NOVA SCOTIA COURT OF APPEAL
Citation: ***Osif v. College of Physicians and Surgeons of Nova Scotia***,
2008 NSCA 113

Date: 20081205
Docket: CA 299088
Registry: Halifax

Between:

Dr. Stani Osif

Respondent/Appellant

v.

The College of Physicians and Surgeons of Nova Scotia

Applicant/Respondent

Revised decision:	The original judgment has been corrected according to the erratum dated **December 9, 2008**. The erratum is attached at the end of this decision.
Judge:	The Honourable Justice Linda Lee Oland
Application Heard:	December 4, 2008, in Halifax, Nova Scotia, in Chambers
Held:	Sealing order and publication ban granted.
Counsel:	Clare Bilek, for the appellant Alexander Benitah and Marjorie Hickey, Q.C., for the respondent

Decision:

[1] The College of Physicians and Surgeons of Nova Scotia applied for the sealing of the appeal book and for a publication ban on the names of patients and their family members identified during the hearing of this appeal. In Chambers, after having read the written submissions of the College and hearing submissions from its counsel and counsel for Dr. Osif, I granted its application with reasons to follow. These are those reasons.

Background

[2] In January 2006 the College received a complaint about Dr. Stani Osif, a hospital emergency room physician. Pursuant to the *Medical Act*, S.N.S. 1995-96, c. 10, as am., the College had its Investigation Committee undertake an investigation. That Committee subsequently broadened the scope of its investigation beyond the original complaint. It conducted an audit of the physician's emergency room records, a clinical assessment of her emergency room skills, and a review of issues identified in her complaint file. These required the review of a number of patient records, including some where the patient is a minor. When it concluded its work, the Investigation Committee referred the matter to the College's Hearing Committee.

[3] In September 2007, Dr. Osif received a revised Notice of Hearing. The charges in that document arose out of the original complaint, the audit, the clinical assessment, and the review of the complaint file. At the outset of the hearing in October 2007, the College applied for a ban on the publication of the names of third party patients and family members. The *Medical Act* authorizes the Hearing Committee to grant publication bans. Dr. Osif did not oppose the ban, nor did any media representative or other person. The Hearing Committee granted the College's application for a publication ban.

[4] The hearing extended over several months. Charts for over a score of patients were produced as exhibits. Most of those patients were not called as witnesses, nor notified of the investigation or the hearing. Nor were their family members called or notified. Other exhibits included references to confidential medical information of patients seen by Dr. Osif who were not referenced in the revised Notice of Hearing.

[5] The Hearing Committee's decision on the charges issued January 18, 2008, and that on disposition and costs on June 26, 2008. While those decisions are available to the public, all third party patients and family members were identified by way of initials rather than their full names.

[6] Dr. Osif's Notice of Appeal was filed in July 2008. The following month, the dates for filing the appeal book and facta were set and the hearing of the appeal itself scheduled for January 28, 2009. The appeal book which was filed in September 2008 consists of several hefty volumes. The transcript of the hearing alone runs close to 3,000 pages. It identifies the third party patients and, in some instances, family members, by their full names. In addition to the transcript, there are almost five dozen exhibits, including a number of patient charts and hospital records, and expert reports that referred to those charts and records, again with identifying particulars.

[7] No concern about disclosure of patient or family names in the transcript or exhibits was raised when the dates for filings and the hearing were set, nor when the appeal book was filed.

[8] In November 2008, counsel for Dr. Osif filed the appellant's factum. It identified third party patients and family members by their full names. Her counsel subsequently filed a redacted version which identifies patients and family members by initials only.

[9] On November 24, 2008, the College filed a Notice of Application seeking the sealing of the appeal book and a publication ban on the names of patients and family members identified during the hearing of the appeal. Dr. Osif does not oppose the application.

[10] In accordance with this court's Practice Directive, counsel for the College posted an electronic notice advising the media of the application. No media representative has sought to intervene.

Issues

[11] The issues on the applications are (a) whether the College is entitled to an order sealing the appeal book, and (b) whether it is entitled to a publication ban on the names of patients and family members identified during the hearing of the appeal.

