CITATION: R. v. Wagner, 2017 ONSC 6603
COURT FILE NO.: M152/17
DATE: 20171102

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	*Neville Golwalla* for the Crown
Applicant	)	
	)	
- and -	)	
	)	
MARY WAGNER	)	Self-represented
Respondent (accused)	)	
	)	
	)	
LIFESITE NEWS	)	*Philip Horgan* for the Intervener LifeSite News
	)	
	)	
	)	**HEARD:** November 2, 2017

Thorburn J.

APPLICATION TO QUASH ORDER REFUSING TO ISSUE PUBLICATION BAN

1. THE ISSUE

[1] The Applicant, Attorney General for Ontario, seeks an Order to quash the order of Libman J. of the Ontario Court of Justice ("the trial judge"). The trial judge refused to issue a publication ban to prevent disclosure of the identity of a doctor ordered to testify at Ms. Wagner's trial but granted a publication ban in respect of two other witnesses who were clinic employees.

[2] The Applicant claims the trial judge applied the wrong test, failed to consider all of the factors he was required to consider as set out in section 486.5(7) of the *Criminal Code*, R.S.C. 1985, c. C-46 and/or failed to provide sufficient reasons for his decision. The Applicant seeks to

have this court order a publication ban on the grounds that Ms. Wagner has been sentenced and therefore the trial judge's role has ended and he is *functus officio*.

[3] The Respondent filed no material and adopts the position of the intervener LifeSiteNews. The Intervener concedes that the trial judge invoked the wrong test but submits there is no error of jurisdiction because the trial judge considered the relevant factors. The Intervener further claims this court has no authority to issue a publication ban.

[4] The key issues on this Application are:

a. whether the trial judge made an error of jurisdiction by applying the wrong test; and if so

b. whether this court can and or should issue a publication ban.

2. THE LAW

The Law re: Quashing a Lower Court Decision on the Basis of Error of Jurisdiction

[5] Jurisdictional errors include applying the wrong test, ignoring relevant material, relying on irrelevant material, and breaching natural justice: *R. v. Duncan*, [2004] O.J. No. 4935 (S.C.) at para. 19.

[6] Any failure on the part of the judge to "observe mandatory provisions of the *Criminal Code*" will result in a loss of jurisdiction: *R. v. C.R.F.*, 2009 SKQB 82, [2009] S.J. No. 494 at paras. 44-46; *R. v. C.V.*, 2005 NSSC 71, 233 N.S.R. (2d) 69 at para. 36; and *Patterson v. R.*, [1970] S.C.R. 409.

[7] Section 486.5(7) of the *Criminal Code* relates to publication bans. In 2015, the wording of section 486.5 was modified: *Victims Bill of Rights Act*, S.C. 2015, c. 13, s. 19. Section 486.5 now provides that a publication ban may be ordered "if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice."

[8] The court must consider all of the following factors:

a) the right to a fair and public hearing;
b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;
c) whether the participant needs the order for their security or to protect them from intimidation or retaliation;
d) society's interest in encouraging the reporting of offences and participation in the criminal justice process;
e) whether there are effective alternatives;
f) the salutary and deleterious effects of the proposed order;
g) the impact of the proposed order on the freedom of expression of those affected by it; and
h) any other factor the judge or justice considers relevant.

[9] The wording in section 486.5(7)(b) was changed in 2015 from the words "would suffer significant harm" to "would suffer harm" if their identity were disclosed.

[10] The burden of proof on a section 486.5 application is proof on a balance of probabilities: *R. v. Subramanian*, 2015 QCCS 6367, [2015] Q.J. 16816 at para. 17.

[11] The *Dagenais/Mentuck* common law test by contrast, provides that a publication ban will be ordered only when,

> a) first, the order is necessary to present a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and then
>
> b) second, the court considers whether 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: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 at para. 32

[12] The common law may supplement but cannot override statutory provisions in the *Criminal Code*: *R. v. Sipes*, 2011 BCSC 1329, [2011] B.C.J. No. 2739 at para. 79; *R. v. Nguyen*, 2015 ABQB 676, [2015] A.J. 1411 at paras. 31-33.

