NOVA SCOTIA COURT OF APPEAL

Citation: *Rhyno v. Nova Scotia Barristers' Society*, 2019 NSCA 67

Date: 20190801
Docket: CA 488264
Registry: Halifax

Between:

Duane Alan Rhyno

Appellant

v.

Nova Scotia Barristers' Society and
The Attorney General of Nova Scotia

Respondents

Judge:	Wood, C.J.N.S.
Motion Heard:	July 25, 2019, in Halifax, Nova Scotia in Chambers
Written Decision:	August 1, 2019
Held:	Motion granted in part
Counsel:	Duane Alan Rhyno, appellant in person Bernadine MacAulay, for the respondent Nova Scotia Barristers' Society Edward A. Gores, Q.C., for the respondent The Attorney General of Nova Scotia (not participating)

Decision:

[1] Mr. Rhyno and the Nova Scotia Barristers' Society ("the Society") jointly move for a confidentiality order pursuant to *Civil Procedure Rule* 85.04. Notice was provided to the media in accordance with the Court's protocol; however, no representatives of the media appeared at the hearing to make submissions.

[2] This appeal arises out of a decision by the hearing panel appointed with respect to complaints against Mr. Rhyno as a member of the Society. The complaints and hearing process are governed by the provisions of the *Legal Profession Act*, S.N.S. 2004, c. 28.

[3] The requested order would prevent publication of any information which could identify certain persons as well as health information about Mr. Rhyno. With respect to the individuals, the draft order says:

> 1. No person shall publish or broadcast any information that identifies or may tend to identify any of the following persons who are identified during this proceeding:
>
> i. Any clients of Mr. Duane Rhyno;
>
> ii. Any properties or residents thereof that are the subject matter of the charges or decisions being appealed; and
>
> iii. Any third parties whose properties were being foreclosed and transferred to Mr. Rhyno

[4] The discipline hearing for Mr. Rhyno was open to the public as required by section 44 (1) of the *Legal Profession Act*. The *Act* also permits a hearing panel to order exclusion of the public from all or part of a hearing in accordance with subsection 44 (2):

> (2) A hearing panel may order that the public, in whole or in part, be excluded from a hearing or any part of it if the hearing panel is satisfied that
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> (a) financial, personal or other matters may be disclosed at the hearing of such a nature that the desirability of avoiding public disclosure of those matters in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings may be open to the public; or
>
> (b) the safety of a person may be jeopardized.

[5] Section 44 (3) gives the panel the discretion to issue a publication ban. At the beginning of Mr. Rhyno's discipline hearing the panel issued the following order:

> **IT IS ORDERED THAT** pursuant to Section 44 (3) of the **Legal Profession Act** no person shall publish or broadcast any information that identifies or may tend to identify any of the following persons who are identified during this hearing:
>
> 1. Any clients of Mr. Duane Rhyno;
> 2. Any properties that are the subject matter of the charges;
> 3. Any third parties whose properties were being foreclosed.
>
> This ban is in effect until further order of the Chair.

[6] During the penalty phase of the hearing, the panel issued a publication ban with respect to a medical condition of Mr. Rhyno which had been referenced at the hearing.

[7] This motion engages the constitutional principles related to open courts and is governed by the decisions of the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442. These principles have been applied by this Court in *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83 and *Resolve Business Outsourcing Income Fund v. Canadian Financial Wellness Group Inc*, 2014 NSCA 98.

[8] The test to be applied to the discretionary decision about whether to issue a confidentiality order and, if so, on what terms has two distinct steps. These have been described by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at para. 53:

> 53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:
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> A confidentiality order under Rule 151 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.

[9] In *Resolve Business Outsourcing* Justice Fichaud noted that an interest must have a public component in order to justify a confidentiality order:

> [26] To summarize the test's two branches, the judge determines whether (1) the confidentiality order is necessary to prevent a serious risk to an important public interest, because reasonable alternative measures would not alleviate the risk, and (2) the salutary effects of the confidentiality order, that may include the promotion of a fair trial, outweigh its deleterious effects, that include a limitation on constitutionally protected freedom of expression and public access to the courts. For the first branch, the important interest must (a) be real, substantial and well-grounded in the evidence, and (b) involve a general principle of public significance, rather than be merely personal to the parties, while (c) the judge's consideration of reasonable alternative measures must restrict the confidentiality order as much as possible while preserving the important public interest that requires confidentiality.

[10] Unless the applicant is able to establish a real and substantial risk to an important public interest, it is unnecessary to engage in the balancing exercise required by the second step of the analysis. For example, the Ontario Court of Appeal in *Out-Of-Home Marketing Association v. Toronto (City)*, 2012 ONCA 212 stated at para. 55:

> [55] However, as was observed in *Williams*, the focus must be on how the motion is framed. **Where the interest in confidentiality engages no public component, the inquiry is at an end**. There is no basis upon which to proceed to the second branch of the test where factors such as the nature of the order's impact on public access and other societal interests become valid considerations.
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> [Emphasis added]

[11] A motion for a confidentiality order requires an evidentiary basis. The judge must have a clear understanding of the facts in order to exercise his or her discretion judicially. In the *Coltsfoot Publishing Ltd.* decision, Justice Fichaud discussed this requirement:

> [31] The "sufficient evidentiary basis" should include more than just conclusory assertions. In *Toronto Star Newspapers Ltd. v. Ontario,* [2005] 2 S.C.R. 188, Justice Fish for the Court said:
>
> > 9 Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity

