CITATION: A.B. v. Canada (Attorney General), 2016 ONSC 1571
COURT FILE NO.: CV-16-00AD001-00ES
DATE: 20160307

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
A.B. Moving Party (Applicant)	Andrew Faith and Emma Carver, for the Moving Party (Applicant)
– and –	
ATTORNEY GENERAL OF CANADA Respondent	Joseph Cheng, for the Attorney General of Canada
– and –	
ATTORNEY GENERAL OF ONTARIO Respondent	Zachary Green, for the Attorney General of Ontario
– and –	
DR. DOE and DR. DOE Respondent	Erica J. Baron, for Dr. Doe and Dr. Doe
	Peter Jacobsen, for the Globe and Mail, the Canadian Broadcasting Corporation, CTV, a Division of Bell Media Inc., and Postmedia Network Inc.
	HEARD: March 3, 2016

T. McEWEN, J.

REASONS FOR DECISION

[1] This is a preliminary motion seeking privacy orders in an application pursuant to *Carter v. Canada (Attorney General)*, 2016 SCC 4. The applicant is an 80-year-old gentleman, married with adult children. In his affidavit he deposes that he has advanced-stage aggressive lymphoma and he wishes to bring an application for a court order authorizing a physician-assisted death. He

and his daughter also depose that his family, attending physicians, palliative care physician, and psychiatrist support the application.

[2] The applicant brings this motion seeking a number of orders. The respondents, the Attorney General of Canada and the Attorney General of Ontario, take no position with respect to the orders sought. The responding physicians support the relief sought by the applicant. The Globe and Mail, Canadian Broadcasting Corporation, CTV, a Division of Bell Media Inc. and Postmedia Network Inc. ("the media respondents")[1] object to certain aspects of the relief sought.

[3] At the motion, the parties and the media respondents agreed to an order that the applicant be permitted to issue the application as set out in the motion record. Counsel also did not object to my making an order, on an interim basis, granting the privacy orders sought in paragraphs (a), (b) and (c) of the notice of motion pending the release of this decision, save and except for those documents that have already been provided by the applicant to the media.

[4] I also set a timetable with respect to the delivery of documents and the hearing of the application that will proceed on March 17, 2016.

[5] The applicant seeks the following confidentiality orders:

(a) An order allowing the moving party and the respondent physicians to be identified anonymously in the application for an order authorizing a physician-assisted death pursuant to *Carter*;

(b) An order banning the publication of any identifying information related to the moving party, his family members and his physicians (including the respondent physicians);

(c) An order sealing the evidence, documents and pleadings filed in the application subject to the moving party's undertaking to provide the filed evidence, documents and pleadings upon request to members of the public and media in a form redacted to remove any information that would identify or tend to identify the moving party, his family members, or his physicians (including the respondent physicians); and

(d) An order for the sealing of this motion record.

[6] The media respondents do not oppose an order permitting the applicant to proceed anonymously and banning publication of his identity or that of his family members. The media

[1] The media respondents are not named respondents in the application but applicant's counsel provided them with certain redacted materials in order so that they may attend and make submissions.

respondents do, however, raise a number of issues concerning the orders sought and specifically oppose any order that provides anonymity to the respondent physicians who are involved in the applicant's care.

The Applicant's Position

[7] The applicant does not seek an *in camera* hearing such as was granted by Martin J. in *H.S. (Re),* 2016 ABQB 121. Thus, the media will not be excluded from the hearing scheduled for March 17, 2016. The applicant does seek a sealing order of the court file, including the motion record filed for this preliminary motion. Thereafter, the applicant proposes that he be allowed to deliver a redacted application record that would redact only that information that would identify him, his family, the responding physicians and healthcare providers.[2] The applicant is content to file the redacted version of the application record with the Court in the usual way. The applicant also proposes to set out the nature of the redactions in the body of the redacted application record.

[8] Additionally, the applicant proposes that the application judge be provided with an unredacted version that will otherwise be subject to a sealing order. The applicant submits that the order should be final with respect to the issue of the identities of the applicant, his family, the respondent physicians and healthcare providers. If, however, based on the explanations in the body of the redacted record, the media respondents take issue with the nature or scope of the redacted material, the applicant agrees that submissions could be made to the application judge.

The Media Respondents' Position

[9] The media respondents submit that the applicant should provide media counsel with an unredacted application record. Counsel could then conduct a "counsel's eyes only" review of the unredacted application record for the purpose of obtaining informed instructions and being able to make informed submissions to the Court as to the nature of the redactions, if necessary. Media counsel gave an oral undertaking to maintain confidentiality in this respect. The materials would then be destroyed to ensure confidentiality.

[10] As noted, the media respondents do not dispute that the identity of the applicant and his family should remain confidential. They make a number of submissions, however, in support of

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[2] Although the motion record refers to A.B.'s physicians, at the motion, counsel sought a more expansive order which includes all healthcare providers including, amongst others, nurses and medical technicians. I allowed the motion to proceed on this basis.

their position for a "counsel's eyes only" review. They also submit that any order I make should be interim and subject to the discretion of the application judge.

