THE COURT OF APPEAL FOR SASKATCHEWAN

Citation: 2013 SKCA 122 Date: 2013-11-15

Between: Docket: CACV2486

101114386 Saskatchewan Ltd.
101115379 Saskatchewan Ltd.
Teamworx Productions Ltd.
Idendego Inc.
Alena Marie Pastuch
Cryptguard Ltd.

Applicants

- and -

Hearing Panel of the Financial and Consumer Affairs Authority

Respondent

Before:
Ottenbreit J.A. (in Chambers)

Counsel:
Louis Browne for the applicants
Ken Ready, Q.C., for the Hearing Panel of the Financial and Consumer Affairs Authority
Sonne Udemgba for the Saskatchewan Financial Services Commission
William Johnson, Q.C., for the Leader Post

Application:

From:	Financial and Consumer Affairs Authority
Heard:	November 14, 2013
Disposition:	Application dismissed
Written Reasons:	November 15, 2013
By:	The Honourable Mr. Justice Ottenbreit

OTTENBREIT J.A.

I. INTRODUCTION

[1] This decision is in respect of an application by Alena Marie Pastuch for a publication ban on certain medical information contained in the material she has filed for her application to stay a decision of the Hearing Panel of the Financial and Consumer Affairs Authority to recommence a hearing dealing with certain allegations against her. When this matter came before me it was not clear that the media had been properly notified by Ms. Pastuch about the request for a publication ban. Accordingly, this matter was adjourned for a day to allow the media to make representations if they wished. When the matter resumed Mr. F.W. Johnson, Q.C., appeared on behalf of the Leader Post and was given standing to argue the issue of whether there should be a publication ban. For the reasons hereinafter set forth the application is dismissed.

II. FACTS AND BACKGROUND

[2] The corporate appellants and Ms. Pastuch have been involved in a protracted hearing conducted by the respondent, the Hearing Panel, concerning alleged dealings by Ms. Pastuch and the corporate appellants in securities and exchange contracts, all of which is alleged to be governed by *The Securities Act, 1988,* S.S. 1988-89, c. S-42.2.

[3] The Hearing Panel initially ordered that the hearing should commence on January 10, 2011. There were, however, a number of applications for

adjournment made by Ms. Pastuch and the corporate appellants which resulted, after additional applications to this Court and the Court of Queen's Bench, in the hearing commencing on December 5, 2012. Proceedings continued from time to time throughout 2013; however, the Hearing Panel adjourned the hearings *sine die* in early September because of medical and health issues raised by Ms. Pastuch. The matter continued to be adjourned *sine die* until October 21, 2013, when the Hearing Panel, after learning that Ms. Pastuch's doctor would provide no further updates on her medical condition until there was a significant change in her progress, decided that the hearing would recommence on November 15, 2013, and requested that Ms. Pastuch and the corporate appellants submit written closing arguments based on the evidence the Hearing Panel had received to date.

[4] This prompted Ms. Pastuch to file an application in this Court for a stay of the October 21, 2013, decision of the Hearing Panel. In support of the application for a stay Ms. Pastuch filed an affidavit which contained, in addition to other information, references to her medical condition. In that affidavit she disclosed that she was part of an organ transplant process which hopefully would save the life of a family member. There was additional reference to Ms. Pastuch having earlier in 2013 taken ill and being hospitalized. Ms. Pastuch attached six notes from her doctor as exhibits to her affidavit. All the notes appear to be not medical reports in the usual sense but updates from her doctor about her ability to continue the hearing before the Hearing Panel and appear to be created for the benefit of the Hearing Panel and designed to persuade the Hearing Panel that Ms. Pastuch could not further participate in the proceedings.

[5] These doctor's notes say little more about the details of Ms. Pastuch's medical situation earlier in the year or about the transplant process than Ms. Pastuch herself discloses in the body of her affidavit. In her affidavit she provides no doctor's medical reports in the sense of diagnostic reports. There are references to her medical situation in other affidavits filed in support of her motion. However, on the whole, little more detail is disclosed than earlier in 2013 she was seriously ill, was at one point hospitalized, was under the care of several doctors, is part of a transplant process which will investigate whether she can be an organ donor to help a family member, and that her doctor opines that she cannot participate in hearings before the Hearing Panel as a result of this.

[6] Ms. Pastuch's counsel acknowledges that the Hearing Panel had made public reference to Ms. Pastuch's medical condition in respect to her participation in the hearings but argues that this past disclosure should have no bearing on the issue of whether this Court bans publication of what appears to be essentially the same medical information as is set forth in her affidavit.

III. POSITION OF THE PARTIES

[7] Ms. Pastuch argues that the medical information is of a highly personal and confidential nature and is required to be protected by privacy statutes such as *The Health Information Protection Act*, S.S. 1999, c. H-0.021 ("*HIPA*") and *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*"), and that to allow publication of such information would

jeopardize her privacy, confidentiality and security. She argues generally that the law mandates a publication ban of medical evidence.

