COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Postmedia Network Inc. v. Named Persons,* 2022 BCCA 431

Date: 20221221
Dockets: CA48404; CA48405

Docket: CA48404

In the Matter of an Application by Postmedia Network Inc., doing business as *The Vancouver Sun* Newspaper and *The Province* Newspaper

Between:

Postmedia Network Inc.

Appellant
(Applicant)

And

Named Persons

Respondents
(Plaintiffs)

And

Attorney General of Canada

Respondent
(Defendant)

- and -

Docket: CA48405

Between:

Postmedia Network Inc.

Appellant
(Applicant)

And

Named Persons

Respondents
(Plaintiffs)

And

Attorney General of Canada

Respondent
(Defendant)

Sealed In Part

Corrected Judgment: The banner on page 2 and the text of the judgment at para. 46 were corrected on January 9, 2023.

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Frankel
The Honourable Madam Justice MacKenzie

On appeal from: Orders of the Supreme Court of British Columbia, dated June 28, 2022 and June 30, 2022 (*In the matter of an application by Postmedia Network Inc.*, Vancouver Dockets S2013431 and S225321).

Counsel for Postmedia Network Inc.:	S. Dawson V. Luxford
Counsel for Named Persons:	E. Patel
Counsel for the Attorney General of Canada:	C. de los Reyes
Place and Dates of Hearing:	Vancouver, British Columbia October 27 and 28, 2022
Place and Date of Judgment:	Vancouver, British Columbia December 21, 2022

Written Reasons of the Court

Summary:

A reporter from The Vancouver Sun was denied access to a court proceeding in which the judge had pronounced orders sealing the court file, banning publication of information, and requiring the action to proceed in camera (in private). Postmedia Network Inc., the newspaper's publisher, attempted to file an application in the Supreme Court registry seeking access to the materials before the court that had led to the orders restricting court openness

being granted, for the purpose of making a further application to vary or vacate those orders. The judge directed that the application not be accepted, and that Postmedia could instead file an originating application to receive an audience with the judge. Postmedia appeared before the judge as directed, and the judge dismissed its application with brief oral reasons. Postmedia appeals, alleging that the process taken was procedurally unfair and that the reasons are inadequate and reveal an error of law.

Held: The appeal is dismissed. The procedure directed by the judge did not result in procedural unfairness to Postmedia, as Postmedia's application was heard. The sealed materials provided by the respondents are an intelligible basis for our review of the judge's reasons. The present case is the rare and exceptional one in which revealing the very nature of the interests at stake would risk disclosing them.

Written Reasons of the Court:

Introduction

[1] It is well established that the open court principle, essential to the rights of freedom of expression and freedom of the press under s. 2(b) of the *Charter*, is fundamental to our democracy and to the rule of law.

[2] Like all rights, these rights are not absolute. In certain circumstances, public access to confidential and sensitive information will endanger and not protect the integrity of our justice system: *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 31 at para. 3. Courts have discretion to make orders limiting court openness where disclosure of such information would pose a serious risk to an important public interest; where the order sought is necessary to prevent this serious risk because reasonable alternative measures will not; and where the benefits of the order outweigh its negative effects: *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38 [*Sherman*].

[3] In addition, the Supreme Court of Canada has been clear that the presence of certain types of information effectively removes the discretion of courts to disclose it. Yet, even in these situations, courts must strive to limit the open court principle as little as possible by ensuring that as much information as can safely be shared is made public.

[4] This appeal engages the question as to whether there may be a rare and extraordinary circumstance in which, due to the highly sensitive nature of protected information and the likelihood of harm as a result of its disclosure, the open court principle can be legitimately limited to the extent that a proceeding is conducted in near-total secrecy.

In such a rare and extraordinary circumstance, disclosing the most basic information – the very nature of the privilege at stake – would amount to a disclosure of the protected information itself.

[5] In such a situation, the reasons of a judge for denying media access to a proceeding will, of necessity, be unsatisfactory, because the very basis for the judge's reasoning will be part of the protected information. What is the role of an appellate court in reviewing the adequacy of such reasons? How can such a decision, which limits guaranteed rights and freedoms, be justified to the public – or can it?

