SUPREME COURT OF NOVA SCOTIA

Citation: A.B.C. v. Nova Scotia (Attorney GEneral), 2011 NSSC 476

Date: 20111223
Docket: Hfx. No. 262658
Registry: Halifax

Between:

A.B.C.

Plaintiff

v.

The Attorney General of Nova Scotia, representing Her Majesty the Queen in Right of the Province of Nova Scotia

Defendant

DECISION

Restriction on publication: Restriction on publication of plaintiff's name under *Civil Procedure Rules* 85.04(1) and (2) and 85.05(1) and (2).

Judge: The Honourable Justice A. David MacAdam

Heard: December 7, 2011

Final Written Submissions: December 7, 2011

Counsel: Mark T. Knox, for the Plaintiff
Glenn Anderson, Q.C., and Darlene Willcott for the Defendant

By the Court:

[1] ABC is one of a number of persons who were sexually assaulted by Cesar Lalo ("Lalo"). Lalo was his probation officer at the time of the sexual assaults.

[2] In 2006 ABC commenced this proceeding against the Attorney General representing her Majesty the Queen in right of the Province of Nova Scotia, seeking damages for the injury and harm caused by Lalo. Prior to trial the defendant admitted liability and the parties agreed on the damages for ABC. At issue was the defendant’s plea of limitations, in view of the fact that the assaults occurred in the mid-1980s, while this action was only commenced in 2006. Following the trial, and prior to the court filing its decision, counsel for ABC applied, pursuant to *Civil Procedure Rule* 85.04, for an order for confidentiality, requesting that the plaintiff be allowed to use the pseudonym "A. B. C." in pleadings and any court order, that the identity of ABC not be published or broadcast, and that all documents filed by ABC were to be filed with the heading using the pseudonym, "A. B. C.".

[3] Relevant on this application are *Civil Procedure Rules* 85.04(1) and (2) and 85.05(1) and (2):

> **Order for confidentiality**
>
> **85.04** (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.
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> (2) An order that provides for any of the following is an example of an order for confidentiality:
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> (a) sealing a court document or an exhibit in a proceeding;
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> (b) requiring the prothonotary to block access to a recording of all or part of a proceeding;
>
> (c) banning publication of part or all of a proceeding;

(d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including a heading.

Notice of motion for confidentiality order

85.05 (1) A party who makes a motion for an order for confidentiality, or to exclude the public from a courtroom, must give reasonable notice to representatives of media, unless a judge orders otherwise.

(2) The notice to media representatives may be given by using the service provided by all courts in Nova Scotia for giving notice to the media through the internet.

[4] Filed on this application was an affidavit by a psychologist registered to practice in the Province of Nova Scotia who is familiar with ABC and had previously conducted a psychological assessment of him. In his affidavit he reviews the various tests he administered. Attached to his affidavit is the report of his findings. His initial psychological assessment was carried out in 2007 and he again met with ABC in 2011. His affidavit concludes:

> In general, a patient's mental health issues require that their personal issues be confidential and protected, allowing disclosure with the therapist to be in a safe and secure environment in order to explore the sexual abuse of a victim.
>
> In my experience, making a victim's name public is an impediment to treatment. Individuals who have been sexually abused generally suffer from shame and embarrassment. Publically disclosing an individual's name, and the fact that they have been sexually abused, most often causes the individual to relive the experience, which has already traumatized that person.
>
> Publically identifying the victim of sexual abuse generally makes that individual more ashamed and embarrassed then they would previously be had this information not been disclosed.
>
> Publicizing the identity of a victim also makes treatment more difficult because the person is already ashamed and embarrassed from the original sexual abuse, may relive the negative affects due to publically identifying themselves, and the ability to enter into a healthy and successful therapeutic relationship becomes less certain.

> My comments above apply to (A.B.C.), who was repeatedly abused by his abuser over a period of time. In addition to my general observations above, (A.B.C.) suffers from some sexual dysfunction and other issues concerning sexual practices and behaviour in his current life. To publically release information that would identify him, and the abuse that he suffered, would (in my opinion) re-traumatize him, and make him even more embarrassed and ashamed. This would make it more difficult to enter therapy, and to be successful in therapy.

Jurisprudence

[5] The guarantees of freedom of expression and of the press are enshrined in s. 2(b) of the *Canadian Charter of Rights and Freedoms*. In *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, Fish J. for the court, in beginning his reasons, observed:

> In any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy.

[6] The freedoms of communication and expression, as he observed, are by no means absolute. At p. 191, he further states:

> ...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.
>
> 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 the disclosure would *subvert the ends of justice* or *unduly impair its proper administration*.

