Court of King's Bench of Alberta

Citation: Canadian Taxpayers Federation v Alberta (Election Commissioner), 2023 ABKB 161

Date:
Docket: 1903 02836
Registry: Edmonton

Between:

Canadian Taxpayers Federation, John Doe, Jane Doe

Applicants

- and -

Alberta (Election Commissioner); Alberta (Chief Electoral Officer); Alberta (Minister of Justice and Solicitor General

Respondents

CTV, a division of Bell Media, Postmedia Network Inc. and CBC/Radio-Canada

Respondents

Memorandum of Decision
of
Associate Chief Justice
K.G. Nielsen

I. Introduction

[1] The Canadian Taxpayers Federation and John Doe ("the Applicants") apply for a restricted court access order. Jane Doe is named as an Applicant but did not participate in the Application. The Applicants seek the following:

- An Order banning publication of the identity of John Doe or his immediate family members;
- An Order partially sealing court records that may reveal the identity of John Doe or his immediate family members;
- An Order permitting John Doe to give evidence in a way that prevents him from being identified, including excluding the public from the proceedings to the extent necessary to protect the identity of John Doe;
- An Order that the public is excluded from the proceedings to the extent necessary to protect the identity of John Doe; and
- An Order allowing John Doe to use the pseudonym John Doe.

[2] Notice was given to the media in accordance with r 6.32 of the *Alberta Rules of Court* Alta Reg 124/2010. CTV, a division of Bell Media, Postmedia Network Inc., and CBC/Radio-Canada (the "Media") oppose the Application.

[3] The Chief Electoral Officer and Election Commissioner provided submissions regarding the amendments to and structure of the *Election Finances and Contributions Disclosure Act*, RSA 2000, c E-2 ("the *Act*") but do not take a position with respect to the Application.

[4] The Alberta Minister of Justice does not take a position with respect to the Application.

II. Background

[5] The Applicants seek Judicial Review of a decision of the Election Commissioner and are making a constitutional challenge to sections 4(1)(j), 9.1(1), 44.5(1), 44.81(1), 44.82(1), 44.9(1)(b) and 44.9(5) of the *Act*. The Canadian Taxpayers Federation is a non-partisan not-for-profit group dedicated to advocating for lower taxes, less waste and more accountable government. John Doe was a contributor to the Canadian Taxpayers Federation.

[6] In 2018 the Canadian Taxpayers Federation purchased two billboards bearing the message: "You can't buy social license when it's not for sale". The Election Commissioner found that the language "social license" was associated with the statements made by Premier Rachel Notley and the Canadian Taxpayers Federation engaged in political advertising, as it was then defined, while not being registered as a third party advertiser as required by s 9.1(1) of the *Act*. A fine of $6,000 was imposed on the Canadian Taxpayers Federation.

[7] Section 44.82 of the *Act* requires registered third party advertisers to disclose the names and addresses of donors if their contributions exceed $250 and are specifically collected for the purpose of political advertising. The Canadian Taxpayers Federation admits that it did not register under the *Act* in order to safeguard the anonymity of its donors and to present its constitutional challenge to the Courts. The Canadian Taxpayers Federation acknowledges that it has other donors who are prepared to participate in these proceedings without seeking anonymity.

[8] After the Originating Application was filed in these proceedings on February 6, 2019, the *Act* was amended, and issue advertising was effectively removed from the definition of political advertising. The parties agree that as a result of the amendment, the content of the billboards would no longer trigger the registration and disclosure requirements under the *Act*.

