

THE BALANCING OF PRIVACY RIGHTS AND THE OPEN COURT PRINCIPLE: DISCLOSURE OF PRIVATE INFORMATION IN LITIGATION

Posted on June 23, 2021

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“This Court has been resolute in recognizing that the open court principle is protected by the constitutionally entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.”

The Supreme Court of Canada’s recent decision in *Sherman Estate v Donovan* [1] (“**Sherman Estate**”), offers clarity on when the open court principle will give ground to the right to privacy. The Supreme Court’s decision is a reminder that although privacy is fundamental to the preservation of a free and democratic society, it is not absolute.[2] The presumption of openness will only yield in circumstances where there is a serious risk to an important *public* privacy interest. Individual privacy interests, such as the discomfort often associated with sharing private information in open court, are not, without more, sufficient to overturn the strong presumption of court openness.

The Case

Sherman Estate arose out of a probate proceeding connected with the highly publicized murders of Bernard and Honey Sherman – the prominent Toronto philanthropists whose murders have been the subject of extensive media coverage since 2017.[3]

The trustees of the couple’s estate wanted to keep the probate files private because of the large value of the estate and because the perpetrators of the murders remained at large.[4] The trustees sought sealing orders of the probate files before the Ontario courts to protect the estate trustees and beneficiaries from both privacy intrusions and risks to personal safety.[5] The trustees argued that if the court files were disclosed to the public there would be a real and substantial risk that the affected individuals would suffer serious harm.[6]

Relying on the principle that the *Canadian Charter of Rights and Freedoms* protects court openness, the

Toronto Star and its Chief Investigative Reporter, Kevin Donovan, sought to access the probate files. They argued that the sealing orders violated their rights of freedom of expression and freedom of the press as well as violated the principle that the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.^[7]

The principle of “open court” is protected by the constitutional guarantee of freedom of expression in Canada and is essential to the proper functioning of democracy. However, this principle can sometimes conflict with individual privacy interests as court proceedings can lead to the dissemination of highly sensitive personal information that may be a source of embarrassment.^[8]

The Decision

The Supreme Court of Canada ultimately agreed with the Toronto Star and Mr. Donovan. In order to overshadow the open court principle there must be a public character of the privacy interest at stake, such as involving the protection of individuals from the threat to their dignity, which can ultimately be threatened by information disclosed in open court.^[9]

The Supreme Court clarified that dignity will be at serious risk only in limited cases^[10] and that the burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk.^[11] Dignity will be at serious risk where the information disseminated would be sufficiently sensitive such that openness would meaningfully strike at the individual’s “biographical core” in a manner that threatens their integrity^[12] and undermines their control over the expression of their identities.^[13] Information affecting this “biological core” includes information that reveals something intimate and personal about the individual, their lifestyle or their experiences.^[14]

The Supreme Court found that the information contained in the probate files did not reveal anything particularly private or highly sensitive about the affected individuals.^[15] Public disclosure of information in the files, consisting of names, addresses, and relationships between the Shermans and their trustees and beneficiaries, did not rise to level of being a public interest in privacy.

The Takeaways

While *Sherman Estate* is undoubtedly of interest to counsel seeking to understand the legal test for obtaining a sealing order (or similar relief), the case also provides helpful clarity for litigants more generally. Civil lawsuits often require the disclosure of sensitive business records or information. This is particularly so in cases involving fraud where production of records and information beyond those created in the ordinary course of business are often sought and produced. The conduct underlying allegations of fraud often involves secret communications between co-conspirators, documents created to facilitate the fraud, and financial

transactions to transfer unlawfully taken funds, make payments for unlawful activities or hide assets.

Such documents may include more personal records such as phone records, text messages, personal emails, bank account statements and transaction records. These types of records do not usually need to be produced in the context of typical commercial disputes. However, in the context of allegations of fraud, these records are often where the proof of the fraud lies.

Sherman Estate offers helpful guidance as to how courts might view the often claimed right to privacy by defendants when a plaintiff seeks to obtain a defendant's personal records in order to seek to prove the fraud allegations. A sealing order to prevent information filed in or relating to a court proceeding from being accessible to the public and an order to prevent production of personal records so they are not disclosed to the other parties in the lawsuit or become part of the public record both raise similar privacy issues.

Both require something beyond the usual embarrassment or discomfort experienced by an individual arising from the disclosure of their text messages or bank records. While such threshold is not impossible to overcome, *Sherman Estate* creates additional challenges for defendants facing fraud allegations who seek to prevent the disclosure of their personal information and records.

[1] [ps2id id='1' target='']/*Sherman Estate v Donovan*, 2021 SCC 25.

[2] [ps2id id='2' target='']/*Ibid* at para 31.

[3] [ps2id id='3' target='']/*Ibid* at para 9.

[4] [ps2id id='4' target='']/*Ibid* at para 10.

[5] [ps2id id='5' target='']/*Ibid* at para 11.

[6] [ps2id id='6' target='']/*Ibid*.

[7] [ps2id id='7' target='']/*Ibid* at para 12.

[8] [ps2id id='8' target='']/*Ibid* at para 2.

[9] [ps2id id='9' target='']/*Ibid* at para 49, 62-63.

[10] [ps2id id='10' target='']/*Ibid* at para 64.

[11] [ps2id id='11' target='']/*Ibid* at para 77.

[12] [ps2id id='12' target='']/*Ibid* at para 86.

[13] [ps2id id='13' target='']/*Ibid* at para 92.

[14] [ps2id id='14' target='']/*Ibid* at para 78.

[15] [ps2id id='15' target='']/*Ibid* at para 92.

by [Talia Gordner](#), [Jamieson Virgin](#), [Ralph Cuervo-Lorens](#) and [Paola Ramirez](#)

A Cautionary Note

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