DATE: **20041116**
DOCKET: C40275

COURT OF APPEAL FOR ONTARIO

ROSENBERG, ARMSTRONG and BLAIR JJ.A.

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	
	)	**Scott C. Hutchison**
	)	**for the appellant**
Appellant	)	
	)	
- and -	)	**Frank Pizzimenti and**
	)	**Joseph Colangelo for the**
SERENDIP PHYSIOTHERAPY	)	**respondent Serendip**
CLINIC, SUTHA KUNARATNAM	)	**Physiotherapy Clinic**
and RESHAWN DEVENDRA	)	
	)	**Reshawn Devendra**
Respondents	)	**In person**
	)	
	)	
	)	**Heard: August 12, 2004**

On appeal from the order of Justice D. Ferguson of the Superior Court of Justice dated June 30, 2003.

ROSENBERG J.A:

[1] This is a Crown appeal from the decision of Ferguson J. quashing a search warrant. Ferguson J. concluded that special post-seizure conditions must be imposed as part of any warrant to search and seize medical records and that since the justice of the peace did not impose those conditions in this case, the justice had no jurisdiction to issue the warrant. The application judge went on to craft the type of post-seizure procedures that in his view would meet minimum constitutional requirements. These requirements included the sealing of the records, notice to all affected parties and an *inter partes* hearing where the issuing justice would determine whether or not the seized records should be disclosed to the police bearing in mind a number of factors. I have attached as

Appendix "A", paragraph 68 of the reasons where the application judge set out the conditions that should be included in search warrants to search and seize medical records.

[2] In my view the application judge erred in holding that a justice of the peace has no jurisdiction to issue a search warrant that otherwise meets the requirements of s. 487 of the *Criminal Code* on the basis that the warrant contains no conditions to protect the privacy of the medical records. I would therefore allow the appeal, set aside the order quashing the warrant and dismiss the application. In light of my conclusion on the main issue, I do not need to deal with issues of standing and notice that the appellant also raised on the appeal.

THE FACTS

[3] As indicated, the application judge quashed the warrant on the basis of a question of law concerning the jurisdiction of the justice of the peace to issue a warrant that does not contain conditions to protect the privacy of medical records. It is therefore only necessary to give a very brief overview of the facts.

[4] The search warrant obtained in this case was in aid of an investigation into a scheme to defraud Kingsway General Insurance Company. The allegation was that "accident recovery" service providers, like the respondent Serendip Physiotherapy Clinic, conspired with corrupted staff at Kingsway to generate false or exaggerated claims and payments for "victims" of motor vehicle accidents. The information to obtain the warrant indicates that five patients of the Clinic participated in the scheme and that Kinsgway made payments to the respondent for services that were never rendered or which had been overvalued.

[5] On February 18, 2003, an officer of the Toronto Police Service Fraud Squad applied for the search warrant. Justice of the Peace R. Lewin issued the warrant without any special terms to protect the privacy of patients' records that might be seized at the Clinic. The warrant was executed on February 19, 2003 and a large number of records were seized, apparently including records of patients who had not been identified in the information to obtain the warrant as parties to the conspiracy. The following week the respondents obtained an order sealing the seized materials pending the determination of an application for an order in the nature of *certiorari* quashing the warrant. The application to quash the warrant was granted by Ferguson J. on June 30, 2003.

REASONS OF THE APPLICATION JUDGE

[6] This brief summary of the reasons of the application judge will not do justice to his very careful and thoughtful reasons. The application judge held that while there was no attack on the constitutionality of s. 487 of the *Criminal Code*, which authorizes the issuance of a search warrant to search for evidence of a crime, that section must be interpreted in accordance with values protected by the *Canadian Charter of Rights and Freedoms*. He noted that in *Descoteaux v. Mierzwinski* (1982), 70 C.C.C. (2d) 385 (S.C.C.), the court read additional common law requirements into the statutory requirements under s. 487 in the case of records that might be covered by solicitor-client privilege.