[7] Later, at p. 192, he added:

> . . . In my view, the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings....

[8] The test was articulated by the majority in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and further developed in *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, where Iacobucci J. said, at p. 462:

> ...A publication ban should only be ordered when such an order is necessary to prevent a serious risk to the proper administration of justice, because reasonable alternative measures will not prevent the risk, and when 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....

[9] Inconvenience or embarrassment is not a justification for a publication ban. In *John Doe v. Smith,* [2001] A.J. No. 428, at paras. 12 and 13, (Alta. Q.B.), Veit J. in responding to what would justify a publication ban in a civil proceeding, stated:

> 12 The case law is clear: mere embarrassment does not constitute justification for a publication ban:.... Nor does a general expectation of personal or health or financial privacy:.... Nor does the fact that the litigant is an "ordinary person" in whom the public has no particular interest:.... The medical privacy issue does not arise in a situation where medical malpractice is alleged. Nor indeed, is there any legitimate expectation of privacy in any case in which a plaintiff uses the court process to ask for money.
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> 13 I note that *S.T. v. Stubbs* appears not to have been followed, except by *Re Phelan*. With respect, I agree with the judge in *A.B. v. Stubbs* who came to the conclusion that the mere embarrassment of the plaintiff because the subject matter of the litigation was a penis enlargement is not a sufficient basis for granting a publication ban and that when a patient sues a doctor for malpractice, any expectation of privacy in relation to the doctor-patient relationship has been waived by the patient.

[10] In *John Doe v. Smith, supra.*, the plaintiff was a medical doctor and a patient of the defendant psychologist. The plaintiff's spouse, also a patient of the defendant, began a sexual relationship with the defendant. Both parties applied to the court to use pseudonyms. In granting the application the court determined that the relationship between the plaintiff and spouse, and the defendant was confidential. Veit J., having determined that "(t)he arching values in this case relate to the alleged abuse of a treating relationship which may invalidate a consent to sexual activity" (para. 14), concluded that given the nature of the allegations, the identity of the plaintiff's spouse should not be revealed. She further found that in

order to grant that limited protection of privacy, it was necessary to also prevent publication of the names of both the plaintiff and the defendant.

[11] In *J. Doe v. M. Brown*, [1998] N.B.J. No. 419 (N.B.Q.B) the parties had a sexual relationship. The plaintiff intended to bring an action claiming the relationship had caused extreme psychological damage resulting in financial loss, including for psychological counselling. The motion by the plaintiff, consented to by the defendant, to amend the title of the proceeding to use pseudonyms, and to prevent the publication of the name of the intended plaintiff or any feature that would disclose the identity, or the names of the individual parties in the intended action, was denied. At para. 12, Clendening J. stated:

> 12 In *S.T. v. Stubbs*, (1998) 158 D.L.R. (4th) 555, a recent decision from the Ontario Court of Justice (General Division), Epstein, J. discussed some of the legal principles involved in a request for an order to allow the non-disclosure of identities. I will paraphrase from pages 560-561 as follows:
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> 1. Is there a substantial risk that there will be adverse publicity surrounding this action?
>
> 2. Is the plaintiff a public figure, and if not, should the party be further victimized by the exposure in the media of an intensely personal situation?
>
> 3. Will the public be offended by the withholding of the actual identity of the plaintiff?
>
> 4. Is there evidence of the potential for serious personal damage to the plaintiff if the order is not granted?

[12] Clendening J. distinguished the circumstances in *S. T. v. Stubbs, supra*. At paras. 13 and 14 she further stated:

> 13 In the *Stubbs* case a young man contracted mumps, and as a result, the development of his sexual organs was inhibited. Subsequently, he contacted Dr. Stubbs regarding penile enhancement surgery when he learned of a new surgical procedure from the Toronto Star. Stubbs performed the surgery but soon after the Plaintiff experienced many problems. Eventually, he had two further surgical procedures by other physicians to reconstruct his penis. As the original surgery was not covered by the Ontario Health Insurance Plan, he sued Dr. Stubbs for substantial damages resulting from battery and negligence. Judge Epstein granted an order for use of initials and at p. 567 identified the relevant tests as:

> My review of the law leads me to conclude that the principles to apply in considering relief of this nature in a civil proceeding are the tests relevant to the granting of injunctive relief applied to the face of a strong presumption of openness in our courts.