Analysis

[12] The College brings its application pursuant to *Civil Procedure Rule* 62.31 which provides that a judge may exercise any jurisdiction or authority of the Court to issue a publication ban (*Rule 62.31(b)*) or to issue a sealing order (*Rule 62.31(c)*) in any proceeding until such other order of the Court.

[13] In *Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)*, 2005 NSCA 158, Bateman, J.A. for this court succinctly summarized the open court principle and its requirements, and the *Dagenais/Mentuck* test developed by the Supreme Court of Canada:

> 14 The open court principle is a hallmark of a democratic society. Openness is required "both in the proceedings of the dispute, and in the material that is relevant to its resolution". (*Sierra Club of Canada v. Canada (Minister of Finance*), [2002] 2 S.C.R. 522, 2002 SCC 41, at para. 1, per Iacobucci, J.)
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> 15 . . . It is recognized, however, that the principle must sometimes yield to the need for confidentiality (*R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76 at para. 31). Courts, therefore, retain the discretion to grant confidentiality orders. This discretion is exercised within the general framework of the *Dagenais/Mentuck* test developed by the Supreme Court of Canada (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck, supra*), and summarized in *Sierra Club, supra* at para. 45 as follows:
>
> > A publication ban should only be ordered 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.

[14] While the *Dagenais/Mentuck* test was developed in the context of publication bans, it applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceeding. See *Re Vancouver Sun*, [2004] 2 S.C.R. 332, at ¶ 23-31; *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 at ¶ 7. The test is meant to be flexible and contextual: *Toronto Star Newspapers* at ¶ 8.

[15] The College's application is for both a sealing order and a publication ban. My analysis which follows is applicable to both these forms of confidentiality orders.

[16] The *Dagenais/Mentuck* decisions arose in the context of criminal proceedings. The appeal in this case does not pertain to criminal law. In my view, the *Dagenais/Mentuck* test as framed in *Sierra Club* is the more appropriate approach in the circumstances before me. Iacobucci, J. for the Court stated:

> A confidentiality order ... should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality 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.

[17] The first branch of the test requires me to determine whether disclosure of the names of third party patients and family members in the appeal book or during the hearing of the appeal would pose a serious risk to an important interest. The interest cannot be one which is merely specific to the applicant, but rather must be one which can be expressed in terms of a public interest in confidentiality: *Sierra Club* at ¶ 55. I must also consider alternative measures to the confidentiality orders that are sought, and ensure that they are not overly broad.

[18] In my view, three important public interests can be identified in this application: (a) the confidentiality of medical records, (b) the integrity of the College and its hearing process, and (c) freedom of information.

[19] Dr. Osif has worked exclusively in the emergency rooms of hospitals. Hospital records concerning a patient or person, or a former patient or person, in the hospital are confidential and cannot be disclosed except with the consent or authorization of the patient or person: *Hospitals Act*, R.S.N.S. 1989, c. 208, s. 71(1).

[20] Only in the limited circumstances enumerated in the *Hospitals Act* may patient records be disclosed without patient consent:

> 71(5) Nothing in this Section prevents the records and particulars of a hospital concerning a person or patient in the hospital or a person or patient formerly in a hospital from being made available to
>
> (a) a person on the staff of the hospital for hospital or medical purposes;
>
> (b) the qualified medical practitioner of the person concerned designated by the person as his physician;
>
> (c) a person authorized by court order or subpoena;
>
> (d) a person or agency otherwise authorized by law;
>
> (e) the Minister or any person or agency designated or authorized by the Minister.

The College can access patient records by virtue of its Ministerial designation or authorization under s. 71(5)(e).

[21] The importance given to the confidentiality of patient records is also reflected in the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5. Its s. 4A(2)(g) specifically provides that the restrictions or prohibitions to access to a record in s. 71 of the *Hospitals Act* prevails over that legislation.

[22] Confidentiality is a hallmark of the relationship between health care professionals and their patients. There is no question that the public considers that

their medical records are confidential and expects that, except in limited circumstances, they will remain confidential. The confidentiality of such records is an important public interest.