[6] This appeal also engages questions as to the proper procedure courts and judges should follow where the media seeks standing in a sealed and *in camera* proceeding for the purpose of making an application to vary or vacate orders restricting court openness.

[7] Specifically, we are confronted with the need for a procedure to govern a situation where, by virtue of the fact that there is *no* information publicly available about a proceeding, the media must make a preliminary application for access to materials in order to understand the very basis for the orders restricting court openness, and consequently to make meaningful submissions in a further application to vary them. Where the lower court is either unwilling or unable to disclose *any* information about a proceeding to the media on such a preliminary application, what is the role of the appellate court?

[8] To this end we must balance the recognition that the court below has the inherent jurisdiction to control its own process and access to its own files, with the need for orders restricting court openness to have legitimacy and accountability to the rule of law. A procedure that puts an order restricting court openness beyond meaningful appellate review cannot be supported.

[9] We acknowledge that the situation before us is unique and thus presents us with the challenge of "building the airplane as we fly it".

Background

[10] On 27 June 2022, a reporter with The Vancouver Sun sought to attend court proceedings in the civil action *Named Persons v. Attorney General of Canada* (the "Named Persons Action"). The reporter was alerted to the case because, as is proper in matters of this kind, it appeared on the publicly available hearing list for the day in question.

[11] The reporter was denied access to the courtroom. It was later confirmed that Chief Justice Hinkson of the Supreme Court of British Columbia, at some point prior to that date, had pronounced restrictive orders sealing the court file, banning publication of information, and requiring the action to proceed *in camera* (the "Restrictive Orders"). The Restrictive Orders are themselves sealed.

[12] On 28 June 2022, the newspaper's publisher, Postmedia Network Inc. ("Postmedia"), attempted to file an application in the Supreme Court registry seeking a) access to the pleadings in the Named Persons Action; b) all materials before the court in connection with the original application(s) that gave rise to the Restrictive Orders; and c) access to the digital audio recordings ("DARs") of the proceedings in connection with said orders. Postmedia also sought standing in the Named Persons Action, if necessary for the purposes of its application.

[13] Postmedia's application stated that the access it sought to materials was solely for the purpose, if considered appropriate upon review of the materials, of advancing a further application to have the Restrictive Orders vacated, terminated, modified or varied.

[14] Chief Justice Hinkson advised via registry staff that the court would not accept the application for filing, but he would hear counsel on 30 June 2022. Postmedia accordingly filed a requisition in the Supreme Court registry in the Named Persons Action seeking an audience for directions on that date.

[15] On 29 June 2022, registry staff advised Postmedia that the requisition had been erroneously filed as Postmedia "d[id] not have standing" in the Named Persons Action, and that Hinkson C.J.S.C. had directed that it be unfiled (the "June 29 Direction"). He had further directed that if Postmedia wished to appear, it could bring an originating application styled "*In the Matter of an application by Postmedia Network Inc. doing business as The Vancouver Sun Newspaper and The Province Newspaper v. Named Persons*".

[16] On 30 June, Postmedia filed a requisition styled as directed. This resulted in the opening of a separate court file from the Named Persons Action.

[17] Counsel for Postmedia appeared before Hinkson C.J.S.C. in chambers on 30 June 2022. Upon the judge's direction, counsel provided the Court with its re-styled originating application seeking relief substantially the same as that in its first application, with the difference that Postmedia now definitively sought standing in the Named Persons Action for

the purposes of pursuing access to materials. Counsel was then directed to give brief submissions.

[18] After these submissions, the judge dismissed Postmedia's application on the merits as well as its request for an order granting it standing in the Named Persons Action (the "June 30 Order").

[19] In oral reasons, the judge stated that, in making the Restrictive Orders, he gave careful consideration to the principles discussed in *Dagenais v. Canadian Broadcasting Corporation*, 1994 3 S.C.R. 835, and *R. v. Mentuck*, 2001 3 S.C.R. 442. He further stated that, given the appellate authorities and other decisions from the Supreme Court of Canada respecting the nature of the application before him, he had concluded that the matter before the Court is one of those rare and exceptional cases where *Dagenais* and *Mentuck* principles do not apply.

