REDACTED VERSION
QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2022 SKQB 129**

Date: 2022 05 17
Docket: QBG 1793 of 2021
Judicial Centre: Regina

BETWEEN:

T.Z.

APPLICANT
(PROPOSED PLAINTIFF)

- and -

P.V.R.

RESPONDENT
(PROPOSED DEFENDANT)

Counsel:

Anderson J. Stodalka — for the applicant
Daniel P. Kwochka — for the respondent

FIAT — ROBERTSON J.
May 17, 2022

INTRODUCTION

[1] This decision considers the balance to be struck between the open court principle and privacy of litigants.

[2] T.Z., as proposed plaintiff [Applicant], seeks an order sealing the court file and anonymizing the names of the parties. For the reasons which follow, the application is dismissed.

BACKGROUND

[3] On August 18, 2021, the Applicant filed a without notice application seeking an order to seal the court file and to anonymize the names of the parties. A draft statement of claim was filed as an exhibit to the affidavit of the Applicant. The claim seeks damages from P.V.R. as the proposed defendant [Respondent] alleging sexual harassment in the workplace and sexual assault.

[4] On August 18, 2021, McCreary J. dismissed the without notice application, stating that it should be brought with notice with leave to seek a private hearing of the with notice application.

> Because the proposed defendant is represented by counsel and is in a position to respond to this application, this matter should be brought with notice. Given the subject matter of the application, leave is given for proposed plaintiff's counsel to contact the local registrar to set a time for a private hearing of the matter, with both parties being given an opportunity to make submissions respecting whether the file should be sealed, the parties anonymized and whether a publication ban is appropriate.
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> [emphasis in original]

[5] No with notice application was ever filed.

[6] On October 7, 2021, Respondent's lawyer, Mr. Kwochka, filed a letter stating that he and Applicant's lawyer, Mr. Stodalka, had agreed the application be scheduled for hearing in regular Chambers on Tuesday October 19. On October 19, 2021, the application was adjourned by consent to November 9, 2021.

[7] On November 9, 2021, the lawyers appeared before Mitchell J. who adjourned the application *sine die* for the purpose of ensuring compliance with General Application Practice Directive *#3*, titled Discretionary Orders Restricting Media

Reporting or Public Access. This practice directive requires notice to the media of any application seeking to restrict public access to the court or a court file.

[8] On March 3, 2022, notice to the media was provided of the hearing scheduled for March 22, 2022. No representative of the media appeared at the hearing on March 22. After hearing argument from the parties, decision was reserved.

ISSUES

[9] The application raises the following issues:

1. Should the court file be sealed?

2. Should the names of the parties be anonymized by initials?

POSITION OF THE PARTIES

[10] The Applicant argued that her privacy rights entitled her to both a sealing order and anonymizing of names to prevent identification of the parties. The Applicant argued that the legislative policy evidenced by s. 486.4 of the *Criminal Code*, RSC 1985, c C-46, which bans publication of information that might identify victims of sexual assault, applies equally to civil actions alleging sexual assault. The Applicant relied upon decisions ordering publication bans or anonymizing names in civil actions involving allegations of sexual assault: *Fedeli v Brown*, 2020 ONSC 994 at para 9, 60 CPC (8th) 417 [*Fedeli*]; *J.B. v C.B.* (March 31, 2016) Regina, QBG 2359/2015 (Sask QB) [*J.B.*]; *S.L. v Slatter*, 2016 ONSC 5065 [*S.L.*]; and *Li v Sing Tao Daily Ltd.*, 2011 ONSC 6197 [*Li*].

[11] The Respondent opposed the application, saying the application did not satisfy the *Dagenais/Mentuck* test 9*Dagenais v Canadian Broadcasting Corp.*, [1994]

3 SCR 835 [*Dagenais*]; *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442 [*Mentuck*]). The application fundamentally misapprehends the test by supposing the potential risk of future harm resulting from gossip is sufficient to justify restriction on public access. If a serious risk to an important public interest did arise, then other measures might be considered as required to mitigate any harm.