[7] The application judge held that there is a universal concern about the privacy of health records. He adopted and adapted the approach taken by L'Heureux-Dubé J. in *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.), a case that dealt with the production of personal information records to an accused. He interpreted the reasons of L'Heureux-Dubé J. in *O'Connor* as creating rules that should apply to any records in the hands of a third party in which a reasonable expectation of privacy lies, including medical and therapeutic records. He also relied on her holding that s. 7 of the *Charter* includes a right of privacy that must be balanced against other societal interests. The application judge also noted that Lamer C.J.C. and Sopinka J. in their separate reasons described therapeutic records as attracting a stronger privacy interest that other forms of information.

[8] The application judge held that physiotherapy records are capable of raising a privacy interest of sufficient importance to warrant protection since they will commonly include a history of the patient's health. He also relied upon the *Report of the Commission of Inquiry into the Confidentiality of Health Information*, Queen's Printer, 1980 (the *Krever Inquiry Report*) to find that all health records should be presumptively protected.

[9] The application judge then went on to craft a set of requirements that should be read in to s. 487 based on the procedures set out in *O'Connor*. The police are required to disclose to the justice of the peace that the records sought are health records. The justice of the peace should then determine whether the records are health records and whether the circumstances show that there may be a privacy interest of a patient at risk if the records are seized. Thus, there may be no privacy interest engaged if the patient has provided a valid consent to the police. If the justice of the peace finds that the documents sought are health records and that there may be a privacy interest at risk, he or she must proceed in accordance with the guidelines set out at paragraph 68 of the reasons for judgment. As indicated, I have attached that paragraph as an appendix to these reasons. In summary, the warrant must require that the records be immediately sealed until a

judicial officer holds a hearing. Where it is feasible, after execution of the warrant, the justice of the peace should require the applicant to give notice to those in possession of the records and the patients whose privacy interests may be at risk so that they can make submissions. The judicial officer must then decide whether and to what extent to require disclosure of the records balancing the competing interests of the police and the patient's right to privacy. In making that determination the judicial officer may take into account a number of factors such as the record's likely relevance to the crime, the extent to which the record is necessary for the investigation, the probative value of the record, the nature and extent of the reasonable expectation of privacy and the potential prejudice to the privacy of the patient. Even if the judicial officer decides that there should be disclosure, it may be necessary to impose certain conditions to mitigate the invasion of privacy. The application judge held that the judicial officer conducting this post-execution hearing would be the issuing justice of the peace or another justice of the same territorial jurisdiction.

[10] The application judge went on to consider at some length the nature of the consent that would be sufficient to dispense with all or most of the conditions that would ordinarily have to be imposed. He also held that it would be a reasonable condition that in all cases the police give notice of the hearing to the professional college that supervises the health care practitioner whose records were sought.

[11] The application judge concluded that the common law requirements were not met in this case, that the justice of the peace acted without jurisdiction in granting the warrant, and that accordingly, the search warrant should be quashed.

ANALYSIS

[12] The principal issue in this case is the nature of the jurisdiction under s. 487 of the *Criminal Code* to issue a warrant to search for and seize health records in which a patient has a reasonable expectation of privacy. Prior to this case, the need for special consideration of search warrants was recognized in three circumstances only:

> 1. Search of a law office (or legal aid office as in *Descoteaux*) to seize records potentially subject to solicitor client privilege.
>
> 2. Search of an office of the press or other media that could interfere with the operation of the media as in *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (S.C.C.). But now see *Canadian Broadcasting Corp. v. New*

Brunswick (Attorney General) (1991), 67 C.C.C. (3d) 544 (S.C.C.) and *Canadian Broadcasting Corp. v. Lessard* (1991), 67 C.C.C. (3d) 517 (S.C.C.).

3. Search of a psychiatrist's office to seize records concerning the treatment of an accused patient: *R. v. J.O.*, [1996] O.J. No. 4799 (Gen. Div.).