III. Evidence

[9] The only evidence before me is an affidavit by John Doe, sworn on January 22, 2020, and filed on July 25, 2022. His evidence includes:

- He is a regular donor to the Canadian Taxpayers Federation;
- He owns and operates a company and for decades one of his larger customers has been a department of the Government of Alberta;
- He fears that if his name is released as a supporter of the Canadian Taxpayers Federation or his involvement in these proceedings is disclosed there may be pressure on the Government of Alberta department to find a new supplier and he would lose a significant client;
- As the Canadian Taxpayers Federation criticizes government spending, he does not believe that his Government of Alberta customer would be pleased to see that he supports advertising campaigns that criticize the government;
- When the New Democratic Party was the governing party he was warned by a fellow vendor that donating to the United Conservative Party could result in loss of business;
- He is afraid that no matter who is in power his support of the Canadian Taxpayers Federation could hurt his chances to maintain and grow existing business with Government of Alberta clients; and
- He has a great interest in the Action as he wants to feel free to support causes that he believes are fundamentally important to Canadian democracy, without the fear of being publicly exposed as a supporter when such action would likely hurt his business.

[10] The Applicants also rely upon an email in the Record of Proceedings. On July 30, 2018, someone emailed the Election Commissioner regarding the Canadian Taxpayers Federation's billboard. The individual took offence to the criticism of the then Premier and stated that they "looked the jokers up who put it there" and knew it was the Canadian Taxpayers Federation. They had also looked into whether the Canadian Taxpayers Federation had registered under the *Act* and demanded that the Election Commissioner "take swift action to have it taken down immediately."

IV. Open Court Principle

[11] The open court principle is a hallmark of a democratic society and it is protected by the constitutional guarantee of freedom of expression: ***Vancouver Sun (Re)*** 2004 SCC 43 at para 23, ***Sherman Estate v Donovan***, 2021 SCC 25 (***Sherman Estate***) at para 30. Open court proceedings maintain the independence and impartiality of the courts, public confidence and understanding of the courts' work and the legitimacy of the process. Reporting on court proceedings by a free press can be said to be inseparable from the principle of open justice. Accordingly, limits on court openness to serve other public interests are recognized sparingly and always with an eye to preserving a strong presumption that justice should proceed in public: ***Sherman Estate*** at paras 30 and 39.

[12] The legal test for a discretionary restricted court access order is set out in ***Sherman Estate*** at para 38 where the Court recast the previous articulations of the test in ***Sierra Club of***

Canada v Canada (Minister of Finance), 2022 SCC 41 (***Sierra Club***), ***Dagenais v Canadian Broadcasting Corp***, 1994 CanLll 39 (SCC) (***Dagenais***) and ***R v Mentuck***, 2001 SCC 76 (***Mentuck***). An Applicant seeking limits to 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.

V. Analysis

A. Important Public Interest

[13] The Applicants assert that court openness will pose a serious risk to three important public interests – privacy, confidentiality, and the right to a fair trial. I will address each separately.

1. Privacy

[14] The Applicants submit that the threatened privacy interest is not merely privacy for its own sake but John Doe is at risk of losing control over core identity-giving information about himself. A highly sensitive aspect of who he is that he did not consciously decide to share will potentially be made available to others. By losing this control it impacts upon his human dignity and therefore takes on a public character. John Doe's right to keep his own sentiments and decide whether to make them public, and the right to vote by secret ballot strike at the heart of John Doe's dignity.

[15] The Applicants submit that there is a centuries long tradition of engaging in political expression under a pseudonym. John Doe wishes to continue this tradition of anonymity in furthering a cause that he believes in. There is an important public interest in allowing citizens to enter into public debate anonymously under a pseudonym.

[16] The Applicants submit that the Canadian Taxpayers Federation's privacy statement gives Canadian Taxpayers Federation donors a reasonable expectation of privacy with respect to any personal information they share with the Canadian Taxpayers Federation.

[17] The Applicants further submit that the subjective element of the legal test has been elevated relying on ***Doe v Canada (Attorney General),*** 2022 ABQB 487 (***Doe***) at para 28 where this Court stated, "*Sherman* stands for the proposition that an individual's opinion about the sensitivity of their information outweighs the opinions of the courts or anyone else."

[18] The Media, citing ***Sherman Estate*** at para 33, submit that the question is not whether the information is personal to the individual but whether it is of such a highly sensitive character that its dissemination would cause an affront to their dignity that society as a whole has a stake in protecting. Information that details the financial contributions of one individual to a not-for-profit organization does not qualify as information in which disclosure would be an affront to the dignity of the individual. John Doe made a conscious choice to engage in litigation in which there is a strong presumption of open court proceedings.

