2020 NSCA 62
Nova Scotia Court of Appeal

Sorenson v. Swinemar

2020 CarswellNS 585, 2020 NSCA 62, 166 W.C.B. (2d) 377, 323 A.C.W.S. (3d) 139, 393 C.C.C. (3d) 481, 453 D.L.R. (4th) 408

Katherine Sorenson (Appellant) v. Schelene Swinemar, Jack Sorenson, and Nova Scotia Health Authority

Wood C.J.N.S., Cindy A. Bourgeois, Derrick JJ.A.

Heard: September 24, 2020
Judgment: October 2, 2020
Docket: C.A. 499817

Counsel: Hugh Scher, John Campion, Kate Naugler, for Appellant
Karen Bennett-Clayton, for Respondents, Ms Swinemar and Nova Scotia Health Authority
Philip Romney, for Respondent, Jack Sorenson
Mary Ann Persaud, for Respondent, Nova Scotia Health Authority

Subject: Civil Practice and Procedure; Constitutional; Criminal; Public; Human Rights

Headnote

Health law --- Miscellaneous

JS was in poor health and he applied for Medical Assistance in Dying ("MAID") and was approved for procedure — JS's spouse, KS, filed Amended Notice of Application in Court seeking declaration that JS did not meet eligibility requirements for MAID — KS brought unsuccessful motion for interlocutory injunction to prevent healthcare providers from providing JS with MAID — KS appealed — In her arguments on appeal, KS raised broader issue, advancing argument for courts to undertake role in determining MAID eligibility — Appeal dismissed; Amended Application in Court dismissed — It was not appropriate that this Court or court below undertake review of assessments that found JS to be eligible for MAID — KS did not have standing to attempt to prevent or delay JS's receipt of MAID — Although parties framed their submissions as relating to proper "role" of courts in reviewing MAID assessments, this was simply different means of asking whether KS had raised justiciable issue — KS had not, in seeking to challenge JS's eligibility for MAID, raised justiciable issue — Determination of eligibility for MAID, including whether individual has capacity, is one that should be left to approved healthcare assessors — Courts did not possess institutional capacity to hear and determined challenges to eligibility determinations made under MAID regime — KS did not have private interest standing to challenge JS's MAID eligibility — In addition to KS's pleadings not giving rise to justiciable issue, there was nothing in legislation she relied on that gave her standing to raise issue she wanted to litigate — KS did not have private interest standing to challenge JS's MAID eligibility assessment because of her status as spouse.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Miscellaneous

JS was in poor health and he applied for Medical Assistance in Dying ("MAID") and was approved for procedure — JS's spouse, KS, filed Amended Notice of Application in Court seeking declaration that JS did not meet eligibility requirements for MAID — KS brought unsuccessful motion for interlocutory injunction to prevent healthcare providers from providing JS with MAID — KS appealed — In her arguments on appeal, KS raised broader issue, advancing argument for courts to undertake role in determining MAID eligibility — Appeal dismissed; Amended Application in Court dismissed — It was not appropriate that this Court or court below undertake review of assessments that found JS to be eligible for MAID — KS did not have standing to attempt to prevent or delay JS's receipt of MAID — Although this was interlocutory appeal related to refusal of interlocutory injunction, it was warranted, and in fact essential, that this Court address issue that could be determinative of litigation commenced in court below and that could have broader implications — Parties had full opportunity to argue matter before this Court, and KS had squarely put issue before this Court — If there was question as to whether this Court or court

Generally — referred to

Personal Directives Act, S.N.S. 2008, c. 8

Generally — referred to

s. 2(m) "spouse" — considered

s. 5 — referred to

s. 6 — referred to

s. 9 — referred to

s. 12(1) — referred to

s. 13(b) — referred to

Rules considered:

Civil Procedure Rules, N.S. Civ. Pro. Rules 2009

R. 5.07 — considered

R. 85.04 — referred to

R. 90.38 — considered

APPEAL by spouse of person approved for Medical Assistance in Dying from judgment dismissing motion for interlocutory injunction.

***Cindy A. Bourgeois J.A.*:**

1 Mr. and Mrs. Sorenson [1] have been married for 48 years. He is 83. She is 82. Mr. Sorenson is in poor health and has made application for Medical Assistance in Dying ("MAID"). He was approved for the procedure, which was initially scheduled for July 20, 2020 and then again on August 4, 2020. Mrs. Sorenson adamently opposes her husband's application for MAID [2] . She has turned to the courts to prevent him from ending his life.

