IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *A.A. (Re),* 2016 BCSC 511

Date: 20160318
Docket: S162587
Registry: Vancouver

In the Matter of

Carter v. Canada (Attorney General), 2016 SCC 4

Re: A.A.

Before: The Honourable Chief Justice Hinkson

Oral Reasons for Judgment

Counsel for A.A.:	J.J. Arvay, Q.C. and S. Tucker
Place and Date of Hearing:	Vancouver, B.C. March 18, 2016
Place and Date of Judgment:	Vancouver, B.C. March 18, 2016

I. Introduction

[1] This is a preliminary application seeking privacy orders preparatory to the filing of a petition for relief brought pursuant to *Carter v. Canada (Attorney General)*, 2016 SCC 4 [*Carter 2016*]. The applicant, whom I have permitted to bring this application identifying herself only as A.A., is a woman who suffers from an advanced stage of multiple sclerosis and seeks a court order authorizing a physician-assisted death.

[2] The applicant seeks the following orders, which I will refer to as privacy orders :

a) a sealing order providing that all documents filed in the Registry and any order or other document issued by the Court in connection with the anticipated petition in these proceedings be sealed, with the exception of the Court's reasons for judgment; and

b) a confidentiality order providing:

i. that the applicant be identified by the initials "A.A." in the anticipated proceedings, including in any reasons for judgment;

ii. that all hearings in the anticipated proceedings be held *in camera*; and

iii. for a publication ban in relation to all facts and details that could lead to the identification of the applicant, her family or physicians, except to the extent it is necessary for the petitioner to present the authorization order itself to obtain access to physician-assisted death.

II. The Applicant's Position

[3] A.A. submits that she is entitled to the privacy orders described above because, given the nature of this application, the general principle of open access to the courts does not apply.

[4] In the alternative, A.A. argues that even if the principle of open access to the courts applies to her anticipated petition, the circumstances of the case warrant confidentiality orders as a case-specific exception in service of the interests of justice.

[5] A.A. submits that her anticipated petition is about her personal health care, and thus her privacy interests are entitled to significant weight in the consideration of whether the confidentiality orders should be granted. The applicant says that certain members of her family may be exposed to a risk of emotional harm if her identity were revealed in connection with this petition.

[6] A.A. also notes the unique and non-adversarial nature of this petition. She argues that the current *status quo* is unconstitutional and imposes serious, actual harm on those who meet the criteria described in *Canada (Attorney General)*, 2015 SCC 5 [*Carter 2015*]. She says that in *Carter 2016*, the Supreme Court of Canada granted a constitutional exemption to all those who met the criteria in *Carter 2015*, and the remedy she will seek is effectively a declaration that she falls within the class of persons for whom this constitutional exemption has already been granted. She therefore submits that her privacy and the privacy of other applicants must be protected so that others are not discouraged from bringing their applications forward.

[7] A.A. argues that the physicians involved in the petition should likewise not be identified, lest the attendant publicity discourage physicians from providing assistance. It is my view that it is for them to ask for anonymity, and one has.

Discussion

A. Authority to Grant the Orders Sought

1. Sealing Order

[8] The authority of the Court to grant a sealing order is derived from its inherent supervisory and protecting power over its own records: *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 at 189.

2. Initializing of Names

[9] It is within the inherent jurisdiction of the Court to order that pseudonyms be used or that the names of the parties be initialized so as to protect their identities. The Court may exercise this jurisdiction where it is satisfied that it would be in the interests of justice to do so: *BH v. JH*, 2015 BCCA 475 at para. 3.

3. In Camera Proceedings

[10] As part of its inherent jurisdiction to control its own processes, the Court has the authority to order that proceedings be held *in camera*: *In the Matter of an Application to Proceed in Camera*, 2006 BCSC 1805 at para. 48; *Bass v. McNally*, 2003 NLCA 15 at para. 14.

4. Publication Ban

[11] The Court has inherent jurisdiction to impose a common law publication ban in civil proceedings as an exercise of discretion: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [*Dagenais*].

B. Legal Framework for Analysis

[12] The legal test that must be applied when the Court considers granting orders that limit the open court principle is set out in *Dagenais* and *R. v. Mentuck*, 2001 SCC 76 [*Mentuck*]. The *Dagenais*/*Mentuck* framework applies to all discretionary decisions that affect the openness of proceedings and limit the freedoms of expression and the press, including the orders sought in this application: *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3.

[13] Under the *Dagenais*/*Mentuck* framework, the party seeking the order bears the burden of proving that the granting of the order is necessary and proportional: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra Club*].

