CITATION: W.V. v. Attorney General of Canada, Attorney General of Ontario and Dr. C. Doe, 2016 ONSC 2087
COURT FILE NO.: 787-16
DATE: 2016/03/24

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: W.V. (Applicant)

AND:

Attorney General of Canada (Respondent)

AND:

Attorney General of Ontario (Respondent)

AND:

Dr. C. Doe (Respondent)

BEFORE: Justice R. M. Raikes

COUNSEL: David Williams and C. Campbell, for the Applicant, W.V.
No one appearing, for the Respondent, Attorney General of Canada
Rochelle S. Fox and Padraic Ryan, for the Respondent, Attorney General of Ontario
Erica J. Baron, for the Respondent, Dr. C. Doe

HEARD: March 23, 2016

ENDORSEMENT

[1] The Applicant, W.V., applies for an order, *inter alia*, as follows:

a. Declaring that the Applicant meets the requisite criteria in order to permit her to avail herself of the constitutional exemption granted in *Carter v. Canada (Attorney General)*, 2016 SCC 4, authorizing a physician-assisted death;

b. Granting the Applicant an exemption to ss. 241(b) and 14 of the *Criminal Code*;

c. Granting any regulated health professional who provides the Applicant with treatment or other services in connection with the physician-assisted death, as authorized by court order, during the period of

> suspension of the declaration of constitutional invalidity, including Dr. C. Doe, an exemption from the application of ss. 241(b) and 14 of the Criminal Code;
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> d. Authorizing Dr. C. Doe to take the necessary medical steps to aid and assist the Applicant in pursuing a physician-assisted death, as authorized by court order.

[2] This Application was issued on March 18, 2016, only five days ago. The Applicant seeks to abridge the time for the hearing on the merits given her medical condition and the ongoing suffering which she endures.

[3] Service has been effected on each of the Attorney General for Canada and Attorney General for Ontario. Counsel for the Applicant filed with the Court a letter from counsel for the Attorney General for Canada which indicates that the Attorney General for Canada takes no position on the merits and will not be in attendance at the hearing of this application. Indeed, no one from the Attorney General for Canada attended.

[4] Counsel for the Attorney General for Ontario is present but takes no position on the merits. She raises a concern with respect to the failure of the Applicant to give notice to the media. She asserts that the Applicant is seeking far-ranging relief in having a sealing order made, an in camera hearing held and anonymity ordered, all in the absence of the media and public. She submits that under the "open courts principle", notice should be given to the media so that the media may attend and make submissions concerning any publication ban or sealing order.

[5] Counsel for the Applicant acknowledges that the decision not to give notice to the media was a decision that he made. He did so out of concern for his client's privacy and health interests. He further submits that there is a genuine concern that the presence of the media will have a chilling effect on future applications by persons similarly situated to the Applicant.

[6] Counsel points to the decision in *HS (Re)*, 2016 ABQB 121, and specifically paras. 77 to 86 of that decision. In that case, the media were present and made submissions to the Court seeking to have access to the unredacted materials filed in support of a similar application for physician-assisted death. In *HS (Re)*, *supra*, Justice Martin found that the necessity for confidentiality was met in the circumstances of that case. She wrote at paras. 79 – 82 as follows:

> 79. It is preferable for matters of confidentiality to be addressed when the Originating Application is filed to allow the motions judge to consider whether there is any need for preliminary orders. However, as this is the first application of its kind in this province and the matter is time-sensitive, I am prepared to deal with these requests in the context of the overall hearing.

> 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 S.C.R. 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 court room 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.
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> 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".

[7] Mr. Williams argues that subsequent decisions have followed suit. He submits that my decision on the merits fulfils the open court principle and public awareness mandate. He submits that it is extremely unlikely that the media could advance any argument in this proceeding different than that advanced before Justice Martin in *HS (Re)*, and the result in that case was eminently reasonable and applicable.

[8] I note that in *HS (Re), supra*, and the subsequent decision of Perell J. in *A.B. v. Canada (Attorney General)*, 2016 ONSC 1912, the court made an order sealing the transcript of the hearing to the extent it would tend to identify the Applicant, the Applicant's family members or healthcare providers. Tab 2 of the Applicant's Book of Authorities is a copy of the Order of Justice Perell in *A.B. v. Canada (Attorney General), supra.* At paras. 10 and 11, Justice Perell ordered:

> 10. Any portion of the transcript of any hearing that contains information that would tend to identify the applicant, his family members, or his healthcare providers shall be sealed.

> 11. Any party whose privacy is protected under the publication ban ordered by Justice McEwen shall be entitled to opt out of the protection granted to them provided that their self-identification as being involved in this application does not disclose or publish the identity, or otherwise prejudice the privacy rights, of any other individual whose identity is protected by that order.