[12] The Respondent also disputes that the action involves sexual assault. The Respondent says it was a consensual office affair which ended unhappily. The alleged lack of consent is based upon the employment relationship. This is admitted in the Applicant's materials, for example the Applicant's brief at paragraphs 5-6:

> 5. The Plaintiff says any consent she may have given to the sexual relations was the result of the power imbalance between the two of them. Further or in the alternative, the Defendant knew or reasonably ought to have known that the Plaintiff only consented to the sexual relations because of her fear that she would lose her employment. nce [sic] between the two of them,
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> 6. Accordingly, she did not truly consent to the sexual relations.
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> [August 18, 2021 Brief of Law on Behalf of the Plaintiff with Respect to her Sealing Order Request]

ANALYSIS

[13] The Supreme Court, in *Sherman Estate v Donovan*, 2021 SCC 25 at para 1, 458 DLR (4th) 361 [*Sherman Estate*], recognized "… As a general rule, the public can attend hearings and consult court files …". The test to be applied in deciding whether to restrict access is that set out in *Sherman Estate* at para 38.

[14] I will review the open court principle and the test in more detail below, along with the cases relied upon by the Applicant, before turning to the two issues in which I will apply that test.

Open Court Principle

[15] James Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders*, loose-leaf (Rel 2, 2008) (Toronto: Thomson Carswell, 2008), wrote at 1-1:

> In Canadian courts, openness is the rule. The exceptions are publication bans, private hearings and sealing orders, ordering granting anonymity by use of pseudonyms and other similar relief. The openness rule is also entrenched and accepted as vital in a democracy.

[16] The Supreme Court of Canada has repeatedly affirmed the open courts principle as the rule, subject to certain exceptions: *A.G. (Nova Scotia) v MacIntyre*, [1982] 1 SCR 175*; Canadian Newspapers Co. v Canada (Attorney General),* [1988] 2 SCR 122 at 129; *Dagenais*; *Mentuck*; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 SCR 332; *Canadian Broadcasting Corp. v Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19; *Endean v British Columbia*, 2016 SCC 42 at paras 66 and 83 – 85, [2016] 2 SCR 162; and *Sherman Estate*.

[17] This prevailing view has not been without criticism. For example, Jane Bailey and Jacquelyn Burkell called for a rebalancing of the competing public interests in open courts and protection of privacy in "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" online: (2017) 48 Ottawa L Rev 1 <https://ir.lib.uwo.ca/fimspub/159> (17 May 2022).

[18] The courts are sensitive to these competing interests. For example, the Courts of Saskatchewan have collaborated in publishing "Public Access to Court Records in Saskatchewan: Guidelines for the Media and the Public", updated in 2020 and available on the website www.sasklawcourts.ca. This publication explains the open court principle, summarizes existing restrictions on public access, explains how to make

an access request for court records and how to apply to restrict access to court proceedings or records.

Test

[19] In *Sherman Estate*, the Supreme Court set aside a sealing order on the estate file of a prominent couple who had been murdered, finding that the privacy rights involved did not outweigh the open court principle. In doing so, the court reaffirmed the open court principle while modifying the *Dagenais/Mentuck* test from a two-step to three-step analysis.

> [1] 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.
>
> [2] Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.
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> [3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

. . .

A. The Test for Discretionary Limits on Court Openness

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p 189; *A.B. v Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 SCR 567, at para 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53 [*Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 2002 SCC 41]. Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(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.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

Onus

[20] The Applicant has the onus of satisfying the test to displace the open court principle which presumes public access to courts and court records. So in *A.G. v Saskatchewan*, 2022 SKQB 11 at para 36, 77 CPC (8th) 330, Mitchell J. wrote:

> [36] It is critical, as well, to underscore that the applicant bears the onus to demonstrate why the orders he seeks are necessary in this case and should displace the principle that court proceedings are

> presumptively open. See: *Sherman Estate* at para 45 and *101114386 Saskatchewan Ltd. v Hearing Panel of the Financial and Consumer Affairs Authority*, 2013 SKCA 122 at para 12, 427 Sask R 25.

