2016 SKQB 175, 2016 CarswellSask 317

2016 SKQB 175
Saskatchewan Court of Queen's Bench

Patient 0518 v. RHA 0518

2016 CarswellSask 317, 2016 SKQB 175

Patient 0518, Applicant and RHA 0518, Physician A0518, Physician B0518 and Physician C0518, Respondents

M.D. Popescul J.

Judgment: May 18, 2016

Docket
: Regina
QBG
1131
/
16

Counsel: Ronald G. Gates, Q.C., for Applicant, Patient 0518
Reginald A. Watson, Q.C., for RHA 0518
Nicholas M. Cann, for Physician A0518, Physician B0518, and Physician C0518
P.M. (Mitch) McAdam, Q.C., for Attorney General of Saskatchewan
Bruce W. Gibson, for Attorney General of Canada

Subject: Constitutional; Criminal; Public; Human Rights

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Health law

I Constitutional issues
I.3 Charter of Rights and Freedoms

Headnote

Health law --- Constitutional issues — Charter of Rights and Freedoms

Patient wished to engage in physician assisted death and brought proceedings to obtain constitutional exemption — Publication ban was put in place regarding identity of patient — Hearing held regarding making ban permanent — Permanent publication ban and sealing order put in place — No reasonable alternative existed — If anonymity not preserved, patient might not be able to spend her remaining days in private and die with dignity surrounded by her family — Possible that patient's family members may be subjected to public scrutiny based on personal, sensitive choice on contentious issue — Patient was concerned she might be contacted or harassed by individuals or groups opposed to her decision to end her life with the assistance of — If confidentiality cannot be maintained, individuals who qualify for physician-assisted death, may not be willing to undergo required legal process — Publishing names of physicians could harm access — Positive effects of ban outweighed negative effects, latter of which were minimal.

2016 SKQB 175, 2016 CarswellSask 317

Table of Authorities

Cases considered by *M.D. Popescul J.*:

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — referred to

Carter v. Canada (Attorney General) (2015), 2015 SCC 5, 2015 CSC 5, 2015 CarswellBC 227, 2015 CarswellBC 228, 66 B.C.L.R. (5th) 215, [2015] 3 W.W.R. 425, 17 C.R. (7th) 1, 320 C.C.C. (3d) 1, 468 N.R. 1, 384 D.L.R. (4th) 14, 366 B.C.A.C. 1, 629 W.A.C. 1, [2015] 1 S.C.R. 331, 327 C.R.R. (2d) 334 (S.C.C.) — considered

Carter v. Canada (Attorney General) (2016), 2016 SCC 4, 2016 CSC 4, 2016 CarswellBC 60, 2016 CarswellBC 61, 331 C.C.C. (3d) 289, 394 D.L.R. (4th) 1, 480 N.R. 208 (S.C.C.) — considered

Dagenais v. Canadian Broadcasting Corp. (1994), 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168, 20 O.R. (3d) 816 (S.C.C.) — followed

R. v. Mentuck (2001), 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409, 163 Man. R. (2d) 1, 269 W.A.C. 1, [2001] 3 S.C.R. 442 (S.C.C.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — referred to

Toronto Star Newspapers Ltd. v. Ontario (2005), 2005 SCC 41, 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 200 O.A.C. 348, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188 (S.C.C.) — considered

Toronto Star Newspapers Ltd. v. Ontario (2005), 2005 SCC 41, 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, 197 C.C.C. (3d) 1, 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 200 O.A.C. 348, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 335 N.R. 201, 76 O.R. (3d) 320 (note), 132 C.R.R. (2d) 178, [2005] 2 S.C.R. 188 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 2(b) — considered

2016 SKQB 175, 2016 CarswellSask 317

HEARING regarding publication ban in proceedings regarding declaration allowing physician assisted death.

***M.D. Popescul J.*:**

1 The Applicant, Patient 0518, has commenced an action by Originating Notice, seeking a declaration that she is entitled to a constitutional exemption authorizing physician assisted death as granted by the Supreme Court of Canada in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.) and *Carter v. Canada (Attorney General)*, 2016 SCC 4, 394 D.L.R. (4th) 1 (S.C.C.).

2 Concurrent with the filing and issuance of the Originating Notice, the Applicant filed an Application Without Notice in which she sought an interim order respecting confidentiality pending the hearing of a permanent publication ban application, scheduled for today, May 18, 2016.

3 On May 13, 2016 I granted an interim order in which, among other things, I authorized the use of pseudonyms and redactons in the material that was made public. I also ordered a temporary publication ban respecting any information that might tend to identify the Applicant, her family, the health region affected and the physicians involved.

4 This decision deals with whether the interim order should be made permanent.

5 The Applicant wishes to spend her remaining days in privacy and die with dignity in the company of her family. The Applicant submits that it is important to her, her family members and the other interested health care professionals that they not be subjected to public attention that would likely be attracted if identifying information about them is disclosed.

6 There is no question that this Court has inherent jurisdiction to grant a sealing order, impose a publication ban, and order that pseudonyms be used to protect the identity of persons involved in the application. See *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) at para 38.

