COURT OF APPEAL FOR ONTARIO

CITATION: Out-Of-Home Marketing Association of Canada v. Toronto (City), 2012 ONCA 212
DATE: 20120402
DOCKET: C53527 and C53521

Feldman, Sharpe and Epstein JJ.A.

BETWEEN

Out-Of-Home Marketing Association of Canada

Applicant
(Respondent / Appellant by way of cross-appeal)

and

City of Toronto

Respondent
(Appellant / Respondent by way of cross-appeal)

AND BETWEEN

Pattison Outdoor Advertising LP and Pattison Sign Group,
A Division of Jim Pattison Industries Ltd.

Applicants
(Appellants / Respondent by way of cross-appeal)

and

City of Toronto

Respondent
(Respondent / Appellant by way of cross-appeal)

Earl A. Cherniak Q.C. and Jason Squire, for Pattison Outdoor Advertising LP

Christopher J. Williams and Patrick Harrington, for Out-of-Home Marketing Association of Canada

Ansuya Pachai and Ian A.G. Duke, for the City of Toronto

Heard: November 23, 2011

On appeal from the judgment of Justice M. Penny of the Superior Court of Justice dated March 3, 2011, with reasons reported at 2011 ONSC 537, 81 M.P.L.R. (4th) 1.

Sharpe J.A.:

[1] In 2010, the City of Toronto enacted a bylaw imposing a tax on "third party signs" – fixed exterior signs that advertise goods or services not available at the premises where the sign is located: City of Toronto, by-law No. 197-2010 (the "Sign Tax by-law"). Pattison Outdoor Advertising ("Pattison") and Out-of-Home Marketing Association of Canada ("OMAC") challenged the Sign Tax by-law on various grounds, principally, that it imposes an indirect tax and therefore is *ultra vires* the City as contravening the *City of Toronto Act*, 2006, S.O. 2006, c. 11 and the *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3. Pattison also argues that the Sign Tax by-law should be quashed on the ground that it is discriminatory. OMAC submits that the even if the Sign Tax by-law is valid, it does not apply to signs that existed at the time of its enactment on account of a provision in the *City of Toronto Act* exempting existing lawfully erected signs from the reach of by-laws "respecting signs".

[2] The application judge gave comprehensive reasons refusing to quash the Sign Tax by-law. However, he accepted OMAC's argument that existing signs were "grandfathered" under the saving provision. The application judge also

imposed a sealing order protecting from disclosure certain financial information filed by Pattison in support of its argument that the tax was *ultra vires*.

[3] Pattison and OMAC appeal the dismissal of their *ultra vires* challenge, arguing that the Sign Tax by-law imposes an indirect tax. Pattison also appeals the dismissal of the challenge on the ground that the Sign Tax by-law is discriminatory. Toronto appeals the "grandfathering" and sealing orders, arguing that the saving provision has no application to a by-law imposing a tax and that there was no basis in law for the sealing order.

[4] My reasons will address the first three issues, all of which address the Sign Tax by-law. In respect of the fourth issue, that of the sealing order, I am in agreement with the reasons of my colleague, Epstein J.A.

The Sign Tax By-Law

[5] The Sign Tax by-law imposes an annual tax on signs that advertise goods or services not available at the place where the sign is located.

[6] The key definitions are as follows:

- THIRD PARTY SIGN - "A Sign…which advertises, promotes, or directs attention to businesses, goods, services, matters or activities that are not available at or related to the premises where the Sign is located" and has an area of greater than 1 square metre.

- SIGN - “Any device, fixture or medium that displays Sign Copy to attract attention to or convey information of any kind and shall include its supporting structure, Sign Face, lighting fixtures and all other component parts.”
- SIGN COPY - “Any colour graphic, logo, symbol, word, numeral, text, image, picture or combination thereof displayed on a Sign Face”

[7] The tax is payable annually on the earlier of a specified date or a date prior to the issuance of a permit for the sign. The tax is imposed on the “owner”, defined as the person who “owns and controls the display of Sign Copy” rather than the owner of the sign itself, making the tax payable by the party who owns or controls the display. There are five tax rates that depend on the size, type and physical properties of the sign. Although the tax is payable only where a sign displays Sign Copy, the amount of the fixed annual tax is not related to, or determined by, the advertising sold by the owner or the revenue derived by the owner from the sale of advertising.

