

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-17-082257-141

DATE: October 21, 2016 (**RECTIFIED ON OCTOBER 25, 2016**)

BEFORE THE HONOURABLE MARIE-ANNE PAQUETTE, J.S.C.

**CENTRE FOR GENDER ADVOCACY
SAMUEL SINGER
SARAH BLUMEL
ELIZABETH HELLER
JENNA MICHELLE JACOBS**

Plaintiffs

v.

THE ATTORNEY GENERAL OF QUEBEC

Defendant

AND

**ÉGALE CANADA HUMAN RIGHTS TRUST
GENDER CREATIVE KIDS CANADA
LGBT FAMILY COALITION**

Interveners

**JUDGMENT
ON THE APPLICATION OF THE ATTORNEY GENERAL OF QUEBEC
FOR THE COMMUNICATION OF DOCUMENTS AND INFORMATION (SEQ. 47)**

1. OVERVIEW

[1] The Plaintiffs argue that certain provisions of the Civil Code of Quebec (**CCQ**) are invalid because they infringe the rights to integrity, security of the person, life, liberty, dignity, privacy and equality guaranteed by the *Quebec Charter of Human Rights and Freedoms* and the *Canadian Charter of Rights and Freedoms*.

[2] In support of their proceedings, they filed a study by Dr. Greta Bauer, Ph.D. in epidemiology¹. This study establishes a link between, on the one hand, the fact of having identity documents that do not conform to one's lived gender identity, and on the other hand, the prevalence of suicide ideations and suicide attempts for this same transgender person.

[3] In the present case, the Attorney General of Quebec (**AGQ**) seeks access to the raw data on which this study is based.

[4] Plaintiffs and Dr. Bauer refuse to communicate the raw data on the grounds that disclosure of the raw data is excessive considering the framework applicable to proof of legislative facts in constitutional cases and would breach the privilege to which this information is subject.

[5] The AGQ retorts that without the raw data it cannot adequately answer the proof invoked against it and for this reason Dr. Bauer's report should be withdrawn.

[6] In the Court's opinion, the rules relating to the proof of legislative facts (that relate here to the alleged unconstitutional effect of the impugned laws), the principle of proportionality and the privilege of confidentiality that applies to the raw data dictate that the AGQ's motion should be dismissed.

2. CONTEXT

[7] Plaintiffs seek, by way of declaratory judgment, to invalidate certain articles of the CCQ relating to:

- 7.1. The requirement to be of full age and to be a Canadian citizen in order to obtain a change of sex designation (art. 71, 72 CCQ);
- 7.2. The requirement to designate a sex on acts of civil status (art. 93, 111, 115, 116, 124, 126, 146 CCQ);

¹ Associate Professor and Graduate Chair in Epidemiology and Biostatistics in the Schulich School of Medicine and Dentistry at Western University (The University of Western Ontario).

- 7.3. The limited effects of changing the sex designation of a transgender parent on the designation of mother/father on the child's act of birth (art. 132 CCQ);
- 7.4. The impossibility for a minor to alone change his or her name (art. 59, 60 CCQ)

,which articles are alleged to breach the rights guaranteed by sections 1, 4, 5 and 10 of the *Quebec Charter of Human Rights and Freedoms* and articles 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

[8] In support of their action, they filed the expert report of Dr. Bauer, which touches upon biostatistics and epidemiology².

[9] This report relies on data that Dr. Bauer and her team of researchers collected in the context of the Trans PULSE project, a vast study conducted in Ontario in 2009-2010 of 433 transgender persons aged 16 and up. The Trans PULSE study is the first such study performed in Canada and the largest study of the transgender population to date. This project, for which Dr. Bauer acted as the principal researcher, has led to the publication of 17 articles in peer review journals³.