[13] Key distinctions between the test articulated at section 486.5 of the *Criminal Code* and the common law *Dagenais/Mentuck* test include the following:

> a) the common law test is a two-step process while the *Criminal Code* provision is a one step process;
>
> b) the common law considers only two factors while the *Criminal Code* provision requires consideration of seven factors to be looked at collectively;
>
> c) the common law test requires the court to determine whether an order is necessary to prevent "serious risk to the administration of justice". The *Criminal Code* provision requires that the Applicant establish there is a real and substantial risk that s/he would "suffer harm if a publication ban were not issued". Where an Applicant fails to provide evidence of a real and substantial risk to the administration of justice but the other six factors weigh in favour of a publication ban, a publication ban may nonetheless be ordered as long as the court is satisfied, after considering all seven factors, that it is in the interests of justice to issue a publication ban.

The Authority to Impose a Publication Ban

[14] When a Court adjudicates a proceeding to its conclusion, the doctrine of *functus officio* applies as finality has been achieved. *R. v. Conley*, [1979] A.J. No. 845 (S.C.A.D.) at para. 14 and *R. v. Washington*, 2008 BCCA 175.

[15] In *R. c. Pépin*, 2016 QCCA 1834, [2016] J.Q. no. 15674 at para. 5, the court held that:

> "Il est bien connu de notre droit qu'une fois la peine imposée, le tribunal qui a prononcé la sentence est *functus officio*, c'est à dire qu'il n'a plus compétence sur cette affaire, à moins que la loi ne le prévoit ou qu'il y ait lieu de corriger une erreur manifeste."

This means that once a matter has been finally concluded, the trier is not permitted to make any further orders in respect of that matter.

[16] In accordance with section 2 of the *Criminal Code*, the Superior Court has inherent supervisory authority over statutory courts to review decisions and make orders.

[17] Neither the cases relied on by the Applicant nor that of the Intervener provides an answer to the question of whether a Superior Court can order a publication ban on appeal after the trial judge refused a publication ban.

[18] In *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 and *R. v. Adams*, [1995] 4 S.C.R. 707 relied on by the Applicant, the Supreme Court restored the Order in issue rather than sending the matter back to the court below for re-consideration. This was done pursuant to section 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26.

[19] In *R. v. Thomson*, [2005] O.J. No. 1124 (C.A.), relied on by LifeSiteNews, a Superior Court judge had quashed a Preliminary Inquiry judge's decision to discharge the accused and committed the accused to trial rather than sending it back for reconsideration by the provincial court. The Court of Appeal held that the Superior Court judge had no jurisdiction to order that the matter proceed to trial as the Superior Court has no jurisdiction over committal or discharge at a Preliminary Inquiry. That is a matter within the exclusive jurisdiction of the provincial court pursuant to s. 548(1) of the *Criminal Code*, so it had to be referred back to the Preliminary Inquiry judge.

3. THE EVIDENCE

The Parties

[20] The Respondent, Mary Wagner is a pro-life activist. She was charged with two counts of breach of probation, mischief and interference with property. The charges relate to events that took place on December 12, 2016 at a medical facility that provides abortion services. Ms. Wagner was convicted of disrupting operations at a women's healthcare clinic that provides abortion services.

[21] Mary Wagner is not represented. She chose to make no submissions and filed no material. She relies on the submissions of the intervener LifeSiteNews.

[22] LifeSiteNews.com is a website that covers pro-life/anti-choice issues. LifeSiteNews was granted intervener status in this proceeding.

[23] On the first day of trial, the Crown sought a publication ban for two employees of the medical facility and a doctor, all of whom were issued subpoenas requiring them to testify on behalf of the Crown at Ms. Wagner's trial.

The Trial Judge's Decision on the Publication Ban issue

[24] On June 9, 2017 the trial judge issued his ruling. He granted the publication ban for two clinic employees and refused the request for a publication ban for the doctor.

