

News

Judge warns different assisted death result may loom

CRISTIN SCHMITZ
OTTAWA

The Manitoba judge who confessed to feeling “uneasy” in imposing sweeping secrecy measures in the province’s first physician-assisted death case warns that such broad confidentiality orders should not become routine.

In March 18 reasons for granting the requested confidentiality order, Manitoba Queen’s Bench Chief Justice Glenn Joyal noted that no one—including “some-what surprisingly” the media’s counsel—opposed the extensive privacy measures granted to the applicant, which included a permanent ban on publishing the applicant’s age and gender, as well as “any description regarding the symptoms of the applicant’s diagnosis”: *Patient v. A.G. Canada* [2016] MBQB.

While the chief justice held the “sweeping” privacy order was justified in this case, he stressed that each case must be considered on its facts and will have

varying implications for the open court principle.

“As such, even with the cumulative force of precedent in like cases, confidentiality orders cannot become perfunctory because of the admittedly delicate and private nature of the information that surrounds hearings such as these,” he advised. Chris Wullum of Winnipeg’s Tapper Cuddy LLP, counsel for CBC, CTV and Global, said his clients looked at the factors for a publication ban and, “based on those considerations, made the informed decision to not oppose this particular application.”

Wullum said the judgment sends a message that “in future cases, depending on different factual circumstances, a different order may result,” adding, “I think, at the end of the day, each case is going to have to be assessed on its own merits.”

Based on unchallenged evidence, the judge had little difficulty concluding that the mentally competent applicant’s circumstances—two terminal



Wullum

diseases, “unbearable” pain and less than a month to live—qualified him/her to obtain a physician-assisted death pursuant to the constitutional exemption granted by the Supreme Court of Canada in *Carter v. Canada (A.G.)* [2016] SCC 4.

The judge struggled more with the applicant’s request to shield his/her age, gender, diseases and symptoms, but ultimately held it was “both necessary and proportional” in the “very unique circumstances.”

Justice Joyal explained: “If the applicant’s identity is disclosed, I recognize that the applicant and applicant’s family may not be able to spend their remaining days in private in a way so as to provide a death with the dignity sought.” The order was necessary to prevent “serious risk to the exercise of the applicant’s *Charter* right and there are no apparent reasonable alternative measures that will do so,” he held.

The comparative rarity of one of the applicant’s terminal illnesses, in combination with the other terminal disease, and information about the person’s gender—made it more likely than not that the person would otherwise be identified by people familiar with the rare condition, the judge concluded.

In that respect, the chief justice’s confidentiality order was broader than the anonymity/sealing orders granted in the two other assisted death cases publicly known by press time that were decided in Alberta and Ontario.

However Chief Justice Joyal emphasized future cases that are more debatable might call for more public scrutiny and less privacy for patients and the health care professionals helping them to die.

“In an area as potentially controversial and fluid as that related to the interpretation and application of the *Carter* criteria and the subject of physician-assisted death, the legitimating objectives of accountability and transparency may in some unique cases prior to June 6, 2016, require levels of openness that could discomfit both applicants and physicians,” he warned.

The chief justice queried, for example, “what position might a court take in a case involving an applicant suffering from a severe depression, whose psychiatrist has provided by way of an affidavit what the applicant purports is the necessary and supporting evidence to satisfy the *Carter* criteria. In such a potentially provocative and controversial scenario,” he warned.

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News

Jensen named newest, possibly last OSC chair

JEFF BUCKSTEIN

Maureen Jensen is the new chair and chief executive officer of the Ontario Securities Commission, succeeding Howard Wetston, who resigned last autumn.

While there is much enthusiasm for the appointment of Jensen, who previously served as the OSC's executive director, the question looming over her two-year term is whether she will be the OSC's last leader.

Ontario has committed to participate in the new Cooperative Capital Markets Regulatory System (CCMRS), alongside British Columbia, Saskatchewan, New Brunswick, Prince Edward Island, the Yukon and the federal government.

"I know Maureen and have incredibly high regard for her. I know she's extremely well respected within the commission," said Patricia Olasker, a senior partner with Davies Ward Phillips & Vineberg LLP in Toronto.

Jensen also had a strong presence in shaping developments at Canada's largest provincial securities regulator, said Olasker.

"From where we are now, I think Maureen is absolutely the right person for the job, because a big part of her job is going to be to steer the commission into the national co-operative regulatory model," said Olasker.

"We were very pleased with that appointment, because Maureen brings broadly based experience not just as a regulator, but also as a businesswoman and a successful one," said Ian Russell, the president and chief executive officer of the Investment Industry Association of Canada in Toronto.

Prior to joining the OSC, Jensen was a senior vice-president with the Investment Industry Regulatory Organization of Canada. She also held senior positions at the Toronto Stock Exchange and worked for 20 years in the mining sector. She is



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Patricia Olasker
Davies Ward Phillips & Vineberg LLP

a geoscientist by training.

Olasker said the biggest priority facing Jensen over the next year will be steering the OSC through the process of moving to a co-operative regulator and ensuring that while doing so, Ontario's voice is heard.

"I think over recent years, Ontario's authority within the CSA has been somewhat diminished or overridden by other members. So she's got an important job to do in ensuring that Ontario's views are heard," Olasker said.