[14] Necessity is established where the applicant demonstrates that:

a) the granting of the order is necessary to prevent a serious risk to an important interest in the context of litigation, because reasonably alternative measures will not prevent the risk; and

b) the salutary effects of granting the order outweigh its deleterious effects: *Sierra Club* at para. 53.

C. Application of the Legal Framework

1. Whether the Openness Principle Applies

[15] Before applying the *Dagenais*/*Mentuck* framework, I will address the applicant's submission that the open court principle does not apply in this case. A.A. argues that the general principle of open access to the courts does not apply in this case because it falls within one of the exceptions set out in *Scott (Otherwise Morgan) et al. v. Scott*, [1913] A.C. 417 (H.L.) [*Scott*].

[16] In *Scott*, Viscount Haldane, L.C., identified certain narrow exceptions to the general principle of open access to the courts, including:

> …[i]n the two cases of wards and lunatics [where] the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or lunatic…

[17] The applicant argues that this case shares the same characteristics as the exception for wards and lunatics described by Viscount Haldane, namely that it is "administrative, non-adversarial court decision-making where the court is essentially charged with guarding the interests of the person forming the subject matter of the application."

[18] I disagree with the applicant's submissions on this issue. I note that the exception for wards and lunatics as described in *Scott* is not absolute. Viscount Haldane only notes that in such cases, it *may* be necessary for the Court to exclude

the public. The Court must still consider whether it would be necessary to do so in the specific case, resulting in the need to apply the *Dagenais*/*Mentuck* framework.

[19] Reliance on the exceptions set out in *Scott* in the manner proposed by the applicant would therefore create a three-step test for the granting of confidentiality orders. The Court would first need to consider whether the case fell into one of the exceptions in *Scott*, and would then have to apply the two-part *Dagenais*/*Mentuck* test. This analysis would be unnecessarily cumbersome and would not assist in resolving the issues.

[20] Further, the authorities cited by the applicant in support of her position that *Scott* remains the law are from the early 1980s, prior to the coming into force of the *Charter*'s provisions on freedom of expression and freedom of the press, and before the *Dagenais*/*Mentuck* framework was developed.

[21] I therefore decline to adopt the analysis proposed by the applicant, and will apply the *Dagenais*/*Mentuck* test in my consideration of whether the orders sought by the applicant should be granted.

[22] In *HS (Re)*, 2016 ABQB 121 [*HS*], Madam Justice Martin permitted a *Carter 2016* hearing to be held *in camera*. At paras. 80-82, she explained her reasoning for proceeding in this manner:

> [80] The Court is very mindful of the important reasons underlying the open court principle. The Supreme Court of Canada has held that this principle is "a hallmark of a democratic society", that it ensures "that justice is administered in a non-arbitrary manner, according to the rule of law" and that it is "inextricably linked to the freedom of expression protected by s. 2(b) of the *Charter*": see *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835, *R v Mentuck*, [2001] 3 SCR 442, 2001 SCC 76 and *Re Vancouver Sun*, 2004 SCC 43, 2 SCR 332.
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> [81] However, in the circumstances, I determined that Ms. S.'s privacy, dignity and autonomy were the more important interests and the hearing was held *in camera*. This application pertains to Ms. S.'s medical state and to the fundamental life choice she wishes to make. Nothing could be more personal and, in my view, the need to protect Ms. S.'s privacy outweighs the benefit of an open courtroom in the circumstances of this case. I also note that the subject of the hearing, being her medical diagnosis and current physical condition, falls within the category of information that ordinarily would be protected under privacy legislation.

> [82] Further, this written judgment provides an alternative mechanism for achieving accountability and transparency and respects the fundamental principles behind the open court principle. It provides what the Supreme Court of Canada in *Re Vancouver Sun* called the openness "necessary to maintain the independence and impartiality of courts."

[23] With respect, I am unable to agree with this view. It does not accord with moderate approach endorsed by Mr. Justice McEwen in *A.B. v. Canada (Attorney General)*, 2016 ONSC 1571 [*A.B.*] which was likewise an application for judicial authorization of a physician-assisted death, albeit not one where an *in camera* hearing was sought.

[24] I am not persuaded an *in camera* hearing is appropriate in this case, nor am I satisfied that the provision of written reasons is an adequate alternative mechanism to achieve accountability in these circumstances. While I accept that A.A.'s privacy interests are engaged and are entitled to significant weight in this context, the subject matter of this petition is exceptional and the public's interest in the issues is understandably strong.

[25] If A.A.'s petition for physician-assisted death is granted, it will be the first *Carter 2016* exemption given by this Court. This case is therefore uniquely significant, and an order for an *in camera* hearing would result in significant prejudice to the open court principle and the rights of freedom of expression and freedom of the press.