[25] He distinguished the position of the doctor from that of the two hospital employees as follows:

> "In one of the articles cited to me, reference was made to the trial before Justice O'Donnell, where in fact the name of the doctor seeking the publication ban before me was part of the evidentiary record…I note further that at the time of Ms. Wagner's arrest on the matters before me, an article that is referred to by the representative, Mr. Horgan [counsel for LifeSiteNews], specifically mentions both the previous proceeding and the testimony and identity of the doctor before me now": Libman J. ruling at page 63.

[26] It is agreed that in fact, the doctor did not testify in any earlier proceeding and that the identity of the doctor was not disclosed in LifeSiteNews articles as the name was misspelt. The doctor's name was mentioned by another person in the facility in a proceeding before another judge but the doctor's name was not previously published.

[27] In his analysis, the trial judge notes that the Crown made reference to the provisions in section 486.5 of the *Criminal Code* as setting out,

> "a number of conditions that a court can take into account when determining that the open court principle ought not to be followed and there should be a publication ban": Libman J. ruling at p. 58.

[28] The trial judge failed to note that the court must take all of those factors into account.

[29] He held that,

> "applying the Supreme Court of Canada's decision in *Dagenais* and *Minte* (sic) … a publication ban should be ordered only when (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternatives will not prevent the risk, and (b) the salutary effects … outweigh the deleterious effects": Libman J. ruling at pp. 62-63.

[30] He went on to say that,

> "Stated shortly, there is an interest in the proceedings before me. The open court principle is an important aspect of that and I'm not satisfied in relation to an individual who has both been referred to previously in relation to a previous proceeding involving this accused in similar circumstances, that the case has been made out.
>
> I've arrived at a different conclusion however, in regard to the two employees who are mentioned in the affidavit. It appears to me that both of these individuals who are identified as clinic employees, have not testified in any previous proceedings, nor have they been identified. I'm prepared to accept in the affidavit that individuals who are essentially coming to the court for the first time to testify in this area, are in a different situation. In applying the *Minte* (sic) test, and having regard to the considerations set out in the *Criminal Code* that has been referred to, I'm of the respectful opinion that the encouragement of individuals who come forward to the criminal justice system for the first time, are important considerations. Accordingly, I'm satisfied that the order is necessary to permit a publication ban on their names only….And in this case, the salutary effects of the ban outweigh the deleterious effects on the rights and interest of the parties.
>
> For this reason, I've concluded that while I'm not persuaded on the record before me that the publication ban should apply to the doctor who provided the affidavit… I am satisfied that the two clinic employees who are referred to in it may be identified by an initial only": Libman J. ruling at pp. 65-66.

[31] The Crown pointed out after the decision was rendered that there was no decision by the doctor to choose to publicly disclosure of the doctor's name as the doctor "was not before Justice O'Donnell [in a prior proceeding] nor was [the doctor] a subject – or a topic in those proceedings. So [the doctor] is essentially coming before the court for the first time": Libman J. ruling at p. 67.

[32] The trial judge did not modify his ruling.

[33] Following the release of the Order, Nordheimer J. granted an interim order without notice banning the publication of the doctor's name until further order of the court.

4. ANALYSIS AND CONCLUSION

Certiorari Application

[34] It is agreed that in deciding whether to order a publication ban, the trial judge invoked the common law test which is the wrong test to be applied in a criminal proceeding. The provisions of section 486.5 the *Criminal Code* are the operative provisions in this criminal proceeding.

[35] The 2015 amendments to section 486.5 of the *Criminal Code* provide that a publication ban will be ordered if, after considering all seven factors listed, taken together, the judge considers that it is in the interest of justice to order it. The trial judge was required to invoke this single step process and consider all seven factors.

[36] By contrast, the common law test is a two-step process where a party seeking a publication ban must establish first that it is necessary to prevent a serious risk to the proper administration of justice because reasonable alternatives will not prevent the risk, and also that the salutary effect outweighs the deleterious effects.