[8] In his very comprehensive and thoughtful reasons, the application judge carefully considered and analyzed Toronto’s Sign Tax by-law. He fully explored the evidence of the process that led to the enactment of the by-law. He also carefully reviewed the evidence relating to the businesses of Pattison and OMAC and of the impact the tax would have on their businesses. As I agree with his analysis of the evidence and his rejection of the arguments that the by-law

should be quashed on the grounds that the tax is indirect and is discriminatory, this portion of my reasons will be relatively brief. I do, however, respectfully disagree with the application judge's holding that signs existing at the time the Sign Tax by-law was enacted are protected by a grandfathering clause which exempts them from being subject to the tax.

ANALYSIS

(1) Does the Sign Tax by-law impose an indirect tax?

[9] It is not disputed that Toronto has no authority to impose an indirect tax. The *City of Toronto Act,* s. 267 only allows Toronto to impose a tax "if the tax is a direct tax". Section 92.2 of the *Constitution Act*, 1867 limits the authority of the province, and therefore municipalities in the exercise of their delegated powers, to the imposition of "direct taxation".

[10] Pattison and OMAC submit that they cannot survive in the outdoor sign advertising business unless they can pass on the economic burden of the tax by increasing advertising rates or reducing the rents paid to landowners. They argue this practical reality makes the tax indirect.

[11] In my view, the application judge correctly rejected this submission. The courts have consistently adopted John Stuart Mill's classic distinction between a direct and an indirect tax in his 1848 treatise, *Principles of Political Economy*, Book V, c. III at p. 371:

> A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs.

[12] See, for example, Canadian *Industrial Gas & Oil Ltd. v. Government of Saskatchewan et al.*, [1978] 2 S.C.R. 545 at p. 581.

[13] It is well-established in the case law, however, that the legal definition of an indirect tax is not to be determined on the basis of pure economics or on the basis of the particular financial circumstances of the parties affected by the tax. The reason is obvious: if the argument of Pattison and OMAC were accepted, virtually every tax would be an indirect tax. Every business that bears a tax will treat the tax as a cost that must be factored into the price charged for its products. This natural tendency of every taxpayer cannot, and does not, automatically make the tax an indirect tax.

[14] One of the most frequently cited and helpful definitions of an indirect tax is that articulated by Rand J. in *Canadian Pacific Railway Co. v. Saskatchewan (Attorney General)*, [1952] 2 S.C.R. 231 at pp. 251-52:

> If the tax is related or relatable, directly or indirectly, to a unit of the commodity or its price, imposed when the commodity is in course of being manufactured or marketed, then the tax tends to cling as a burden to the unit or the transaction presented to the market.

[15] I agree with Toronto's argument that the third party sign tax simply does not fit this definition. The tax is not tied to the price of, or the revenue from, the advertising. It is a flat annual tax imposed on the sign owner. It is not a tax on the commodity sold by the sign owner, and it is not imposed on, rated, or rateable to, a unit of the commodity or its price. It is not imposed on a commodity in the course of production or marketing and therefore it cannot "cling" as a burden to the unit or transaction as it is presented to the market. The fact that the tax is triggered by the presence of Sign Copy and that the amount of tax is determined by a classification system based on size, type and physical properties does not make it a tax on a unit of sale or production. In the application judge's words, at para. 108:

> [T]he tax is levied on any device which displays a message advertising goods or services at a location other than where the device is located. To be sure, the "device," to be taxable, must display a "message." But that does not change the nature of the tax itself, which is a tax on the "device." The tax does not vary with the volume or nature of the advertising copy displayed.

[16] The appellants place considerable emphasis on the point that the nature of a tax is to be assessed according to its "general tendency". They say that because, as a matter of business economics, they must pass on the burden of the tax, its "general tendency" is to be an indirect tax. However, as the application judge correctly held, that argument has been consistently rejected in the case law: see *Canadian Pacific Railway Co. v. Saskatchewan (Attorney*

General) [1952] 2 S.C.R. 231; *New Brunswick (Minister of Finance) v. Simpson-Sears Ltd.* [1982] 1 S.C.R. 144, at p. 161-3; G. V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution*, 2nd ed. (Toronto: Canadian Tax Foundation, 1981), at p. 83; Peter Hogg, Constitutional Law of Canada, 5th ed., looseleaf, (Toronto: Carswell, 2010), at ch. 31.2.

