

Faltenhine v. Bragg Communications

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Collateral use of Crown files

RCMP found not subject to non-party civil discovery rules

A garage burns down in suspicious circumstances. A car hits a bus at excessive speed. A recreational boater runs aground on his way home from a dock-side pub.

Whether investigating a claim, defending a civil action, or pursuing a subrogated recovery, insurers require the best information available to properly assess questions of liability, damages and coverage. Often that will include a police file, which typically contains material not available anywhere else.

A new decision from the Nova Scotia Supreme Court, ***Faltenhine v. Bragg Communications*** 2007 NSSC 229, could present insurers with a significant barrier to disclosure of RCMP materials in these circumstances.

The plaintiffs in ***Faltenhine*** alleged assault by one of the defendants while he was impersonating a service person employed by the other defendant. In their civil action for assault, the plaintiffs sought a court order compelling the RCMP to produce its file as well as the clothing.

Justice Moir opened the decision by observing that “one might have thought it well settled” that the civil court could not compel disclosure or participation in discoveries unless the Crown was a party.

Indeed a line of Nova Scotia cases—some cited in the ***Faltenhine*** decision—does support that view.

The settled position, according to ***Faltenhine***, is that the Crown is bound only by legislation that expressly states it has the power to do so. There is no such power in the relevant provincial legislation in this province. Justice Moir also stated that “the courts have always recognized a royal prerogative against discovery,” a prerogative protected by the provincial ***Interpretation Act***.

The plaintiffs in ***Faltenhine*** went a different route, relying on ***Temelini v. Wright***, a 1999 decision of the Ontario Court of Appeal that applied *federal* legislation to bind the RCMP to Ontario’s civil non-party disclosure rules. As a result, the RCMP although a non-party was obliged to produce its files in a malicious prosecution action.

The ***Temelini*** decision hinged on s. 27 of the federal ***Crown Liability and Proceedings Act***, which states in part that “the rules of practice and procedure of the court in which proceedings are taken apply in those proceedings.”

Following a lengthy exercise in statutory interpretation, a unanimous Ontario Court of Appeal decided that by “necessary and logical” inference, s. 27 bound the federal Crown to provincial civil procedure rules.

Faltenhine decided otherwise. Although he found ***Temelini*** a “persuasive authority,” Justice Moir conducted his own review of the statute and arrived at the opposite conclusion.

Justice Moir did remark, without further discussion, that *Temelini* had been followed in a New Brunswick decision, *Goguen v. Leger Estate* 2004 NBQB 73. In *Goguen* the defendant insurer in a single motor vehicle accident case successfully applied for disclosure of the RCMP's investigation into the accident.

We note that *Temilini* has recently been followed in two decisions that may not have been before the court in *Faltenhine: Corbett v. Samsports.Com* 2007 ABCA 151, a unanimous decision from the Alberta Court of Appeal, and *R v. Taylor* 2007 NSSC 56, where Justice LeBlanc of the Nova Scotia Supreme Court applied *Temelini* to award costs against the Crown following a successful application to quash a search warrant.

The Court of Appeal is scheduled to hear an appeal from *R v. Taylor* in October 2007. We gather that no appeal is planned in *Faltenhine*.

In the meantime, *Faltenhine* likely means that insurers can expect even more resistance in seeking non-party disclosure from the RCMP.

This article is produced by Huestis Ritch to keep our clients and friends informed of current legal issues. It is intended for general information purposes only. If you have any questions or comments on the above, or if you would like to be added to our mailing list, please feel free to contact any member of our litigation group at (902) 429-3400 or by email: Murray Ritch—mjr@hrlaw.net; Bill Kydd—whk@hrlaw.net; Peter Darling—pdd@hrlaw.net; Phil Chapman—pmc@hrlaw.net; Jean McKenna—jmck@hrlaw.net; Matt Williams—mgw@hrlaw.net; Lisa Richards—lr@hrlaw.net; Margot Ferguson—mf@hrlaw.net; Elissa Hoverd—eh@hrlaw.net; Roger Shepard—rts@hrlaw.net; Wayne Francis; wjf@hrlaw.net.