NOVA SCOTIA COURT OF APPEAL

Citation: A.B. v. Bragg Communications Inc.,
2010 NSCA 57

Date: 20100625
Docket: CA 330605
Registry: Halifax

Between:

A.B., by her litigation guardian, C.D.

Applicant

v.

Bragg Communications Incorporated, a body corporate,
The Halifax Herald Limited, a body corporate,
and Global Television

Respondents

Judge: The Honourable Justice Oland

Application Heard: June 24, 2010, in Chambers

Held: An order is granted permitting the appellant and her litigation guardian to provide by way of pseudonym, that is by initials, for the purposes of the appeal; and an order is granted imposing a publication ban on the actual words in the fake Facebook profile of the appellant, pending any further order of this court.

Counsel: Michelle Awad, Q.C., for the appellant
Kimberley Hayes, for the respondent Bragg Communications was not present
Nancy G. Rubin, for the respondent Halifax Herald Limited
Alan V. Parish, Q.C. for the respondent Global Television
Stanley MacDonald, Q.C. for Beyond Borders: Ensuring Global Justice for Children, proposed intervenor

Decision:

[1] The applicant, who has appealed a decision of a Chambers judge, brings a motion for orders permitting the use of pseudonyms, namely initials, for the purposes of the appeal, and for a stay of the judgment below or a publication ban. She also asks that her appeal be set down for hearing. The Halifax Herald Limited and Global Television had participated in the application before the Chambers judge. The media respondents do not consent to the orders sought by the applicant, and take no position on her motion. For the reasons which follow, I grant the motion for the use of initials, and for a publication ban pending the disposition of the appeal.

Background

[2] A person whose identity is not known to her created a fake Facebook profile of the fifteen year old applicant. The applicant, by her litigation guardian who is her father, applied for permission to proceed by way of initials for herself and her litigation guardian, for a publication ban concerning the substance of the allegedly defamatory statements made about her, and for an order requiring the respondent, Bragg Communications Incorporated, to provide any information in its possession regarding the identity of the owner of the IP address used to create that fake profile. Bragg Communications did not participate in the application. The media respondents opposed the application for a publication ban and the use of initials.

[3] The applicant's application in Supreme Court Chambers was partially successful. Justice Arthur J. LeBlanc was satisfied that a *prima facie* case of defamation had been made out, that there was no means other than production of the documents sought by which the required information could be obtained, and that public interest favouring disclosure of such information prevailed over freedom of expression and privacy in this case. However, he denied the confidentiality measures sought by the applicant, namely the use of initials and a publication ban. His decision is reported as 2010 NSSC 215. No order has yet issued.

[4] In subsequent oral decisions, the judge stayed the effect of his decision until the end of the day of June 16, 2010 and then extended that stay until midnight tonight, June 25, 2010.

[5] The applicant has appealed the Chambers judge's denials of her requests for permission for her and her litigation guardian to proceed by way of initials and for a publication ban. On June 17, 2010 she filed a notice of motion seeking:

> (i) an order permitting her and litigation guardian to proceed by way of pseudonym for the purposes of the appeal, pursuant to *Civil Procedure Rule* 90.37(15)(a); and
>
> (ii) an order extending the stay of the judgment below pending the final disposition of the appeal matter pursuant to *Rule* 90.41(2).

The applicant also asks to have her appeal set down. Bragg Communication Inc. is not participating in the appeal or on this motion. The media respondents do not consent to the orders sought by the applicant and take no position on her motion.

[6] On June 21, 2010 I received by fax a letter from Jonathan M. Rosenthal, a member of The Law Society of Upper Canada who had just been retained by Beyond Borders: Ensuring Global Justice for Children ("Beyond Borders"). He advised that his client, an organization devoted to the advancement of the rights of children, would be seeking leave to intervene and that it had been granted intervenor status before the Supreme Court of Canada in certain cases. He asked that the applicant's motion be adjourned and indicated that the applicant was agreeable to an adjournment. The media respondents subsequently wrote me that they did not consent to any adjournment. Nor would they consent to any further extension of the stay by the judge whose decision is under appeal.

[7] Yesterday afternoon, Beyond Borders through its Nova Scotia counsel, Stanley MacDonald, Q.C., filed Notice of Motion requesting an order granting it intervenor status and for an adjournment of the applicant's motion today. It was not filed within the time stipulated in *Rule* 90.19. Beyond Borders clarified that it wished to be heard not only on the appeal, but also on the applicant's motion for permission to use initials and for a stay or publication ban.

[8] This morning in Chambers, Beyond Borders withdrew its request for an adjournment. I need not consider whether, pursuant to *Rule* 90.19(1), an intervenor may appear on a motion before a single judge of this court.

Analysis

[9] It is helpful to begin by identifying the tensions which arise on motions for confidentiality in court proceedings. In *Shannex Health Care Mangement Inc. v. Nova Scotia (Attorney General),* 2005 NSCA 158, Bateman, J.A. for this court stated:

> [14] The open court principle is a hallmark of a democratic society. Openness is required in "both 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.)
>
> [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.

[10] Freedom of expression and freedom of the press in relation to legal proceedings are also important. So important that they are recognized as fundamental freedoms in s. 2 of our *Canadian Charter of Rights and Freedoms.*

[11] I turn then, to the applicant's motion for permission for the applicant and her litigation guardian to proceed by way of initials for the purposes of the appeal and for a stay of the judgment below or a publication ban pending the final disposition of the appeal.