[10] Among other things, this report cites the results taken from the Trans PULSE study according to which a transgender person that possesses at least one document with a sex designation corresponding to his or her lived gender, has a lower risk of suicide ideations and suicide attempts. In such cases, a 27% reduction in suicide ideations and a 62% reduction in suicide attempts was observed.

From our data, we estimated that if we made a change to ensure that 100% of this group had at least one legal identity document with a sex designation matching their lived gender, we would expect that it would prevent 9% of such trans person from considering suicide in a given year, reducing the annual prevalence of suicide ideation in this group from 33% to 24%. Among those considering suicide, we estimate it could prevent 23% from attempting, reducing the annual attempt rate within this group from 37% to 14%. Thus, our models predicted a 27% reduction in the annual prevalence of suicide ideation and a 62% reduction in the suicide attempts rate among those with ideation.⁴

[Emphasis added by the Court]

[11] The AGQ mandated Dr. Marissa Ginn, Ph.D. in economics and Mr. Martin Cloutier, economist, to produce a counter-expertise.

² Exhibit R-1, Report dated February 21, 2015.

³ Sworn Statement of Dr. Bauer (August 4, 2016), para. 3

⁴ *Id.*, pp. 3-4

[12] Dr. Ginn and Mr. Cloutier state that in order to adequately respond to Dr. Bauer's report they need access to the raw data gathered in the context of the Trans PULSE study. They demand access to the survey questionnaires and answers gathered from all the respondents who participated in the study, but are ready to accept measures that would preserve the confidentiality and the security of the raw data.

3. THE QUESTION AT ISSUE

[13] The Court must therefore determine whether the rules of evidence or any legal principles limit the AGQ's right to access the raw data underlying the Trans PULSE study so that it can analyze the foundations of the expert report that the opposing party has invoked.

4. ANALYSIS

4.1 The general framework applicable to the right to communication of evidence

[14] The AGQ pleads that denying it access to the raw data underlying the Trans PULSE study would breach its right to a full and equal, public and impartial hearing, a right which is guaranteed by section 23 of the *Quebec Charter of Human Right and Freedoms*:

23. Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.

The tribunal may decide to sit *in camera*, however, in the interests of morality or public order.

[15] However, it is established that the right to a full and equal public and fair hearing by an independent and impartial tribunal confers a protection that is procedural and not substantive in nature. As such, section 23 codifies the principles of natural justice, which include a party's right to know the proof invoked against it and which it has to meet.

[16] This guarantee therefore does not impose one particular type of procedure. Among other things, the requirement of equality contained in article 23 does not impose a perfect equality of means for both parties. Rather, it requires an equitable procedure having regard to the nature of the proceedings and the interests at stake.

[17] In sum, the requirements of this procedural guarantee are not absolute but vary according to the circumstances⁵.

⁵ *Imperial Tobacco Canada Ltd. v. Québec (Attorney General)*, 2015 QCCA 1554, paras. 46, 50-55, 113. Application for leave to appeal denied by the Supreme Court of Canada (no 36741, May 5, 2016).

[18] Recall also that while the right to communication of each party to a civil proceeding is broad, it is not unlimited.

[19] In fact, communication is restricted to that which is relevant and necessary to the litigation.

[20] Note also that the *Code of Civil Procedure* allows the refusal of access to documents or information when a substantial and legitimate interest justifies such a refusal.⁶

[21] Communication must also therefore sometimes be limited in order to avoid an unnecessary or a illegal infringement of a party's privacy or that of a third party⁷.

[22] In the same manner, communication can sometimes be refused on the basis of a privilege, the respect of which requires the exclusion of evidence, in the name of an overriding public interest that is considered superior to those of the administration of justice and the search for the truth⁸.

[23] In the present case, Dr. Bauer's expert report was filed in the context of a constitutional challenge. In addition, it involves data collected in a particular scientific research context subject to guarantees of confidentiality.

[24] These two important contextual elements limit the AGQ's right to the communication of the information it seeks.