[13] The respondents support the decision of the application judge on the basis that, in their view, it is time to recognize that all health records (not just psychiatric records) attract a sufficiently important privacy interest that search for and seizure of those records require special protection. They argue that the fact that no other court has yet to recognize the need for such a special regime is no reason not to impose one if such a decision can be justified as a matter of law and policy.

[14] In considering this issue, I intend to review the analogies relied upon by the application judge, especially the seizure of records from lawyers' offices and production of records of sexual assault victims to the accused. I will then consider the broader question of whether the special regime is required as a matter of law and policy, taking into account *Charter* values.

The analogy to the search of a lawyer's office

[15] The application judge relied upon the rules respecting the search of a law office only as a precedent for circumstances where courts have used the common law to impose conditions to the use of the search warrant power beyond those set out in s. 487 of the *Criminal Code*. It is useful, however, to look briefly at the law office cases because they illustrate the exceptional nature of the relationship involved. In *Descoteaux* at p. 396, Lamer J. referred to *Solosky v. The Queen* (1979), 50 C.C.C. (2d) 495 (S.C.C.) where at p. 510, Dickson J. described the solicitor client relationship as a "fundamental civil and legal right" founded upon a "unique relationship". As a result, the solicitor client relationship gives rise to both a rule of evidence and a substantive rule. The rule of evidence precludes the admission into evidence of documents that are protected by solicitor client privilege. The substantive rule is a broader one that protects the fundamental right of clients to have their communications kept confidential. In the result, the courts have crafted a number of stringent conditions that must take into account both the rule of evidence and the substantive rule. LeBel J. summarized those conditions in the recent decision of the Supreme Court in *Maranda v. Richer* (2003), 178 C.C.C. (3d) 321 at para. 10:

> 1. No search warrant can be issued with regard to documents that are known to be protected by solicitor-client privilege.
>
> 2. Before searching a law office, the investigative authorities must satisfy the issuing justice that there exists no other reasonable alternative to the search.
>
> 3. When allowing a law office to be searched, the issuing justice must be rigorously demanding so to afford maximum protection of solicitor-client confidentiality.
>
> 4. Except when the warrant specifically authorizes the immediate examination, copying and seizure of an identified document, all documents in possession of a lawyer must be sealed before being examined or removed from the lawyer's possession.
>
> 5. Every effort must be made to contact the lawyer and the client at the time of the execution of the search warrant. Where the lawyer or the client cannot be contacted, a representative of the Bar should be allowed to oversee the sealing and seizure of documents.

[16] The first condition follows from the rule of evidence. The other four conditions largely implement the substantive rule. It is because the solicitor client relationship is unique and has these exceptional attributes that the courts have imposed special conditions. The informant who applies for the search warrant, the authorizing judge and those responsible for executing the warrant must address these conditions: *Maranda* at para. 14.

[17] Unlike the search of a lawyer's office, search of a clinic offering physiotherapy services does not risk the breach of an established class privilege. *Prima facie*, records seized from such a clinic are admissible in evidence at a court of law. By contrast, records held in a lawyer's office are presumptively covered by solicitor client privilege and thus presumptively can not be "evidence" within the meaning of s. 487 and therefore not subject to seizure.

[18] There is also no analogous substantive rule that protects the confidentiality of patient physiotherapist communications in the same way that the substantive rule protects solicitor client confidences. To the contrary, the regulations under the *Physiotherapy Act,*

1991, S.O. 1991, c. 37, while confirming the obligation of the practitioner to keep confidential information about a patient, make that obligation subject to the exception where disclosure is "required or allowed by law": O. Reg. 861/93, s. 1 (9). This is not to minimize the importance of patients' privacy interests, a matter I will discuss later, but simply to make the point that the solicitor client relationship is simply not an apt analogy for embarking on a new regime for other types of searches. More importantly, there are no established legal rules governing the patient and health provider relationship that can serve as the foundation for the kinds of conditions imposed in this case.

