

CANADA / JUDGMENT

Svangtun v. Pacific National Exhibition

2019 BCSC 1542

COURT

Supreme Court of British Columbia

DECIDED

12 September 2019

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2019 BCSC 1542 Svagtun v. Pacific National Exhibition IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Svagtun v. Pacific National Exhibition, 2019 BCSC 1542 Date: 20190912 Docket: S128925 Registry: Vancouver Between: Eden Rose Svagtun an infant by her Litigation Guardian Patricia Svagtun Plaintiff/Appellant And Pacific National Exhibition, Christie Kerr, John/Jane Doe #2, John/Jane Doe #3, John/Jane Doe #4, District of North Vancouver, John/Jane Doe #5, John/Jane Doe #6, Kenneth Linde, Langley Animal Clinic Ltd. and Vancouver Coastal Health Authority Defendants/Respondents And District of North Vancouver, Pacific National Exhibition Third Parties

- and - Docket: S128926 Registry: Vancouver Between: Tyler Enzo Nadalin an infant by his Litigation Guardian Lisa Ann Nadalin Plaintiff/Appellant And Pacific National Exhibition, Christie Kerr, John/Jane Doe #2, John/Jane Doe #3, John/Jane Doe #4, District of North Vancouver, John/Jane Doe #5, John/Jane Doe #6, Kenneth Linde, Langley Animal Clinic Ltd. and Vancouver Coastal Health Authority Defendants/Respondents And District of North Vancouver, Pacific National Exhibition Third Parties
- and - Docket: S128927 Registry: Vancouver Between: Jakob William Nadalin an infant by his Litigation Guardian Lisa Ann Nadalin Plaintiff/Appellant And Pacific National Exhibition, Christie Kerr, John/Jane Doe #2, John/Jane Doe #3, John/Jane Doe #4, District of North Vancouver, John/Jane Doe #5, John/Jane Doe #6, Kenneth Linde, Langley Animal Clinic Ltd. and Vancouver Coastal Health Authority Defendants/Respondents And District of North Vancouver, Pacific National Exhibition Third Parties Before: The Honourable Madam Justice Sharma (In Chambers) On appeal from: A decision of a Master of the Supreme Court of British Columbia dated January 31, 2019 (indexed at 2019 BCSC 121) Reasons for Judgment Counsel for Plaintiffs/Appellants: M. Gianacopoulos, K. Sandulescu Counsel for Defendant/Respondent, Vancouver Coastal Health Authority: D.J. Bell, A.C. Fraser Counsel for Defendants/Respondents, Intervenor the Attorney General of British Columbia: L.F. de Lima, K. Hogg, A/S Place and Date of Hearing: Vancouver, B.C. May 27 & 28, 2019 Place and Date of Judgment: Vancouver, B.C. September 12, 2019 I. INTRODUCTION

[1] This is an appeal of Master Scarth's January 31, 2019 decision, indexed at 2019 BCSC 121 (the "Master's Decision"). The appeal is brought pursuant to R. 23-6(8).

