

THURSDAY, JUNE 28, 2012

CITATION: R. v. Adam Gour 2012 ONSC 4082

R E A S O N S F O R J U D G M E N T

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McISAAC, J. (Orally):

Adam Gour stands charged that "...between the 1st day of September in the year 2009 and the 30th day of November in the year 2009, both dates inclusive, at the Town of Bradford West Gwillimbury, in the said Region, and elsewhere in the Province of Ontario, he did by deceit, falsehood or other fraudulent means defraud the people of Ontario the sum in excess of \$5000.00..." Given the immateriality of the time frame alleged in this indictment, the Crown was permitted to lead disclosed evidence relating to activity on Mr. Gour's behalf prior to September 1, 2009: see S.601(4.1) (a) C.C.

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The accused described himself as "Campaign Director". Prior to his incorporation of Northern Ontario Sick and Disabled Children's Foundation ("Northern Ontario") on September 21, 2009 as his own non-profit corporation, he had operated a marketing enterprise which he called Pro2Call Communications which functioned out of premises in North Bay. In early 2009, he entered into an agreement with George Marton to act as a third party fundraiser on behalf of Mr. Marton's duly registered charity, Kare for Kids International ("Kare for Kids"). This was the

resurrection of a relationship that had flourished following their having entered into a similar arrangement in 2006 where Mr. Gour operated as Evolve Digital Marketing Agency.

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The advertised object of the arrangement was to raise funds for needy children with medical afflictions that generated expenses that were not covered by the provincial medical program. These included out-of-province medical procedures, special equipment and family travel expenses associated with hospital attendances in centres such as Ottawa and Toronto. Mr. Marton testified that his expectation was that the accused would run a general fundraising campaign and that there would be no particular individual child efforts although such a child could be promoted as "an example" of the poorest and sickest children of the world that his organization was trying to assist.

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In the initial stages of this arrangement, the fundraising was conducted by canvassers who operated out of a call centre at Mr. Gour's premises in North Bay. They were hired to work on a commission basis which was always paid to them in cash based on contributions generated. Later he decided to campaign at shopping centres and "Big Box" stores by means of manned collection boxes accompanied by posters of specific children and brochures. It was two such displays being operated in Bolton and

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5 Bradford which the police interdicted on November 27, 2009 as the result of a complaint that the poster child being used had not been authorized by her family. Mr. Gour was arrested that day and has been prohibited from any further charitable solicitations as a term of his release from custody.

10 Four fundraisers testified on behalf of the Crown. Donald Connors is blind. He was initially hired to solicit phone donations. After two months, he began to solicit at stores in early May, 2009 at various locations throughout Ontario. He canvassed on behalf of 15 three specific children and received a 25% commission on funds collected plus travel expenses which included meals and hotel which were paid by the accused. He worked approximately 18 weeks between May and November 20 when they were shut down by the police.

20 Although he averaged \$500-600 per weekend, that figure could involve only \$200-250 on a slow weekend. Mr. Gour never provided an income statement as he was an independent contractor and Mr. Connors never reported this income to 25 the Canada Revenue Agency ("CRA"). He testified that the accused instructed him to advise potential contributors that he was a volunteer and that all of the collected money went to the promoted child. His commission was raised to 30 30% once Mr. Gour incorporated his own non-profit in September, 2009.

In cross-examination, he conceded that he knew it was wrong to hide the commission arrangement from potential contributors but that he did what Mr. Gour told him to do and that he chose to continue to collect contributions despite these misgivings. He also conceded that he had failed to mention that the accused had instructed him to mislead contributors about these commissions when he testified previously under oath.

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Jeff McKnight worked on the collection boxes between May and November, 2009. He described a sliding scale of commissions wherein he was paid 20% of contributions up to \$500, 25% for \$500-1000 and 30% for those over \$1000. Based on this scale, he earned on an average \$650 per weekend. All commissions were paid out of cash collected. In the 12 weeks he worked exclusively for Mr. Gour, he earned \$8400 based on a total collection of approximately \$42,000. He was aware that the children's families did not get the "lion's share" of the monies collected which went to the accused and his team of collectors. He admitted that the main purpose of the campaign was "to put money into our pockets" and that he would only volunteer information about his commission if he was specifically asked by contributors about it. He received no instructions from Mr. Gour as to how to speak to the public. When he mentioned to inquiring members of the public that he received a commission from the collections, they would

refuse to make any contribution and would walk away. The switch following the incorporation of Northern Ontario was "seemless" and was described by the accused as worthwhile because Kare for Kids involved excessive administrative costs.