The analogy to the *O'Connor* regime

[19] The application judge found the strongest support for requiring additional conditions in a search for health records in the reasons for judgment of L'Heureux-Dubé J. in *O'Connor,* which he interpreted as requiring enhanced protection for medical and therapeutic records. The application judge relied in particular on L'Heureux-Dubé J.'s discussion of the right to privacy in paragraphs 110 to 119. In that part of her reasons for judgment L'Heureux-Dubé J. discusses the right to privacy in very broad terms. She notes that a right to privacy is recognized in the *Charter of Rights and Freedoms,* the common law, various international documents and in domestic statutes such as the *Civil Code*, S.Q. 1991, c. 64. However, it is important to point out that L'Heureux-Dubé J.'s discussion of a right to privacy was in a context where there was no express statutory or constitutional regime protecting the records at issue. *O'Connor* is about the right of an accused to invoke judicial procedures to obtain production of private records in the hands of third parties (i.e. not the Crown). Further, while L'Heureux-Dubé J. referred to health and therapeutic records, her discussion was intended to apply to a wide range of documents to which an accused might seek access. She stated explicitly that her discussion was intended to apply to "any record, in the hands of a third party, in which a reasonable expectation of privacy lies" (para. 99). Thus, her discussion of a right to privacy cannot in principle be limited to health or therapeutic records. It is written to cover the broadest range of records. Her ultimate conclusion is that just as s. 8 of the *Charter* generally requires a search by agents of the state to be premised upon a system of pre-authorization, so s. 7 requires a reasonable system of pre-authorization to justify court-sanctioned intrusions in the private records of witnesses in legal proceedings (para. 119).

[20] If the application judge is right about the scope of *O'Connor* there is no principled basis for limiting its application to health records. The regime he proposes would have to apply to any document in which a third party (i.e. someone other than the target of the search) has a reasonable expectation of privacy. In fact, I can see little difference in principle in limiting the new regime to documents in which third parties have reasonable expectations of privacy.

[21] Section 487 of the *Criminal Code* sets out minimal requirements that adequately balance, at the investigative stage, the state interest in law enforcement and the public interest in protecting the privacy of the patients and the targets of the search. The warrant can only issue where the informant has demonstrated in writing and under oath a credibly based probability that a crime has been committed and that evidence of that crime will be obtained by a search of the premises. The analogy used by the motion judge to therapeutic and similar records of sexual assault victims sought by an accused for use at the trial of a sexual assault is not an apt one. Section 487 sets out a code of procedure which, as I have said, requires a demonstration of credibly based probability before the material can be seized. The common law and now statutory regime for production of personal information records in sexual assault cases filled a gap in procedure. Before *O'Connor* and the *Criminal Code* amendments concerning personal information records, such records would be subject to production merely through issuance of a subpoena. No such gap exists where the state seeks to invoke the statutory search warrant procedures. The seizure of medical records by the police through execution of a warrant also does not implicate the kind of policy considerations at play where the alleged abuser seeks highly personal records from the alleged victim of a sexual assault.

[22] Finally, I note that in *O'Connor*, the very case that established the common law procedure for production of therapeutic records in sexual assault cases, there is no suggestion that the ordinary search warrant process is not the appropriate vehicle where the state, rather than the accused, seeks to obtain records in which a third party may claim a privacy interest. To the contrary, in her discussion of the right to privacy, L'Heureux-Dubé J. makes reference to cases that support the use of search warrants to obtain documents and records in which a third party might have a reasonable expectation of privacy. Perhaps most significantly is her reliance upon the reasons of La Forest J. in *R. v. Dyment* (1988), 45 C.C.C. (3d) 244 (S.C.C.). In that case, La Forest J. (at p. 261) and Lamer J. (at pp. 248-49) both indicated that the material involved in that case, a vial containing the accused's blood, could have been obtained through the ordinary search warrant procedure. La Forest J. said the following:

> In *Hunter v. Southam Inc., supra*, at p. 109 C.C.C., p. 653 D.L.R., p. 161 S.C.R., this court expressed the view that "... where it is feasible to obtain prior authorization ... such authorization is a pre-condition for a [constitutionally] valid search and seizure" (emphasis added). In the present case, as I observed earlier, the focus is not predominantly on the taking of the sample by the physician, but on its seizure by the police. *It seems obvious to me that, assuming adequate cause, the police officer could have obtained a warrant authorizing the seizure of the sample* (as happened, for example, in *R. v.*

> *Carter* (1982), 2 C.C.C. (3d) 412, 144 D.L.R. (3d) 301, 39 O.R. (2d) 439 (Ont. C.A.)), and there was nothing that could justify his failure to do so. [Emphasis added.]