[19] The Media also submit that disclosing John Doe's identity as a financial contributor to the Canadian Taxpayers Federation is not comparable to being deprived of the ability to cast a

vote in private. The Chief Electoral Officer and Election Commissioner submit that Elections Alberta upholds the highest standards with respect to administering free and fair elections in Alberta and the secrecy of the ballot is a dearly held principle. Transparency and accountability in election financing does not detract from the secrecy of the ballot in any way.

[20] The Supreme Court of Canada was clear that privacy, understood in reference to dignity, is only at serious risk where the information in the Court file is sufficiently sensitive. This threshold is fact specific: ***Sherman Estate*** at para 76. Individuals involved in court proceedings necessarily reveal personal information that would otherwise not be public; however a party who starts a legal proceeding waives his right to privacy at least in part and the right to privacy, however defined, in some measure gives way to the open court ideal: ***Sherman Estate*** at para 58. The fact that openness is disadvantageous or distressing will not generally, without more, warrant interference with court openness: ***Sherman Estate*** at para 63.

[21] I find that the Applicants have not established an important public interest relating to privacy. The information at issue, that John Doe is a donor to the Canadian Taxpayers Federation and is participating in these proceedings, is not of a highly sensitive character that it strikes at the core identity of John Doe. Its dissemination would not cause an affront to dignity that society as a whole has a stake in protecting. The disclosure of John Doe's identity would reveal that he was a contributor to the Canadian Taxpayers Federation which reveals that he did support some or all of the Canadian Taxpayers Federation's ideals of lower taxes, less waste and more accountable government. The Canadian Taxpayers Federation is non-partisan and it does not promote any political party or candidate. It does not follow that the disclosure of this information reveals who John Doe votes for or in any way contradicts the right to vote by secret ballot.

[22] The Applicants' argument regarding the right to anonymously engage in political debate goes to the Constitutional challenge of the *Act's* provisions requiring disclosure of donor names. Courts are presumptively open and independent from government and political matters.

[23] The Applicants' reliance on the Canadian Taxpayers Federation's privacy statement is untenable. It is not reasonable to rely on a privacy statement that does not acknowledge legal obligations including those of participating in the judicial process. In any event, the Canadian Taxpayers Federation is not disclosing John Doe's identity. John Doe chose to participate in court proceedings that are subject to the open court principle.

[24] The Applicants, relying on ***Doe***, suggest that John Doe's own subjective opinion about the sensitivity of his information is the determining factor. The Media argue that the Applicants' assertion is inconsistent with the Supreme Court of Canada's jurisprudence and is not a sentiment expressed by the Court in ***Sherman Estate***.

[25] The Court in ***Sherman Estate*** at para 78 is clear that the question is not what the Applicant's reasonable expectation of privacy was. The focus of the analysis is not whether the information is personal to the individual but whether a larger societal interest requires protection: ***Sherman Estate*** at para 33. In ***Doe*** at para 34 it was found that the proceedings engaged the important public interests of protecting sensitive information relating to stigmatized medical conditions and sexual assault. These are important public interests identified by the Court in ***Sherman Estate***. The Court in ***Doe*** did not consider a situation where an Applicant's opinion about the sensitivity of the information differed from the Court.

2. Confidentiality

[26] The Applicants submit that the Canadian Taxpayers Federation privacy statement creates a reasonable expectation that the information provided to the Canadian Taxpayers Federation will be treated confidentiality. Maintaining the confidentiality of the Canadian Taxpayers Federation, John Doe, and every Canadian Taxpayers Federation supporter is of a sufficiently public character to require protection.