[20] Postmedia appeals the June 30 Order dismissing its application on the merits, alleging the judge's reasons were inadequate in the circumstances and that the judge erred in stating the *Dagenais*/*Mentuck* principles do not apply to the Named Persons Action, on the basis that the *Dagenais/Mentuck* framework applies to *every* discretionary order restricting court openness.

[21] Postmedia further appeals Hinkson C.J.S.C's June 29 Direction that its application in the Named Persons Action not be accepted for filing and that its requisition in that action be unfiled, alleging that this was done in a procedurally unfair manner without hearing from Postmedia or issuing reasons for judgment.

[22] In the unusual circumstances presented here, Postmedia also seeks an order pursuant to s. 25 of the *Court of Appeal Act*, S.B.C. 2021, c. 6, granting it the relief substantially sought in the court below and permitting it to appear before this Court on a subsequent application to vacate or vary the Restrictive Orders.

[23] Prior to the hearing of the appeals, the respondents Named Persons and Attorney General of Canada ("AG") filed an application to bring fresh evidence of certain documents filed in the Named Persons Action, which represent the record providing the basis for the original Restrictive Orders.

[24] They also applied for 1) an interim order sealing those materials, pending this Court's

hearing of the application and the appeal on its merits; and 2) an order prohibiting the appellant from accessing the materials until or unless otherwise determined by this Court hearing the application and appeal. It was determined that the fresh evidence application and interim sealing order application would be heard by the division hearing the appeals.

[25] The respondents further filed an application to quash the appeal of the June 29 Direction, on the basis that there is no entered order to appeal.

Issues

[26] The issues for the Court on the merits of the appeal are:

1. Is Hinkson C.J.S.C.'s June 29 Direction that Postmedia's June 28 application not be accepted for filing, and that its June 29 requisition be unfiled, a decision that is reviewable by this Court? If not, should this appeal be quashed? If so, was that decision procedurally unfair?

2. Did Hinkson C.J.S.C. err in concluding that *Dagenais*/*Mentuck* principles do not apply to the Named Persons Action, and were the judge's reasons dismissing Postmedia's application on the merits inadequate in the circumstances?

[27] The issues for the Court on the application are:

3. Should the respondents' fresh evidence application be granted, and should the Court grant a continuing sealing order and order directing that the fresh evidence and related submissions be accessible only to the Court and the respondents?

Discussion

[28] Each of the issues, including the respective positions of the parties, is dealt with below.

The June 29 Direction

[29] The AG asks this Court to quash the appeal taken from the June 29 Direction on the basis that the Direction is not an order, or if it is, it resulted in no prejudice. It further argues that because Postmedia does not have standing in the Named Persons Action, it cannot bring an appeal from that proceeding.

[30] Postmedia's position is that, when the judge directed that its application in the Named Persons Action not be accepted for filing, and further directed that its requisition in that action be unfiled, the judge made an order concerning, at least, Postmedia's standing in the Named Persons Action. It says this was an "order of substance" that should be subject to appellate review.

[31] On this basis, Postmedia asks that the respondents' application to quash be dismissed. It cautions this Court against effectively endorsing a practice of unfiling compliant applications in a manner that substantively affects Postmedia.

[32] First, the absence of an entered order is not determinative as to whether an "order" within the meaning of the *Court of Appeal Act* has been made – courts interpret the definition purposefully. This Court considered it to include a refusal to grant leave to file a judicial review application: *Gichuru v. Purewal*, 2021 BCCA 375. Refusing leave to file is effectively what the judge did with respect to Postmedia's application within the Named Persons Action. As was the case in *Gichuru*, such a refusal must usually be accompanied by at least a simple notation on the court file indicating the reason. In this case, the refusal was accompanied by a further direction to file an originating application. This procedure in its totality comprises the June 29 Direction.

[33] Because of the ultimate view we take, we can assume, without deciding, that the entire procedure directed by Hinkson C.J.S.C. was an order subject to appeal, and review it on that basis. We therefore dismiss the respondents' application to quash.