4.2 Proof of legislative and social facts in the constitutional context

[25] In order to judge the constitutionality of a law in the Charter context, courts must have an adequate factual foundation. These questions cannot be determined in a factual vacuum⁹.

[26] Constitutional litigation draws on two categories of evidence: adjudicative facts on the one hand and legislative or social facts on the other hand.

[27] On the one hand, adjudicative facts concern the immediate parties to the litigation: who did what, where, when, how and why? These facts need to be established with admissible evidence¹⁰.

[28] On the other hand, legislative or social facts establish the broader social context beyond the specific facts at issue. They relate to the effects of a law, its object, its

⁶ C.C.P., art. 12, 228.

⁷ *Pétrolière impériale c. Jacques*, [10214] 3 S.C.R. 287, para 29.

⁸ *Globe and Mail v. Canada (Attorney General)*, [2010] 2 S.C.R., para. P. 51; *Bisailon v. Keable*, [1983] 2 S.C.R. 60, 96.

⁹ *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, 1099.

¹⁰ *Id.*

history, its social, economic and cultural context. They are of a more general nature and are subject to less stringent admissibility requirements than adjudicative facts¹¹.

[29] Here, Dr. Bauer's opinion and the conclusions drawn from the Trans PULSE study are relied upon in support of this second category of facts. They relate to the effect of the impugned provisions and to the alleged infringement of the constitutional rights of Quebecers, in particular the rights to life, integrity and security of the person.

[30] The rules of admissibility of this type of evidence are therefore more flexible.

[31] The AGQ's application for communication must be decided in light of this premise, which is incompatible with an unlimited search of all original sources of each affirmation contained in the expert report at issue.

[32] Dr. Bauer **consented to communicate** all of the information that Dr. Ginn and Mr. Cloutier asked for with the exception of the raw data.

[33] As such, Dr. Bauer **consented to transmit** the program's algorithms and dictionaries used in the context of the Trans PULSE study¹².

[34] In addition, she voluntarily transmitted the entirety of the communications exchanged in the context of the peer review process that preceded the publication of the results of the Trans PULSE study in 17 scientific articles¹³.

[35] This information will permit the AGQ's experts to know the manner in which the variables were coded, what was included in the analysis and what was not reported.

¹¹ *Id.*; *Renvoi : Loi anti-inflation*, [1976] 2 S.C.R. 373, 388; *Presse Itée (La) v. Poulin*, 2012 QCCA 2030, par. 15.

¹² Sworn statement of Dr. Bauer (August 4, 2016), para. 24. To date, Dr. Bauer has agreed to communicate the following in response to the PGQ's experts' requests: :

- Programs and algorithms used to obtain results reported in the study *Intervenable factors associated with suicide risk in transgender persons: a respondent driven sampling study in Ontario, Canada*;
- Code book of raw variables from the Trans PULSE survey (document describing raw variable names, format, values, etc.);
- Syntax for variable recoding or derived variables (*i.e.*, syntax to replicate a variable that has been modified or that has been created by a combination of information from raw variables);
- Raw output from all saved programs and algorithms from the study *Intervenable factors associated with suicide risk in transgender persons: a respondent driven sampling study in Ontario, Canada*. This includes raw output from saved programs and algorithms that were tested during the course of the study, regardless of whether or not results were reported in the aforementioned article;
- Trans PULSE Survey questionnaire, available on the Trans PULSE project website at: <http://transpulseproject.ca/resources/trans-pulse-survey/>.

¹³ Exhibit GB-6.

They can therefore verify the quality of the analysis and the treatment of the data by Dr. Bauer and the members of her team¹⁴.

[36] The Court finds that this communication is sufficient to permit them to study the foundations of Dr. Bauer's expertise and attack the credibility of her opinion, if necessary.

[37] In addition to this independent verification, the AGQ will be able to cross-examine Dr. Bauer, because the Plaintiffs produced an expert report in support of the data they invoke and that flows from the Trans PULSE study.