[27] The Applicants further submit that this Court should afford the same protection to not-for-profit organizations and citizens engaged in important public policy dialogue as was found in ***Sierra Club*** where a proprietary interest in documents prepared by the Chinese authorities was protected through a Confidentiality Order. The Applicants also rely on ***Canada (Commissioner of Competition) v Chatr Wireless Inc***, 2011 ONSC 3387 (***Chatr Wireless***) and ***Royal Bank of Canada v Westech Appraisal Services Ltd***, 2017 BCSC 773 (***Royal Bank***) arguing that the public interest claimed by the Canadian Taxpayers Federation more clearly engages Charter values. They assert that there would be a chilling effect on public advocacy and civil society generally if not-for-profit organizations and their donors' public interests in privacy and confidentiality were taken less seriously than those of telecommunications providers, banks, and authoritarian governments.

[28] The Media submit that any commercial concerns raised by John Doe are specific to his business and do not engage a public interest in confidentiality. Reputational harm to a business does not justify a restriction to court openness: ***Fairview Donut Inc v The TDL Group Corp***, 2010 ONSC 789 and ***Publow v Wilson***, 1994 CanLll 7421 (ONSC).

[29] I find that the Applicants have not established an important public interest with respect to confidentiality. Courts have found that commercially sensitive information may require restricted court access orders; however, to restrict court access a public interest in confidentiality must be engaged. As stated in ***Sierra Club*** "a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests.": ***Sierra Club*** at para 55.

[30] The Canadian Taxpayers Federation's privacy statement does not create an important public interest. An expectation that confidentiality is guaranteed in spite of the common law requiring public participation in court proceedings is not a reasonable one. As stated in ***Turner v Death Investigation Council***, 2021 ONSC 6625 at paras 58-59 regarding a promise of confidentiality to witnesses by an investigative body:

> ...undertakings of this kind are simply incapable of displacing constitutional imperatives, repeatedly endorsed by the Supreme Court of Canada, which demand the courts to operate within, and to enforce, the concept of openness... the claims of individuals to reasonable reliance on assurances of confidentiality do not, standing alone, constitute an important public interest.

[31] This is a fact specific determination. ***Chatr Wireless*** and ***Royal Bank*** relied on by the Applicants involved the Competition Bureau's ability to enforce the regulatory scheme under the *Competition Act* and the integrity of the financial system by maintaining competitiveness. They are distinguishable and do not assist the Applicants.

3. Fair Trial

[32] The Applicants submit that an individual's right to a fair trial is an important public interest requiring protection. They argue that if John Doe is denied anonymity in these proceedings, a declaration that the provisions of the *Act* requiring disclosure of donor names are unconstitutional will have been for nothing. They rely on ***Stikeman v Gottlieb***, 2019 ONSC 7582 (***Stikeman***) in which the plaintiff sought an injunction to prevent the defendant from making defamatory statements against them. The plaintiff argued that an open trial would defeat the remedy being sought as the publication of the statements would render the plaintiff's right to a fair trial nugatory.

[33] I agree that the right to a fair hearing, more aptly described in these circumstances as meaningful recourse to the judicial system, is an important public interest that promotes the administration of justice. The open court principle creates a catch 22 for a party wishing to litigate the right to be anonymous. As stated at para 31 in ***Stikeman:***

> ... a party seeking to prevent the publication of information should not be deprived of that relief as a result of publication of that information in advance of a determination of the litigation. Such a result impairs the effectiveness of the courts and hence the administration of justice.

[34] The Court in ***Sherman Estate***, referencing ***S v Lamontagne***, 2020 QCCA 663 (***Lamontagne***), identified that an important public interest may be engaged where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim: ***Sherman Estate*** at para 54.

[35] In ***Lamontagne*** the applicant sought an injunction and compensation for harm as a result of harassment. Threats attributed to the respondent included revealing the identity of the applicant. The Court granted the application for anonymity stating at paras 34-35.

> ... the confidence of litigants in the administration of justice will be undermined if no measures allow effective access to the courts while ensuring that parties preserve their rights. ... it would be rather paradoxical if the appellant were placed in the position of having to waive the exercise of a right because of an affront to his dignity caused by judicial proceedings, when the action itself seeks precisely to obtain compensation for an infringement of that right.