[23] He made these comments notwithstanding his description at pp. 260-61 of the use of the vial of blood as a serious violation of the "personal autonomy of the individual", and his finding that the seizure "infringed upon all the spheres of privacy already identified, spatial, personal and informational". There is no suggestion in *Dyment* that the justice granting such a warrant was required to impose further post-seizure conditions.

Reliance on the Krever Inquiry Report

[24] The application judge relied on the Krever Inquiry Report as support for the importance of protecting the privacy of medical records. It must be recalled, however, that the Krever Inquiry was directed at the sharing of information between health care professionals and facilities and the police without appropriate legal process. The Commissioner raised no objection to disclosure of records pursuant to a valid search warrant. As he said at p. 106, "A search warrant permitting the seizure of documents and records relating to a particular patient is usually unobjectionable." He then went on to discuss the experience of one hospital where overly broad warrants had been issued and the hospital attempted to obtain legal advice about the warrants' validity. There is nothing in that discussion to cast doubt on the basic premise that an ordinary search warrant should be used to obtain access to such records. I do not think the Krever Inquiry Report supports the application judge's approach.

The analogy to psychiatric records

[25] The application judge found support for his approach in the decision of Roy J. in *R. v. J.O.* That case concerned the validity of a warrant to seize records from a psychiatrist concerning a patient that the psychiatrist had been treating. It appears that the police were seeking information about statements the patient may have made to his psychiatrist that would support allegations that the patient, also a physician, had sexually abused his own patients. Roy J. held that the warrant should be quashed because the justice of the peace failed to impose certain conditions upon its execution, to protect the privacy of interests of patients being treated by the psychiatrist. The suggested conditions are similar to those required by the application judge in this case, such as the sealing of the records until a judicial determination was made of "the probative value as opposed to the prejudicial effect of such records"(*J.O.* at para 6).

[26] For the purposes of this case, I do not need to decide whether *J.O.* was properly decided. The context was so different that in my view the case offers no support for the decision in this case. First, the psychiatrist whose records were seized in *J.O.* was not the suspect. In this case, the allegation is that the employees and patients whose records were being sought were carrying out the unlawful conduct.

[27] Second, an argument might be made that the records seized were privileged in accordance with the *Wigmore* criteria as recognized by the Supreme Court of Canada in cases such as *R. v. Gruenke* (1991), 67 C.C.C. (3d) 289 (S.C.C.). Those conditions are the following:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

[28] Thus, Roy J. referred to the societal interest in encouraging health care professionals who have sexually abused patients to seek treatment knowing the treatment will be given "within the context of a privilege and or privacy" (para. 4). No similar claim is made in this case that the records were privileged. To the contrary, the respondents concede that the medical records seized were not protected by privilege.

[29] Third, a special statutory regime protects psychiatric records in a way that is very different from other health records. Under s. 35 of the *Mental Health Act*, R.S.O. 1990, c. M.7, any clinical record compiled in a psychiatric facility is subject to disclosure pursuant to a "summons, order, direction, notice or similar requirement" except where the attending physician states in writing that he or she is of the opinion that disclosure is likely to result in harm to the treatment or recovery of the patient or is likely to result in bodily harm or injury to the mental condition of a third person. If so, the record is not to be produced except under an order made by the court on notice to the attending physician. I need not decide whether this regime would apply to a warrant issued under federal legislation such as the *Criminal Code*. Suffice it to say that this legislation

represents a compelling indication that psychiatric records occupy a unique position and that the safest course for a justice of the peace in issuing a search warrant to seize psychiatric records is to provide that the records be sealed until a court is able to mediate among the various claims and the different legislative schemes.