[17] I agree with and adopt the following passage from the application judge's reasons rejecting this argument, at para. 95:

> The fact that sign owners may recoup the tax in their overall pricing structure, competitive and other factors permitting, is no ground for classifying the tax as an indirect tax. The fact that the tax is a cost of carrying on business which may compel the sign owners to try to recover it from customers does not mean that it is, for constitutional purposes, not exacted from the very person who it is intended and expected would pay it.

[18] In *Reference re Quebec Sales Tax*, [1994] 2 S.C.R. 715 at pp. 725-27, the Supreme Court held that the fact that the taxed party may seek to pass on the economic consequences of the tax, more or less successfully, is not the defining feature of the legal "passing on" requirement. The legal nature of the tax is to be assessed by asking the question posed by Rand J. as stated above: does the tax "cling" as a burden to the unit of production "in the sense that its amount attaches to the good and moves together with the good through the chain of supply"? To repeat, the annual tax at issue here may increase Pattison's and OMAC's cost of doing business and those parties may therefore charge more for the product they

sell. However, the annual tax is not imposed on a unit of advertising space sold by the appellants and it lacks the “clinging” quality that is the hallmark of an indirect tax.

[19] The Sign Tax by-law is distinguishable from the tax at issue in *Ontario Home Builders’ Association v. York Region Board of Education*, [1996] 2 S.C.R. 929 which dealt with a levy on new residential dwelling units to cover education capital costs. The levy, imposed on the developer, was determined by the number of units being sold. For that reason, it was found to fit the definition of an indirect tax in that it was rated to a unit of the commodity, imposed when the commodity is in course of being marketed, and would therefore naturally cling as a burden to the unit or the transaction presented to the market.

[20] I agree with Toronto that the tax at issue here is very similar to the annual fee imposed on signs that was at issue in *Urban Outdoor Trans Ad. v. Scarborough (City)* 52 OR (3d) 607, at para. 39:

> The annual fees involved in this case, if not fees, are similar to a land tax and, in my view, would more properly be considered to be direct taxation. The annual fee is paid in relation to permanent fixtures within the City. It is not tied to the number of times that the billboard space is sold to an advertiser. The annual fee is not targeted at any commodity. These billboards are used as part of national advertising campaigns. The fees do not cling as a burden to these advertising campaigns. There was no evidence that the annual fee was demanded from the sign companies in the expectation and intention that they could indemnify

> themselves at the expense of these national advertisers. The fact that the companies might attempt to recoup the fee in their overall pricing structure did not make it an indirect tax. [citations omitted]

[21] I conclude, accordingly, that the application judge did not err in finding that the Sign Tax by-law did not impose an indirect tax.

(2) Is the by-law discriminatory?

[22] The Sign Tax by-law contains a long list of exemptions for various signs including signs owned by the Crown, Crown corporations, boards and commissions, education boards, universities and other post-secondary institutions, hospitals, nursing homes and the City of Toronto: see s. 771-78.

[23] Pattison's attack on the by-law as discriminatory focuses on the exemption for "an Owner who has entered into a revenue sharing agreement with the City of Toronto." Toronto has a revenue sharing agreement with Astral Media Outdoor ("Astral"), Pattison's competitor, whereby Astral supplies for public use "street furniture" – transit shelters, benches, garbage containers, public washrooms and information kiosks - and is permitted to sell space on these structures for advertising. Toronto receives not only the benefit to its residents of the facilities provided by Astral but also a share of the advertising revenue. This represents a significant source of revenue for Toronto.

[24] Pattison complains that Astral has an unfair competitive advantage because it does not have to pay the third party sign tax. This, Pattison submits, constitutes a form of discrimination that renders the by-law vulnerable to attack.

[25] The application judge properly focussed on the applicable legal test for municipal discrimination laid down by the Supreme Court of Canada in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 259:

> The rule pertaining to municipal discrimination is essentially concerned with the municipality's power. Municipalities must operate within the powers conferred on them under the statutes which create and empower them. Discrimination itself is not forbidden. What is forbidden is discrimination which is beyond the municipality's powers as defined by its empowering statute. Discrimination in this municipal sense is conceptually different from discrimination in the human rights sense; discrimination in the sense of the municipal rule is concerned only with the ambit of delegated power.

