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Limits on Evidence Collected by Private Investigators

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It is a common occurrence.

Your client tells you that it has been sued by a plaintiff claiming to have suffered an injury as a result of your client's actions. Your client does not believe that the plaintiff is injured to the extent the plaintiff alleges, or to the extent purported in the plaintiff's medical report. As a result, your client wants to hire a private investigator to verify the validity of the plaintiff's claim and has asked you to help initiate an investigation.

Undoubtedly, you would commence an investigation with the purpose of obtaining evidence for use at trial to refute the plaintiff's allegations. However, the decision in *Cowles v. Balac*, [2004] O.J. No 4534 suggests that the admissibility of evidence obtained by investigators will not be automatic. Rather the courts will carefully scrutinize the manner in which the evidence was collected by the investigator. Where the evidence was obtained in a manner contrary to spirit of the Rules of Professional Conduct, even if by an investigator, the evidence is likely to be excluded.

The Facts

Jennifer Cowles and David Balac were driving through African Lion Safari when a tiger attacked their vehicle, ultimately ending up in the vehicle with the couple. Both Ms. Cowles and Mr. Balac sustained serious

injuries and subsequently commenced Actions against, among other defendants, African Lion Safari.

In preparing their defence, African Lion Safari's solicitor retained a private investigator to investigate Ms. Cowles. This investigation took place, on occasion, over a four year period. African Lion Safari's solicitor stated that his instructions to the investigator were to determine whether Ms. Cowles was employed at her pre-accident employment, and how often she was working. Ultimately, the solicitor stated that the evidence gathered by the private investigator confirmed Ms. Cowles' own evidence on her examination for discovery.

The Surveillance

The court granted Ms. Cowles' motion to exclude the evidence obtained by the private investigator and ordered the complete production of the investigation file to Ms. Cowles. The court felt that the production of the investigation file was necessary to ensure that no "improperly obtained evidence" would be put into evidence at trial.

In excluding the evidence, the court found that the private investigator had an obligation to advise Ms. Cowles who he was and why he was speaking with her prior to conversing with her. Since he did not do



so, the conversations were held to be improper and the evidence of those conversations was excluded.

The court made its decision to exclude the evidence by making particular reference to Rule 4.03(2) of the Rules of Professional Conduct. Rule 4.03(2) states:

A lawyer shall not approach or deal with a person who is represented by another lawyer, save through or with the consent of that party's lawyer.

The court held that it was no more appropriate for the solicitor to have retained a private investigator to approach the plaintiff, who was represented, than it would have been for the solicitor to approach her directly.

The court also stated that it is a solicitor's responsibility to ensure that a private investigator is made aware of the Rules of Professional Conduct. Any evidence obtained by the investigator in breach of Rule 4.03(2), and any evidence further obtained as the result of that breach, will be excluded from the trial proceeding.

The Impact of Cowles

The *Cowles* decision should not be read as the end of the use of private investigation services during the course litigation. Rather, the decision highlights that the courts may strictly impose limits on the manner in which evidence is obtained in civil matters, particularly where there is a breach of Rule 4.03(2) in the gathering of that evidence.

Ferenczy v. MCI Medical Clinics et al. (2004), 70 O.R. (3d) 277 is indicative of this view. In *Ferenczy*, the court held that videotape surveillance of a plaintiff in a personal injury claim was admissible and did not violate the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"). The videotaped evidence showed the plaintiff holding a cup of coffee in her left hand; the plaintiff's evidence had been that her left hand was disabled and she could not grip a hairbrush or a cup with that hand.

With respect to the admissibility of the evidence, the court said:

The plaintiff has sued [the defendant] and made a claim in her pleadings and in her evidence that her left hand has been disabled.

The surveillance was undertaken in a public place and relates directly to the alleged disability. The introduction of such evidence has the potential to operate unfavourably to the plaintiff, but not to render the trial unfair.

Further, the court found that PIPEDA did not apply to exclude evidence taken by a private investigator in the course of civil proceedings. In part, the court found that PIPEDA could not apply because the defendant (or the defendant's agent, the private investigator) was not collecting personal information in the course of a commercial activity. Rather, the defendant was mounting a defence to the plaintiff's allegations:

This is a personal purpose in the context of the civil action brought against him by the plaintiff. In my view, this conclusion is consistent with the overall purpose of the Act which is aimed primarily at information collected as part of commerce.

The court also held that the plaintiff had given her implied consent to the defendant to collect, use and disclose her personal information insofar as:

- a. The information was collected to allow the defendant to defend the Action; and,
- b. The recording was made in a public place.

The court stated further that by commencing her action, the plaintiff made her injuries an issue in the action. As a result, it was not open to her to allege that she did not consent to the collection of the information used against her at trial.

In any event, the court stated, the collection of the evidence would not have violated PIPEDA on the basis of an exception to the consent requirements found in that legislation. That exception states that evidence can be collected without the knowledge or consent of the individual in question, if it would compromise the availability or the accuracy of the information, and if the evidence was collected in a circumstance where it was reasonable for purposes related to the investigation of a breach of an agreement or a contravention of the laws of Canada or a province. A tort was held to fall within the definition of the laws of Canada or a province. Once this exception was met, the defendant was permitted, pursuant to PIPEDA if it had been found to apply, to use that information and to disclose it.

The difference between the two cases appears to be the nature of the investigation and the actions taken by the investigator. In *Ferenczy*, the investigator did not attempt to speak to the plaintiff; he only took videotape evidence of the plaintiff while she was in a public place. This approach can be contrasted with the approach taken in *Cowles*, where the private investigator interacted with Ms. Cowles during the course of the investigation.

The foregoing cases indicate that surveillance can be conducted to gather evidence for use at trial, but counsel must be careful when instructing private investigators. Counsel should ensure that they instruct private investigators in writing, and place clear limits on the retainer.

Specifically, counsel should advise private investigators:

- Not to speak to, or otherwise engage, represented parties;
- That any evidence they collect if they violate their retainer may be inadmissible at trial;
- Of the content of Rule 4.03(2) of the *Rules of Professional Conduct*.

By following these basic principles, litigators will continue to have access to private surveillance evidence at trial while respecting their obligations under the Rules of Professional Conduct.

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