> 14 The *Stubbs* case differs from the case at bar. In *Stubbs* the court could rely on an affidavit of a psychiatrist who had treated the plaintiff. The doctor stated that it would be very traumatic and damaging for the plaintiff if the background to the surgery, the surgery itself and the results of it were disclosed to the public in a manner that identified the plaintiff. Judge Epstein quoted from the doctor's affidavit that "the personal psychological damage to the plaintiff of public disclosure of these matters could be severe, and probably could have serious and lasting effects on his happiness, well-being and mental health."...

[13] Clendening J. then reviewed the evidence tendered on the application before her, concluding that it did not meet the tests applicable to such a motion. At para. 15 she continued:

> 15 While this case is not particularly unique, I do realize that the Applicant's privacy right should be balanced against the public interest. It is enshrined in our legal system that openness in the court system is the best policy. In *Doe v. Hirt*, [1991] B.C.J. No. 3904 at p. 5 Justice Catliff described the test of balancing the privacy right and the public interest:
>
> > In summary, it seems to me that from reading the cases involved, that the principle to be applied here is that the Court will not grant anonymity merely because of potential embarrassment to a party, but rather that there must be some public interest in the question which justifies such an unusual order.

[14] Three cases in Nova Scotia have considered applications for confidentiality orders pursuant to *Civil Procedure Rule* 85.

[15] In *A. B. v. Bragg Communications Inc.,*[2011] N.S.J. 215, 2011 NSCA 38, (N.S.C.A., in chambers), Beveridge J. A. dismissed a motion for an order permitting the use of pseudonyms and to extend a publication ban pending the ultimate disposition of the proceeding in the Supreme Court of Canada, in a case involving allegedly defamatory material posted on a fake facebook profile. In his reasons Beveridge J. A. reviewed the background relating to the motion for the confidentiality order. Initially LeBlanc J., of the Nova Scotia Supreme Court,

found that there was not the requisite evidentiary basis to grant the requested confidentiality order. However he stayed the effect of his decision pending an appeal to the Nova Scotia Court of Appeal. In chambers, Oland J. A., ordered that the plaintiff could proceed by the use of initials and imposed the publication ban pending further order of the court. The Court of Appeal later dismissed the appeal, upholding the decision of LeBlanc J. on the basis that the appellant had failed to demonstrate an error in principle or that absent intervention a patent injustice would result. However, in order to preserve any further rights of appeal, Saunders J. A. ordered that the publication ban issued by Oland J. A. be continued for a period of sixty days or such further time as the Nova Scotia Court of Appeal or the Supreme Court of Canada may direct. The matter is now before the Supreme Court of Canada, which has granted leave to appeal, and permitted the appellant and her litigation guardian to proceed by use of pseudonyms and prohibited publication of the allegedly defamatory words used pending final disposition of the appeal.

[16] Two decision by Coughlan J. of the Nova Scotia Supreme Court have also denied confidentially orders under *Civil Procedure Rule* 85.04.

[17] In *R. v. Cummings*, 2011 NSSC 324, after reviewing the test enunciated by Iacobucci J. in *R. v. Mentuck*, *supra*, Coughlan J. held that there must be a sufficient evidentiary basis for an order and the onus is on the party seeking the confidentiality order. He found that there was no evidence justifying the granting of the order sought.

[18] In *Cahuzac v. Wisniowski*, [2010] N.S.J. No. 319, 2010 NSSC 258, Coughlan J. dismissed the application noting that the relationship between the parties was already the subject of media reports and consequently their identities were publicly known. He held that the evidence presented did not demonstrate that the applicant had satisfied the test for a publication ban, although recognizing that publicity about the action would cause her embarrassment and emotional stress.

Conclusion

[19] The affidavit evidence by ABC's psychologist refers to him being "ashamed and embarrassed". However, it also refers to the possible re-traumatizing of ABC, making it more difficult for him to undergo successful therapy in the future.

[20] Referring to the legal principles outlined by Epstein J. in *S. T. v. Stubbs*, *supra*., it is evident that the second, third and fourth principles are applicable in the present circumstances. As the trial has already been held there is no risk that adverse publicity would affect this proceeding. However, ABC is not a public figure and it is clear from the affidavit of his psychologist that he would be further victimized by exposure in the media of an intensely personal situation. There is no reason why the public would be offended by the withholding of his actual identity. There is evidence of the potential for serious personal damage to ABC if the order is not granted.

[21] In the present circumstances the public is entitled to know that one of Lalo's abused victims has brought a civil proceeding against the defendant. Balancing all considerations; however, I see no need that the name of that individual be identified.

[22] Judgment accordingly.

MacAdam, J.