- [2] The case consists of three parallel actions brought by infant plaintiffs for damages they say resulted from an E. coli outbreak in 2009 at a petting zoo in the agricultural building at the Pacific National Exhibition (the "PNE").
- [3] The action was commenced in December 2012. Prior to filing the actions, plaintiffs' counsel made a request and received a large amount of information from the Vancouver Coastal Health Authority ("VCHA") under the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 [FIPPA]. The documents released under the FIPPA request are approximately 1500 pages and contain redactions for personal information. About eight years later, a second batch of documents were disclosed pursuant to this litigation. These documents also had the names and contact information redacted.
- [4] The VCHA said the redactions are pursuant to s. 22 of FIPPA and s. 91 of the Public Health Act. The plaintiff disagreed, and applied for unredacted copies of the documents.
- [5] The master dismissed the application. The plaintiffs now appeal.
- [6] The parties agree that the issue on this appeal is the proper interpretation of s. 91 of the Public Health Act, S.B.C. 2008, c. 28, which is a question of law. They also agree that the standard of review is correctness.
- [7] Because the appeal concerns statutory interpretation, the Attorney General of British Columbia was granted intervenor status. II. BACKGROUND
- [8] The litigation giving rise to this appeal was summarized by Madam Justice Norell, in a decision indexed at 2018 BCSC 656:
- [13] The plaintiffs' notices of civil claim allege that in 2009 there was an E. Coli outbreak at the PNE petting farm. The plaintiffs visited the petting farm and subsequently became ill. The plaintiffs allege the defendants failed to take reasonable steps to avoid transmission of E. Coli to the plaintiffs. The allegations include failures with respect to design, presentation, supply of equipment and animals, maintenance, operation, inspection, warnings, hand washing facilities, and supervision of the petting farm. The claims are based on strict liability, negligence, contract, and statutory obligations including under the Occupiers Liability Act, R.S.B.C. 1996, c. 337.
- [14] In their respective responses to civil claim, some defendants deny a duty of care, and each defendant denies breach of any standard of care and causation. Each defendant makes cross-claims against the other defendants. All of the defendants allege negligence on the part of the plaintiffs, and some defendants allege negligence on the part of the plaintiffs' parents or guardians. Those allegations include inadequate hand washing and failure to supervise.
- [9] As Madam Justice Norell noted, causation is in dispute. The infant plaintiffs in S128926 (Tyler Nadalin) and S128927 (Jakob Nadalin) fell ill and were hospitalized, and E. coli was found in their stool. However, the defendants do not admit that either boy contracted the infection from the petting farm or that if they did it was because of a breach of the standard

of care. The plaintiff in S128925, Eden Svangtun, also fell ill and was hospitalized. However, there was no E. coli found in her stool. With regard to her, the defendants also deny that she contracted E. coli at all.

[10] The defendants include:

- a) The PNE, which designed, operated and hosted the petting farm "playpen" in its agricultural building during its annual summer fair;
- b) Christie Kerr, the PNE Manager of Agriculture who was responsible for the agricultural building, including the petting farm;
- c) The District of North Vancouver, which supplied the petting farm animals and had a role in the petting farm design, maintenance and operation; and
- d) The VCHA, which inspected the petting farm several times, including on the first day of the fair and approved it for public health and safety, and which a few weeks later investigated the E. coli outbreak and linked to the petting farm which it had inspected and approved.

III. OUTLINE OF ISSUES

[11] The primary issue, both before the master and on appeal, is whether s. 91(2) of the Public Health Act prevents the disclosure of the unredacted documents.

[12] Section 91 of the Public Health Act provides that: 91(1) A person who has custody of, access to or control over personal information under this Act must not disclose the personal information to any other person except as authorized under this or any other enactment.

(2) A person referred to in subsection (1) is not, except in a proceeding under this Act, compellable to disclose or provide evidence about personal information the person has custody of, access to or control over.

[13] The parties agree that the documents sought by the plaintiffs are relevant for the purposes of documentary disclosure under the Rules. They also agree that the redacted portions at issue constitute "personal information" as defined by the Public Health Act.

[14] However, they disagree on whether the effect of s. 91(2) is to preclude disclosure of personal information. The plaintiffs argue that the s. 91(2) requirement that a person not be made "compellable to disclose or provide evidence about personal information" applies only to "evidence about personal information", which is a distinct category from "personal information". The defendants and the Attorney General disagree, and say that the correct interpretation of s. 91(2) precludes this Court from ordering the disclosure of the information at issue. IV. THE MASTER'S DECISION

[15] Before the master, the plaintiffs argued that s. 91(2) applies only to evidence in court "about personal information", and therefore has no bearing on their application for the production of information prior to trial. They supported that position with two points. First, that there is a difference between the non-compellability of evidence "about personal information" as

contained in section 91(2) and the nondisclosure of "the personal information" in section 91(1). Second that section 91(2) only applies to disclosure of evidence to the court rather than an exchange of documents between the parties prior to discovery.

