COURT OF APPEAL FOR ONTARIO

CITATION: Winter v. Sherman Estate, 2018 ONCA 379
DATE: 20180417
DOCKET: M48819 (C64434)

van Rensburg J.A. (Motion Judge)

BETWEEN

Kerry J.D. Winter, Paul T. Barkin
and Julia Winter, personal representative of
Dana C. Winter, deceased, and Jeffrey A. Barkin

Plaintiffs (Appellants)
Moving Parties

and

The Estate of Bernard C. Sherman, Meyer F. Florence,
Apotex Inc. and Joel D. Ulster

Defendants (Respondents)
Responding Parties

Bradley Teplitsky, for the moving parties

Katherine L. Kay, for the responding parties

Kevin Donovan, in person for the intervener Toronto Star Newspapers Ltd.

Heard: April 5, 2018

ENDORSEMENT

[1] The moving parties, who are two of the appellants in this appeal, have brought a motion for: (i) an order appointing the Office of the Public Guardian and Trustee (the "OPGT") as litigation guardian for the third appellant, Kerry Winter; (ii) if necessary, an order requiring Mr. Winter to attend for a mental examination by a

health practitioner; (iii) in the alternative, an order removing Bradley Teplitsky as counsel of record for Mr. Winter; (iv) an order extending the time to perfect the appeal; and (v) an order that the evidence filed on the motion concerning Mr. Winter's mental health be treated as confidential, sealed, and not form part of the public record.

[2] When the motion was first before this court, time for perfection of the appeal was extended, and the appeal has now been perfected. Mr. Teplitsky was removed as counsel for Mr. Winter in the appeal. An assessment of Mr. Winter was directed with his consent, on terms and conditions agreed between the moving parties and the OPGT. The two affidavits of Julia Winter in support of the motion dated February 21, 2018 (the "February Affidavit") and March 11, 2018 (the "March Affidavit") were sealed pending further order, and the sealing order motion was adjourned to be brought back on before me as case management judge on the appeal, on notice to the media.

[3] On the return date, the moving parties no longer requested an order sealing the two subject affidavits in their entirety. Rather, they sought to protect the confidentiality of certain information contained in the affidavits and Exhibit A to the March Affidavit. Mr. Winter and the OPGT did not attend. Mr. Teplitsky advised the court that Mr. Winter supported the motion, and that the OPGT was taking no position.

[4] Except as I shall explain, the motion was opposed by the respondents and by Toronto Star Newspapers Ltd. (the “Toronto Star”). The Toronto Star was permitted to intervene on the motion, and to be represented at the hearing by Kevin Donovan, senior investigative journalist. The respondents were provided with redacted versions of the two affidavits, which were otherwise sealed pending this decision.

[5] The moving parties raise two confidentiality concerns in respect of the affidavits of Ms. Winter. First, there are passages that disclose solicitor-client communications between Mr. Winter and Mr. Teplitsky, although solicitor-client privilege has not been waived by Mr. Winter. Second, the affidavits disclose personal information about Mr. Winter’s mental health, confided for the purpose of seeking the appointment of a litigation guardian. Certain passages in the March Affidavit and its Exhibit A also disclose personal information about the health of Jeffrey Barkin, who is not a party to the appeal.

[6] The parties agree that the applicable test was articulated by Iacobucci J. in *Sierra Club v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. A sealing or confidentiality order should only be granted when (a) such an order is necessary in order to prevent a serious risk to an important interest, in the context of litigation, because reasonable alternative measures will not prevent the risk (the “necessity” branch); and (b) the salutary effects of the 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 includes the public interest in open and accessible court proceedings (the "proportionality" branch): *Sierra Club*, at pp. 543 and 544. The court must consider whether something less than a sealing or confidentiality order would be sufficient in the circumstances and, if such an order is made, must ensure that it is not overly broad: *Sierra Club*, at p. 546.

[7] Dealing first with solicitor-client communications, Mr. Teplitsky identified certain passages that he asked the court to redact for all purposes. He advises that the moving parties will not be relying on such evidence in support of the motion to appoint a litigation guardian for Mr. Winter. The respondents and the intervener agreed to the redactions of solicitor-client communications on this basis. They asked the court, however, to exercise appropriate caution in redacting only narrowly-defined, actual solicitor-client communications.