<u>Permission to Use Initials</u>

[12] *Rule* 90.37 reads in part:

> 90.37 (15) A judge of the Court of Appeal, on motion, may make an order to do any of the following, until the Court of Appeal provides a further order:
>
> (a) allow the use of pseudonyms in the pleadings.

[13] In *Sierra Club*, *supra*, Iacobucci, J. for the Court stated at ¶ 53:

> 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.

These principles were reiterated and applied in *Osif v. The College of Physicians and Surgeons of Nova Scotia*, 2008 NSCA 113 which also referred to authorities including *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *Mentuck, supra.*

[14] The *Dagenais/Mentuck* test, as framed in *Sierra Club*, *supra* imposes a two-part burden on the applicant. First, she must demonstrate that the confidentiality measures sought are necessary to prevent a serious risk to an important interest where reasonable alternative measures will not prevent it. I accept the applicant's argument that a person's reputation is an important interest. The principles of defamation law, including the presumption of damage and liability for republication, reflect the importance of one's reputation. Individual privacy can also be considered. Although it is not absolute and must be balanced against legitimate societal needs, it is an accepted value in our society, one which the common law has protected through causes of action such as trespass and defamation: *R. v. O'Connor*, [1995] 4 S.C.R. 411 at ¶ 115 and 117.

[15] According to the applicant, the serious risk to be prevented consists of the risk of further damage to her reputation by republication and of damage to her emotional well-being. In his affidavit evidence, the applicant's father deposed that by his observation, his fifteen year old daughter was "extremely shaken and distressed" by the fact that the Chambers judge's decision would require her name to be publicized in order to obtain the information towards identifying the person who created and published the fake Facebook page. Neither he nor his daughter had expected, nor was prepared for, the national media attention the case has attracted. He also deposed that he was concerned that his daughter would suffer "emotional harm and perhaps other adverse effects on her mental and emotional health if her identify were disclosed along with the defamatory statements as part of this proceeding".

[16] Protection of a minor's emotional health was a consideration in *Jane Doe v. Church of Jesus Christ of Latter-Day Saints,* 2003 ABQB 794. There the parties sought the sealing of the court file pertaining to settlement of an action by a minor for damages for sexual assault by a church leader. The materials included an affidavit from the minor's next friend identifying the minor's emotional health as the basis for the application. At ¶ 9 Chief Justice Wachowich stated that "protection of the minor's emotional health is a legitimate concern, and that it is necessary in the fair administration of justice". He refused to seal the file, but granted a partial publication ban aimed at the "legitimate objective" of ensuring that the minor's identity was not made public.

[17] I am satisfied that the applicant has established that the use of initials is necessary to prevent a serious risk to an important interest where reasonable alternative measures will not prevent it. She has met the first part of the *Sierra Club*, *supra*, test.

[18] The second part of the burden on the applicant is to show that the benefits of the confidentiality measure outweigh any deleterious effects. The salutary effects of the use of initials are evident. The identity of the minor applicant, and that of her litigation guardian, her father, whose identity could lead to disclosure of the applicant's identity, would be protected. The risk to her mental and emotional health would be reduced, if not eliminated.

[19] The deleterious effects of the use of initials in this case are not substantial. The media respondents have not taken issue with the applicant's submission that the media have already reported on the substance of this case.

[20] On balance, I find that the salutary effects of the use of initials in this case outweighs the deleterious effects. The applicant has satisfied the second, and final, part of the *Sierra Club*, *supra* test. I will grant an order permitting the applicant and her litigation guardian to proceed by way of pseudonym, that is, by initials, for the purposes of the appeal.

[21] I would observe that in her grounds of appeal, the applicant argues that the Chambers judge erred in law in denying her permission to use initials. Were I to deny her motion to proceed on the appeal of that part of the decision, the appeal would be rendered moot.

Stay or Publication Ban

[22] Pursuant to *Rule* 90.41 and *Rule* 90.37(15)(b) respectively, the applicant seeks a stay or a publication ban pending the disposition of her appeal. What she wants kept confidential are the actual words of the fake Facebook profile. The nature of its contents has already been reported in the media.

[23] Either a stay or a publication ban would achieve the same result in these particular circumstances. The two-part *Sierra Club*, *supra*, test set out above applies to a motion for publication ban. I am satisfied that, for the reasons already expressed in regard to the motion for the use of initials, that the applicant has met the test for a publication ban.

[24] I will grant an order imposing a publication ban on the actual words in the fake Facebook profile of the applicant, pending any further order of this court.

Motion for Date for Hearing

[25] The hearing of the appeal is set down for a full day, December 7, 2010. The appeal book is to be filed by July 15, 2010.

[26] Mr. MacDonald on behalf of Beyond Borders has indicated that he will quickly attend to a motion to abridge the time for filing a motion for intervenor status and, if granted, the motion itself. Once the motions are determined, counsel for the applicant is to arrange to set the dates for filing of the facta in telephone Chambers. Should all counsel on the appeal determine that a full day is not required, counsel for the applicant agreed to advise the court at her earliest opportunity.

Oland, J.A.