[26] In my view, the application judge correctly concluded that Pattison failed to demonstrate that the exemption for revenue sharing arrangements amounts to discrimination under that test.

[27] The *City of Toronto Act*, s. 267 specifically authorizes Toronto to provide for exemptions from taxes. Section 10(1) provides that "a by-law under this Act may be general or specific in its application and may differentiate in any way or on any basis the City considers appropriate." The application judge carefully considered the evidence as to the rationale for the revenue sharing exemption.

He found that the exemption was not arbitrary or improperly motivated and that it was rationally connected to a legitimate municipal purpose.

[28] The application judge described the Sign Tax by-law, at para. 142, as “one of several policy initiatives relating to signs and billboards and that, while seeking to raise revenues, the City also had to balance a number of competing interests, claims and other policy objectives.” These policy objectives include not only raising revenue for municipal purposes, but also controlling and regulating the display of signs and enhancing the quality and character of shared public spaces. The revenue sharing exemption allows Toronto to enter an arrangement that significantly benefits the city and its residents. Toronto is able to gain both substantial revenue and the provision of physical structures and facilities for the use and enjoyment of its residents that also enhance the city’s visual and physical qualities.

[29] The fact that this arrangement may give Astral a competitive advantage over Pattison renders neither the by-law nor the exemption vulnerable to attack. The revenue sharing agreement with Astral is simply a different arrangement, fully authorized by the Act and the by-law, that permits Toronto to advance and achieve legitimate municipal objectives.

(3) Are signs that existed on the date the by-law was enacted exempt from the tax?

[30] OMAC submits that existing signs were "grandfathered" and not subject to the tax because of the *City of Toronto Act*, s. 110.

> **Advertising devices**
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> **110.** (1) A City by-law respecting advertising devices, including signs, does not apply to an advertising device that was lawfully erected or displayed on the day the by-law comes into force if the advertising device is not substantially altered, and the maintenance and repair of the advertising device or a change in the message or contents displayed is deemed not in itself to constitute a substantial alteration.
>
> **Lien for costs and charges**
>
> (2) All costs and charges incurred by the City for the removal, care and storage of an advertising device that is erected or displayed in contravention of a City by-law are a lien on the advertising device that may be enforced by the City under the *Repair and Storage Liens Act*.

[31] The application judge accepted OMAC's argument. He held, at para. 152, that the "narrow question of interpretation" was whether the Sign Tax by-law was a by-law "respecting advertising devices, including signs" and that "the answer is unequivocally yes." The application judge noted that the phrase "in respect of" had consistently been given very wide scope. He rejected Toronto's argument that properly read, s. 110 only applied to by-laws regulating or restricting signs, stating, at paras. 159-60, that if the legislature had intended to limit the reach of s. 110, more specific language to that effect was required.

[32] Toronto appeals the application judge's determination and argues that s. 110 is nothing more than a non-conforming use provision intended to apply to by-laws enacted pursuant to the City's authority to regulate signs. The reach of s. 110, according to Toronto, does not extend to exempt owners of existing signs from paying the tax imposed by the Sign Tax by-law. The Sign Tax by-law is a measure enacted pursuant to the City's authority to raise revenue. It does not render unlawful any sign that was, before its enactment, lawfully erected or displayed and therefore s. 110 has no application.

[33] While I agree with the application judge that the word "respecting" is ordinarily given broad meaning, it is not the only or, in my view, the governing word in s. 110. Section 110 must be read as a whole and in the context of the rest of the Act. There are several aspects of the wording of s. 110 that, when read in the light of the section's apparent purpose and other relevant provisions of the Act, satisfy me that it does not apply to the Sign Tax by-law.

[34] I take as my starting point the source of Toronto's authority to enact the Sign Tax by-law. That authority is to be found in s. 267(1) of the *City of Toronto Act* which gives the City the power "to impose a tax in the City" provided the by-law is a direct tax and satisfies certain criteria specified in s. 267(3). As stated in its preamble, the Sign Tax by-law was enacted "for the purpose of supplementing the revenue of the City".