Nicole Bisette originally worked as a 14% commissioned fundraiser for Mr. Gour when he had his arrangement to collect on behalf of Kare for Kids. She eventually assumed the additional role of office manager on a fixed salary of \$10 per hour. She testified that she was instructed by Mr. Gour to falsely advise the contributors that the fundraisers were "volunteers". She knew that third party fundraisers should disclose their involvement to potential contributors and that she knew she was lying when she told them that she was a volunteer. She also admitted that she did not report this income to the CRA and that she had serious run-ins with the accused over monies that she claims he still owes her.

Stephen McCoy managed canvassers on behalf of Mr. Gour prior to the incorporation of Northern Ontario. He testified that he followed his instructions to mislead the public as to receiving commissions for their efforts. He described a commission scale of 25% for the first \$500, 30% for \$500-1000 and 35% for anything over \$1000. Later in his testimony he

testified that he "guessed" the accused had said "something" about the fundraisers being volunteers. He subsequently took over the fundraising for Kare for Kids after the accused's relationship with George Marton ended and his volunteers now receive expenses only. They receive no commissions and they do not feature any individual poster children.

In cross-examination, he testified that despite being told by the accused to describe himself as a volunteer when he was receiving these handsome commissions, he still saw himself as a volunteer. This makes no sense to me. Nor does his pathetic attempt to avoid responsibility for his 2005 fraud conviction where he denied misleading the court when he pleaded guilty. He had attempted to explain that he was really innocent of this offence and he was only following his lawyer's advice when he entered his plea.

The accused did not testify nor did he offer any witnesses or evidence to counter the case advanced on behalf of the Crown. The issue therefore is whether the Crown has established beyond a reasonable doubt that Mr. Gour defrauded the public when he collected these monies allegedly on behalf of Kare for Kids and/or Northern Ontario. The Crown first suggests that the accused actively misrepresented the intended beneficiaries of the

5 campaigns when he advanced the poster children and their families as beneficiaries as opposed to Kare for Kids/Northern Ontario. However, George Marton in his testimony allowed for an individual child being promoted as an "example" or, as Mr. Goldstein has so colourfully described, as a "facsimile" of the many unfortunates who were intended for assistance. Accordingly, I cannot be satisfied beyond a reasonable doubt that this scenario is sufficient to establish liability. This conclusion prevails in those circumstances where the family of the promoted poster child had not approved the campaign undertaken by the accused because I am not prepared to reject Mr. Goldstein's submission that there is nothing illegal in someone initiating a gratuitous fundraising on behalf of another. It may be gauche and cruel but it is not criminal.

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25 The Crown next focuses on the fact that Mr. Gour represented the fund-raising medium to be Kare for Kids when it was really Pro2Call, his marketing company. Again, I cannot be satisfied that this circumstance, by itself, is sufficient to establish liability. There is no issue that Mr. Gour and Kare for Kids had formalized their relationship in January, 2009. In addition, Mr. Marton stated that the accused remitted close to anticipated amounts each month while their arrangement continued up and until the end of September, 2009. Based upon this scenario, the

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failure to disclose the involvement of a third party fundraiser is, in my view, by itself, insufficient to convict the accused. Although it may have been a technical misrepresentation, I have trouble finding that it was material to the generation of the donations that were made.

The Crown next underlines the commission arrangement for the various fundraisers and the fact that both Pro2Call and Northern Ontario were "for profit" as being an active deceit or a material non-disclosure. Ms. Wright on behalf of the Crown suggests that this scenario of fraud has been clearly established based upon the testimony of the four fundraisers. However, the credibility of these individuals has been individually and collectively attacked by the defense. I am satisfied that each of these people and their evidence is suspect and should be approached with much caution. Donald Connors conceded that he knew it was wrong to mislead contributors about the true situation of his being a paid fundraiser. Yet he was prepared to perpetrate this scam from week to week on the many members of the unsuspecting public who blindly put their money into these collection boxes. He was also unprepared to report this significant commission income to tax officials because he was concerned that it may affect his disability pension pay-out. His payment had been suspended on two previous occasions for failure to disclose alternate sources of income.