[34] As to prejudice, Postmedia argues that the June 29 Direction separated it from the proceeding and the record in which the Restrictive Orders affecting its rights were granted. It says the "hermetically sealed" proceeding in which its application was heard was an inferior substitute for standing in the Named Persons Action itself. For example, it says this prevented counsel for Postmedia from seeing who the other lawyers in the Named Persons Action were, so as to approach them with a potential agreement that could be brought to the court.

[35] Fundamentally, Postmedia says that where an order limiting court openness is made without notice to the media, the media should generally have standing to challenge it where they can show that they will make submissions not considered in its making that could affect the result: *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at para. 47 [*Manitoba*].

[36] The question is if there was any material difference to Postmedia whether its application was heard by Hinkson C.J.S.C. in the context of the Named Persons Action or in the context of the proceeding initiated by the originating application. We conclude that there was not. The procedure taken was not unfair and did not prejudice Postmedia's rights.

[37] The term "standing" here requires some qualification. While it is quite true that the media should generally be granted standing to challenge orders restricting court openness made without notice, it is for this specific purpose that standing is granted. "Standing" in this context does not mean standing to argue the merits of the action as a party to that action, but standing to bring an application and have a right of audience with the judge who granted the orders.

[38] Postmedia had that opportunity here. Further, the separate proceeding made no difference to its burden before the court, nor would Postmedia necessarily have had any more access to information had its right of audience been granted in the context of the Named Persons Action. It is telling that Postmedia's initial application sought standing in the Named Persons Action only "if necessary…for the purposes of this application". Obviously, standing in the action itself is not the litmus test for whether the media can effectively bring an application to challenge restrictive orders.

[39] Hinkson C.J.S.C. clearly directed as he did for a reason, and it can be inferred that part of the reason was to provide a procedural avenue for Postmedia to be heard while also protecting against inadvertent disclosure of sensitive information. This was a case management decision within the discretion of the judge, as part of the inherent jurisdiction of the court to control its own procedure.

[40] That said, we note that creating a parallel file with an originating application should not be used by a court to marginalize an application by a representative of the media to vary or vacate a restrictive order. The procedure within the parallel file should be just as robust.

[41] Postmedia further argues that the June 29 Direction was procedurally unfair as no notice was given to Postmedia, nor were reasons issued.

[42] Based on our conclusion that Postmedia's rights were not prejudiced by the procedure taken and that the June 29 Direction was part of the court's exercise of inherent jurisdiction, neither reasons nor notice were required. As stated, the reasons are implicit in the choice of procedure. Further, the swiftness of the direction gave Postmedia the opportunity to appear

on June 30, while hearings in the Named Persons Action were ongoing. Notice in this situation may have hindered fairness.

[43] We add the comment below on the minimum level of notice that should be given by courts in the future when a complete sealing order, or when the sealing of a sealing order itself, is being contemplated.

[44] The Supreme Court of Canada has been clear that a judge is not required to post a public notice and seek submissions when considering orders restricting court openness, and in fact is enjoined from "choosing 'worthy' intervenors": *Vancouver Sun* at para. 53. Notice is a matter within the discretion of the judge.

[45] However, as here, if the media independently learns of an *in camera* proceeding, a basic level of notice must be provided to them of the existence of restrictive orders to support their ability to bring submissions on those orders. These requirements are set out in PD-58, Practice Direction on Sealing Orders for Civil and Family Proceedings, which states:

> 8. Where a sealing order directs that the entire court file be sealed, the registry staff must attach the sealing order to the front of the court file, unless the sealing order itself is sealed. Where a sealing order directs that particular documents within the court file be sealed, the registry staff must segregate those documents in a package and attach the sealing order to the front of the package containing the sealed documents.
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> 9. Where a sealing order itself is sealed, the applicant or applicant's counsel must complete the notice in the form attached as Schedule B, and registry staff must attach the notice to the front of the court file.
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> [Emphasis added.]

[46] In this case, it seems that Postmedia's counsel saw no such notice, and at the hearing counsel for the respondents were not able to confirm whether they complied with para. 9 of PD-58. Counsel later advised that, per registry staff, notices of sealed sealing orders are not viewable by members of the public. If this is the case, it does not appear to be consistent with para. 9.