[35] I agree with Toronto that, given its revenue raising purpose, the Sign Tax by-law was not and could not have been validly enacted under the City's authority, conferred by s. 8(2) 10, to "pass by-laws respecting…Structures, including fences and signs." That is made clear by s. 13 which expressly states that s. 8 does not authorize the City to "impose any type of tax". Section 8(2) 10 is, however, the source of legislative authority for the enactment of the Sign Regulation By-law, a by-law which, as its name suggests, prescribes detailed standards for signs and renders signs that do not comply with those standards unlawful. The Sign Regulation by-law explicitly incorporates s. 110(1) of the Act, protecting from its reach non-conforming signs that were in existence at the time it was enacted.

[36] The language relied on by OMAC in s. 110 specifically tracks the wording of the power to regulate signs conferred by s. 8(2). That section, as I have noted, authorizes the City to "pass by-laws *respecting*…signs." In my view, by using those very words in s. 110, the legislature indicated an intention to relate the grandfathering effect of s. 110 to regulatory by-laws enacted pursuant to s. 8(2). The Sign Tax by-law is not "a by-law respecting signs" pursuant to s. 8(2). It is a by-law "to impose a tax in the City" pursuant to s. 267(1). The fact that it applies to or affects signs does not make it a by-law *respecting* signs within the meaning of the relevant power-conferring statutory provisions.

[37] More generally, the language of s. 110 clearly indicates that it was enacted to deal with the unfairness of subjecting existing signs to newly enacted regulatory standards. It is a classic example of a legal non-conforming use provision that is designed to protect a property owner who has erected a structure in reliance on existing municipal standards from being subjected to standards that did not exist at the time the structure was erected. See, for example, Ian MacF. Rogers and Alison Scott Butler. *Canadian Law of Planning and Zoning*, loose-leaf, 2nd ed. (Toronto: Carswell, 2009), at para. 6.2.1:

[38] Section 110 operates to exempt signs that were "*lawfully* erected or displayed on the day the by-law comes into force". The word "lawfully" indicates that its purpose is to deal with the regulation of signs and the application of the standards that the City has prescribed for lawful signs. Similarly, the reference to "substantial alteration" indicates that the purpose of s. 110 is to deal with the problem of changing standards in relation to existing uses, an issue commonly encountered with non-conforming uses. Subsection 110(2), allows the City to recover the cost of removing non-complaint signs, which confers a power that coincides with the regulation of signs and the prescription of regulatory standards. In my view, the references to signs that were "lawfully erected or displayed", to "substantial alteration" and to recovering the cost of removal of non-compliant signs all point to regulation of signs, not taxation.

[39] I also agree with the submission that the powers conferred by the *City of Toronto Act* should be read in a generous fashion so as to enable the City to meet the needs of its residents and to provide them with good government. To apply the legal non-conforming use provision to the Sign Tax by-law would represent a significant limitation on the powers of the City to raise revenue. There is nothing in the provisions of the Act conferring the power to impose taxes limiting that power by excluding the imposition of taxes on things that already exist at the time a taxing by-law is enacted. In my respectful view, to read s. 110 as limiting the City's revenue generating powers in the manner suggested by OMAC is not required by the specific language of s. 110. Moreover, when read in the light of ss. 8(2) and 267(1), such a reading would be contrary to the overall purpose and scheme of the Act.

[40] For these reasons, I conclude that the application judge erred in holding that signs existing at the time the Sign Tax by-law was enacted are "grandfathered" and not subject to tax. Accordingly, I would allow Toronto's appeal on this issue.

[41] Given my conclusion on that issue it is not necessary for me to consider the related issue of the actual date the Sign Tax by-law came into effect.

DISPOSITION

[42] For these reasons, I would dismiss the appeals of Pattison and OMAC, but allow Toronto's appeal from that portion of the judgment holding that the *City of Toronto Act*, s. 110, exempts from tax signs existing at the date the Sign Tax by-law was enacted. I agree with the Epstein J.A. that the Toronto's appeal against the sealing order should also be allowed.

[43] If the parties are unable to agree as to costs, we will receive brief written submissions.

"Robert J. Sharpe J.A."
"I agree K. Feldman J.A."

Epstein J.A.:

[44] I am in agreement with the reasons and disposition of my colleague, Sharpe J.A., concerning the first three issues. Consequently, my reasons will address only the fourth issue.

[45] In my view, the application judge erred in law by granting the sealing order. I would allow the City of Toronto's appeal on this issue.