[36] The Court of Appeal of Alberta in ***AB v College of Physicians and Surgeons of Alberta*** 2021 ABCA 320 (***College of Physicians***) granted an anonymization order to a doctor challenging a publication on its website by the Registrar of the College of Physicians and Surgeons that he was charged with sexual assault. The Court stated at para 19:

> I am satisfied that anonymizing the name of the applicant in this opinion is necessary. Use of the applicant's legal name would expose the applicant to the substantial risk that the value of a successful appeal would be greatly, if not completely, diminished. It would, in effect, mean that the court system would not realistically be available to contest the validity of the Registrar's position. Meaningful recourse to the courts is an important public interest that warrants protection.

[37] The Applicants have not established that the important public interests of a fair trial or meaningful recourse to the Courts apply in these circumstances.

[38] The public interest is engaged when the plaintiff has no choice but to engage the judicial process in order to obtain their remedy and the open court principle defeats the remedy prior to adjudication of the claim. Without a restricted court access order successful litigation would provide no meaningful remedy as the damage would have been done – “the horse would have already left the barn.”

[39] John Doe does not face this dilemma. He is not required to participate in the proceedings in order for the issues to be adjudicated by the Courts. The Applicants admit that there are other Canadian Taxpayers Federation donors willing to participate in the litigation. John Doe chose to be a plaintiff knowing that the Court system presumes openness with respect to all participants, with covertness being the exception.

[40] There is no direct link between the relief claimed by the Applicants in the Application and in the proceedings where they seek:

- A declaration that the Election Commissioner’s finding that the Canadian Taxpayers Federation contravened s 9.1 of the *Act* was incorrect or unreasonable;
- A declaration that the penalties imposed by the Election Commissioner are unreasonable, excessive, arbitrary, punitive, disproportionate, and contrary to s 51.01 of the *Act;*
- A declaration that sections 4(1)(j), 9.1(1), 44.5(1), 44.81(1), 44.81(1), 44.9(1)(b) and 44.9(5) of the *Act* are unconstitutional;
- Any appropriate and just remedy pursuant to the Constitution Act, 1982 declaring that these sections of the *Act* be struck and that the last sentence of s 5.2(1) be amended to read, “shall maintain the confidentiality of all information, including the identity and personal information of all financial contributors to any third party that engages in any electoral or political advertising.”;
- An interim stay of the penalties imposed until the proceedings are exhausted;
- Alternatively, an Order remitting the decision back to the Election Commissioner for a new hearing; and
- Alternatively, an Order rescinding all the administrative penalties and directing the Election Commissioner to either issue a letter of reprimand or no penalty at all.

[41] Whether the Applicants are granted all, any or none of the relief claimed, the Court’s decision will not result in the disclosure of John Doe’s identity. He faces no jeopardy. John Doe’s participation in the proceedings by his given name does not render any of the remedies sought in the Application meaningless.

[42] The Applicants have failed to establish an important public interest and have not met the first branch of the ***Sherman Estate*** test.

B. Serious Risk

[43] My conclusion that the Applicants have failed to establish an important public interest is sufficient to end the analysis. However, I will address the Applicants' and the Media's arguments regarding serious risk.

[44] The Applicants contend that the test to limit court openness does not require scientific or empirical evidence and the Court can find harm by applying reason and logic citing ***AB v Bragg Communications Inc***, 2012 SCC 46 (***Bragg***). They submit that John Doe's evidence is sufficient as it is no more speculative or indirect than that which supported a serious risk to a privacy interest in other cases such as ***Work Safe Twerk Safe v Her Majesty the Queen in Right of Ontario,*** 2021 ONSC 1100 ***(Work Safe)*** where the concerns of strippers (the term used in the decision) was much less specific or direct than John Doe's evidence.