[47] In our view, following this simple direction removes a level of confusion and mystery from the process by confirming the existence of sealing orders that are themselves sealed for members of the public or the media who seek to view these files in the registry. This is the least the court can do to preserve the legitimacy of its orders; the media should not have to

sleuth out their very existence.

[48] We note that the propriety of PD-58 was not raised before us. We have, therefore, not considered whether it is appropriate to deny someone denied access to a file, access to the order sealing the file.

[49] We turn now to the fresh evidence and interim sealing order applications, as integral to our review of the June 30 Order.

The Fresh Evidence and Interim Sealing Order Applications

[50] The respondents jointly sought to put before this Court, by way of a fresh evidence application, materials that provide context for the Restrictive Orders and the record that can clarify the basis for Hinkson C.J.S.C.'s reasons for the June 30 Order.

[51] The respondents also sought interim sealing orders over the fresh evidence and related submissions to make them accessible only to this Court and the Respondents, and an order directing that oral argument at the hearing of the appeal referring to the fresh evidence be made *in camera* and *ex parte* counsel for Postmedia.

[52] We addressed these applications the day before the hearing of the appeals, with counsel for Postmedia and counsel for the respondents in attendance.

[53] Postmedia submitted that these are further discretionary orders restricting court openness, and the respondents must therefore justify them according to the *Dagenais/Mentuck,* and now *Sherman,* framework. It argued the applications amounted to a request for an order preventing Postmedia from seeing material the Respondents rely on to defeat its appeals, which unfairly prejudices it and deprives the court of its full submissions. Postmedia argued that it, or, at the least, its counsel, must be entitled to see and address all the material put before the court, and that the respondents could seek a protective order if the appeals succeed.

[54] It appeared to us that the fresh evidence was necessary in order for this Court to understand the respondents' position and meaningfully exercise its appellate role. It therefore meets the test in *Palmer v. The Queen,* [1980] 1 S.C.R. 759, 1979 CanLII 8. On this basis, we made an order admitting the fresh evidence application.

[55] With regard to the interim sealing and protective orders, and the order that portions of

the hearing addressing the fresh evidence be conducted *in camera* and *ex parte* Postmedia, it appeared that this was the only procedure that would allow us to review the materials without resulting in a *de facto* variation of the Restrictive Orders made by the court below. Without knowing the nature of the protected information, it was not within this Court's discretion to reveal it.

[56] This procedure is not without precedent. When the very information upon which to base submissions is sealed, "preliminary orders may be required to decide what information is provided to the parties and on what terms they are to receive it": *R. v. Canadian Broadcasting Corporation*, ONCA 2008 397 at para. 52 [*CBC*].

[57] A recent case in the Supreme Court of British Columbia dealt with a similar situation in which a media representative sought to unseal a sealed file (*In the Matter of a Search Warrant OTR2019014*, 2022 BCSC 591). Three individuals whose privacy rights were affected opposed the application. They sought a ruling that part of the hearing of the application take place *ex parte* the media representative.

[58] The media representative alleged, as Postmedia does here, that those seeking this further order restricting court openness had to meet the *Sherman* test. As the application judge had not seen the protected material, the judge could not decide whether or not it met the test. The judge stated:

> [38] It will sometimes be necessary to consider material outside of the presence of the applicant before a serious risk to an important public interest has been demonstrated, so that the court can determine whether or not one exists...
>
> [42] The key assumptions underlying proceeding *ex parte* of an applicant are that: (1) it is actually necessary, as counsel represents, to rely on the sealed material, or supplementary confidential information, in order to uphold the sealing order; and (2) there are no measures short of excluding the applicant that can uphold the interests at issue until they are finally determined.

[59] The judge found that interim sealing orders could be appropriate even when near-absolute privileges such as informer privilege were not involved, with attendant modifications to support the open court principle as much as possible:

> [39] …even when near-absolute privileges are not involved, it would still be untenable to require that the very information that has been sealed, or other confidential information relied on by the interested party to uphold the order, be revealed to the applicant on the basis that the *Sherman Estate* test has not yet been

> fulfilled. There will have to be times when a court initially accepts the representations of counsel for an interested party that nothing short of an *ex parte* review of the actual material will demonstrate the interest at stake and the extent of the risk to it. The alternative is a dead end in the hearing process, in which the interested parties cannot justify the secrecy they seek without violating it.