> could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result.
>
> [32] Similarly, in *Globe and Mail*, Justice LeBel for the Court (paras 92-94, 99) rejected the "bald assertions, without more", with "no tangible proof" of the supposed serious risk that was advanced for the requested publication ban.
>
> …
>
> [38] ... My reading of the authorities, such as *Globe and Mail*, is that the facts to support a confidentiality order must be established by evidence (that is assessed on the balance of probabilities), not by bald assertions or unsworn generalizations, and those facts in turn must establish a real and substantial risk to an important public interest

[12] The Ontario Superior Court described this need for an evidentiary foundation in *Commissioner of Competition v. X*, 2018 ONSC 3374:

> [53] As stated in *Mentuck* at para. 34 and as quoted above, the serious risk must be "real, substantial and well grounded in the evidence" and it must be more than trying to obtain a benefit or advantage to the administration of justice. I add to this, in the circumstances of the present case where the public interest component weighs heavily, that it must be more than a risk of mere disadvantage, more than a risk of embarrassment, and more than a desire to be free of publicity. Additionally, it is the "risk" of prejudice that needs to be proved rather than the occurrence of the actual prejudice because, as the Applicant's counsel has submitted, no one has a crystal ball.

[13] It is with these principles in mind that I will consider the requested order. The first step is to consider whether the evidence presented establishes that some restriction on publication is necessary to prevent a serious risk to an important public interest. The evidence filed on behalf of the Society consists of the affidavit of Colleen Crowther, which describes the publication bans ordered by the hearing panel. Mr. Rhyno's affidavit indicates that his medical condition was never brought forward in the original hearing.

[14] For uncontested matters, the Court may accept representations from counsel in lieu of formal proof. In this case, the Society's brief includes a description of the information sought to be protected and the nature of the evidence at the discipline hearing. It says Mr. Rhyno was accused of making misrepresentations to lenders in mortgage applications for properties which he had acquired from third parties. The identifying information for these third parties is part of what is included in the proposed order.

[15] According to the hearing panel decision, none of these persons testified as witnesses. One, a tenant of Mr. Rhyno's, filed an affidavit indicating that he did not sign a lease which had been prepared in his name.

[16] The primary argument advanced in support of the confidentiality order was that disclosure might negatively impact the integrity of the Society's regulatory process because individuals would be less likely to come forward with their concerns if they believed their identity might become public. In support of that proposition, the Society relies on the decision in *Osif v. College of Physicians and Surgeons of Nova Scotia*, 2008 NSCA 113. That case involved a request for a sealing order and a ban on publication of the names of patients and family members referred to in an appeal from a physician discipline hearing. The Court identified the important public interests at play as follows:

> [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.

[17] As with physicians, confidentiality is the hallmark of communications between solicitor and client. This is an important interest that must be protected assiduously. For this reason, the names and other identifying information with respect to Mr. Rhyno's clients should be subject to a publication ban as requested. The non-disclosure of names does not prevent the press or members of the public from understanding the allegations against Mr. Rhyno and the issues raised by this appeal.

[18] The third parties who are not clients are in a different situation. The evidentiary record indicates that none testified at the hearing, and it is not clear what contact they may have had with the Society and its investigators. In oral submissions, Ms. MacAulay said that she believes some had no contact with the Society. There is nothing before me to suggest that these individuals brought

forward any complaints or concerns on their own initiative. I have no evidence to show that disclosure of their names would have any negative impact on the Society's regulatory process. If they had any expectations during the investigation, it should have been that their information might be presented at a hearing which would be open to the public in accordance with the requirements of the *Legal Profession Act*.

[19] The distinction between protecting the privacy interests of patients and of third parties is discussed in the decision of the Prince Edward Island Court of Appeal in *Dr. Ian Reid v. Health PEI*, 2017 PECA 22 . In that case the Court found that there was an important public interest in patient confidentiality and went on to say:

> [15] I am not of the same view however when it comes to the names of the witnesses save for the two patients who testified. In my view the names of the two patients who testified should be protected for the reasons contained in the preceding three paragraphs. I note that the decision issued by the Health PEI makes reference to the patients only by their initials. If the patients are identified, then their very personal medical records are also made public. I would extend the order to include the names of the two patient witnesses who testified.
>
> [16] I would not, however, grant the order sought concerning the other witnesses. There is no evidentiary basis upon which I conclude there is a serious risk to the integrity of the system. While the applicants fear that health professionals will not be forthcoming in the future, that fear has no evidentiary basis. Medical professionals are indeed that; professionals. While the Health PEI may not have the ability to subpoena them, medical professionals have an ethical and professional responsibility to provide information and evidence when the integrity of the health system is at stake.

[20] In my view, the same distinction can be drawn in this case between clients of Mr. Rhyno and the non-clients who were mentioned at the hearing and did not testify.

[21] The applicants have not satisfied me with respect to the first requirement under *Dagenais*/*Mentuck*, and that is the existence of an important public interest which is at serious risk. As a result, I will not grant the confidentiality order with respect to the third party names and properties.

[22] Both parties advised that the particulars of Mr. Rhyno's medical condition were irrelevant to the appeal. In light of the importance of maintaining the confidentiality of medical records, I am prepared to grant the order requested with

respect to that information. I am also prepared to permit Mr. Rhyno's clients to be identified by initials or pseudonyms.

[23] For the reasons outlined above, I will grant the motion for a publication ban in part and only with respect to Mr. Rhyno's clients and his medical condition.

Wood, C.J.N.S.