[45] The Media submit that the Court in ***Bragg*** considered extensive legal and social-science evidence and based on the evidence Justice Abella stated that it was logical to infer that children may suffer harm through cyber bullying: ***Bragg*** at paras 20-27. In ***Desjardins v Canada (Attorney General),*** 2020 FCA 123 (***Desjardins***) the Federal Court of Appeal specifically noted that strong evidence was before the Court supporting the conclusion that harm would result from disclosing the child's name: (***Desjardins***) at para 84. ***Bragg*** "did not call into question the principles set out in *Dagenais*, *Mentuck* and *Sierra Club*, according to which the harm that could result from disclosure must be 'well grounded in evidence'": ***Desjardins*** at para 82. Or as explained in ***Windels v Canadian Broadcasting Corporation*** 2022 SKCA 72 at para 51, ***Bragg*** must be understood in context: "It does not mean that reason and logic alone will suffice, or that no evidence is required; rather, it reflects the fact that whether the evidence meets the 'well-grounded' standard depends on the nature of the risk at issue."

[46] The Court in ***Sherman Estate*** made clear that the test to limit court openness is a fact specific determination that requires that the serious risk asserted be well grounded in the record of the circumstances of the particular case: ***Sherman Estate*** at para 102. Direct evidence is not necessarily required to establish a serious risk to an important public interest. It is possible to identify objectively discernable harm on the basis of logical inferences but this process of inferential reasoning is not a licence to engage in impermissible speculation. "An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation.": ***Sherman Estate*** at para 97.

[47] The Court in ***Sherman Estate*** provided this guidance regarding the seriousness of the risk:

- The seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle: ***Sherman Estate*** at para 80;
- It is appropriate to consider the extent to which information is already in the public domain: ***Sherman Estate*** at para 81; and
- The seriousness of the risk is affected by the probability that the dissemination will actually occur. The Applicant does not have to establish the dissemination will certainly occur but the risk will be more serious the more likely it is that the information will be disseminated. "...the magnitude of risk is a product of both the gravity of the feared harm

and its probability.": ***Sherman Estate*** para 82. Probability does not have to be identified in numerical terms but can be discerned in light of the totality of the circumstances and balance this one factor alongside other relevant factors: ***Sherman Estate*** para 83;

[48] Applying the ***Sherman Estate*** framework to the facts of this case, I conclude that there is insufficient evidence to establish a serious risk or the likelihood of the information causing harm. No inferences may be reasonably drawn without engaging in speculation.

[49] Court openness would identify John Doe as a financial contributor to the Canadian Taxpayers Federation and a participant in the proceedings. The evidence does not establish a serious risk that this information would result in pressure being applied on the Government of Alberta which would cease doing business with John Doe. The evidence regarding a warning from another vendor is hearsay and with respect to donations to a political party, not the Canadian Taxpayers Federation which is a non-partisan organization.

[50] John Doe also submits that the email to the Election Commissioner from a member of the public is evidence that it is conceivable that someone could pressure the Government of Alberta to terminate John Doe's contract. It is speculative that someone who took issue with a Canadian Taxpayers Federation billboard in 2018, or anyone else, would seek out John Doe's identity through these Court proceedings and would then successfully target John Doe and cause harm to his business. In fact, in response to the Media's argument, John Doe submits that "it is not clear why the public would give weight to a political message based on a $250 contribution from a local small business owner, nor why the public would be particularly interested in his identity."

[51] I do not find that there is well grounded evidence that supports a finding of serious risk.

[52] Even if the Applicants had succeeded in establishing a serious risk to an important public interest, which they have not, they would have had to establish that the relief sought is necessary as there are no reasonable alternatives. A sealing or exclusion Order would not be consistent with minimal impairment of the open court principle in that such Orders would be overly broad in these circumstances: ***Sherman Estate*** at para 105. A publication ban would restrict the dissemination of personal information to only those persons consulting the Court record and prohibit those individuals from providing that information to the pubic. A publication ban which is a less onerous Order would have likely been sufficient.

C. Benefits Outweigh Negative Effects

[53] The Applicants have not established that the benefits of the Order sought outweigh the harmful effects of restricting court openness.

VI. Conclusion

[54] The Application is denied. John Doe must participate in these proceedings by his given name.

Heard on the 1st day of February, 2023.
Dated at the City of Edmonton, Alberta this 15th day of March, 2023.

K.G. Nielsen
A.C.J.C.K.B.A.

Appearances:

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