Jeff McKnight acknowledged that he was aware the children and their families were not getting the "lion's share" of the collections because of the deductions for commissions and for whatever Mr. Gour was taking for himself off the top. He admitted the main purpose of these campaigns was to put money in the pockets of the people associated with Mr. Gour. He explained his failure to disclose this income to the CRA was because the work was short-term, he needed the money and he never received a T4. In my view, this explanation is patently rubbish.

Nicole Bisette conceded that she paid cash from Mr. Gour to the fundraisers as their commission entitlements without any concern for income tax deductions. She received her payments in the same manner and did not declare the income to CRA. In addition, she continues to display obvious animosity towards the accused over monies allegedly owed in relation to a digital publication that he commissioned from her. She also acknowledged that she intentionally breached the requirement of disclosing the involvement of a third party fundraiser to the public and that she lied to them when she said that she was involved as a volunteer.

Stephen McCoy conceded that he knew it was wrong to mislead the public about the fact the fundraisers were not volunteers and were being paid commissions of between 25 and 35 per cent

depending upon amounts collected. One of his managerial responsibilities was to assure that all of his collection team introduced themselves to the public as volunteers as he had been instructed by the accused. He not only has a conviction for fraud in 2005, he attempted to resile from his guilty plea when pressed by Mr. Goldstein.

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All of these individuals are suspect for the reasons I have just articulated. As such, I find it prudent to seek some independent confirmation of each of their descriptions of events before acting upon it. I am satisfied that there is some confirmation of the testimony of Donald Connors from the evidence of the witness Sherry Quail. She was the only contributor to testify. On November 14, 2009 she made a \$500 contribution to a blind man who I am satisfied was Mr. Connors at a Sobey's store in Alliston. The cheque she wrote was memoed to the poster child featured on the kiosk display. This fundraiser made no mention that he was being compensated financially for his efforts. I accept this witness' testimony in this regard. In my view, it tends to support the evidence of Mr. Connors that the accused had instructed this fundraiser to keep the commission arrangement from potential donors. In turn, I am satisfied the evidence of this suspect witness can and does support the similar versions of Mr. Gour's secret commission

5 instructions referred to by Nicole Bisette and Stephen McCoy: see R. v. Winmill (1999) 42 O.R. (3d) 582 (C.A.) at para. 115. There is no suggestion of collaboration among these witnesses and, indeed, Jeff McKnight testified that he received no such instructions from the accused during his tenure with him.

10 Accordingly, based upon this review of the evidence, I am satisfied beyond a reasonable doubt that the accused had instructed his canvassers to tell potential contributors to keep secret the commission arrangement between himself and these fundraisers and that when inquiries were made about it, all of them except 15 Jeff McKnight, lied about the true arrangement. In addition, I am satisfied to the same degree that this misinformation was material in the sense that if it had been properly disclosed to 20 its full extent, any further contributions would have dried up as Mr. McKnight said was the case once he advised the public of the fact he was being paid for his efforts.

25 These findings, however, do not conclude my analysis of potential liability on this scenario. As I have already noted, only one contributor testified in this almost two week trial. From the record before me, there must 30 have been hundreds if not thousands of individuals who either responded to the phone canvasses overseen by Mr. Gour or who put money

5 into the collection boxes displayed across a good section of this province over the period of some ten months before he was shut down. Ms. Quail only testified that she assumed that the canvasser she dealt with was an unpaid fundraiser. No contributor has testified that he or she was actually told that the canvassers were unpaid. Although I am satisfied that some such contributors were actively deceived, the record does not disclose how many of them were 10 so treated.

15 That drives me to the ultimate conclusion that the vast majority of contributions were generated in circumstances where there was non-disclosure as opposed to incidents of active deceit. Does the failure to disclose a commission arrangement of between 14-35% 20 constitute fraud in Canadian criminal law? My conclusion is that it does.