[38] It is certainly preferable, in general, that social science evidence be presented through an expert witness capable of being cross-examined, particularly where this evidence touches upon a decisive question¹⁵.

[39] Recall at the same time that it is not unusual, in the context of Charter litigation, to rely on judicial notice, logic and reason, or studies not submitted through expert evidence, in order to establish certain social or legislative facts¹⁶. It is even acceptable, sometimes even desirable, to proceed in this fashion especially in simple matters.

[40] How far can the AGQ therefore go in order to verify the foundations of Dr. Bauer's opinion and the Trans PULSE study?

[41] A party certainly has the right to know the facts on which an expert bases his or her opinion and the sources from which the expert derived his or her information in order to answer adequately and in an enlightened fashion the evidence presented to the Court¹⁷.

[42] Moreover, a party generally has the right to cross-examine an expert to verify the quality and weight of his or her expertise. To this end, it is permissible to verify whether the expertise follows generally acceptable techniques, how an expert conducted a survey, selected his or her sample, etc.

[43] But a party must establish the necessity of proceeding to this verification.

[44] In effect, the right to test the basis of an expertise doesn't go so far as to permit or to require bringing as witnesses all of the individuals surveyed or all of the individuals that were the subjects of the study. It doesn't go so far as to permit the forced communication of all of the raw data invoked in all of the research and studies invoked

¹⁴ Sworn Statement of Dr. Bauer (August 4, 2016) paras 24-25; Sworn Statement of Dr. Ginn (September 7, 2016, para 18.

¹⁵ *R. v. Spence*, [2005] 3 S.C.R. 458, para 68.

¹⁶ *A.B. v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567, paras 16, 20; *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, para 117; *Law v. Canada*, [1999] 1 S.C.R. 497, para 83.

¹⁷ *Poulin v. Prat*, [1994] R.D.J. 301, 309 (C.A.).

in support of an expert report filed in a civil or constitutional case. In every case, it is not necessary that the opposing party be able to precisely reconstruct all of the work of the expert in order for studies or expert reports to be admitted into evidence¹⁸.

[45] The right to test the basis of Dr. Bauer's expertise is therefore not absolute and unlimited. It is limited to what is necessary and is shaped by the context¹⁹.

[46] Here, the information communicated will amply permit the necessary verifications and the raising of all points that will allow the nuancing, attack or putting into perspective of Dr. Bauer's opinion.

[47] Suppose that after having redone the entirety of the work performed in the context of the Trans PULSE study with the raw data in hand, that the AGQ's experts demonstrated that the reduction in the prevalence of suicide ideation and suicide attempts was not 27% and 62% respectively, but rather 3% and 5%. The impact of such conclusions on the outcome of the litigation would in all likelihood not be decisive.

[48] In this context, the exercise of communication that the AGQ requires is not necessary and not desirable from the perspective of relevance and proportionality.

[49] Finally, note that Dr. Bauer's report is based largely on the results of the Trans PULSE study conducted in the context of her academic activities. The Trans PULSE study was not produced for the purposes of the present litigation.

[50] In the context of the present constitutional challenge, other experts who did not participate in the project could therefore base themselves on the published research emanating from the Trans PULSE study without having to face any demand to communicate the raw data underlying the study. Dr. Bauer cannot be subject to this excessive and unreasonable burden to communicate all of the raw data underlying this study for the simple reason that she is the principal researcher. Otherwise, the Court would be deprived of an expert report by an expert witness who is more, if not the most, qualified to testify with respect to the study at issue.

4.3 The privilege relating to confidential communications between a researcher and the participants in a scientific study

[51] The communication of the raw data underlying the Trans PULSE study would also breach the privilege of confidentiality that applies to the data.