[8] The argument of the Leader Post is simply that court proceedings are open to the public and media, the onus is on Ms. Pastuch to prove the ban on publication was warranted, and that Ms. Pastuch had failed by convincing evidence to demonstrate that the *Dagenais/Mentuck* test respecting publication bans had been met. Accordingly the Leader Post asked that the application be dismissed. The Hearing Panel and counsel made argument in support of this position.

IV. ANALYSIS

[9] The sole issue is whether Ms. Pastuch has demonstrated that a publication ban on the medical information she has disclosed is, in the circumstances, warranted.

[10] In Canada there is a constitutional right to the dissemination of information about judicial proceedings. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at para. 32, the Supreme Court of Canada established 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
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> (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.

This is called the *Dagenais/Mentuck* test.

[11] In a more recent decision, *CBC v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, the Supreme Court of Canada noted:

> 1 The open court principle is of crucial importance in a democratic society. It ensures that citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes inasmuch as the transparency that flows from access ensures that justice is rendered in a manner that is not arbitrary, but is in accordance with the rule of law.

[12] That Court has also long recognized that there are exceptions to this principle:

> The general principles are as follows: (1) Every court has a supervisory and protecting power over its own records. (2) The presumption is in favor of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right. (3) Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. Curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.
> *(A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175)

The onus is therefore on the person seeking the publication ban to prove that it is warranted in the circumstances by convincing evidence.

[13] In my view, Ms. Pastuch has not satisfied me that her request for a publication ban meets the requirements of the *Dagenais/Mentuck* test. She has not met her onus.

[14] Ms. Pastuch admits that her medical condition has been an on-going issue before the Hearing Panel and has already been made public to some

extent. Moreover, Ms. Pastuch has chosen to disclose similar medical information in this proceeding. The medical information is very cryptic and provides no more than broad brush strokes as to her medical condition and the medical reasons why she seeks a stay of the Hearing Panel's October 21, 2013, decision. Nevertheless, it is a significant factor which she asks the Court to consider in her stay application.

[15] The argument of Ms. Pastuch is basically that medical information must be held confidential. However, that is not the starting point. The starting point is that the court process is an open and public process. This is a pillar of our democratic society. There must be a justifiable reason why this openness should be restricted.

[16] Litigants should know that if they provide medical information to the court that it is provided to an open and transparent process and that the courts will not automatically restrict its dissemination by the media without being statutorily required to do so and without the *Dagenais/Mentuck* test being satisfied.

[17] Ms. Pastuch argues that *HIPA* and *PIPEDA* require the publication ban. It is my view that these statutes do not apply nor does *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 ("*FIPPA*") apply. But *FIPPA* makes it clear in s. 23(3)(e.1) and s. 24(1.1) that *HIPA* governs medical information and not *FIPPA*. More importantly, s. 2(2) of *FIPPA* specifically indicates that the government institutions to which the *Act* applies does not include the Court of Appeal, the Court of Queen's Bench or the Provincial Court of Saskatchewan. Similarly, *HIPA* adopts the same

definition of government institutions as used in *FIPPA* which means that *HIPA* also does not apply to the courts. Likewise, I am not convinced that *PIPEDA* applies either. It applies to federally regulated organizations and in Saskatchewan to the private sector. *FIPPA* is the Saskatchewan public sector privacy legislation. There is, in my view, no statutorily mandated confidentiality for Ms. Pastuch's medical information in this case.

[18] That said, in the proper case medical information may form the basis for a ban on publication. Much depends on the circumstances and the particular facts of the case and whether the *Dagenais/Mentuck* test has been met. How the *Dagenais/Mentuck* test is applied has been outlined in *M.E.H. v. Williams*, 2012 ONCA 35, 346 D.L.R. (4th) 668. There must be a public interest at stake. Personal concerns of a litigant standing alone will not satisfy the necessity branch of the *Dagenais/Mentuck* test:

> 25 *Mentuck* describes non-publication and sealing orders as potentially justifiable if "necessary in order to prevent a serious risk to the proper administration of justice". A serious risk to public interests other than those that fall under the broad rubric of the "proper administration of justice" can also meet the necessity requirement under the first branch of the *Dagenais Mentuck* test: *Sierra Club of Canada*, at paras. 46-51, 55. The interest jeopardized must, however, have a public component. Purely personal interests cannot justify non-publication or sealing orders. Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test: *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *Sierra Club of Canada*, at para. 55; *A.B. v. Bragg Communications Inc.*, 2011 NSCA 26, 301 N.S.R. (2d) 34, at paras. 73-75.

