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The Public Interest in Privacy: The Supreme Court of Canada's Decision in *Sherman Estate v. Donovan*

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In *Sherman Estate v Donovan*,[2] the Supreme Court of Canada considered whether personal privacy and related physical safety concerns can justify an exception to the ordinarily open-court file in probate proceedings. Specifically, the Court considered whether personal privacy and safety concerns can qualify as public interests important enough to justify sealing otherwise open court files. More generally, the Court considered how to reconcile privacy, as a fundamental consideration in a free society, and the open court principle, as protected by the constitutionally entrenched right of freedom of expression.

Writing for a unanimous Court, Justice Kasirer recognized a narrow but highly significant aspect of privacy as being an important public interest for the purposes of the relevant test applicable to confidentiality orders established in *Sierra Club of Canada v Canada (Minister of Finance)*.[3] Legal proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not merely in discomfort or embarrassment, but in an affront to personal dignity. Where this narrower dimension of privacy is shown to be at serious risk, an exception to the open court principle may be justified. According to Justice Kasirer, this dimension of privacy is rooted in "the public interest in protecting human dignity".[4]

But on the facts before the Court in this particular case, the Court agreed with the Ontario Court of Appeal below, which found that neither the alleged privacy risk nor the alleged risk to physical safety was sufficiently serious enough to overcome the strong presumption of open courts.

Background Facts and Proceedings Below

Bernard Sherman and Honey Sherman, a prominent couple in business and philanthropic circles, were found dead in their Toronto home in 2017; their deaths, which continue to be investigated as homicides, generated intense public interest and media scrutiny. The couple's estates and estate trustees sought to limit the media scrutiny and ensure an orderly transfer of the couple's property outside the glow of what they considered the public's morbid fascination both with the couple's (still) unexplained death and the apparently great sums of money involved.

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[2] *Sherman Estate v Donovan*, 2021 SCC 25.
[3] *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522.
[4] *Sherman Estate, supra* note 1, at para 7.

Specifically, the estate trustees sought a sealing order to prevent further intrusions of their and the beneficiaries' privacy and safety. They argued that if the information in the court files were to be made open to the public, their privacy would be compromised and their lives would be put in jeopardy as long as the couple's death remained unexplained and those responsible remained at large.

The sealing orders were initially granted upon request, and then subsequently challenged by Keith Donovan, a journalist and one of the respondents on the appeal, along with Toronto Star Newspapers Ltd. The Toronto Star argued that the sealing orders violated not only its constitutional rights of freedom of expression and freedom of the press, but also the attendant principle that the workings of the courts must be open to the public as a means of guaranteeing the transparent and fair administration of justice.

The initial application judge applied the Supreme Court's test from *Sierra Club*.[5] The judge found that both prongs – the privacy/dignity risk, and the safety risk – of that test were met on the facts at bar, and that they "very strongly outweigh" what he characterized as the narrow public interest in the "essentially administrative files" at issue.[6] Loathe to issue an indeterminate sealing order, however, the application judge sealed the files for two years, with the possibility of renewal.[7]

The Ontario Court of Appeal unanimously allowed The Toronto Star's appeal, and lifted the sealing orders.[8] The Court of Appeal noted that the *Sierra Club* test requires the presence of a public interest, and found that the sealing orders sought by the trustees in this case were purely personal and thus lacked any public interest. The Court of Appeal also found that there was no evidence in this case that could warrant a finding that disclosure of the estate files posed a real risk to anyone's public safety.[9]

The Supreme Court Revises the *Sierra Club* Test

The outcome of the appeal turned on whether the application judge should have sealed the estate documents pursuant to the test for discretionary limits on court openness previously established in the Supreme Court's *Sierra Club* decision.[10]

A long line of Supreme Court jurisprudence holds that court openness is protected by the constitutional guarantee of freedom of expression, and is considered essential to the proper functioning of Canadian democracy. Moreover, this principle includes and is considered inseparable from reporting on court proceedings by a free press. The test for discretionary limits on court openness is designed to maintain the strong presumption of openness while

[5] Ontario Superior Court of Justice, 2018 ONSC 4706, 41 ETR (4th) 126.
[6] *Ibid* at paras 31, 33.
[7] *Sherman Estate, supra* note 1 at para 16.
[8] Court of Appeal for Ontario, 2019 ONCA 376, 47 ETR (4th) 1.
[9] *Ibid* at para 16.
[10] *Sherman Estate, supra* note 1 at para 29.

offering sufficient flexibility for courts to protect other, competing public interests where they arise.[11]

But the case at bar raises a challenge to this established analytic framework: Can the protection of privacy, where privacy is a matter of public concern, justify exceptions to the open court principle, including the freedom of the press to report on legal proceedings?[12] Neither the right of privacy nor the open court principle is absolute or without exceptions. Reconciling these two ideas, and determining the role of privacy in the *Sierra Club* test, is thus the crux of this case.[13]