[60] We find this to be a sound articulation of the situation here. In the circumstances, it was necessary to accept the representations of counsel for the respondents that nothing short of an *ex parte* review of the actual material would demonstrate the interest at stake and the risk to it. We therefore granted the requested orders and reviewed the sealed material prior to hearing the appeals the following day.

The June 30 Order

[61] Postmedia's appeal of the June 30 order rests on two grounds: that the judge's reasons for dismissing its application for access to materials in the Named Persons Action are inadequate and that they disclose an error of law.

[62] We note this appeal is not from the Restrictive Orders themselves, nor was Postmedia's application an application to vary or vacate those orders. Rather, it was a preliminary application for access to materials, in order to, if appropriate, bring a further application to vary or vacate the orders.

[63] We therefore limit our analysis to the issues at hand. We also set out a preferable procedure for future situations of this kind.

[64] Postmedia submits that in the unusual circumstances of a civil action against a state actor proceeding *in camera* and under complete sealing orders, the judge's reasons were required to contain sufficient details about the court's analytical process so as to permit appellate review. It argues that the reasons are unclear as to *why* the leading authorities on court openness have no application in the Named Persons Action.

[65] It says that if the Restrictive Orders were discretionary, then the reasons reflect an error of law because the *Dagenais/Mentuck/Sherman* framework applies to *every* discretionary order displacing court openness: *Sherman* at para. 38; *Re: Vancouver Sun*, 2004 SCC 43 at para. 31.

[66] The respondents argue that the duty to provide reasons cannot force a judge to

reveal, by way of justifying their decision, information that they consider cannot be revealed. The respondents say that what Postmedia seeks is an explanation of the confidentiality and privileges in issue that attract the exemption from *Dagenais/Mentuck/Sherman*, which is contrary to the very purpose of the Restrictive Orders and compromises their integrity. To the extent that Postmedia seeks a *de facto* variation of those orders in this proceeding, the Respondents suggest that this amounts to a collateral attack.

[67] With respect, the collateral attack argument is without merit. The court in *Dagenais* made it clear that the rule against collateral attacks is not intended to immunize court orders from review, and recognized that there should be flexibility in its application in the context of media challenges to orders restricting court openness. Postmedia cannot be faulted for following the procedure it was directed to by the court below in an effort to gain access to information that would allow it to make meaningful submissions.

[68] The error of law argument can be dealt with in brief. Postmedia's argument is predicated on an inference that the Restrictive Orders are in fact discretionary. Yet, the judge clearly states in his reasons that he had concluded, after a careful review, that the matter was one of those rare and exceptional cases where *Dagenais* and *Mentuck* principles do not apply. There is no error of law in this statement; the Supreme Court of Canada has been clear that there are types of confidentiality to which the *Dagenais*/*Mentuck* framework does not apply, and that this framework is only one application of the open court principle to a situation of secrecy. It was never intended to apply to all actions limiting freedom of expression in a court: *Named Person v. Vancouver Sun*, 2007 SCC 43 at paras. 36, 42 [*Vancouver Sun*].

[69] The issue of adequacy of reasons is more complex. The giving of reasoned judgments is central to the legitimacy of the courts: *R. v. Sheppard*, 2002 SCC 26. As the court in *Sheppard* stated, while there is no general duty to give reasons divorced from the circumstances of each case, a judge can be said to have erred in law if they fail to provide an explanation of the decision that is sufficiently intelligible to permit appellate review: at paras. 1, 28.

[70] In addition, under the functional approach, reasons should justify and explain the result, tell the unsuccessful party why they lost, provide for informed consideration of the grounds of appeal, and satisfy the public that justice has been done: *Sheppard* at para. 24; *F.H. v. McDougall*, 2008 SCC 53 at para. 98.

