**CITATION**: Salvation Army v. Dhaliwal; 2022 ONSC 1447

**COURT FILE NO.:** CV-19-621896
**RELEASED:** 2022/03/04

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** The Governing Council of The Salvation Army in Canada and The Salvation Army Toronto Grace Health Centre

Plaintiffs

**AND:** Varinder Singh Dhaliwal, a person under disability by his litigation guardian, Baljeet Kaur Dhaliwal

Defendant

**BEFORE:** Associate Justice Graham

**COUNSEL:** R. Curcio, for the plaintiffs

N. Sinjari, for the defendant

**HEARD:** March 4, 2022

## ENDORSEMENT

(Ruling on an issue of litigation privilege)

[1] On July 6, 2014, the defendant Varinder Dhaliwal sustained catastrophic injuries in a motor vehicle accident. Since December 24, 2014, other than for one week in March, 2015, he has been hospitalized at The Salvation Army Toronto Grace Health Centre ("Salvation Army TGH"), a health care facility providing complex and specialized rehabilitation and palliative care. His mother, Baljeet Kaur Dhaliwal, is his litigation guardian.

[2] Salvation Army alleges that since Mr. Dhaliwal first became a patient at TGH, he was invoiced for the services provided, and these invoices were paid, first by his insurer TD Insurance and then by him. In this action, the plaintiffs claim that Mr. Dhaliwal continues to be a patient receiving services at TGH but has not paid any of the invoices since March 31, 2018.

[3] Salvation Army alleges that throughout Mr. Dhaliwal's stay at TGH until May 1, 2019, it issued invoices for medical rehabilitation services of $514.95 per day and attendant care services of $6,000.00 per month. In early 2019, they advised Mr. Dhaliwal that the rate applied to the services provided "is disproportionate to the costs incurred by the Facility" and effective May 1, 2019, the invoices would reflect a flat rate of $1,069.00 per day being the Ministry of Health and Long Term Care's approved "out of province" rate.

[4] When the statement of claim was issued on June 13, 2019, the defendant was alleged to owe the plaintiff $327,926.30 and the amount owing has subsequently increased by $1,069.00 per day. The plaintiffs allege a breach by the defendant of an agreement to pay for their services and in the alternative, unjust enrichment to the extent of the value of those services.

[5] In his statement of defence, Mr. Dhaliwal acknowledges that he has received services from Salvation Army TGH but disputes the quantum invoiced. He alleges that he settled his accident benefits claim with TD Insurance on April 10, 2018. He alleges that on September 5, 2018, through his guardian of property (now his litigation guardian) he executed an Undertaking Agreement providing *inter alia* that the med-rehab services cost $514.95 and attendant care services cost $6,000.00 per month. He also pleads that on May 1, 2019, the plaintiffs "unilaterally and arbitrarily" increased the costs of care provided from $514.95 per day to $1,069.00 per day. He alleges that this "arbitrary change" is unconscionable and not contemplated at the time of the Undertaking Agreement of September 5, 2018 and is a bad faith attempt to take advantage of a financially vulnerable individual.

[6] Examinations for discovery of the plaintiffs' representative Ralph Anstey and Baljeet Kaur Dhaliwal for the defendant were held on May 12, 2020 and September 3, 2020 respectively. The defendant and plaintiff subsequently moved to compel answers to each others' undertakings and refusals. The defendant also moved to amend their statement of defence to add a counterclaim for damages for breach of contract, misrepresentation and fraudulent overbilling of services.

[7] At the hearing, counsel for the parties informed the court that they resolved all issues on the motions except for whether the plaintiffs were required to answer Q. 248 from Mr. Anstey's examination for discovery. The request and response as recorded in the chart filed by the defendant are:

> **Q. 248** To produce the handwritten notes in relation to Ralph's [Mr. Anstey's] discussion with Ms. Isakow-Weiss [the manager of the nursing unit at the defendant hospital] at the end of December, 2018 or early 2019, when he first found out that the services were being reduced to Mr. Dhaliwal.
>
> **Response:** Mr. Anstey's notes were made at the request of counsel and in the context of this ongoing litigation. Accordingly, these notes are privileged. Mr. Anstey was told that Mr. Dhaliwal was receiving the following services at the time he took his notes:
>
> - OT: not on active caseload, quarterly reassessment only
> - Physio: 30 minutes for quarterly reassessment
> - Recreation therapy: 1-2/month for bedside sensory stimulation
> - Speech: Q3 for assessment

[8] The parties both have copies of the December 5, 2018 email from Mr. Iqbal Bedi of the defendant's law firm to Edyta Ostrowski, a financial analyst with the plaintiffs. The issue on the motion relates to production of the plaintiff's copy of the email on which Mr. Anstey made handwritten notes at his meeting with Ms. Isakow-Weiss. As stated in the chart quoted above, the plaintiffs' objection to producing those notes is that they are protected by litigation privilege. The plaintiffs have provided to me and I have inspected a copy of the email including the handwritten notes pursuant to rule 30.04(6).