2 On July 31, 2020, Mrs. Sorenson filed a Notice of Application in Court seeking a declaration that Mr. Sorenson does not meet the eligibility requirements for MAID "according to Canadian law". She requested permanent and interlocutory (temporary) injunctions to prevent healthcare providers from providing him with MAID. A motion brought by Mrs. Sorenson for an interlocutory injunction was heard on August 7, 2020 by Justice Peter Rosinski of the Nova Scotia Supreme Court. The first line of her written submissions in support of the motion asserted she "questions the assessments conducted in support of a request for assisted suicide" made by her husband.

3 By order issued August 14, 2020, Justice Rosinski dismissed Mrs. Sorenson's motion. He declined to grant an interlocutory injunction preventing Mr. Sorenson from obtaining MAID.

4 Mrs. Sorenson now appeals to this Court. In her arguments on appeal, she raises a broader issue than merely whether Justice Rosinski's decision is supportable in law. Mrs. Sorenson advances a strenuous argument for the courts to undertake a role in determining MAID eligibility. She submits the "Rule of Law" requires this Court "to ensure that the legal criteria for MAID have been met".

5 Relating more specifically to the decision under appeal, Mrs. Sorenson argues Justice Rosinski's analysis discloses numerous errors. She asks this Court to issue an interlocutory injunction halting Mr. Sorenson's access to MAID until such time as the Application in Court can be heard. She further requests the court below be directed to address her outstanding motion for production, scheduling of discoveries, and setting of hearing dates, including cross-examination of numerous doctors and nurses, in a "speedy fashion".

90. The Rule of Law **requires a Court to ensure that the legal criteria for MAID have been met** before the Court effectively authorizes MAID to proceed in circumstances where there are multiple conflicting reports that call into serious question a person's capacity, consent to treatment, and whether or not they meet the legal criteria required to authorize a lawful assisted death. [16]

(Emphasis added; footnotes in factum omitted)

58 Mr. Sorenson asserts this Court has no role to play in the present instance. In his written submissions, he says:

15. There is a clear administrative process set out in legislation, the policies and procedures for MAID. There is no requirement for court intervention before a person may invoke the right to die. ...

59 Similarly, the NSHA and Ms. Swinemar submit "that judicial oversight is not appropriate and is not a requirement under the [NSHA] Policy nor in the *Criminal Code*". They argue the consultative process that led to the MAID amendments demonstrates Parliament was aware of the potential for conflicting assessments, did not view this as fatal to a patient ultimately being found eligible to receive MAID, and declined suggestions that there be a mechanism for judicial oversight or review.

60 Although the parties have framed their submissions as relating to the proper "role" of courts in reviewing MAID assessments, this, in my view, is simply a different means of asking whether Mrs. Sorenson has raised a justiciable issue. Absent a justiciable issue, there is no role for either this Court, or the court below.

61 In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (S.C.C.), Justice Rowe describes justiciability as follows:

[32] This appeal may be allowed for the reasons given above. However, I also offer some supplementary comments on justiciability, given that it was an issue raised by the parties and dealt with at the Court of Appeal. In addition to questions of jurisdiction, justiciability limits the extent to which courts may engage with decisions by voluntary associations even when the intervention is sought only on the basis of procedural fairness. Justiciability relates to the subject matter of a dispute. The general question is this: Is the issue one that is appropriate for a court to decide?

[33] Lorne M. Sossin defines justiciability as

> a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.

(*Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 7)

Put more simply, "[j]usticiability is about deciding whether to decide a matter in the courts": *ibid.*, at p. 1.

[34] There is no single set of rules delineating the scope of justiciability. **Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter**: see *Sossin*, at p. 294. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (*ibid.*).

(Emphasis added)

62 I will now consider the two factors underlying justiciability — legitimacy and the institutional capacity of the courts.

63 A court's legitimacy to adjudicate a matter includes a consideration of whether the subject matter advanced for judicial scrutiny has been placed with another decision maker. As I will explain below, it is clear Parliament fully intended, provided it is undertaken in a manner consistent with the law, the determination of MAID eligibility should rest with authorized medical and nursing professionals not with judges. The Province of Nova Scotia has not enacted legislation that contemplates judicial intervention in assessing MAID eligibility.[17] I am also satisfied the institutional capacity of the courts is not well-suited to respond to the time-sensitive nature of challenges advanced in relation to MAID eligibility assessments.

64 For clarity, I am not suggesting courts could never have a role in matters relating to MAID. Clearly, challenges to the constitutionality of the MAID provisions fall squarely within the jurisdiction of the courts and have been entertained accordingly.[18] Questions as to whether policies governing MAID within a province or health authority are in compliance with the *Criminal Code* could be a subject for judicial determination. Of course, allegations that assistance in dying was provided or counselled in contravention of the MAID exemptions in the *Criminal Code* would be dealt with in the courts[19] . These are just examples of where courts would be tasked with deciding justiciable issues relating to MAID. This is not such a case.