[71] In *CBC*, the Ontario Court of Appeal commented on the adequacy of reasons in the context of orders restricting court openness: an application judge's reasons should indicate the specific basis upon which particular information is to be kept under seal. The court elaborated (at para. 56):

> In some cases, the application judge may find that it is not possible to adequately explain the reason for sealing information without providing an analysis that reveals sensitive information. This concern does not, however, discharge the judge from the obligation of providing sufficiently detailed reasons so that his or her decision is comprehensible by the parties and susceptible of appellate review.
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> [Emphasis added.]

[72] Alternatively, the basis for reasons may be clear from the record. Where the record discloses all that is required to be known to permit appellate review, less detailed or even no reasons may be acceptable. The question is whether, in the circumstances, the functional need of the parties and the public to know has been met: *Sheppard* at para. 55.

[73] The purpose of allowing the respondents' fresh evidence application was to shed light on the record informing the reasons of the judge below in order for this Court to fulfill its appellate function.

[74] Having reviewed that material, we confirm that the sealed record provides an intelligible basis for our review of the reasons. This case represents, indeed, a rare and exceptional set of circumstances in which revealing the very nature of the confidential information would disclose it. Hinkson C.J.S.C chose his words carefully with attention to the interests at stake, clearly of the mind that further commentary would tend to compromise them in a manner that would be contrary to the interests of justice.

[75] However, this is obviously an unsatisfactory place to leave the analysis, since Postmedia and the public at large must accept the word of now two courts that their *Charter* rights to freedom of expression and freedom of the press are being limited in a justifiable way on the basis of a record that they cannot see.

[76] Further, the dismissal of this application below prohibits Postmedia from access to *any* information about the nature of the case that would allow it to make meaningful submissions on a further application to vary or vacate the Restrictive Orders themselves. This results, effectively, in those orders being placed beyond appellate review. While the court below must do justice in each case, including by having the discretion to deny standing to the media to

hear a motion to vary or set aside a restrictive order (*Manitoba* at paras. 47–49), such a decision must be justified and be seen to be justified.

[77] In most cases in which court openness is limited, even those dealing with non-discretionary or near-absolute types of privilege, at least some information can be shared about the nature of the interests at stake that can provide a comprehensible basis for the limitation. The present case is the rare and exceptional one in which not even that is possible. While rare, the jurisprudence from the Supreme Court of Canada contemplates such a case that requires total secrecy.

[78] For example, the court has said that a judge must have the authority to hold an entire proceeding *in camera* if certain types of disclosure issues are present. Further, *any* information that might lead to identification of a protected person, not only their name or other obviously identifying details, is privileged information that a court does not have discretion to disclose: *Vancouver Sun* at paras. 40–41. If the nature of the undisclosable information itself might, in the context of the proceeding, lead to the identification of protected persons, revealing that information is beyond the discretion of the court, even to counsel for media on an undertaking of confidentiality.

[79] Nevertheless, the problem remains that total secrecy impairs *Charter* rights and affects the legitimacy of the judicial process. Where reasons cannot fulfill the functional role of justifying and explaining the result to the parties and the public because that explanation would defeat the confidentiality in issue, some other procedure must be in place to provide at least some assurance to the public that a legitimate process has been followed.

[80] We make the recommendations below as to the procedure to be followed when media seeks to bring an application to vary complete sealing orders and orders that the sealed case proceed *in camera*. We are cognizant of the fact that the court below has the inherent jurisdiction to control its own procedure and access to its own files. However, the procedure followed here placed this Court and the parties in an untenable position.

[81] Courts have grappled with the need for procedures that ensure meaningful arguments are placed before them in situations where, as here, they must decide an issue on the basis of an *in camera* hearing. In such a hearing taking place *ex parte* the media, all parties present – in this case the Named Persons and the AG – are arguing strenuously for the same conclusion; that is, restricting any and all disclosure of information related to the

proceeding. This deprives the court of the benefit of meaningful submissions and the adversarial process.

[82] In these circumstances, it may be preferable for a judge to appoint an *amicus curiae* for a precise role, namely, that of making argument as to the proper way of both protecting the privilege in issue and realizing the open court principle. This is not the same as arguing the legal scope of the privilege: the Supreme Court of Canada has been clear that this responsibility belongs to the judge alone: *Vancouver Sun* at paras 48–51.