- [16] The VCHA argued that even though the documents being sought are relevant, that is not determinative on the issue of disclosure pursuant to R. 7-1. It submitted that s. 91(2) is clear on its face that it is not compelled in any fashion to disclose personal information.
- [17] The Attorney General argued that reading s. 91 as a whole grants the custodian of personal information a discretion to make disclosure, but prevents them from being compelled to do so.
- [18] In the master's view, s. 91(2) has two possible meanings (para. 65) : The statement that a custodian is not compellable to 'disclose or provide evidence about personal information' could mean either:
- a) the custodian is not compellable to (i) disclose personal information or (ii) provide evidence about personal information; or
 - b) the custodian is not compellable to (i) disclose evidence about personal information or (ii) provide evidence about personal information.
- [19] The master concluded that the second interpretation was more consistent with the plain and ordinary meaning of the words used in the normal sentence construction. She also noted that s. 91(2) is a more specific provision than s. 91(1) and was therefore more directly applicable to the application, invoking specialibus generalia non derogant. In her view, s. 91(2) removed compellability of disclosure of personal information not only for trial and final hearings, but all pretrial proceedings because there is no indication in the statute itself that any difference was made between those two.
- [20] However, she disagreed with the Attorney General that a custodian had a discretion about disclosure of personal information under section 91(1). In her view neither subsection could be interpreted as conferring on a public body any discretion.
- [21] At para. 84, the master concluded that s. 91 "insulates holders of personal information under the PHA such as VCHA from the usual disclosure obligation under the Rules" of court in order to deal with swift responses to public health threats (para 84). She therefore dismissed the plaintiffs' application. V. PRELIMINARY ISSUES
- [22] Before turning to the interpretation of the PHA that is under appeal, there are two preliminary issues. First, the plaintiffs object to the admissibility of portions of an affidavit filed by the Provincial Health Officer on behalf of the Attorney General. Second, the plaintiffs applied to adduce fresh evidence at the hearing of the appeal. A. Admissibility of the Provincial Health Officer's Affidavit

- [23] The plaintiffs objected before the master to the admissibility of an affidavit of Dr. Bonnie Henry, the Provincial Health Officer, on the basis that it contained opinion evidence. The master concluded that the affidavit was unhelpful because it did not add anything of significance beyond what is discernible from the language of the statute itself.
- [24] As a general observation, any portion of an affidavit that expresses an opinion about the correct interpretation of a statute is inadmissible as constituting legal argument; it also constitutes inadmissible evidence because it is opinion evidence that goes to the ultimate issue before the court.
- [25] Before me, the Attorney General conceded there were portions of that affidavit which constituted opinion evidence. However, the Attorney General sought to rely on some of the inadmissible content as "submissions" rather than evidence. The plaintiffs maintained that the opinions ought not to be before the court in any form.
- [26] I agree that there are portions of Dr. Henry's affidavit that are inadmissible and/or irrelevant, but I also find portions of her affidavit to be helpful in understanding how the legislative scheme operates.
- [27] Counsel for the Attorney General properly conceded that paragraphs 19 and 25 of the affidavit are inadmissible and did not seek to rely on them in any form. I also find paragraphs 16, 18, 22, and 23 to be inadmissible and I have ignored those paragraphs.
- [28] However, in my view, the remainder of the affidavit is factual and uncontroversial evidence that animates this Court's understanding of the legislation in a way that is helpful beyond just reading the words of the statute. B. Admitting Fresh Evidence
- [29] The fresh evidence the plaintiffs wanted to introduce was two voluminous affidavits. The affidavits, which were sworn about a week before the hearing of the appeal, comprised notices to admit sent to the defendants and the subsequent refusal of the defendants to make admissions.
- [30] In essence, the plaintiffs sought to have the defendants admit to the truth of certain facts articulated in some of the documents that are the subject of the disclosure obligation. For example, the plaintiffs seek the admission of "the statement in the Outbreak Summary that reads, "at least seventeen people who visited the barnyard/petting farm area at the PNE on or after August 22nd, 2009 fell ill with E.coli 0157: h7, a bacteria which can cause severe diarrhea and occasionally kidney failure in those infected."
- [31] The four-part test for admitting fresh evidence on appeal was established in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, and was recently summarized in *R. v. Sipos*, 2014 SCC 47 at para. 29: Generally, fresh evidence should not be received if it could have been obtained at trial by exercising due diligence, although this criterion is not strictly applied in criminal matters when it would be contrary to the interests of justice to do so. The evidence must be relevant in the sense that it relates to a potentially decisive issue and reasonably worthy of belief. Finally, the evidence, if accepted, must reasonably be expected to have affected the result