[23] Also of importance is the public interest in ensuring that the College's process for regulating the practice of medicine and governing the medical profession operates efficiently. The objects of the College are directed to the service and protection of the public: *Medical Act*, s. 4(3). Its investigation and hearing process requires access to confidential medical records in order to function. However, the use of that information is limited to those regulatory purposes and, unless they initiated a complaint, patients and their family members are usually not involved in the investigation or hearing.

[24] The third important public interest is access to information and, more particularly, the importance and role of the press in informing the public in a free and democratic society. The open court system allows the press to fulfill its responsibilities.

[25] I then consider whether the confidentiality orders sought by the College are necessary to protect these important public interests. If they were granted, the confidentiality of medical records and the integrity of the College and its hearing process would be safeguarded and enhanced.

[26] The important public interest that would be harmed is the public's right to information. However, neither the public nor the media would be excluded from the courtroom. The only details sought to be withheld are the names and identifying information of patients whom Dr. Osif provided with care, and their family members, which appear in the appeal book and which may be disclosed during the hearing. The names of the parties, the nature of the case, the issues on appeal, and the positions of the parties would remain in the public domain. The exclusion of those identifying particulars would not diminish the ability of the public or the media to understand the proceeding nor to communicate its import. I am of the view that if granted, the confidentiality orders would amount to a minimal intrusion of the public interest in access to information.

[27] The only alternative measure to a sealing order and publication ban appears to be a redaction of the massive appeal book and the numerous exhibits in order to

excise identifiable personal information such as names and contact particulars. In accordance with *Civil Procedure Rule 62.14*, five copies of all that material were made and filed with the court. Of course, each of the parties also has a copy. Counsel for the College advised that the appeal book is filled "from one end to the other" with identifying particulars, and that redaction would require extensive blacking out of that information. It is apparent that the effort required to properly redact the appeal book and exhibits would have to be painstaking and very significant. The requisite copies of the redacted documents would then have to be made. The entire exercise would also be time-consuming and costly.

[28] A redaction would also delay the hearing of the appeal and the resolution of this matter. The hearing before the Hearing Committee commenced on October 1, 2007. Its decisions issued in January and June 2008. The appeal of those decisions is scheduled for hearing in late January 2009, just more than a month hence and with December holidays intervening. Counsel for Dr. Osif advised me that her client's priority is to maintain the hearing date for the appeal.

[29] These considerations persuade me that while redaction of the appeal book is an alternative to the granting of a sealing order, it is neither a practical nor a reasonable alternative.

[30] I am satisfied that the first branch of the test is met. The confidentiality orders are necessary to prevent a serious risk to an important interest because there are no reasonably alternative measures that will suffice.

[31] I move then to the second branch of the test which requires a weighing of the salutary effects of the confidentiality order against its deleterious effects on the rights and interests of the parties and the public. To do so, the benefits that would accrue were it granted, and the adverse impact that it may have on other public interests, must be considered.

[32] Earlier in this decision, I identified the confidentiality of medical information and the integrity of the College process as two important public interests. Limiting access to the names and contact particulars of third party patients and their family members by way of the sealing order and publication ban applied for would benefit these interests.

[33] Balanced against that salutary effect is the negative impact on the open court principle and open access to justice. Granting the order and ban would deny the public and the media access to the content of the appeal book and the exhibits, and prevent the disclosure of the identities of third party patients and family members which appear there and which may be provided in open court. There would be a limitation to the right to free expression and to the core value of the search for the truth to that extent only. There is no restriction to the court room or to the hearing. The other core values underlying freedom of express which are identified in *Sierra Club* at ¶ 75, namely, the promotion of self fulfilment of individuals by allowing them to develop the rights and ideas as they see fit, and ensuring open participation in the political process, are not impeded. Nor would there be any adverse effect on the right to a fair trial or to the efficacy of the administration of justice.

[34] I conclude that the salutary effects of a sealing order and publication ban outweigh their deleterious effects.

Disposition

[35] I would grant an order sealing the appeal book such that it does not form part of the public record of the court. I would also grant a publication ban on the names of the patients and their family members on the hearing of the appeal scheduled for January 28, 2009 or any adjourned date.

Oland, J.A.

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Erratum:

[1] Paragraph [26], penultimate sentence, change “proceeding not to communicate its import.” to read “proceeding nor to communicate its import.”