[83] In the usual situation, the media would have access to at least some material upon which to base submissions. Occasionally, circumstances may arise in which this information cannot be given to the media representatives themselves, but only to their counsel upon an undertaking not to disclose it: *Vancouver Sun* at para. 59. In the situation at hand, where even revealing the nature of the privilege to counsel for the media represents too great a risk, an *amicus curiae* can provide submissions regarding the importance of ensuring that the privileges in issue are not overextended, and the way in which this can be accomplished in the context of the case.

[84] In our view, this would have led to a better process here. When the media brings an application requesting access to materials in a fully sealed and *in camera* case, the judge below should appoint an *amicus* to whom information can with less risk be revealed in order to make argument. The judge must still take great caution, and material should be redacted as needed. The result may still be a complete sealing of the file and an entirely *in camera* proceeding – the Supreme Court of Canada has been clear on this as part of the range of correct results – but the public and the parties will at least know that the matter has been fully argued and considered.

[85] Further, an application brought by the media should, at first instance, be an application to vary or vacate the orders restricting court openness, rather than a preliminary application for access to materials. In a case like this, they amount to the same thing: allowing access to materials leading to the Restrictive Orders would effectively be a variation of them. If a decision of the court below is to come before this Court, it should be a substantive decision as to the need for and scope of the orders themselves, with the benefit of the arguments of the *amicus*. This would result in a better use of both courts' resources.

[86] We note that Postmedia may still bring an application in the court below to vary or

vacate the Restrictive Orders to the court below, and any order made by that court on such an application would be subject to appeal. We further note that once the hearings in the Named Persons Action have concluded, the justification for the complete sealing of the file may also shift, but this would be for the court below to review at first instance.

Disposition

[87] In light of our conclusions that the June 29 Direction was not procedurally unfair and that the sealed record provides an intelligible basis for our review of the reasons for the June 30 Order, we dismiss Postmedia's appeal. We accordingly decline to grant the relief sought under s. 25 of the *Court of Appeal Act*.

[88] In the circumstances, the parties will bear their own costs.

"The Honourable Chief Justice Bauman"

"The Honourable Mr. Justice Frankel"

"The Honourable Madam Justice MacKenzie"

Appendix "A"

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Postmedia Network Inc. v. Named Persons*, 2022 BCCA 431

Date: 20221221
Dockets: CA48404; CA48405

Docket: CA48404

In the Matter of an Application by Postmedia Network Inc., doing business as *The Vancouver Sun* Newspaper and *The Province* Newspaper

Between:

Postmedia Network Inc.

Appellant

(Applicant)

And

Named Persons

Respondents
(Plaintiffs)

And

Attorney General of Canada

Respondent
(Defendant)

- and -

Docket: CA48405

Between:

Postmedia Network Inc.

Appellant
(Applicant)

And

Named Persons

Respondents
(Plaintiffs)

And

Attorney General of Canada

Respondent
(Defendant)

STATEMENT CONCERNING THIS APPEAL AS READ BY A SINGLE JUDGE PRONOUNCING JUDGMENT PURSUANT TO SECTION 40 OF THE *COURT OF APPEAL ACT*

This is a statement that will be posted on the Court's website concerning this appeal. It is anticipated that this statement will be replaced with redacted reasons for judgment, as now explained.

The reasons for judgment are signed. The appeal is dismissed.

The full reasons for judgment and the record of proceedings in this Court and in the Supreme Court of British Columbia are subject to sealing orders necessary to protect highly-sensitive

and confidential information.

Today, 21 December 2022, counsel for the respondents will receive a copy of the unredacted reasons for judgment, having provided undertakings not to disseminate or make publicly available the content of the reasons in unredacted form, except as may be necessary for purposes related to the future conduct of this proceeding.

The Court has asked counsel for the respondents to provide submissions concerning any redactions before any portion of the judgment can be publicly released.

If any redactions are necessary, the final redacted version of the reasons for judgment will then be released in Chambers and made available to the public, consistent with the practice of this Court.

The Court acknowledges the co-operation of counsel in handling the mechanics of the delivery of judgment in this matter.