25 There are many cases dealing with deceit and falsehood. However, material non-disclosure has been long recognized under the category of "other fraudulent means". A lawyer's failure to disclose the existence of a second mortgage to a purchaser was found to potentially qualify under this head of fraud: see MacKrow v. The Queen [1967] S.C.R. 22. A failure to disclose a secret real estate commission in a property 30 purchase so qualified in R. v. Kristensen [1980] B.C.J. No. 1603 (C.A.). More recently, a

failure to disclose a series of hidden profits by an investment real estate promoter was found to constitute fraudulent conduct: see R. v. Emond (1997) 117 C.C.C. (3d) 275 (Que.C.A.), leave to appeal to S.C.C. dismissed - September 25, 1997. In that case, Baudoin, J.A. for the Court imposed two conditions to this principle of law at p.284 (translation):

The falsehood can consist of a positive act, but also sometimes a mere omission, that is to say a situation where, through his silence, an individual hides from the other person a fundamental and essential element. This is what Beverley McLachlin, J. called in R. v. Theroux [1993] 2 SCR 5 the "non-disclosure of important facts".

But then again this silence or this omission must be such as would mislead a "reasonable person".

See as well R. v. Zlatic [1993] 2 SCR 29 at para.31.

Applying those criteria to the facts as found by me, I am satisfied beyond a reasonable doubt of the following:

1. the failure to disclose the handsome commissions being paid to these apparent "volunteers" constituted the

hiding of a fundamental and essential element of this fundraiser-contributor relationship; and

2. this failure to disclose was such as to mislead the reasonable contributor.

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In coming to this conclusion, I reject Mr. Goldstein's suggestions that the commissions described in this case are an unfortunate "fact-of-life" given the prevailing competition in the charity industry of present-day Canadian society. In responding to this submission, I want to make it clear that I am not ruling that charities cannot employ the necessary evil of third party fundraisers. They can do so and even allow them to charge 95% of their collections so long as they give the potential contributor an informed and transparent choice. If the donor is prepared to opt for a high-commission charity as opposed to a low or no-commission option, that is his or her choice. But, at least it is a choice that is fully informed.

Mr. Goldstein also emphasizes that CRA "permits" a revenue/expenditure ratio of up to 35% as being "unlikely to generate questions or concerns": see Exhibit 72. This Guideline has nothing whatsoever to do with the fundraiser's obligation to disclose important circumstances such as a system of handsome fundraiser

commissions to potential contributors. It is totally irrelevant to the task at hand.

I am similarly unimpressed with the submission that the alleged misconduct canvassed in this case would be better dealt with under the Charities Accounting Act, R.S.O. 1990, Chapter C.10 instead of being policed under the heavy hand of the Criminal Code. There is no question that the allegation herein could have formed the basis for civil proceedings under that legislation: see Ontario (Public Guardian and Trustee) v. AIDS Society for Children (Ontario) [2001] O.J. No. 2170 (Sup. Ct. of Justice). However, I do not see the Crown's choice to proceed under the Criminal Code as being in any way inappropriate.

In conclusion, for these reasons, the accused is found guilty as charged. Mr. Goldstein conceded that these fundraising campaigns generated contributions in excess of \$5000 from the public of Ontario. I will defer a determination of the total amount defrauded to the sentencing phase of these proceedings.

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Certification

FORM 2

Certificate of Transcript
Evidence Act, Subsection 5(2)

5 I, Tracey Gamsby, certify that this document is a true and
accurate transcript of the recording of *R. v. Adam Gour* in the
Superior Court of Justice, held at 75 Mulcaster Street,
Barrie, Ontario, taken from Recording No.('s) 3811-002-
10 20120628 which has been certified in Form 1.

July 11, 2012 Original signed by Tracey Gamsby
C.C.R.

15 Date Transcript Ordered.....June 28, 2012
Date Transcript Completed.....July 11, 2012
Date Ordering Party Notified.....July 12, 2012

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SUPERIOR COURT OF JUSTICE

5 HER MAJESTY THE QUEEN

v.

10 ADAM GOUR

REASONS FOR JUDGMENT

15 BEFORE THE HONOURABLE JUSTICE J. McISAAC,
on June 28, 2012, at BARRIE, Ontario

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APPEARANCES:

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