ANALYSIS

[11] I will first canvass the law with respect to the orders sought by the applicant, and will then deal with the media respondents' submissions.

Jurisdiction

Sealing Orders

[12] Section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides the court with the authority to seal documents or otherwise ensure that they do not comprise part of the public record:

> 137.(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

Initialization

[13] The jurisdiction of the court to use initials or pseudonyms to protect the identity of the parties derives from Rule 2.03 of the *Rules of Civil Procedure*, R.S.O. 1990, Reg. 194, that allows the court to dispense with Rule 14.06 which provides that the names of the parties must be identified in the title of proceedings:

> 2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.
> …
> 14.06(1) Every originating process shall contain a title of the proceeding setting out the names of all the parties and the capacity in which they are made parties, if other than their personal capacity.

Publication Bans

[14] Courts have inherent jurisdiction to impose common law publication bans in a civil context as an exercise of discretion: see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at para. 71.

The Law

[15] The analytical approach developed by the Supreme Court in *R. v. Mentuck*, [2001] 3 S.C.R. 442, and *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, applies to all discretionary decisions that affect the openness of proceedings and limit freedom of expression

and freedom of the press: see *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65, at para 13; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at para 7.

[16] The Supreme Court most recently set out what is known as the *Dagenais/Mentuck* test in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53, where it held that a sealing order should only be granted when:

a) 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 ("**necessity**"); and

b) The salutary effects of the order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression which in this context includes the public interest in open and accessible court proceedings ("**proportionality**").

[17] Further, the test was considered by Martin J. in *H.S. (Re)* where she stated:

> [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 CanLII 39 (SCC), [1994] 3 SCR 835, *R. v. Mentuck*, [2001] 3 SCR 442, 2001 SCC 76 (CanLII) and *Re Vancouver Sun*, 2004 SCC 43 (CanLII), 2 SCR 332.
>
> [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."
>
> …

> [84] I find that the circumstances of this case demonstrate the necessity of confidentiality orders as required by *Dagenais*. Further, it is to be hoped the presence of a written judgment strikes the appropriate balance between the salutary and deleterious effects of such an order and achieves the openness and public access discussed in *Re Vancouver Sun*.

Discussion

[18] For the reasons below, I accept the applicant's proposal that he be allowed to redact the application record and the identities of A.B. 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.

[19] In the case of *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 13, the Supreme Court noted that an interest must be sufficiently compelling to warrant restriction on freedom of the press and open court. The Supreme Court further noted that there are cases in which the protection of societal values must prevail over openness. In my view, cases involving physician-assisted dying warrant such restrictions, certainly to the extent of the moderate request being made by the applicant.

[20] The applicant, who is not seeking an *in camera* hearing such as was granted in *H.S. (Re)*, is taking a very reasonable and moderate position concerning issues of confidentiality when he seeks to redact only information that might identify him, his family, the responding physicians, and his health care providers. His proposal to allow the media respondents to raise objections based on the explanations in the redacted record is also reasonable. The application is obviously time sensitive, and the complicated proposal of the media respondents would run the risk of protracted negotiations between counsel, increase the costs of the applicant, and possibly sidetrack the application with interlocutory steps and delay. The applicant's proposal, on the other hand, allows the matter to move to the hearing stage in a prompt fashion and allows the application judge to review the unredacted record along with the reason for the redactions. The scope of the redactions can be revisited, if necessary, at the hearing of the application, subject to the discretion of the application judge.

[21] The media respondents argue that they cannot make meaningful submissions at this time since the applicant has not yet filed his application record, and without having an opportunity to conduct a "counsel's eyes only" review, they do not know what the applicant seeks to redact. I disagree. The media is being provided with a largely unredacted record and the interests of the media in seeing the record to make meaningful submissions must be balanced against the public interest in facilitating applications to go forward as contemplated by the Supreme Court in *Carter*. Counsel for the media respondents noted that this is an extraordinary remedy with

serious ramifications, and so there must be the greatest amount of media oversight to the courts. While I am sensitive to the media's submission, I am of the view that the applicant's proposal will reasonably allow for the media respondents to make submissions before the application judge if they take issue with the scope of the redactions. In the interim, the applicant can proceed to the application in a timely manner.

[22] I agree with the media that there are matters of great public interest and importance arising from this application; however, as noted, the moderate proposal of the applicant strikes the appropriate balance between the salutary and deleterious effects of an order diminishing the open court principle and allows the Court to focus on its role in this process.

[23] The applicants are not making an unreasonable request with respect to confidentiality in this case; each redaction will include particularized explanations as to the nature of the information removed. The privacy order sought will not make the court record inaccessible, as the media will have the opportunity to bring any objections on the redacted information to the application judge.