Review of cases cited

[21] In *Fedeli,* Faieta J. made a publication ban of the name of a woman alleged to have been the subject of sexual harassment by a prominent person:

> [9] The privacy interests of a person who makes an allegation of sexual assault or sexual harassment in a civil proceeding is high, particularly when she has not initiated the civil proceeding. A complainant may be subject to unnecessary trauma and embarrassment, both for herself and her family, if she is identified. Without protection of her privacy interests, a person who has been sexually assaulted or sexually harassed may be unwilling to come forward. Further, the failure to afford such protection to a person alleging sexual assault or sexual harassment may deter other persons from coming forward to report sexual misconduct. Such interests are recognized and protected in a criminal proceeding as s. 486.4 of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that an order banning publication of any information that could identify a victim of sexual assault is mandatory if sought by the Crown or victim. In my view, the policy reflected by s. 486.4 of the *Criminal Code* is equally applicable in these civil proceedings.
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> [10] Having reviewed the terms of the Order, I am satisfied that the Order is not overly broad and that the relief sought is proportionate to the risk of harm to the Complainant.
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> [11] Finally, I find that the salutary effects of the Order far outweigh its deleterious effects. The Order will ensure that the Complainant is not placed in the position of having to suffer a gross violation of privacy by having her identity and description of very sensitive events publicly revealed, not just in this Court but also very broadly, whether through media reports or online statements. The deleterious impacts of this Order on freedom of expression and freedom of the press are not apparent particularly given the narrow scope of the Order sought. The open court principle does not serve to feed the insatiable prurient interests of the few. The public's ability to understand the evidence and findings in this case will not be compromised by withholding the identity of the Complainant.

[22] *Fedeli* was cited in *Sherman Estate* at para 77. *Fedeli* is distinguishable on the facts from this application in that the woman for whom protection was sought had not initiated the civil action. But *Fedeli* does recognize the privacy interest of an alleged victim of sexual harassment or sexual assault as an important public interest.

[23] In *J.B.*, Brown J. dismissed an application to seal the file and make a blanket prohibition ban, where the mother in a fractious custody battle persisted in making allegations against the father of sexually abusing the children after the investigating authorities had concluded the allegations lacked substance. Brown J. did, however, order anonymization of materials on the court file to avoid identification of the children and banning any publication that would identify the children. Again, this decision is distinguishable in that it involved children who are considered vulnerable persons and to whom courts owe a special duty under the doctrine of *parens patriae* (parent of the people). What is noteworthy is that the court preferred and fashioned an alternate and more limited order to provide protection.

[24] In *S.L.*, Mew J. granted an order permitting the plaintiff to use initials in pleadings as a form of publication ban. The endorsement does not provide any context, so the decision is of limited relevance.

[25] In *Li*, Master Sproat addressed an application to require the plaintiff in a wrongful dismissal action to provide further answers to questioning. The decision records that one of the reasons given as cause for dismissal from employment was the plaintiff's repeated errors in publishing material subject to publication bans. I fail to see the relevance of this decision to the issues in this case.

[26] I will add one case not cited, *Ricard v The University of Windsor*, 2021 ONSC 5877, in which Favreau J., on judicial review of a decision by a university

adjudicator that the applicant committed sexual assault, ordered a publication ban of any information that could identify the victim. In doing so, the court at para. 6 applied the test from *Sherman Estate*:

> [6] I am satisfied that this is an appropriate case for a publication ban and sealing order and that it meets the recently restated test in *Sherman Estate v. Donovan*, 2021 SCC 25. As held by the Supreme Court, the test requires the court to find that:
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> a. Court openness poses a serious risk to an important public interest;
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> b. The order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent this risk; and
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> c. As a matter of proportionality, the benefits of the order outweigh is negative effects.