[8] Solicitor-client communications are routinely protected from disclosure in litigation, including in particular solicitors' affidavits for removal from the record and in support of an order to appoint a litigation guardian: see, for example, *Evans v. Evans*, 2017 ONSC 5232, 99 R.F.L. (7th) 379; *DiPaolo v. Valeriote*, 2011 ONSC 338, 196 A.C.W.S. (3d) 1163; and rule 4(13) of the *Family Law Rules*, O. Reg. 114/99. Redaction or expungement of confidential information from the court record for all purposes can be a reasonable alternative: *Sierra Club*, at pp. 546 and 547. That is what Mr. Teplitsky is asking for in connection with the passages in the affidavits covered by solicitor-client privilege.

[9] I have examined the two affidavits. There is no reference to solicitor-client communications in the March Affidavit, so no redaction for this purpose is required. The February Affidavit contains a number of explicit references to solicitor-client communications. I direct the redaction of paras. 12, 13, the first and fourth sentences of para. 14, and paras. 15 (a) and (d) of the February Affidavit, which will no longer form part of the court record in the litigation guardian motion, or for any purpose.

[10] I turn to the references to Mr. Winter's personal health information. Here, the request is not to expunge the information from the court record, but to protect it from disclosure. The moving parties seek to rely on this information in support of the motion for a litigation guardian, but they do not want any of it disclosed to the public, or even to the respondents or the respondents' counsel.

[11] The first branch of the *Sierra Club* test, referred to as the "necessity" branch, requires the risk to the interest sought to be protected by the confidentiality order to be real and substantial. The risk must be "well-grounded in the evidence" and pose a serious threat to the interest in question. The interest cannot be merely specific to the party requesting the confidentiality order, but "one which can be expressed in terms of a public interest in confidentiality": *Sierra Club*, at p. 544.

[12] What is the evidence in this case to support the necessity for the confidentiality order sought by the moving parties? There is no affidavit from them

or from Mr. Winter to address this part of the test, nor do the February or March Affidavits speak to the impact of disclosure of this information on Mr. Winter. Instead, the moving parties rely on the nature of the information itself, and argue that there is a public interest in parties to litigation bringing forward information about mental health difficulties without concern that it will be broadcast in the media or by people who might seek to take advantage of that information. Further, the moving parties assert that Mr. Winter's personal health information should be protected from the respondents, because this information is before the court and relevant only to the litigation guardian issue, which is between Mr. Winter and the other appellants and does not affect the respondents.

[13] The respondents point out that they were served with the motion, including the request for the appointment of a litigation guardian for Mr. Winter. They contend that they have an interest in the proper progress of the appeal, which may well be affected by the making or refusal of an order respecting an appellant's disability. In any event, they point to the Statement of Claim to argue that Mr. Winter put his mental health in issue in the action in the court below. They also assert that the moving parties have not established that there is any public interest at stake in respect of Mr. Winter's personal information. The Toronto Star filed a number of media reports in which Mr. Winter has been open and forthcoming about his various personal struggles, and submitted that, in the circumstances of this

case, there is neither a private nor a public interest that would warrant the exceptional protection of a confidentiality order.

[14] A motion to appoint a litigation guardian affects both the personal interests of the individual whose ability to make decisions in a proceeding are affected, and the administration of justice. On such a motion, it is important that those who are concerned about a person's capacity to participate in litigation and/or to instruct counsel are able to bring forward appropriate information for the court's consideration. The issue to be determined is the person's capacity at the time the order is considered: see, for example, *Family and Children's Services of the Waterloo Region v. J.V.,* 2017 ONCA 194, at para. 28; *Constantino v. Constantino*, 2016 ONSC 7279, at para. 55. And direct medical advice and information about a person's actual mental condition is key: *Barnes v. Kirk*, [1968] 2 O.R. 213 (C.A.) and *Constantino*, at para. 58.

