    - Is the distinction that one situation involves public safety that requires control of the accused through sentencing and therefore no immunity?
    - If *Brown* applies
      - » Use and derivative use immunity
        - Para. 94

Corporate Ethics, Conflicts and Privilege (Problem 3)