[37] Although the trial judge referred in passing to the provisions of 486.5 of the *Criminal Code*, this was not the test that he applied and there was limited analysis of only some of the factors enumerated in section 486.5 of the *Criminal Code*. The Intervener concedes that there was an error in invoking the wrong test, and that the trial judge reviewed only "a number of [the factors enumerated in section 486.5]": Intervener's Factum at para. 9. There was no analysis of factors (d), the societal interest in encouraging the reporting of offences and participation in the criminal justice process, and (g) impact on freedom of expression of those affected by the order.

[38] The trial judge made an error of jurisdiction in applying the wrong test and in failing to consider and analyze all seven factors that must be considered as set out in section 486.5(7) of the *Criminal Code*.

[39] Moreover, the trial judge's decision to allow a publication ban for the two clinic employees but not for the doctor is based entirely on the conclusion that the doctor's identity had previously been disclosed. For this reason only, he concluded that although a publication ban should issue for the two clinic employees, there should be no publication ban for the doctor.

[40] The parties agree that there is no basis in principle to distinguish between the situation of the doctor and that of the two clinic employees as, at no time did the doctor choose to disclose the doctor's identity in public and there was no prior publication of the doctor's identity in the media.

[41] For these reasons, the application to quash the trial judge's ruling in respect of the publication ban is granted.

Whether the Matter Should Be Remitted to the Trial Judge or Adjudicated in this Court

[42] The parties agree that the trial judge is *functus*: the matter can no longer be remitted to the trial judge as the trial judge's order was issued in the context of Ms. Wagner's trial and she has now been convicted and sentenced and the trial is therefore concluded.

[43] The question is whether the Superior Court has the jurisdiction to impose the publication ban.

[44] There is no authority directly on point as the two appeals where publication bans were imposed on appeal (*Mentuck* and *Adam*s) were done pursuant to the Supreme Court rules, which

are not applicable in this case. Furthermore, the *Thomson* case cited by the Intervener is also not applicable.

[45] Contrary to the facts in this case, in the *Thomson* case, once the Superior Court quashed the discharge, the Preliminary Inquiry judge was not *functus*, as the question that remained to be decided was whether on reconsideration, there was reasonable evidence upon which a jury could convict and the matter should therefore proceed to trial. Moreover, the *Criminal Code* provides that the decision as to whether or not to send a matter to trial after a Preliminary Inquiry is a matter exclusively within the jurisdiction of the Provincial court.

[46] In this case, although the trial judge is *functus*, the power to issue a publication ban is a matter within the inherent jurisdiction of the Superior Court. To do otherwise would leave the doctor without any recourse to protect the important right to the issuance of a publication ban in appropriate circumstances.

[47] I note that in *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, the Supreme court recognized that the superior court of a province has inherent jurisdiction to grant an interim remedy in litigation taking place in the provincial court as superior courts have,

> "a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51. These powers are derived "not from any statute or rule of law, but from the very nature of the court as a superior court of law" (Jacob, at p. 27) to enable "the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner" (p. 28). In equally broad language Lamer C.J., citing the Jacob analysis with approval (*MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 29-30), referred to "those powers which are essential to the administration of justice and the maintenance of the rule of law", at para. 38. See also *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 18, *per* Rothstein J., relying on the Jacob analysis, and *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at paras. 29-32.
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> … "The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways" (p. 23 (Jacobs, emphasis added)).
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> Of course the very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution. In the case of inferior tribunals, the superior court may render "assistance" (not meddle), but only in circumstances where the inferior tribunals are powerless to act and it is essential to avoid an injustice that action be taken."

[48] For these reasons, it is appropriate to invoke the inherent jurisdiction of this court to impose a publication ban. There is no legislative provision to prevent this and to do otherwise would leave the Applicant with no recourse where important safety and privacy rights are at stake.