Olasker believes this situation dates back to Ontario's decision not to participate in the passport system [which the OSC announced in March 2007] that the other provinces and territories signed on to. The other Canadian jurisdictions have developed and worked comfortably under the

passport system, she said.

The CSA describes the passport as "a regulatory system that gives a market participant automatic access to the capital markets in other jurisdictions by obtaining a decision only from its principal regulator and meeting the requirements of one set of harmonized laws."

"It worked for them. And they made their own decisions collectively about issues where historically Ontario would have landed the discussion. And so Ontario, I think, found itself cut out of a lot of the debate," Olasker explained.

But Olasker also believes that the OSC remains "hugely relevant" even as it prepares to join the larger CCMRS.

"The reality is there's only one capital market in Canada of any importance, and it's here in Ontario. The OSC regulates that market. This is where the knowledge and the expertise reside. That's embodied in the OSC and they're central," she explained.

Alberta and British Columbia, for example, both have capital markets, but those are significantly smaller than Ontario's, she noted.

Russell said Jensen is ideally suited for OSC chair at this time because she had been involved as the provincial regulator's representative in helping to put together the CCMRS. "So she's very knowledgeable about the organizational structure of this new entity, and is the right person to shepherd the transition, if you will, from the OSC into the new model," Russell said.

He believes the OSC will remain relative during the transition period, because until the new co-operative regulator receives formal recognition, the OSC will continue to have full authority in Ontario for rulemaking, oversight and enforcement of securities rules.

"And those powers will stay in place until there's this formal transfer of authority, so to speak, which is going to be some time," added Russell, who expressed con-



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James Scarlett
Torys LLP

cern about ongoing delays, such as the announcement of a board and executive management.

James Scarlett, a partner with Torys LLP in Toronto, also hailed Jensen's appointment, based on her past senior level experience with the OSC, along with her knowledge of the issues and connections with key people in Ontario and other provinces.

Scarlett also noted that the CCMRS has a way to go, and is by no means yet a certainty.

"This is an endeavour that requires continued co-operation and effort and progress from six different governments," he said. "They're still getting regulations and other legislative documents in place, along with protocols for the provinces and jurisdictions to work with each other."

Scarlett would prefer to see a full national securities regulator to include all provinces and territories.

"It wouldn't be without its challenges. But I do think it would be a better system. I think it would be more efficient. I think it would be more effective. And I think it could be done in a way that takes into account local issues.

"But the reality is that Quebec has always been implacably opposed for issues that I would think are more political than anything else, and I don't think that anyone should expect that to change, nor should anyone disrespect that. Alberta's [also] staunchly opposed," said Scarlett.

But "I do want to be clear I am a big supporter of the [CCMRS] initiative. I think it's very worthwhile doing, and I think it needs somebody with vision to drive it forward," he added.

Although Jensen was unavailable for an interview, she released a media statement which said in part:

"This is a crucial time for our agency as we move forward with efforts to modernize capital markets regulation in Ontario and Canada. The OSC will continue to support the government of Ontario in establishing and developing the Cooperative Capital Markets Regulatory System. At the same time, the OSC will continue to focus on enhancing the retail investor experience, providing greater access to capital for businesses and strengthening our enforcement program through new tools such as no-contest settlements and a whistleblower program."

Russell said the OSC has made a lot of headway in strengthening enforcement through improved co-ordination with other provincial regulators and with the Royal Canadian Mounted Police.

"I think to the commission's credit, that enforcement actions will be perhaps more successful as a consequence," Russell added.

Privacy: Parts of confidentiality ruling made judge 'uneasy'

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ario—where the boundaries of the *Carter* criteria may be exceeded—is there not a societal and public interest, perhaps different than that in the present case, so as to cause the acknowledged privacy interests to play out somewhat differently in the context of both parts of the *Dagenais/Mentuck* test?"

The judge accepted that letting out information about the applicant's diseases, age and gender risked drawing public attention

and impinging on the patient's privacy, including the possibility that the applicant and the applicant's family might be contacted, or even harassed, by people opposed to the applicant's decision to end their life.

In addition to banning publication of the applicant's age, gender and "any description regarding the symptoms of the applicant's diagnosis," the judge banned publication of the names and other information that could identify the applicant, the appli-

cant's family and "any physicians, pharmacists, nurses, social workers or other health care providers who provide assistance to the applicant."

Unlike the case in Alberta, the hearing of the Manitoba application proceeded in open court, with notice to the media (as did the Ontario case). There is a public court record, with the banned information redacted. The judge ordered the unredacted court record sealed permanently.

"Let me conclude my discus-

sion of the confidentiality aspects of this application by saying that notwithstanding my discretionary determination to grant the order, there are parts of this confidentiality order with which the court is uneasy given their impact on the open court principle which I have acknowledged is not absolute," Chief Justice Joyal said. "It will suffice to repeat, that these applications will be fact specific and future applications may give rise to determinations different than the ones I

have made in the present case."

He opined that "in most cases there would seem to be absolutely nothing served by identifying an applicant or his/her family" but "in a different case, the combination of very unique facts, the open court principle, the position of the parties (and/or media) and the application of the *Dagenais/Mentuck* test may lead to a confidentiality order much different and more narrow than the one granted in the present case."