[24] The media respondents also rely upon the Supreme Court of Canada's decision in *Mentuck* wherein the Court, at paragraph 34, articulated that in order for a publication ban to be imposed there must be a "real and substantial risk" well-grounded in the evidence. They argue that evidence is required to ground the necessity of curtailing the open court principle as contemplated in the *Dagenais/Mentuck* test. The media respondents submit that in this case there is no evidence before me that a confidentiality order is necessary with respect to the physicians' identities.

[25] First, I am not of the view that evidence of the societal interest being protected is necessary in the context of this application where the privacy interests of the applicant about the intensely private and personal matter of his death are obvious, and where the privacy concerns about his family and physicians are equally obvious.

[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. Counsel for the physicians submit that the physicians do wish to keep their identities private and explained that the physicians wish to maintain anonymity because of personal and professional implications. Their wish and concerns are entirely reasonable, in my opinion, given the publicity and controversy surrounding physician-assisted death. 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.

[27] Time is of the essence and to delay the application so that further evidence could be

adduced would inhibit the applicant's ability to bring the application forward and would create greater uncertainty at a time of tremendous stress. Further, in a situation involving private health care matters, I see little justification to force the physicians to produce evidence for this motion. This is particularly so where the application is unopposed by the applicant's family and physicians.

[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.

[29] The media respondents also submit that it is relevant for the Court and the public to know whether the same health care providers are participating in multiple applications and are "rubber-stamp types". To be clear, the media respondents do not make that type of assertion with respect to the physicians in this case, but rather as a general public interest issue.

[30] I do not share this concern. The proposal of the applicant allows the application judge to scrutinize the identity of the physicians involved and make inquiries as to whether the doctor has participated in other such applications. In any event, this being the first application of its type in the province, it is a prospective concern that is not currently before the Court.

[31] The media respondents further submit that, by keeping the identities of the physicians confidential, others who wish to come forward seeking a physician-assisted death would be prejudiced by not knowing which physicians to turn to.

[32] In my view, this is not a realistic concern. I accept the submissions of the applicant and the physicians that access to such medical treatment does not come by way of reported court decisions but rather by way of physician referrals. In fact, this has been proposed by the College of Physicians and Surgeons of Ontario in its recent draft interim Guidelines on Physician-Assisted Death, which provide that physicians approached about bringing *Carter* applications must refer a patient to another physician in the event that they do not wish to participate. In *T.(S.) v. Stubbs*, 38 O.R. (3d) 788, at para. 62, the court noted that "the open court principle is not offended when disclosure of what is sought to be kept confidential would serve no useful purpose." Revealing the identities of the physicians in this case would not serve a public interest where access to such medical treatment does not come by way of reported court decisions, or through the media, but by way of referrals. Physicians' names do not need to be published in order for people to get access to this kind of care.

[33] In fact, as the applicant submits, the opposite may be achieved, as 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.

The Scope of This Order

[34] As noted, the applicant submits that any order concerning privacy involving the applicant, his family, the respondent physicians and healthcare providers ought to be final with the application judge retaining the discretion to review the scope of the redactions to ensure that they are in keeping with my privacy orders.

[35] The media respondents submit that any order that I make should be made on an interim basis with the application judge retaining discretion to revisit the order.

[36] I accept the applicant's submission in this regard. It is in keeping with the existing case law wherein the decision to allow litigants to proceed anonymously is made at the outset and not later revisited by the Court. Given the sensitive nature of this application it is my view that the privacy orders, save and except interpretation by the application judge, should not be revisited. To do so would only subject the applicant, the respondent physicians and healthcare providers, to ongoing uncertainty thus, in part, undermining the intent of this decision.

Disposition

[37] I have determined that the applicant's proposal is a reasonable compromise that strikes a balance between the importance of the open court principle and the right of the applicant to bring this application and maintain his privacy and dignity and that of his family, as contemplated by the Supreme Court in *Carter*. This reasonably extends to protecting the identity of the involved responding physicians and health care professionals in the greater public interest of reducing any risk that applicants, physicians, and their health care providers are deterred from participating in *Carter* applications.

[38] Further, the applicant's proposal maintains the right of the media respondents to move before the application judge to dispute the scope of the redactions if they deem fit, following a review of the applicant's redacted application record and accompanying explanations.

[39] Based on the foregoing I order as follows:

a) the court file, including the motion record, shall remain sealed;

b) the applicant, his family, and the respondent physicians shall be allowed to proceed anonymously as parties in the forthcoming application;

c) there shall be a publication ban with respect to any identifying information relating to the applicant, his family, the respondent physicians and the applicant's healthcare providers;

d) the applicant shall file a public copy of all evidence, documents and pleadings from which information that would tend to identify the moving party, the moving party's family members, the responding physicians and his healthcare providers is redacted and which is to include a description of the redactions;

e) the applicant shall be allowed to file a sealed, unredacted version of the application record for the benefit of the application judge;

f) the within order, with respect to the scope of the redactions to be performed by the applicant, is subject to the discretion of the application judge.

Mr. Justice T. McEwen

Released: March 7, 2016

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DR. DOE and DR. DOE

Respondent

REASONS FOR JUDGMENT

Mr. Justice T. McEwen

Released: March 7, 2016