The Right to be Heard

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By Debra McKenna

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There is a very poignant scene in the 1988 film *The Accused*[2] in which Jodie Foster's character, Sarah Tobias, is lying in a hospital bed injured and despondent – having just intentionally rammed her car into the truck of one of the men who cheered and egged on three men who had sexually assaulted her in a bar. In explaining why she had done this to the lawyer who prosecuted her attackers and allowed them to plea guilty to lesser offences, Tobias responded: "I never got to tell nobody nothing. You did all my talking for me."

I saw the film long before I went to law school, or even knew I wanted to be lawyer, but the scene always stuck with me and it came to mind recently as I read the decision in *R. v. Strybosch*.[3] In that case, the defendant had been charged with sexual assault and sexual interference, with respect to events that were alleged to have occurred some 18 years earlier. In its decision, the Court granted a stay of the prosecution and held that it was an abuse of process for the Assistant Crown Attorney ("ACA") to resile from a resolution agreement in which the defendant had agreed to enter into a peace bond and to undertake counselling.

The evidence before the Court was that the ACA repudiated the resolution agreement after speaking with the complainant – in a telephone call that the complainant recorded unbeknownst to the ACA. According to the ACA, she had misunderstood what the complainant meant in her police interview when using the words "repressed" memory. This reference had informed the ACA's analysis of the reliability of the complainant's evidence and the reasonable prospect of a conviction. Of note, the ACA had not spoken with the complainant prior to agreeing to the resolution agreement. In opposing the stay, the Crown argued that the complainant deserved "to have her day in court" and, likewise, the defendant deserved his opportunity to be acquitted if the trier of fact was not prepared to rely on the complainant's evidence.

However, after reviewing the full contents of the recording, in which the ACA made a number of comments about the strength of the case, the Court was persuaded that to continue the prosecution was an abuse of process, noting:

I agree with the applicant that the decision to repudiate the resolution agreement is tainted by the Crown's conduct, specifically insofar as it suborned its public duty to the complainant's personal agenda, such that it would be unfair or oppressive to allow the Crown to now proceed with the prosecution.[4]

Leaving aside whether it was inappropriate for the ACA to withdraw from the resolution agreement in the circumstances, one of the things that struck me in reviewing the decision was the manner in which the complainant was described. Admittedly, I have not heard the recording between the ACA and the complainant, but it was interesting that the complainant was characterized in the decision as having an "agenda" – which projected a tone that her desire to tell her version of the events at a trial was somehow inappropriate. In that regard, it is noteworthy that the *Canadian Victims Bill of Rights* came into force in 2015 and it specifically provides complainants with the right to convey their views and also to have their views considered – not to interfere with prosecutorial discretion but the

right to express themselves as part of recognizing their "participation" in the process.[5]

However, in its decision, the Court described the complainant's comments to the ACA as follows:

Notwithstanding the merits of the case, the complainant indicated that she "wanted to go forward with the trial for the very, very simple reason of letting his family know – my side of it". She stated that she wanted to "send a message" and that "the message is so much more important than the verdict".

I find that C.T., by her own admission, intimated a desire to use the public prosecution as a means of advancing her own agenda, namely, to confront the accused with the allegations in front of his family, irrespective of whether there was any prospect of proving such allegations beyond a reasonable doubt.[6]

In the end result, the Court concluded that the ACA had been induced by the complainant to resile from the resolution agreement, describing the complainant as "dogged", "difficult" and "insistent". At a time of heightened public awareness about the under-reporting of sexual violence, those are some harsh comments for someone exercising personal agency.

Unlike a Crown prosecutor, complainants are not burdened with an obligation to consider the public nature of the proceedings and/or its legal parameters when expressing their views. Complainants are also distinct from other members of the public because, obviously, the proceedings (or the events that underpin them) affect them in a very personal way. Consequently, it is unreasonable to expect that complainants would not be invested in the process or the outcome – it is their opportunity to tell their story.

In reflecting on the decision and the court's comments, I turned my mind to the role of complainants in other legal contexts – and, in particular, in professional regulatory matters where, unfortunately, sexual misconduct continues to be pervasive. For example, in addressing complaints governed by the *Regulated Health Professions Act* ("*RHPA*"),[7] complainants are entitled to a measure of procedural fairness in the complaint-screening process. In fact, complainants have a statutory right under the *RHPA* to seek a review of the complaint decision if they are unsatisfied with the outcome and/or concerned with how the complaint was investigated by the regulator.[8]

Similarly, where complaints under the *RHPA* are referred to discipline, complainants actually have the ability to seek non-party participation at the hearing, if they wish. If granted by the discipline panel, their participation can include, among other things, the right to make oral or written submissions, to lead evidence, and/or to cross-examine witnesses.[9] Complainants also have standing in circumstances where their privacy interests are at stake and must receive notice where their personal records are being sought to be produced.[10]

This is not to say that complainants direct how complaints or discipline matters are handled by a regulator – they do not. Like criminal proceedings, the mandate of professional regulation is protection of the public interest. But, when it comes to matters of sexual abuse and the damage that sexual abuse causes to patients and to the repute of the profession, the *RHPA* recognizes that certain provisions have been legislated explicitly to encourage complainants to report sexual abuse and to eradicate sexual abuse from the health professions.[11] That is the "agenda", so to speak. Complainants telling their story is an important role in advancing that agenda.

[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65, at para. 127 (CanLII): "The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard." (https://canlii.ca/t/j46kb).

[2] The film was inspired by actual events in 1983 and subsequent trial in Massachusetts, in which a woman was sexually assaulted by four men in a bar while others in the bar reportedly watched, but did not intervene.

[3] *R. v. Strybosch*, 2021 ONSC 6109 (CanLII) (https://canlii.ca/t/jj39v).

[4] *R. v. Strybosch*, 2021 ONSC 6109 at para. 60 (CanLII) (https://canlii.ca/t/jj39v).

[5] *Canadian Victims Bill of Rights*, S.C. 2015, c. 13, s. 2, ss. 14 and 20(a)(ii) (https://laws-lois.justice.gc.ca/eng/acts/c-23.7/page-1.html). Also see: *R. v. Nowack*, 2019 ONSC 5551, at paras. 86 to 89 (CanLII) (https://canlii.ca/t/j2lrt).

[6] *R. v. Strybosch*, 2021 ONSC 6109 at paras. 49 and 50 (CanLII) (https://canlii.ca/t/jj39v).

[7] Health Professions Procedural Code, Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1990, c. 18 (https://www.ontario.ca/laws/statute/91r18).

[8] Health Professions Procedural Code, 29(1) and 29(2), Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1990, c. 18.

[9] Health Professions Procedural Code, s. 41.1, Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1990, c. 18.

[10] Health Professions Procedural Code, s. 42.2(4), Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1990, c. 18.

[11] Health Professions Procedural Code, s. 1.1, Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1990, c. 18.

For more information or inquiries:

Debra McKenna

Toronto
416.947.5080

Email:
dmckenna@weirfoulds.com

Debra McKenna is a litigation partner in the Regulatory Practice Group at WeirFoulds LLP.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035