[19] The Court went on to say:

> 31 The necessity branch focuses exclusively on the existence of a serious risk to a public interest that can only be addressed by some form of non-publication or sealing order. The potential benefits of the order are irrelevant at this first stage of the inquiry: *Mentuck*, at para. 34. Unless a serious risk to a public interest is

> established, the court does not proceed to the second branch of the inquiry where competing interests must be balanced.
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> 32 As there is no balancing of competing interests at the first stage, it is wrong at that stage to consider the extent to which the societal interests underlying and furthered by freedom of expression and the open court principle are engaged in that particular case. Even if those values are only marginally engaged (the respondent's submission in this case), restriction on media access to and publication in respect of court proceedings cannot be justified unless it is necessary to prevent a serious risk to a public interest. A court faced with a case like this one where decency suggests some kind of protection for the respondent must avoid the temptation to begin by asking: where is the harm in allowing the respondent to proceed with some degree of anonymity and without her personal information being available to the media? Rather, the court must ask: has the respondent shown that without the protective orders she seeks there is a serious risk to the proper administration of justice?

[20] With respect to freedom of expression and the open court principle, the Court stated:

> 33 In approaching the necessity branch of the inquiry, the high constitutional stakes must be placed at the forefront of the analysis. Freedom of expression, including freedom of the press and other media communications, is a constitutionally protected fundamental freedom. The constitutional right to freedom of expression protects the media's access to and ability to report on court proceedings. The exercise of this fundamental freedom in the context of media coverage of court proceedings is essential to the promotion of the open court principle, a central feature of not only Canadian justice, but Canadian democracy: *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at paras. 1-2; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at para. 26; *Ottawa Citizen Group Inc. et al. v. R.* (2005), 75 O.R. (3d) 590 (C.A.), at paras. 50-55; *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726, 102 O.R. (3d) 673, at paras. 22-24.
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> 34 Limits on freedom of expression, including limits that restrict media access to and publication of court proceedings, can be justified. However, the centrality of freedom of expression and the open court principle to both Canadian democracy and individual freedoms in Canada demands that a party seeking to limit freedom of expression and the openness of the courts carry a significant legal and evidentiary burden. Evidence said to justify non-publication and sealing orders must be "convincing" and "subject to close scrutiny and meet rigorous standards": *R. v. Canadian Broadcasting Corp.*, at para. 40; *Toronto Star Newspapers Ltd. v. Ontario* (2003), 67 O.R. (3d) 577 (C.A.), at para. 19, aff'd 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 41; see also *Ottawa Citizen Group*, at para. 54.

In the context of this approach, I find that Ms. Pastuch has not met the requirements of *Dagenais/Mentuck*.

[21] Ms. Pastuch must satisfy both arms of the *Dagenais/Mentuck* test before a publication ban must be ordered.

[22] Ms. Pastuch has not been able to articulate any reason why an order banning publication is necessary to prevent serious risk to the proper administration of justice or the going forward of the application for a stay. Moreover, given the long history of the proceedings between Ms. Pastuch and the Hearing Panel, it is clear that the application for a stay would be a matter of public interest.

[23] I do not find that Ms. Pastuch has proven there is a risk to the proper administration of justice by failing to ban publication of the medical information filed in support of her stay application. Although generally speaking, Ms. Pastuch has a privacy interest and publication of medical information can constitute a serious risk to the proper amendment of justice in some circumstances, in this case it does not. Ms. Pastuch has disclosed only general information in this respect. In this case there are only broad brush strokes with respect to Ms. Pastuch's medical condition with no detailed medical information being provided. The scope of any publication of that information is therefore necessarily general as well. Ms. Pastuch has not satisfied me that a publication ban is a necessity to prevent serious risk to the administration of justice.

[24] However, I am also not convinced that even if necessity were proven that the salutary effects of the publication ban outweigh the deleterious effects within the meaning of the *Dagenais/Mentuck* test:

> 24 The core values of freedom of expression that the *Charter* seeks to protect were articulated by the Supreme Court in *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927, at para. 53:
>
> > [53] ... (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed ....

[25] The ability of the media to report on the administration of justice is important to collective rights. The public would benefit from a full and accurate reporting of this case. Such reporting serves to improve the public's understanding of the court process.

[26] There is a high value placed on an open courtroom and the media's ability to disseminate information on what happens in the administration of justice. The open court principle is "inextricably linked to the freedom of expression protected by s. 2(b) of the *Charter* and advances the core values therein" (*Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, para. 26).

[27] Taking into consideration the *Dagenais/Mentuck* test, the general nature of the medical information, the lack of detail provided, any privacy rights of Ms. Pastuch, the open court principle and the right of the media to report on the administration of justice, I am not satisfied that a ban on publication is warranted.

V. CONCLUSION

[28] The application of Ms. Pastuch must be dismissed. Counsel for the Leader Post has asked for costs of $2,500.00 to be fixed. Counsel for the Hearing Panel has similarly asked for costs to be fixed. In the circumstances the Leader Post shall have its costs fixed at $1,500.00 to be paid forthwith. There will be no order with respect to costs for the Hearing Panel at this time. The issue is reserved to the decision on Ms. Pastuch's stay application.

DATED at the City of Regina, in the Province of Saskatchewan, this 15th day of November, A.D. 2013.

"Ottenbreit J.A."

OTTENBREIT J.A.