Should the court file be sealed?

[27] The important public interest identified is the Applicant's privacy. The risk is harm to the Applicant by revealing information about her private life. As her brief at paragraph 17 explains:

> 17. A sealing order is necessary in order to prevent any future harm to the Plaintiff. The medical community in Saskatchewan is small. In these smaller communities, information about the private lives of individuals can spread quickly.

[28] In *Sherman Estate* at para 74, the Supreme Court distinguished between ordinary intrusions on privacy and those intrusions which risk harm to the dignity of the individual:

> [74] Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more

> rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

[29] Disclosure of an office affair is embarrassing, but does not, without more, rise to the level justifying restriction on access to court records. As the Supreme Court observed in *Sherman Estate* at para 84, "… individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness …".

[30] But my decision is based upon and, for the purpose of this application, accepts the Applicant's pleading of sexual harassment and sexual assault. Privacy rights are an important public interest. The privacy interests of a person who makes an allegation of sexual assault or sexual harassment in a civil action are high. I accept that disclosure of such information "strikes at the subject's more intimate self". Therefore, the first part of the test is satisfied.

[31] However, I am not satisfied that sealing of the court file is necessary to prevent serious risk to the Applicant's privacy interests.

[32] First, the very reason given by the Applicant for concern – that the medical community is small and gossip spreads – brings into question whether the proposed measures would be effective. I take note, however, of the caution in *Sherman Estate* at para 81 about the utility of measures to limit further spread of information:

> [81] It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of

> privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. … The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible …

[33] Second, unless court proceedings were closed, which was not requested and would be a drastic infringement on the open court principle, the action will be heard in public so information would be revealed.

[34] Third, as illustrated in *J.B.*, other reasonable alternative measures exist to mitigate against this risk. More limited measures will usually be preferred.

[35] With respect to the final part of the test, I am also not satisfied that any benefit from sealing the court file is proportional to its negative effects on the open court principle.

[36] The competing interests in this case are both important public interests. Both have a constitutional basis in rights guaranteed by the *Canadian Charter of Rights and Freedoms.* Section 2(b) "… freedom of the press and other media of communication" apply to the open court principle. Section 7 "… security of the person …" and s. 8 protection against "… unreasonable search and seizure" apply to individual privacy. In balancing these two important public interests, I am not satisfied that the proposed sealing order, which removes any access to the court record, is proportional.

[37] I therefore dismiss this part of the application.

Should the names of the parties be anonymized by initials?

[38] Having accepted the Applicant's privacy interest as an important public interest, I need only consider whether the proposed order is necessary because no other reasonable alternative measures are available and whether the benefit of the proposed order is proportional to its negative effects.

[39] For the same reasons stated in addressing the first question, I am not satisfied that an order to anonymize all pleadings is necessary or proportional.

[40] Judges can and do anonymize published decisions to protect the privacy interests of individuals, including in cases involving allegations of sexual assault or where children or other vulnerable persons are involved, by redacting names and substituting initials. While this is sometimes required by law, for example under s. 486.4 of the *Criminal Code*, other times judges exercise their discretion to do so on a case-by-case basis where they decide it is justified. I find that discretionary authority is a reasonable alternative measure which is available and which I will employ in this decision. Other judges who hear aspects of the case as it proceeds may exercise their discretionary authority as they see fit and circumstances warrant.

[41] I therefore dismiss this second part of the application.

COSTS

[42] The Applicant did not seek costs. The Respondent asked for costs if the application was dismissed. I make no award of costs, having regard to the relative novelty (based on lack of Saskatchewan cases) and the importance of the issue.

SUMMARY

[43] The application is dismissed without any award of costs. The names of the parties will be redacted in the published decision with initials substituted.

J.
D.N. ROBERTSON