when considered along with the trial evidence

- [32] The plaintiffs suggested a somewhat less stringent test, as set out in *M.Y. Sundae Inc. v International Dairy Queen, Inc.*, 2018 BCSC 744 at para. 30, whereby the evidence will be admitted if the evidence might (as opposed to "must") have affected the outcome: In order to admit fresh evidence on appeal from an order of a master, the applicant must demonstrate that the evidence was not available at the time of the hearing before the master despite due diligence and that the evidence might have affected the ruling had it been before the court of first instance. The application of these requirements can be relaxed; the ultimate question is whether it is in the interests of justice to introduce the fresh evidence: *Wright v. Sunlife Assurance Company of Canada*, 2014 BCCA 309 at para. 21 and *476605 B.C. Ltd. v. Insurance Corp. of British Columbia*, 2010 BCSC 1149 at para. 8, *aff'd* 2011 BCCA 181. [Emphasis added.]
- [33] There is no need to resolve this issue, because even when applying the plaintiffs' less stringent test, it is clear that their application to admit fresh evidence must fail. The fact that the defendants have insisted that the plaintiffs prove, for instance, that an outbreak occurred may illustrate why the plaintiffs are seeking the unredacted documents in issue. However, the issue before the master turned on the meaning of s. 91 of the Public Health Act, which is not affected by the issue of whether the evidence the plaintiffs are seeking is important to their case. It follows that evidence does not pertain to a potentially decisive issue, and could not have changed the result.
- [34] Therefore, the application to adduce fresh evidence is dismissed. VI. ANALYSIS
- [35] The plaintiffs advance similar arguments to those made before the master, and say the master erred in law in concluding that s. 91(2) of the Public Health Act does not allow VCHA to disclose the information being sought. Both VCHA and the Attorney General submit that the Master's Decision should be upheld because it is correct.
- [36] The modern approach to statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21.
- [37] Section 91 of the Public Health Act provides as follows: Confidentiality of personal information 91 (1) A person who has custody of, access to or control over personal information under this Act must not disclose the personal information to any other person except as authorized under this or any other enactment.
- (2) A person referred to in subsection (1) is not, except in a proceeding under this Act, compellable to disclose or provide evidence about personal information the person has custody of, access to or control over.

- [38] The plaintiffs argue that s. 91(2) is not applicable to the present facts, because it applies only to evidence about personal information, but not personal information. Personal information, the plaintiffs say, is addressed by s. 91(1). Accordingly, the plaintiffs submit they are entitled to receive the personal information at issue, because the Rules constitute an enactment under which the information can be disclosed. The defendants and the Attorney General disagree.
- [39] The plaintiffs repeated the argument made before the master. In my view, her distillation of the issue was correct. I agree with her that there are essentially two potentially valid interpretations of s. 91(2), and in particular, the key phrase "disclose or provide evidence about personal information".
- [40] The interpretation, promoted by the plaintiffs, is that this phrase is meant to indicate a bar on compelling (1) the disclosure of personal information or (2) the provision of evidence about personal information. The second interpretation is that the phrase is a bar on compelling the (1) disclosure of evidence about personal information, or (2) the provision of evidence about personal information.
- [41] The benefit of the first interpretation to the plaintiffs is that it restricts the applicability of s. 91(2) to "evidence about personal information". This allows them to argue that "evidence about personal information" means something different than "personal information", and that s. 91(2) is not applicable to documents at issue, which are personal information. They then point to s. 91(1) to say that the Rules are an enactment that specifically authorizes the disclosure of personal information.
- [42] By contrast, the second interpretation prevents the compelled disclosure of personal information (except for proceedings under the Public Health Act, which this is not), and therefore prevents the compelled disclosure of the documents.
- [43] For the reasons below, I favour the second interpretation.
- [44] As Dr. Henry's affidavit explains, the scheme under the Public Health Act permits, inter alia, the collection of private medical information from healthcare providers, and in some circumstances, mandatory testing for disease. These significant, potentially intrusive powers lead to the acquisition, and sometimes the production, of personal information. Dr. Henry observed that the reporting requirements and related administrative procedures allow prompt public health interventions to prevent further spread of the disease, which, obviously, is a major object of the Public Health Act.
- [45] The powers granted under the legislation are crucial to its interpretation. I agree with the Attorney General that because of the highly invasive and mandatory nature of the powers under the Public Health Act, the countervailing protection of confidential personal information takes on greater significance, both because it limits the injury to privacy that might arise out of the exercise of the Public Health Act's powers, and because it mitigates the risk that individuals may conceal infectious diseases from medical professionals who