The analogy to media records

[30] In several cases, the courts have considered whether special conditions apply to searches of offices of the press or other media. Neither the application judge nor the respondents in this court relied upon these authorities. However, I have found some of the media search cases helpful in resolving the issue raised by this case. In *Re Pacific Press Ltd. and the Queen*, Nemetz C.J. quashed warrants issued to search the premises of two Vancouver newspapers. The warrant in respect of one of the newspapers was quashed on technical grounds. The warrant to search the premises of the other newspaper was quashed because there was not sufficient information upon which the justice of the peace could determine whether the warrant should issue, considering the special place that Parliament had accorded the free press under the *Canadian Bill of Rights*, S.C. 1960, c. 44. In particular, Nemetz C.J. held at p. 495 that the before issuing the search warrant the justice of the peace should have had information about:

> 1. whether a reasonable alternative source of obtaining the information was or was not available, and
>
> 2. if available, that reasonable steps had been taken to obtain it from that alternative source.

[31] Subsequent cases that have considered the scope of *Pacific Press* have pointed out that the search in that case interfered with the operation of the media and delayed publication of the newspapers. See for example *Canadian Broadcasting Corp. v. Lessard* at p. 535 per Cory J. Those later cases have generally cast some doubt on whether information respecting these two requirements concerning alternative source are mandatory preconditions. There is the suggestion in *Lessard* and its companion case *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* that the failure to set out the lack of alternative sources "was simply another factor to be taken into account in assessing the reasonableness of the search": *Lessard* at 535. Also see *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* at pp. 556-57. In the end, the test for the validity of a search warrant to search offices of the media is, as with other searches, reasonableness. The judicial officer asked to authorize such a search must consider all the factors and must in particular consider the impact of the proposed search on the ability of the media organization to fulfill its now constitutionally recognized

function. See *Canadian Charter of Rights and Freedoms*, s. 2(b). In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, Cory J. held at pp. 556-57:

> If a search will impede the media from fulfilling these functions and the impediments cannot reasonably be controlled through the imposition of conditions on the execution of the search warrant, then a warrant should only be issued where a compelling state interest is demonstrated. This might be accomplished by satisfying the two factors set out by Nemetz C.J.B.C. in *Pacific Press*: namely, that there is no alternative source of information available or, if there is, that reasonable steps have been taken to obtain the information from that source. Alternatively, the search might be justified on the grounds of the gravity of the offence under investigation and the urgent need to obtain the evidence expected to be revealed by the search.

[32] In the result, the media search cases offer no support for the regime constructed by the application judge in this case. Rather, the media cases, especially *Canadian Broadcasting Corp. v. New Brunswick (Attorney General),* strongly suggest that the *Charter of Rights and Freedoms* does not impose any mandatory conditions for the issuance of a search warrant beyond those set out in s. 487 of the *Criminal Code.* If that is the case in respect of the media, which is expressly recognized in s. 2(b) of the *Charter*, it is difficult to see how such mandatory conditions could be imposed in other contexts. I will deal with that issue further.

The privacy of health records

[33] The respondents submit that the special regime imposed by the application judge can be justified because of the heightened expectation of privacy that exists in personal information contained in medical records. They point out that the Supreme Court of Canada has stressed the importance of respecting the confidentiality of the physician-patient relationship. Too easy access to medical records would constitute an intolerable intrusion into a relationship where the patient, in order to obtain proper treatment, is driven to reveal information of a most intimate character. Access to health records by the state threatens an intrusion into the core *Charter* value of respect for the dignity of the individual. Further, as La Forest J. pointed out in *Dyment* at p. 258, the trend towards the health team approach results in a much wider dissemination of private medical information amongst health care professionals. Thus, it is entirely possible that the patient records seized in this case concern not just records of the treatment received at the physiotherapy clinic but confidential information from the patient's treating physician.