Legitimacy

65 In determining whether Parliament intended courts to have a role in MAID eligibility assessments, including the determination of capacity, one must look at the process that preceded and informed the legislative response.

66 Parliament's legislative response was necessitated by *Carter*. That decision informed where Parliament placed the responsibility for determining MAID eligibility, including in relation to individuals who may be particularly vulnerable. The Court observed:

> **The Feasibility of Safeguards and the Possibility of a "Slippery Slope"**
>
> [114] At trial Canada went into some detail about the risks associated with the legalization of physician-assisted dying. In its view, there are many possible sources of error and many factors that can render a patient "decisionally vulnerable" and thereby give rise to the risk that persons without a rational and considered desire for death will in fact end up dead. It points to cognitive impairment, depression or other mental illness, coercion, undue influence, psychological or emotional manipulation, systemic prejudice (against the elderly or people with disabilities), and the possibility of ambivalence or misdiagnosis as factors that may escape detection or give rise to errors in capacity assessment. Essentially, Canada argues that, given the breadth of this list, there is no reliable way to identify those who are vulnerable and those who are not. As a result, it says, a blanket prohibition is necessary.
>
> [115] The evidence accepted by the trial judge does not support Canada's argument. **Based on the evidence regarding assessment processes in comparable end-of-life medical decision-making in Canada, the trial judge concluded that vulnerability can be assessed on an individual basis, using the procedures that physicians apply in their assessment of informed consent and decisional capacity in the context of medical decision-making more generally. Concerns about decisional capacity and vulnerability arise in all end-of-life medical decision-making**. Logically speaking, there is no reason to think that the injured, ill, and disabled who have the option to refuse or to request withdrawal of lifesaving or life-sustaining treatment, or who seek palliative sedation, are less vulnerable or less susceptible to biased decision-making than those who might seek more active assistance in dying. **The risks that Canada describes are already part and parcel of our medical system**.
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> [116] As the trial judge noted, the individual assessment of vulnerability (whatever its source) is implicitly condoned for life-and-death decision-making in Canada. In some cases, these decisions are governed by advance directives, or made by a substitute decision-maker. Canada does not argue that the risk in those circumstances requires an absolute prohibition (indeed, there is currently no federal regulation of such practices). In *A.C.*, Abella J. adverted to the potential vulnerability of adolescents who are faced with life-and-death decisions about medical treatment (paras. 72-78). Yet, this Court implicitly accepted the viability of an individual assessment of decisional capacity in the context of that case. **We accept the trial**

102 Further, courts do not possess the institutional capacity to hear and determine challenges to eligibility determinations made under the MAID regime.

Standing

103 My conclusion that Mrs. Sorenson has not raised a justiciable issue impacts directly on whether she has standing. Mrs. Sorenson asserts she enjoys both private and public interest standing. Mr. Sorenson disagrees, as does the NSHA and Ms. Swinemar.

104 The purpose of the law of standing was explained by Justice Cromwell in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45 (S.C.C.) as follows:

> [1] ... The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government....

105 Private interest standing derives from a party having a direct personal interest in a question to be determined by the court. Mrs. Sorenson argues she has private interest standing on the following bases:

- The *Adult Capacity and Decision-making Act*, the *Hospitals Act*, and the *Personal Directives Act* allow her to make an application to the court.
- She has automatic standing because Mr. Sorenson has appointed her his substitute-decision maker.
- She is his spouse.

106 Mrs. Sorenson does not have private interest standing to challenge Mr. Sorenson's MAID eligibility. As I have discussed, Mrs. Sorenson's pleadings do not give rise to a justiciable issue. Further, there is nothing in the legislation she relies upon that gives her standing to raise the issue she wants to litigate. Those Acts do not apply to MAID eligibility assessments. She has not asked the courts to provide her with relief under those statutes.

107 Mrs. Sorenson's assertion that her husband appointed her his substitute-decision maker has been raised for the first time on appeal. I note:

- Neither her Notice of Application in Court, nor the Amended Notice of Application in Court identify her as commencing the proceedings in her capacity as substitute-decision maker.
- Her affidavit in support of the motion in the court below does not reference she has been appointed Mr. Sorenson's substitute-decision maker.
- A review of the record, including transcripts of the appearances before Justice Campbell and Justice Rosinski, does not reveal any reference to Mrs. Sorenson being appointed as Mr. Sorenson's substitute-decision maker.
- Her written submissions in the court below are silent as to the existence of a Power of Attorney or Personal Directive by which Mrs. Sorenson is appointed as her husband's substitute-decision maker.

108 Before concluding anyone has standing to bring legal action by virtue of a power of attorney or personal directive, it would be necessary to consider the contents of the document as well as whether it was still in effect. I note the following provisions of the *Personal Directives Act*:

