Supreme Court of Canada recognizes privacy as a ground for sealing orders

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Sealing orders are commonly sought in civil litigation across Canada to protect sensitive commercial and other information. As sealing orders run contrary to the open-courts principle, the courts must balance the beneficial impact of the order in protecting an important interest against the public interest in open courts. In its decision in *Sherman Estate v Donovan* 2021 SCC 25 (*Sherman*), the Supreme Court of Canada recognized that the public interest in protecting individuals' dignity is sufficiently important that a sealing order preventing disclosure of personal information may be granted. However, *Sherman* sets the bar for granting a sealing order protecting personal information very high. Only information that "reveals something intimate and personal about the individual, their lifestyle, or experiences," such as sexual orientation or potentially stigmatizing medical information will likely support the granting of a sealing order.

Sherman represents an important evolution in the protection of individuals' privacy in Canada, and will be important wherever sensitive personal information may become part of the public record. For example, LGBTQ+ individuals may be at risk if their sexual orientation or gender identity are disclosed. As the possibility of having to disclose sensitive personal information may present a barrier to certain individuals in accessing the courts, Sherman provides a key tool in improving access to justice.

The Facts

After the passing of Barry and Honey Sherman in December 2017, the trustees of their estates sought sealing orders over the court files related to the probate of the Shermans' estates. At first instance, the Ontario Superior Court of Justice granted the requested order, finding that the privacy and dignity of those affected, including the beneficiaries of the estates, outweighed the harmful effect of the sealing orders. A journalist appealed the initial grant of the sealing order, and the Ontario Court of Appeal overturned the orders finding, among other things, that "personal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle."

The Decision

Since 2002, the common law test for sealing orders in civil matters has been the two part test articulated in *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41 *(Sierre Club)*. Under the *Sierra Club* test, a party seeking a sealing order had to demonstrate:

- an order was necessary to prevent a serious risk to an important interest, including a commercial interest, because alternative measures would not prevent the risk; and
- the positive effects of the order outweighed the negative effects, including the public interest in open court proceedings.

Writing for a unanimous court in *Sherman,* Justice Kasirer found that the *Sierra Club* test rests upon three core prerequisites, which must be established in order to obtain a sealing order:

1. court openness poses a serious risk to an important public interest;
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.

Justice Kasirer noted that this formulation preserves the essence of *Sierra Club* test. Accordingly, previously decided cases likely remain good law.

More importantly, Justice Kasirer found that, under the first branch of the test, there is a public interest in preserving individuals' dignity. Where core aspects of individuals' personal lives, which bear on their dignity, are at risk due to dissemination of sufficiently sensitive information, this may support the granting of a sealing order. Some examples of such sufficiently sensitive information included potentially stigmatizing medical diagnoses, sexual orientation, or potentially stigmatizing work history. However, Justice Kasier noted that such information is not *per se* grounds for a sealing order; the extent to which the information has already been disseminated in the public domain is relevant to whether the sealing order should be granted.

Underpinning Justice Kasirer's reasoning is the recognition that dignity, which he articulates as a social concept involving presenting core aspects of oneself in a controlled and considered manner. In other words, there is a public interest in protecting individuals' rights to decide when, how, and to whom (if at all) information about fundamental aspects of their identities is disclosed. This public interest is sufficiently important that, in some cases, it can tip the balance away from the public interest in open courts, which is constitutionally protected under section 2(b) of the *Charter of Rights and Freedoms*.

Justice Kasirer also found that the presumption in favour of open courts will not be overcome lightly. Even though certain information, if disclosed, may be disadvantageous, embarrassing, or even distressing, this will not be sufficient to support a sealing order. The trustees in *Sherman* were ultimately unsuccessful in having the sealing orders reinstated, as the information they sought to protect (names and addresses, identity of the estate administrators, the extent of assets dealt with in the estates, and the identity of beneficiaries) was not near enough to the 'core of

biographical data' which the public interest in protecting dignity protects, to support a sealing order.

BLG acted for the Income Security Advocacy Centre, one of the interveners on the case, with a team that included Ewa Krajewska, Teagan Markin and Mannu Chowdhury.

By

Daniel B.R. Johnson

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Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3
T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9
T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2
T 604.687.5744
F 604.687.1415

Montréal
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Suite 900
Montréal, QC, Canada
H3B 5H4
T 514.954.2555
F 514.879.9015

Toronto
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22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3
T 416.367.6000
F 416.367.6749