[9] The law with respect to litigation privilege was summarized by DiTomaso J. in *Sky Solar (Canada) Ltd. v. Economical Mutual Insurance Co.*, 2015 ONSC 4714 (at para. 80):

> **80** ***As for litigation privilege, once again, the onus rests on the party seeking litigation privilege. That party is required to establish two elements: (a) that litigation was contemplated; and (b) that the documents for which privilege is sought were created for the dominant purpose of litigation***. This is a conjunctive test. As such, courts have refused to accept the claim of litigation privilege over the documents prepared after the time of litigation was contemplated, where there was no evidence that the subject documents were prepared for the dominant purpose of litigation. [emphasis added]

[10] In *Mamaca v. Coseco Insurance Co.*, [2007] O.J. No. 1190, Master Dash considered the onus on the party claiming litigation privilege. For context, *Mamaca* was a case in which a plaintiff, in asserting a claim against an accident benefits insurer following a motor vehicle accident, sought production of the defendant's entire claims file, and the insurer claimed litigation privilege over documents created after the claim for benefits was denied and mediation was requested. Master Dash stated as follows (at para. 15):

> **15** ***The onus is on the party claiming litigation privilege to lay an evidentiary foundation for that privilege. The best evidence would be an affidavit from the claims handler as to when she reasonably anticipated that litigation was likely and why and that her ongoing investigation and document creation was to assist in the defence of that litigation.*** It would however, not be sufficient evidence for the adjuster to make general assertions that all documents created after litigation was reasonably anticipated were prepared for purposes of that litigation. The evidence must be specific and speak to the content of each document. The court could also look to the circumstances and the chronology of events to help in determining the dominant purpose for creation of the documents. It may also "inspect the document for the purpose of determining . . . the validity of a claim of privilege" pursuant to rule 30.06(d). [emphasis added]

[11] Plaintiffs' counsel submits that the document speaks for itself and the fact that the original email on which Mr. Anstey made his notes is from the defendant's lawyer to the plaintiffs created a sufficient likelihood of litigation to cloak the notes made at the meeting with litigation privilege. The plaintiffs commenced the action in June, 2019 and the notes were made in relation to an issue that is both part of the defendant's defence of that action and the counterclaim that the defendant sought to add to its statement of defence on this motion.

[12] The defendant submits that the plaintiffs' action was not commenced until June 13, 2019, and there is no evidence that litigation was contemplated when the notes were made six months previously. There is no evidence from Mr. Anstey himself to the effect that he prepared the notes in contemplation of litigation. Also, the plaintiffs never responded to the email, so there was no communication from the plaintiffs raising the spectre of litigation prior to the subject meeting.

[13] Based on the case law reviewed above, the issue is whether the plaintiffs have met their onus to demonstrate that Mr. Anstey's handwritten notes on the printed copy of defendant's counsel's December 5, 2018 email were made for the dominant purpose of reasonably contemplated litigation.

[14] Plaintiffs' counsel's submission is that defendant's counsel's email of December 5, 2018 alleged a failure to provide various services that were included in monthly invoices to the defendant, thus giving rise to a reasonable likelihood of litigation with respect to that issue. However, there is no suggestion in the email that the issue raised would be litigated; the mere fact that the email came from a law firm does not automatically mean that there would be a lawsuit. It was the plaintiffs who received the email, and not the defendant on whose behalf it was sent, who eventually started the litigation; the plaintiffs cannot convincingly argue that the defendant somehow raised the prospect of the lawsuit that they themselves started.

[15] Most importantly, based on *Mamaca, supra*, if the plaintiff contemplated litigation on receipt of the December 5, 2018 email, it was incumbent on Mr. Anstey to provide evidence to that effect. The only evidence from the plaintiffs in response to the defendant's motion is in the affidavit of Karen Lam, a law clerk at the plaintiffs' law firm, which makes no reference to Mr. Anstey's state of mind at the time of his meeting with Ms. Isakow-Weiss. Absent concrete evidence from Mr. Anstey, the plaintiffs' bald statement that the "notes were made at the request of counsel and in the context of this ongoing litigation" is of no value. In the absence of any such evidence, the plaintiffs have not met their onus to demonstrate that Mr. Anstey made those notes for the dominant purpose of contemplated litigation.

[16] For these reasons, the plaintiffs' claim of litigation privilege over Mr. Anstey's notes fails and the plaintiffs shall produce the notes that are the subject of Q. 248 at his examination.

[17] **Costs:** Counsel agreed that there be no additional costs of the motions beyond the disposition of costs in their consent order. Accordingly, I make no further order as to costs.

A Graham

ASSOCIATE JUSTICE GRAHAM

**Date:** March 4, 2022