[52] The Supreme Court of Canada has recognized that certain information in certain circumstances can be the subject of a privilege of confidentiality that prohibits its

¹⁸ Voir par exemple : R. v. Lavallée, [1990] 1 S.C.R. 852, 878, 882, où une étude sur le syndrome des femmes battues a été admise en preuve sans le témoignage ou la communication des réponses des 400 femmes sondées.

¹⁹ *Boutique Linen Chest (Phase II) inc. v. Wise*, 1997 Can LII 10085, pages 11-12 (C.A.).

communication to third parties, and this, in both civil and criminal proceedings. The existence of such a privilege results in the exclusion of the evidence, even if relevant, in the name of a public interest considered superior to that of the administration of justice and the search for the truth.

[53] Such is the case for example with respect to journalist-source privilege²⁰, litigation privilege²¹ and police informant privilege²².

[54] The existence of such a privilege is established on a case by case basis, according to the four criteria known as the Wigmore test, frequently cited in the case law:

- (1) the communications originated in a confidence that they will not be disclosed;
- (2) the element of confidentiality was essential to the full and satisfactory maintenance of the relation between the parties;
- (3) the relationship at issue must be one which in the public interest must be deliberately and sedulously fostered;
- (4) the injury that would inure to the relationship by the disclosure of the information must be greater than the benefit to the public interest in the search for the truth²³

[55] The analysis of these four criteria confirm that the raw data gathered in the context of the Trans PULSE study are protected by the privilege related to confidential communications between a researcher and the participants in scientific research.

4.3.1 The communications were made confidentially with the assurance that they would not be disclosed

[56] First, the communications between Dr. Bauer and her research team and the participants in the Trans PULSE study were made with the assurance that the raw data would not be shared or communicated to third parties.

[57] The preliminary meetings between the researchers and community members, the letter of information given to participants prior to their consent to participate in the study,

²⁰ *Globe and Mail v. Canada (Attorney General)*, [2010] 2 S.C.R. 592, paras. 22, 53, 66; *Parent v. R.*, 2014 QCCS 132, para. 84.

²¹ *Boiler Inspection and Insurance Company of Canada v. Corporation municipale de la paroisse de St-Louis de France*, [1994] R.D.J. 95 (C.A.); *Société d'énergie de la Baie James v. Lafarge Canada Inc.*, [1991] R.J.Q. 637 (C.A.).

²² *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, 90, citing *Marks v. Beyfus* (1890), 25 Q.B.D. 494, 498 (C.A.).

²³ *R. v. National Post*, [2010] 1 S.C.R. 477; *R. v. Gruenke*, [1991] 3 S.C.R. 263. John Henry WIGMORE, *Evidence in Trials at Common Law*, vol. 8, McNaughton Revision, par. 2285.

and the research protocol put in place by the ethics board for the Trans PULSE project all confirm this²⁴.

4.3.2 The confidentiality of the communications was essential to the full and satisfactory maintenance of the relationship between the researchers and the participants in the Trans PULSE study

[58] Second, this anonymity was essential to the maintenance of the trust relationship between the research team and the participants in the study.

[59] In fact, for the purposes of the project, the research team first worked for three years in order to build the trust relationship with this vulnerable and marginalized population.

[60] This first phase preceded all data gathering.

[61] The pillar of this trust relationship and of the consent of the participants in this study was the promise that only members of the research team would have access to the raw data²⁵.

[62] Communication of the raw data to any person outside of the Trans PULSE research team, even to other researchers, has been systematically refused²⁶.

4.3.3 The public interest requires the deliberate and sedulous fostering of relationships such as the one between the researchers and participants in the Trans PULSE study

[63] Third, it is in the interest of the public that the relationship of trust and confidence between scientific researchers and the human subjects that participate in their research be valorized, respected and protected.