[26] Additionally, in combination with the other privacy orders sought by the petitioner, conducting these proceedings *in camera* would effectively prevent the public from having any information about the case, other than what is volunteered by the parties or provided by the Court in its reasons for judgment. The media would therefore be limited to reporting on the facts and the issues through the lens of the Court and the parties, without being able to form its own view. This would also have a significant impact on the rights of freedom of expression and freedom of the press.

[27] I therefore decline to grant an order that the proceedings in this petition will be held *in camera*.

2. The Dagenais/Mentuck Test

[28] Three of the other orders sought in this application were also sought in *A.B.* In that case, the applicant sought a sealing order, the initializing of names, and a publication ban. He did not seek to have the proceedings heard *in camera*.

[29] There, Mr. Justice McEwen referred at para. 19 to *A.B. (Litigation Guardian of) v. Bragg Communications Inc*., 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 13, wherein the Supreme Court of Canada noted that an interest must be sufficiently compelling to warrant restriction on freedom of the press and open court, but that there are cases in which the protection of societal values must prevail over openness.

[30] I adopt McEwen J.'s reasoning at para. 18:

> [18] …I accept the applicant's proposal that he be allowed to redact the application record and the identities of [himself] and his family, the responding physicians and health care providers involved and grant the orders sought. In my view, both branches of the *Dagenais/Mentuck* test are met. The confidentiality order is necessary in order to ensure that the applicant, his family, physicians and other health care professionals, are not deterred from participating in a *Carter* application for fear of unwanted publicity and media attention. Further, the proposal suggested by the applicant strikes the appropriate balance between public interest in open court proceedings and the salutary effects of a confidentiality order in this case.

[31] Insofar as the orders sought for the initialization of names of physicians and others whose assistance will be required should A.A. proceed with an assisted death, but who wish to remain anonymous, I also adopt the reasoning of McEwen J. in *A.B.* at paras. 26, 28 and 33:

> [26] As noted by the Supreme Court of Canada, the matrix of legislative and social facts in cases involving physician-assisted death differs from the existing jurisprudence: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 47. ... I accept the proposition that physicians might be less likely to provide assistance to terminally ill patients if their identities were known. Failing to protect the confidentiality of the physicians' identities could well prevent persons from seeking *Carter* applications in the future, and it may prevent doctors from participating – this is a public interest of great importance in these circumstances and justifies the moderate proposal of the applicant of a redacted record with explanations.
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> …

> [28] The interests at stake in this case are clear based on the submissions before me and the guidance of the Supreme Court in *Carter*. On the one hand, there is the open court principle furthered by media participation. On the other hand, there is the privacy and dignity of the applicant, coupled with the interest in the public not being discouraged from bringing future *Carter* applications, and the privacy rights of the physicians, who expressed a wish to remain anonymous through their counsel.
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> …
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> [33] … publishing the names of the physicians might cause prejudice to those seeking this type of application by deterring physicians from providing this kind of care. In *Mentuck*, the Supreme Court protected the anonymity of undercover police officers after concluding that revealing their identities would create a "serious risk" to the efficacy of the operations. In this case, it is reasonable to accept that there may be a serious risk of impairing access to physicians willing to assist potential *Carter* applicants. In the circumstances, this risk is sufficiently serious to warrant the protection of anonymity sought by the physicians.

[32] I therefore grant the petitioner's requests for a sealing order, initialization of her name, and those of her relatives, and a publication ban on details that could lead to her identification or that of her family, or her physicians, other than Dr. Wiebe.

[33] I have concluded that such an order will adequately protect the petitioner's privacy interests but also strike a proportional balance between the salutary and deleterious effects of broader publication.

D. Order Authorizing Participation of Unnamed Pharmacist and Nurse in Physician-Assisted Death

[34] In her anticipated petition, A.A. will seek an order authorizing the participation of an unnamed pharmacist and nurse in the physician-assisted death. Although I am not making a ruling on this issue at this time, I must observe that I am not inclined to grant orders that purport to give authority to unnamed persons. I will need to hear further submissions on this aspect of A.A.'s petition when the matter is heard.

III. Summary

[35] I decline to order that the proceedings in this hearing will be held *in camera*.

[36] I grant the following orders as sought by the applicant:

a) a sealing order providing that all documents filed in the Registry and any order or other document issued by the Court in connection with the anticipated petition in these proceedings be sealed, with the exception of the Court's reasons for judgment; and

b) a confidentiality order providing:

   i. that the applicant be identified by the initials "A.A." in the anticipated proceedings, including in any reasons for judgment; and

   ii. for a publication ban in relation to all facts and details that could lead to the identification of the applicant, her family or physicians other than Dr. Wiebe, except to the extent it is necessary for the petitioner to present the authorization order itself to obtain access to physician-assisted death.

"The Honourable Chief Justice Hinkson"