[34] I accept this characterization of the issue and of the nature of the intrusion. The question, however, is whether the statutory conditions in s. 487 of the *Criminal Code* strike the proper balance between the state interest in law enforcement and the public and individual interest in protecting the confidentiality of health records. In my view, with the possible exception of psychiatric records, the section does strike the proper balance. In the absence of a direct attack on the constitutionality of s. 487, that section must be taken as meeting the requirements of the Constitution, including the privacy protections contained in ss. 7 and 8 of the *Charter*. The section is designed to mediate between the state interest in the investigation and the public and individual interest in documents and other materials in which there is a reasonable expectation of privacy. As a result of s. 487, Parliament has permitted a judicial officer to authorize all manner of serious intrusions into the privacy of individuals. If the requirements of s. 487 are met, the police can enter a private home and seize the most intimate of records such as diaries and personal papers. The *Criminal Code* does not mandate a further post-seizure process other than the procedures in s. 489.1 dealing with the return of seized property. Using s. 487, the police can obtain financial and other records from third parties, material about the individual's lifestyle, intimate relationships and even personal opinions. They can gain access to a core of biographical and other information that is protected by s. 8 of the *Charter*. But, it has never been suggested that a properly issued search warrant, meaning a search warrant that was obtained in accordance with the requirements set out in s. 487, authorizes an unreasonable search and seizure.

[35] It follows that the requirements of s. 487(1)(b), in particular the requirement that the officer provide information under oath of reasonable grounds to believe that the records sought "will" afford evidence with respect to the commission of an offence, strikes the proper balance even where the target of the search is the seizure of health records. By its terms, s. 487 precludes granting of a search warrant for the purposes of a fishing expedition or on the basis of mere suspicion. Thus, where, as here, it is conceded that the medical records are not protected by privilege, the only mandatory pre-requisites to the granting of the search warrant are those set out in that section. In the absence of a Constitutional challenge to the validity of s. 487, I can see no principled basis for drawing a line around the types of records seized in this case and exempting them from the s. 487 regime and I can find no legal basis for engrafting common law requirements on to a comprehensive statutory scheme.

[36] To return briefly to the media cases, in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, Cory J. held at p. 556 that the "constitutional protection of freedom of expression afforded by s. 2(b) of the *Charter* does not … import any new or additional requirements for the issuance of search warrants". Rather, s. 2(b) provides "a backdrop against which the reasonableness of the search may be evaluated. It requires

that careful consideration be given not only to whether a warrant should issue but also to the conditions which might properly be imposed upon any search of media premises." He then went on at pp. 560-61 to list a number of factors a justice of the peace should consider in deciding whether to grant the search warrant and, if so, the conditions to be attached. This approach can be criticized for failing to provide a predictable regime. It draws no bright lines around what is and is not a permissible use of the search warrant power in the search of the media. Moreover it is unclear what the impact would be on the validity of the search warrant, where material about these factors is not included in the information to obtain the warrant.

[37] Accepting these shortcomings in the media search regime, it seems to me that the search and seizure of medical records can stand in no higher position. Thus, the threat to privacy and dignity of the individual represented by a search of premises containing medical records can serve as nothing more than "a backdrop against which the reasonableness of the search may be evaluated". The primary obligation to balance the interests of the state and the interests of the public and the individual rests with the justice of the peace who has a discretion to refuse to issue the search warrant even where the minimum requirements set out in s. 487 of the *Criminal Code* are met.

[38] In the proper exercise of his or her discretion the judicial officer can impose conditions where the police seek to seize records containing private medical information. For example, where the records likely contain private mental health information, the justice of the peace might well include special sealing conditions. However, the failure to include such conditions in the case of every warrant to search for and seize medical records does not affect the jurisdiction of the justice of the peace.

[39] The respondents note that some sixty files were seized although the files of only a much smaller group of clients were named in the warrant. If the police did not execute the warrant in accordance with its terms, or if the warrant itself was overly broad or if there was an over seizure there are remedies available at trial and, possibly, by way of *certiorari* or civil suit. Those issues are not before the court on this appeal.