[9] Counsel for the Attorney General for Ontario drew to my attention the very recent decision of Justice Conlan released March 21, 2016 on a similar application for physician-assisted death (see 2016 ONSC 2022). In that case, Justice Conlan ordered that notice be given to the media. He adjourned the hearing of the application on the merits for 10 days for that purpose. At paras. 16 – 19, he wrote:

> 16. When there is a motion before any court that requests the degree of confidentiality that is asked for here, including a sealing order, it is presumed that the media will be notified before the motion is heard. In other words, as Justice Nordheimer observed fairly recently, the media should always be notified of her request for a sealing order unless there is a court order dispensing with the notice requirement. *M. (A.) v. Toronto Police Service*, 2015 ONSC 5684 (Div. Ct.).
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> 17. I am not insensitive to the submissions made by counsel for the Carter Applicant, which include allusions to more pain and suffering caused by further delay and the alleged limited public interest in allowing the media to address issues already canvassed in other similar cases.
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> 18. I am not satisfied, however, that there is sufficient reason demonstrated here to depart from the presumption that the media ought to be notified of the relief being sought.
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> 19. I am able to minimize the risk of any further prejudice to the Carter Applicant by offering an early date to hear both the motion and the application – a date less than two weeks from one counsel first appeared before me, upon notice given to the media.

[10] I agree with the rationale expressed by Justice Conlan but I am also mindful of the condition and circumstances of this particular Applicant, including the urgency of her Application, and the role which the media would play on an application in any event. It seems to me that the circumstances here are exceptional. The right of the public to know and of the media to report can be preserved while allowing the Application to proceed on its merits. In my view, the Applicant's *Charter* rights are paramount in these circumstances given that time is truly of the essence and the open court principle can be adequately protected by other means.

[11] I am satisfied on the evidence before me that the Applicant's circumstances are dire and require adjudication on the merits at the earliest opportunity. A delay, even a modest one, may potentially work a significant injustice to the Applicant and her ability to ultimately exercise her constitutionally protected rights.

[12] Therefore, I order as follows:

1. I authorize the use of pseudonyms in the title of proceeding and Application materials to protect the identity of the Applicant, her family and healthcare providers.

2. Counsel for the Applicant shall immediately file with the court a redacted Application Record that removes any information which may divulge of the identity of the Applicant, her family members or healthcare providers.

3. Counsel for the Applicant shall promptly provide notice to the media including a copy of this endorsement/order.

4. On an interim basis pending determination of any motion which may be brought by the media, the following terms shall apply,

   a. any information that could identify the Applicant, a member of the Applicant's family, or any regulated health professional involved in the Application or in assisting the Applicant in her dying shall not be published in any document or broadcast or transmitted in any way, specifically including the following information:

      (i) the Applicant's name, age, condition (neither specific nor general descriptions to be published), symptoms, location, physical appearance, or any other information that identifies or tends to identify the Applicant;

      (ii) the Applicant's family members' names, ages, genders, locations, physical appearances, employers, or any other information that identifies or tends to identify the Applicant's family members;

      (iii) the name, age, gender, location, physical appearance, employers, specialties, or any other information that identifies or tends to identify any regulated health professional involved in the Application or in assisting the Applicant in her dying.

   b. Any party whose privacy is protected under the publication ban ordered herein shall be entitled to opt out of the protection granted

to them provided that their self-identification as being involved in this Application does not disclose or publish the identity, or otherwise prejudice the privacy rights of any other individual whose identity or anonymity is protected by this order.

c. The Court file in this proceeding shall be sealed except for the redacted set of materials, which shall be open to inspection by the public in the ordinary manner.

d. Any portion of the transcript of any hearing that contains information that would tend to identify the Applicant, her family members, or her health care providers shall be sealed pending further order of this Court.

e. The Attorney General for Canada and the Attorney General for Ontario are prohibited from disclosing any information that would otherwise be subject to the publication ban provided for in this order to any person or entity.

f. The media may move on motion in respect of any matters covered by this order provided that they do so on at least seven days' notice to each of counsel for the Applicant, counsel for the Respondent, Dr. C. Doe, and the Attorney General for Canada and Attorney General for Ontario.

[13] The Applicant acknowledged that there is a risk, however small, that her identity may be released or disclosed if a motion is made by the media and is successful. I do not mean to suggest any likely outcome of such a motion by this acknowledgement. It simply reflects the possibility that the publication ban and sealing order may be set aside if the media applies and is successful.

[14] In an ideal world, the Court and Applicant in this case would be able to accommodate the giving of notice and the hearing of the Application on the merits at a not distant future date. Of course, if this were an ideal world, this Application would not be before me at all. Nevertheless, I am convinced that the urgency of the Applicant's situation demands a compromise; one that permits her to proceed with her Application on the merits while preserving the opportunity for the media to have its day in court.

[15] It may be that there will be no motion brought by the media. Perhaps access to the redacted Application Record and the decision on the merits will suffice. I note that if notice had been given to the media and the motion brought before me, that motion, if successful, would only have entitled the media to the same information that they will ultimately have access to, albeit later. The media have no role in the determination of the merits.

[16] It seems to me reasonable to give the media 60 days from this date to initiate that motion after which, the publication ban and sealing order will become final.

[17] This decision should not be seen to countenance the approach that was taken in this case by counsel for the Applicant in not providing notice to the media. I understand why he did as he did, but this issue could have been avoided altogether by the provision of timely notice.

Justice R. M. Raikes

Date: March 24, 2016