[64] In fact, particularly where vulnerable communities are concerned, weakening this trust relationship could limit and harm the quantity, the quality, and the scientific value of the information that is put at the disposal of researchers; marginalizing these populations even further. Such information and studies are necessary and sometimes

²⁴ Sworn Statement of Dr. Bauer (August 4, 2016), paras 6-8; Exhibits GB-2 (*Extract of the Research Ethics Board Protocol*), DB-3 (*Letter of information for the Trans PULSE project*). Voir aussi par analogie : *Parent v. R.*, 2014 QCCS 132, paras 92-94.

²⁵ Sworn Statement of Dr. Bauer (August 4, 2016), para. 6; Sworn Statement of Mr. Mark Daley, *Associate Vice-President (Research) at the University of Western Ontario* (August 4, 2016), paras. 11-12. Exhibit MD-1 (Tri-Council Policy Statement, *Ethical Conduct for Research Involving Humans*), p. 60. See also par analogie : *Parent v. R.*, 2014 QCCS 132, para. 102.

²⁶ Sworn Statement of Dr. Bauer (August 4, 2016), para. 8.

essential for the public in general, for universities, for political decision makers and for vulnerable populations themselves²⁷.

4.3.4 The public interest served by refusing the communication of the protected information outweighs the public interest in the search for the truth

[65] Fourth, the damages that would result from harming this relationship of trust and confidence exceed the damage that the AGQ could suffer as a result of the refusal to communicate the raw data underlying the Trans PULSE study.

[66] As discussed above, even without the communication of the raw data, the AGQ will dispose of sufficient information and means to contest or nuance Dr. Bauer's opinion, especially because it constitutes evidence of social or legislative facts in the context of constitutional litigation.

[67] In addition, the consequences of a breach in the promise of confidentiality given to the participants in the Trans PULSE study go well beyond the participants and the researchers in the present case. The trust relationship has an institutional dimension and confidence in the university as a whole and the scientific community in general may be harmed or jeopardized²⁸.

[68] The AGQ's right to attack the validity and foundations of Dr. Bauer's expertise does not justify such consequences.

[69] The AGQ's proposal to redact the raw data in order to exclude any identifying information²⁹ might seem reasonable at first blush.

[70] However, this avenue is not more acceptable. In effect, communication of the raw data, even redacted, would breach the undertaking of confidentiality at the base of the trust relationship between the participants and the researchers of this study. This is all the more so given that the parties to whom disclosure would be made, the economists, Dr. Ginn and Mr. Cloutier, have no relationship of trust and confidence with the participants.

[71] In closing, it would be odd and undesirable if the researchers who have undertaken obligations of confidentiality with respect to research participants be systematically forced to breach their ethical obligations if they want to be authorized to act as experts before the Courts regarding their work. If this were to be the case, Courts would ultimately be forced to systematically rely on experts who have a less intimate, less direct and sometimes less profound knowledge of the subject matters at issue.

²⁷ Voir par analogie : *Parent v. R.*, 2014 QCCS 132, paras. 138-142.

²⁸ Sworn Statement of Mr. Mark Daley (August 4, 2016), para. 18. See also par analogie : *Parent c. R.*, 2014 QCCS 132, paras. 145, 168-169.

²⁹ Sworn Statement of Dr. Ginn (September 7, 2016) paras. 5-6.

FOR THESE REASONS, THE COURT:

[72] **DISMISSES** the Attorney General of Quebec's Application for the Communication of Documents and Information.

[73] **WITH COSTS.**

MARIE-ANNE PAQUETTE, J.S.C.

M^e Audrey Boctor
M^e François Goyer
IRVING MITCHELL KALICHMAN
Attorneys for the Plaintiffs

M^e Marilène Boisvert
M^e Marie-Claude Michon
DIRECTION GÉNÉRALE DES AFFAIRES JURIDIQUES ET LÉGISLATIVES
Attorneys for the Defendant

M^e Mouna Aber
DAVIES WARD PHILLIPS & VINEBERG
Attorneys for the Intervenor, Egale Canada Human Rights Trust

Date of hearing: September 27, 2016