Should the Order be Made

[49] A publication ban issue in the context of a criminal proceeding is governed by the provisions in section 486.5(7) of the *Criminal Code*. All seven factors in section 485.5(7) must be considered to determine whether, on a balance of probabilities, it is in the interest of the proper administration of justice to order a publication ban.

[50] The seven factors that must be considered are as follows:

a) the right to a fair and public hearing;
b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;
c) whether the participant needs the order for their security or to protect them from intimidation or retaliation;
d) society's interest in encouraging the reporting of offences and participation in the criminal justice process;
e) whether there are effective alternatives;
f) the salutary and deleterious effects of the proposed order;
g) the impact of the proposed order on the freedom of expression of those affected by it; and
h) any other factor the judge or justice considers relevant.

[51] The right to a fair and public hearing includes Ms. Wagner's right to a fair trial and society's interest in hearing cases on their merits. A publication ban on the terms of the ban imposed for the two clinic employees (that is, disclosing all of the circumstances and all of the evidence adduced by the witness with identification of the witness only using initials and not the name) is a minimally intrusive publication ban. However, since there may be relatively few doctors as compared to clinic workers at the facility, a minimally intrusive ban for the doctor would be to simply refer to the doctor as "the doctor" rather than by initial or by name. This would satisfy the public interest in all of the evidence adduced and the witness' right to protection of his or her identity.

[52] In looking at the second and third factors, there is a real and substantial risk of harm to the witness and a need to protect doctors who perform these legally protected services from that risk. Abortion is a controversial issue about which people have strongly held views.

[53] The Applicant filed material and the witness testified in respect of events that took place involving pro-life activists in establishments that provide abortion services in Canada and abroad. While the Respondent provided a 2012 study that showed that in that year there were no instances of physical violence or threats of violence in Canada, that does not address the broader

issue as to whether there is a real and substantial *risk* of harm to the witness based on past practice and past incidents of harassment, retaliation and harm.

[54] This is particularly true in the case of doctors who may live or work outside of Canada as information circulated on the internet transcends national borders.

[55] If reasonable concerns about safety are not addressed, they may choose not to assist with legally protected medical procedures.

[56] In this case the doctor provided evidence of harassment, threats and violence against those known to assist in providing abortion services around the world. Moreover, the doctor and the two clinic employees did not choose to testify: they were required by court order to do so. Witnesses may be reluctant to participate in the justice system if their safety and privacy concerns are not met, particularly in cases such as this that deal with controversial issues such as disrupting operations at a clinic that provides abortion services. It is important to encourage participation in the justice system, as per the fourth factor.

[57] In considering the fifth factor, there is no reasonable alternative to this request for a ban on the name of the doctor and deletion of the name. This is the only means to protect both the identity of the doctor and permit all of the evidence surrounding the incident to be adduced.

[58] Using this least restrictive measure would also satisfy the sixth factor. The salutary effects are that all of the evidence save for the identity of the doctor can be published. The proposed publication ban is also consistent with the order protecting the identity of the clinic workers, which is not being challenged by the Respondent or the Intervener.

[59] The proposed publication ban would also satisfy the seventh factor in that the impact of the limited ban on freedom of expression would be minimal: all information would be available and a full discussion can take place about the issues and the circumstances, save for the name of the doctor.

[60] Although I am satisfied that there is a real and substantial risk of harm to the witness, even if I were not, after considering the seven factors taken together, I am satisfied on a balance of probabilities that it is in the interest of justice to impose a publication ban on the doctor's name.

[61] For the above reasons, I find that the trial judge made an error of jurisdiction by applying the wrong test and the decision must therefore be quashed. As the trial judge is now *functus* and the trial judge can no longer issue the publication ban, the Superior Court may exercise its inherent jurisdiction to issue a publication ban as, in the circumstances of this case, a publication ban is warranted.

[62] All references to the doctor shall refer only to "the doctor" without any further identification. All references to the doctor's name shall be removed from all publicly available materials within the control of the Respondent and LifeSiteNews within 48 hours. LifeSiteNews shall advise all members of its organization of the existence of this publication ban.

Thorburn J.

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