According to Justice Kasirer, while mere embarrassment caused by the dissemination of personal information in court does not justify a limit on court openness, "circumstances do exist where an aspect of a person's private life has a plain public interest dimension."[14] Specifically, personal information disclosed in court "may result in an affront to a person's dignity"; where privacy seeks to protect individuals from this affront, "it is an important public interest relevant under *Sierra Club*."[15]

The novel question under the *Sierra Club* test when risks to dignity are concerned is not whether the information in question is "personal" to the individual affected, but whether, "because of its highly sensitive character, its dissemination [in court] would occasion an affront to their dignity that society as a whole has a stake in protecting."[16]

This analysis must focus on the *impact* – rather than the mere fact – of the dissemination in court of sensitive personal information. The information must also strike at the "core identity" of the individual concerned, that individual's "biographical core," such that its dissemination in court would amount to "an affront to dignity that the public would not tolerate, even in the service of open proceedings."[17]

To accommodate and give effect to this narrow yet highly significant public interest in privacy where a serious risk to personal dignity is at stake, the Court has revised the two-step inquiry under the *Sierra Club* test[18] so as to include a third step. Now, individuals asking a court to exercise its discretion to limit the open court principle must establish that:

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[11] *Ibid* at para 30.
[12] *Ibid* at para 31.
[13] *Ibid*.
[14] *Ibid* at para 32.
[15] *Ibid* at para 33.
[16] *Ibid*.
[17] *Ibid* at paras 34-35.
[18] In *Sierra Club, supra* note 2 at para 53, the Court held that a confidentiality (*i.e.,* sealing) order should be granted only when (1) 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 (2) the salutary effects of the confidentiality order, including 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.

1) court openness poses a "serious risk" to an important public interest (including but not limited to the newly recognized public interest in protecting individuals from affronts to their dignity);

2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

3) as a matter of proportionality, the benefits of the order outweigh its negative effects.[19]

This test now applies to all discretionary limits on court openness, including sealing orders, publication bans, orders excluding the public from a hearing, and redaction orders, subject only to valid legislative enactments.[20]

Justice Kasirer adds that there is no closed list of important public interests for the purposes of this test, but he also reaffirms the Court's guidance in *Sierra Club* that courts must be "cautious" and "alive to the fundamental importance of the open court rule" when identifying important public interests.[21] While it has become trite for the Supreme Court to say of a new – or newly clarified – legal test that it is "fact-based" and necessarily dependent on "context," it is perhaps equally trite to lazily criticize the Court for not providing a comprehensive catalogue of a new test's potential applications,[22] a hopeless and, in any event, not particularly helpful task in a continually evolving social and cultural landscape, including but by no means limited to the ongoing evolution of the Internet and social media.

At the same time, however, Justice Kasirer makes perfectly clear the limits of the Court's ruling by explaining that only "specific aspects of privacy interests can qualify as important public interests under *Sierra Club*."[23]

Justice Kasirer further explains that "rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation […] That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine."[24] This task, Justice Kasirer concludes, "remains a high bar", one that will be successfully reached "only in limited cases."[25]

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[19] *Sherman Estate, supra* note 1 at para 38.
[20] *Ibid.*
[21] *Ibid* at para 42, citing *Sierra Club, supra* note 2 at para 56.
[22] See e.g. Ian MacKenzie, "The Open Court Principle and Privacy: A New Frontier?", *SLAW* (8 September 2021), online: http://www.slaw.ca/2021/09/08/the-open-court-principle-and-privacy-a-new-frontier/, arguing that "[t]he court, unfortunately for those facing requests for confidentiality orders, felt there was no need to provide a catalogue of the range of sensitive personal information that could give rise to a serious risk to a person's dignity."
[23] *Sherman Estate, supra* note 1 at para 49.
[24] *Ibid* at para 61.
[25] *Ibid* at paras 62-63.

Conclusion

Unlike the Ontario Court of Appeal below, the Supreme Court of Canada recognizes in *Sherman Estate* that personal concerns "can coincide with public interests within the meaning of *Sierra Club*."[26] The protection of certain aspects of privacy – in this case, core personal dignity – is important not only to the affected individual but also to society. Because the established jurisprudence on the importance of privacy cannot be directly transposed to the jurisprudence on open court, the Supreme Court in *Sherman Estate* has adapted the *Sierra Club* test so as to accommodate a narrow and specific yet highly significant public-interest dimension of privacy capable of limiting the open court principle.

But as the Court hastens to clarify, "[n]othing here displaces the principle that covertness in court proceedings must be exceptional."[27] As such, the Court has incrementally revised the *Sierra Club* test in order to accommodate a more modern understanding of the public interest in privacy.

[26] *Ibid* at para 48.
[27] *Ibid* at para 63.