[15] In this case, Mr. Winter has consented to an assessment to determine whether he "is unable to understand information relevant to making a decision in respect to an issue or issues in the appeal or is unable to appreciate the reasonably foreseeable consequences of a decision or lack of decision". The focus of the assessment is on whether Mr. Winter *currently* has capacity to participate in the appeal and to instruct counsel. As such, the court need not rely on what Ms. Winter states in her February Affidavit about her knowledge of Mr. Winter's medical history

and past diagnosis. This information can be redacted or expunged for all purposes, as a reasonable alternative to a confidentiality order.

[16] I therefore direct that the last sentence of para. 7, and the entirety of paras. 8 and 10 of the February Affidavit, be redacted for all purposes and not form part of the record in the motion or appeal.

[17] As for the confidentiality order sought in respect of other references to Mr. Winter's current mental state, it is relevant as observational evidence from someone who knows the litigant well, and I am not satisfied on the evidence in this case that the moving parties have discharged their burden in respect of the "necessity" part of the *Sierra Club* test for the protection of such evidence. The passages in question consist of Ms. Winter's personal observations of her brother-in-law and inform her opinion as a layperson that he is under a disability and requires a litigation guardian. They do not contain any diagnosis or any other opinion of a medical practitioner, nor do they refer to communications between Mr. Winter and a medical practitioner, which might give rise to more specific confidentiality concerns.

[18] In addition, the remaining passages of the affidavits speak of some of the same problems that Mr. Winter has discussed openly with the media. In so far as this information is already public, it cannot be "necessary" to protect it with a confidentiality order. In any event, on this record there is no evidence to suggest

that the disclosure of this information would cause any harm to Mr. Winter, or indeed to any broader public interest in protecting the personal medical information of vulnerable individuals.

[19] As such, I am not persuaded, on the evidence in this case, that there is a "real and substantial risk" to Mr. Winter's privacy interests, or to the broader public interest, in the confidentiality of the remaining statements of Ms. Winter about Mr. Winter's mental state and other matters. In arriving at this decision, I place no weight on what is pleaded in the Statement of Claim, nor do I agree that Mr. Winter through his pleading alone has placed his mental health at issue in the Superior Court action.

[20] I turn to the request to redact from the March Affidavit the references to Jeffrey Barkin's health, as well as Exhibit A, which is an affidavit of Karen Barkin sworn May 27, 2017, addressing her husband's health. Mr. Teplitsky advised that Ms. Barkin's affidavit, although served on the respondents in the Superior Court proceedings, was never filed in court, and the motion in respect of which the affidavit was served did not proceed. I was also advised that neither Jeffrey Barkin nor Karen Barkin was served with the motion now before this court, which of course has nothing to do with Jeffrey Barkin, who is not a party to the appeal.

[21] The references to Mr. Barkin's health and Ms. Barkin's affidavit are unnecessary and irrelevant to the motion for the appointment of a litigation

guardian for Mr. Winter. Accordingly, the third, fourth and fifth sentences of para. 12 as well as para. 38 and Exhibit A to the March Affidavit shall be redacted for all purposes and not form part of the court record.

[22] Finally, I leave for another occasion the determination of two issues: (1) whether the respondents in fact have an interest in the litigation guardian issue that would permit them to argue for or against the appointment when that matter comes back before the court, and (2) whether the assessment report to be prepared in this matter will be part of the court record and protected from public disclosure if filed (which issue, while referred to, was not specifically argued at this time).

[23] I therefore direct that the following passages be redacted and no longer form part of the court record in the litigation motion or for any other purpose:

1. February Affidavit: para. 7 (only the last sentence to be redacted); paras. 8, 10, 12, 13 (in their entirety); para. 14 (only sentences 1 and 4 to be redacted); paras. 15(a) and (d) (in their entirety).
2. March Affidavit: para. 12 (only sentences 3, 4 and 5 to be redacted); para. 38 (in its entirety); and Exhibit A to the March Affidavit, sworn May 26, 2017 (in its entirety).

[24] These directions shall take effect 14 days after the release of these reasons. This will allow those affected to consider what steps, if any, they may wish to take

to challenge them. For those 14 days, the February Affidavit and March Affidavit will remain sealed in their entirety.

[25] If anyone seeks costs of this motion and there is no agreement, submissions are to be exchanged and filed with the court within 45 days of these reasons.

“K. van Rensburg J.A.”