[46] Pattison's evidence included financial information pertaining to its outdoor sign inventory that Pattison identified as being proprietary, confidential and commercially sensitive. At the outset of the hearing, the parties entered into a confidentiality agreement that allowed Pattison to produce this documentation on a confidential basis. This agreement was without prejudice to Pattison's right to seek a sealing order from the court or the City's right to resist such an order.

[47] In the course of the hearing of the application neither counsel made specific reference to the documents in issue. However, they were marked as exhibits, and certain witnesses for Pattison relied on the information in the documents to support the evidence they provided to the court in affidavits sworn in support of Pattison's challenge to the Sign Tax By-Law.

[48] At the conclusion of the hearing, Pattison moved for an order sealing the documents from public access. No members of the media were notified of the application.

[49] The foundation of Pattison's sealing order request, as described by the application judge, is that "the public dissemination of this financial information would cause significant harm to its competitive position and business." The City took issue with this and also submitted that the information was necessary for the public to understand the outcome of the application.

[50] The application judge, in his reasons for granting the order, made no reference to the test for granting a confidentiality order. Rather, he responded to the competing arguments and concluded that Pattison had "an important interest in the preservation of its proprietary and confidential information" and that because the evidence in issue was not "determinative of the constitutional question", keeping it confidential would not adversely affect the public's ability to comprehend the proceedings and their outcome.

[51] A request to have exhibits sealed implicates the open court principle, and must be approached with great care. The application judge was required to apply the two-step approach identified in a series of cases from the Supreme Court of Canada involving non-publication orders and/or sealing orders: see *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 26; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at paras. 45-46; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at para. 32. This approach is commonly referred to as the *Dagenais/ Mentuck* test.

[52] In *Mentuck*, Iacobucci J. said, at para. 32:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[53] Under the controlling jurisprudence, before the court can address the degree to which the public's interests may be harmed by the order, the party seeking the order must present evidence that demonstrates that the order is necessary to prevent a serious risk to an important interest expressible in terms of a public interest in confidentiality: see *Sierra Club*, at para. 55.

[54] It has been held that *Mentuck's* requirement that non-publication and sealing orders are potentially justifiable only if "necessary in order to prevent a serious risk to the proper administration of justice", may refer to a serious risk to public interests other than those that fall under the broad rubric of the "proper administration of justice": *Sierra Club of Canada*, at paras. 46-51, 55. However, the interest jeopardized must have a public component. As Doherty observed in *M.E.H. v. Williams*, 2012 ONCA 35, at para. 26, there are other interests that

may be considered essential components of the “proper administration of justice”, such as access to the courts.

[55] However, as was observed in *Williams*, the focus must be on how the motion is framed. Where the interest in confidentiality engages no public component, the inquiry is at an end. There is no basis upon which to proceed to the second branch of the test where factors such as the nature of the order’s impact on public access and other societal interests become valid considerations.

[56] If the issue relied upon to seek a confidentiality order does involve a public component, the evidence must be carefully examined. The evidence relied upon to satisfy the first branch of the test must be “convincing” and “subject to close scrutiny and meet rigorous standards”: see *R. v. Canadian Broadcasting Corp.*, 2010 ONCA 726, 102 O.R. (3d) 673, at para. 40; *R. v. Toronto Star Newspapers Ltd.* (2003), 67 O.R. (3d) 577 (C.A.), at para. 19, aff’d 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 41; *Williams*, at para. 34; see also *Ottawa Citizen Group Inc. v. R.* (2005), 75 O.R. (3d) 590 (C.A.), at para. 54. This demanding evidentiary standard is in keeping with the well-recognized serious implications of the order.

[57] Pattison framed its need for the sealing order on the basis that disclosure would imperil its commercial interests. The only evidence in support of this assertion is a statement in the affidavit of Randy Otto that the information under

seal is “highly sensitive and confidential and can be used by Pattison Outdoor’s competitors, advertisers and land owners to Pattison Outdoor’s disadvantage.”

[58] In my view, this evidence falls short of allowing Pattison to get past the first branch of the *Mentuck* test. There is no indication of how the information could be used against Pattison’s business or how great a risk disclosure would present.

[59] Absent a supportable finding sufficient to pass the first branch of the test, the order could not have been made under the controlling jurisprudence.

[60] I would therefore allow the City’s appeal on this issue and set aside the sealing order.

“G.J. Epstein J.A.”

Released: April 02, 2012