are obligated to report them. As the Attorney General puts it, there must be "a high level of trust between patients and the public health system".

- [46] It is difficult to reconcile this objective with the plaintiffs' proposed interpretation. First, I agree with the Attorney General that it is difficult to draw any coherent distinction between "evidence about personal information" and "personal information", such that something included in the latter category would not also be included in the former. The personal information at issue here is the names and contact information of the patients infected in the same circumstances as the plaintiffs. It seems to me that "evidence about" that personal information would include, at the very least, their names and contact information.
- [47] Even if this issue is put aside, and I accepted that "evidence about personal information" is a distinct category from "personal information", I am left to wonder why the Legislature would choose to prevent the disclosure of "evidence about" personal information in civil proceedings, but not the personal information itself. To do so would be inconsistent.
- [48] The plaintiffs propose a definition of evidence about personal information as "descriptive information" "generated in the PHA processes", including the information generated by actions set out in the PHA and applicable regulations. If the plaintiffs' definition is accepted, it seems hard to understand why, in a section titled "confidentiality of personal information", the Legislature would prevent the compelling of "evidence of personal information" but not the personal information itself.
- [49] Turning to the second interpretation of s. 91(2), in my view it is far more consistent with s. 91 as a whole and the scheme of the Public Health Act.
- [50] I agree with the master that s. 91(1) "provides for a general obligation on the part of a holder of personal information to keep it confidential except where authorized under the [Public Health Act] or any other enactment": Master's Decision at para. 58. The Rules constitute an "enactment": Interpretation Act, R.S.B.C. 1996, c. 238. Accordingly, and as the master observed at paras. 60 and 61, if s. 91(1) is considered alone, it would entitle the plaintiff to seek the documents through the document discovery process set out in the Rules.
- [51] However, s. 91(1) must be read in conjunction with s. 91(2). I agree with the Attorney General that the word "compelled" in s.91(2) invokes the legal process. The term "compel" is often used in the context of a legal proceeding. For example, R. 7-2 (18)(b), which describes the scope of examinations for discovery, provides that a person being examined "is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge relating to any matter in question in the action" (emphasis added).

- [52] In my view, s. 91(2) operates as an exception to the general principle set out by s. 91(1). Although the Legislature saw fit to permit the disclosure of personal information under an enactment generally, it did not see fit to permit, in the context of a legal proceeding, either the compelled disclosure of personal information, or the compelled provision of evidence with respect to personal information. It follows that the master was correct to dismiss the plaintiffs' application.
- [53] Personal information collected under the Public Health Act is necessarily going to be linked to the very private matter of a person's health. That is because section 9 allows a person to collect, use or disclose personal information only if it is necessary for the stipulated purposes contained in subsections (a) through (h). In other words, the only reason the VCHA has anybody's personal information is because it is related in some way to public health services and or protection of public health. Thus, the heightened concern about the confidentiality of highly private information attaches to any personal information collected under the legislation.

CONCLUSION

- [54] The appeal is dismissed. "Sharma J."

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Prepared on 26 October 2026 · Esheria