7 The real question, of course, is not whether the Court can grant the relief sought, but whether it should.

8 The open court principle is "inextricably tied to the s. 2(b) *Charter* right *[Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11] to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice." See *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.) at para 74, [2002] 2 S.C.R. 522 (S.C.C.) [*Sierra Club*]. However, although extremely important, the open court principle is not absolute. In *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 (S.C.C.) at paras 1 to 4, [2005] 2 S.C.R. 188 (S.C.C.), the Supreme Court of Canada expressed this concept as follows:

> 1 In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
>
> 2 That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(b) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
>
> 3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.

> 4 Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration.

9 The test to be applied on applications to restrict the openness of legal proceedings was established in the Supreme Court of Canada decisions in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 (S.C.C.). The *Dagenais*/*Mentuck* test provides that the constitutional right to disseminate information about judicial proceedings can only be restricted when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

(*Sierra Club* at para 45).

10 This test applies to all discretionary court orders that limit freedom of expression and freedom of the press in legal proceedings. The onus rests on the applicant to displace the open court principle.

a) The confidentiality order is necessary to the proper administration of justice,

11 Fewer decisions are more personal and private than the one the Applicant has made to apply for physician-assisted death. If anonymity is not preserved, the Applicant may not be able to spend her remaining days in private and die with dignity surrounded by her family. It is possible that the Applicant's family members may be subjected to public scrutiny based on a personal, sensitive choice on an issue which remains highly contentious in the public domain. The Applicant has expressed the fear that she will be contacted or harassed by individuals or groups opposed to her decision to end her life with the assistance of a physician.

12 If confidentiality cannot be maintained, individuals who qualify for physician-assisted death, may not be willing to undergo the required legal process. Applications of this nature are a very significant and personal decision made by individuals who are inherently vulnerable. It is reasonable to conclude that prospective applicants who qualify for constitutional exemptions may also experience similar concerns if their identities are made public, which would thereby limit their access to physician-assisted death.

13 Publishing the names of the physicians involved also creates a risk to the accessibility of those who may wish to consider a physician-assisted death. Physician-assisted death is not only a controversial subject among the general public, it remains a contentious issue among physicians. The physicians who filed affidavits raise real and legitimate concerns that disclosure of their identity could cause professional and personal harm. Many physicians are not willing to offer this service due to fears about negative impacts on their professional reputation and risk to their personal safety. If the identities of these physicians are made public, the Applicant argues that they may be reluctant to be involved in the Applicant's physician-assisted death. If that happens, the Applicant will not be able to exercise the constitutional right to die with dignity. Further, if the physicians' names are made public, it may have a chilling effect on other physicians coming forward to assist.

14 It seems to me that there are no reasonable alternatives to banning the publication of the names and identifying information of the interested participants to this application.

2016 SKQB 175, 2016 CarswellSask 317

15 Accordingly, I conclude that a permanent publication ban and sealing order is necessary in the current circumstances to prevent a serious risk to the proper administration of justice. In these circumstances, the risk is specific to the Applicant, her family members, and her health care professionals, and additionally has an objectively discernible public component. Further, I find that there is no reasonable alternate measure to prevent these risks. The interim publication ban has been carefully tailored to only prohibit the information necessary to protect against the risks involved. Making the interim ban permanent is appropriate.

b) The salutary effects of the publication ban outweigh the deleterious effects.

16 I find that the salutary effects of a permanent publication ban and sealing order outweigh any deleterious effects on the rights and interests of the public and the media.

17 The Applicant's health is rapidly deteriorating. Although she is at peace with her decision, she must be experiencing anxiety knowing that she is facing the end of life. A confidentiality order gives the Applicant the assurance that she will not suffer from any additional stress related to this application and reassures her family that they will be able to spend their last days together as they choose. Further, it reassures the Applicant's health care professionals that they will be protected from any harmful, personal or professional consequences flowing from assisting the Applicant to exercise her constitutional right to a physician-assisted death.

18 Further, there is a public component to the salutary effects of a confidentiality order. Future applicants may not be discouraged from bringing similar applications for constitutional exemption for fear of being subjected to public scrutiny. Health care professionals may not be deterred from participation in a physician-assisted death if publication of their identities is banned. The salutary effects of the confidentiality order on the accessibility of the constitutional exemption for physician-assisted death are significant and far-reaching.

19 On the other hand, the deleterious effects of the publication ban are minimal. The hearing will not be in camera and the public and the media will be entitled to attend. The only aspect being protected is the identity of the Applicant, her family, and her health care professionals. Protection of this one aspect does not unduly restrict the media's exercise of its freedom of expression. Further, I find that the core values underlying the freedom of expression would be protected. The public debate about physician-assisted death can continue unhindered without the requirement of publishing the identities of the interested parties. Furthermore, members of the media will have access to the redacted version of the court record, and can adequately report on the proceedings without publishing identities of the involved parties.

20 Given the narrow scope of the confidentiality order, I find that the deleterious effects are significantly tempered. Therefore, I hereby order that the terms and conditions respecting confidentiality, publication bans and sealing of the court file as set forth in the interim decision of May 13, 2016 shall be made permanent.

Order accordingly.

End of Document