[40] I would conclude these reasons with one caveat. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* at p. 556, Cory J. held that if a search would impede the functioning of the media and the impediments could not be reasonably controlled by the imposition of conditions, a warrant should only be issued "where a compelling state interest is demonstrated". This suggests that while no particular factors, such as the *Pacific Press* alternative source conditions, may be constitutionally mandated, a search pursuant to a warrant that otherwise complies with s. 487 might nevertheless be

found to violate the protection against unreasonable search and seizure because of the failure to demonstrate a compelling state interest in the particular circumstances of the case. As Cory J. went on to hold at p. 558, "it is the over-all reasonableness of a search which is protected by s. 8 of the Charter".

[41] Similarly, it may be that in a particular case, the search and seizure of medical records failed to meet constitutional standards because of circumstances unique to that case. The seizure of the psychiatric records in the *R. v. J.O.* case may well be an example. But, the violation of s. 8 in such a case will not be the result of failure to meet a set of rigid conditions like those set out by the application judge in this case.

[42] As I have said, the respondents may have a constitutional complaint because of the manner in which the warrant was executed in this case. However, I see no basis for finding that the justice of the peace made a jurisdictional error in granting the warrant in this case; a case that involved allegations of serious fraud by the patients and health providers targeted by the search warrant and where what was sought was not confidential health information but allegedly fabricated and falsified information.

DISPOSITION

[43] Accordingly, I would allow the appeal, set aside the order quashing the search warrant and dismiss the application. I would order that the seized records remain sealed for a period of ten days pending a further application to a judge of this court should the respondents apply for leave to appeal to the Supreme Court of Canada.

Signed: **"M. Rosenberg J.A."**
"I agree Robert P. Armstrong J.A."
"I agree R. A. Blair J.A."

RELEASED: "MR" November 16, 2004

APPENDIX "A"

PARAGRAPH 68 OF THE APPLICATION JUDGE'S REASONS FOR JUDGMENT

If the Justice of the Peace determines that the documents sought are health records and that there may be a privacy interest of a patient at risk if the records are seized, then the Justice of the Peace should proceed in accordance with these guidelines:

(a) The warrant should require that the records be sealed immediately upon seizure and remain sealed until a judicial officer holds a hearing. The records must not be read by the police until a judicial officer can make a determination as outlined below. This is not specifically discussed by the *O'Connor* judgment but it is a necessary implication of the finding that once the Crown has possession any concern as to privacy disappears and by the underlying rationale that "all individuals have a right to privacy which should be protected as much as is reasonably possible": para. 7 and 18. I also note the comments of L'Heureux-Dubé J. that if the records are read the privacy has been lost.

(b) Where it is practically feasible to give notice, the Justice of the Peace should require the applicant, after the execution of the warrant, to give notice to those in possession of the records and to those who have a privacy interest in the records to permit them to make submissions as to the balancing of the competing interests. (para. 20)

(c) The applicant and those persons receiving notice should be afforded an opportunity to make submissions to the judicial officer who is to make the decision about disclosure after the search warrant is executed.

(d) The judicial officer must make a decision as to whether and to what extent to require disclosure after balancing the competing interests of the police need to investigate crime and a patient's right to privacy. In making this determination the judicial officer should consider these factors:

(i) Is the record likely to be relevant to the alleged crime? (para. 19)

(ii) The extent to which the records are necessary for the police to investigate a crime. (para. 31)

(iii) The probative value of the record

(iv) The nature and extent of the reasonable expectation of privacy vested in that record

(v) The potential prejudice to the privacy of the person who is the subject of the record

(e) The judicial officer should consider examining the records to determine whether and to what extent they should be disclosed. (para. 30)

(f) The judicial officer should consider restricting disclosure and mitigating the invasion of privacy by imposing conditions.

(the paragraph references are to the related discussion in *O'Connor*)