COURT FILE NO.: CV-20-00645831-0000
DATE:20240507

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: DENT-X CANADA

Plaintiff

AND:

R. KILISLIAN DENTISTRY PROFESSIONAL CORPORATION, DR. KILISLIAN DENTISTRY PROFESSIONAL CORPORATION, RITA KILISLIAN DENTISTRY PROFESSIONAL CORPORATION, KI EQUITY CORP.

Defendants

BEFORE: Koehnen J.

COUNSEL: *Dustin Milligan* for the moving party intervenor Canadian Broadcasting Corporation

Neil Colville Reeves, Robert McGlashan for the plaintiff

Craig Mills for Mitsubishi HC Capital and Mark Pagniello

Avi Slodovnick, Joseph Natale, Corina-Anca Anghel for Rita Kilislian

Christopher Caruana for CWB Maximum Financial Inc.

Andrew Curnew on his own behalf

HEARD: December 18, 2023

ENDORSEMENT

[1] This is a motion by the intervener, Canadian Broadcasting Corporation to unseal a court file that I had sealed by an endorsement dated March 7, 2023.

[2] The matter arises out of a series of 10 actions, many of which are substantially or entirely duplicative, involving three principal groups of parties: financing parties (as reflected by Mitsubishi HC Capital and CWB Maximum Financial Inc.), Dent-X Canada and the Kilislian defendants. This latter group includes Dr. Rita Kilislian, a number of her personal corporations and herself represented husband Andrew Curnew.

[3] The actions arise out of a series of business arrangements pursuant to which some of the Kilislian defendants leased dental equipment from Dent-X by way of financing provided by the financing parties. After that things seem to have fallen apart. The statements of claim contain broad allegations of wrongdoing between Dent-X and the Kilislian parties. Dent-X alleges that the Kilislian the parties failed to pay on their leases and engaged in various forms of fraud. The Kilislian the parties allege that Dent-X failed to deliver equipment, delivered faulty or used equipment and also engaged in various forms of fraud. Both sides make a number of personal allegations against each other involving their personal integrity, past encounters with the law and mental health. Many of those allegations are improper and irrelevant to the actual claim.

[4] The actions never advanced beyond the pleadings stage. Some of the statements of claim were never served. Some were never defended. No productions were exchanged.

[5] After much wrangling, the parties mediated before former Master Ronald Dash who helped the parties arrive at a settlement at a two day mediation. One term of the settlement was that the court file be sealed. Paragraph 2 of a document entitled Outline of Terms of Settlement provides:

> The within terms of settlement are conditional upon all parties consenting to, and the court agreeing to grant an order sealing all pleadings, and other materials filed. The parties agree and shall provide whatever affidavits and/or support necessary to ensure that the court grants the said sealing order.

[6] The minutes of settlement themselves simply state as a term that Dent-X shall seek and obtain a sealing order.

[7] In a short hearing before me on March 7, 2023 I granted the sealing order with the consent of all parties in an endorsement of less than 3 pages. At the time, the actions seemed unworthy of any public interest. They involve equipment leases and mutual recriminations between the lessor and the lessee not uncharacteristic of such disputes although more intense here than is usual. The order arising out of that hearing sealed the following court files: CV-20-00645831-0000; CV-21-00654485-0000; CV-22-00677910-0000; CV-21-00666167-0000; CV-22-00682182-0000; CV-22-00677903-0000; CV-22-00677904-0000; CV-22-00677961-0000; CV-22-00681900-0000; and CV-22-00679282-0000.

[8] The Canadian Broadcasting Corporation Became interested in one of the parties to the settlement as part of an investigative story. It applies to lift the sealing order to obtain access to the court files.

[9] The CBC and the respondents have now filed substantially more detailed factums setting out the law on the issue as opposed to arguing the issue from a higher level which was done at the initial hearing on March 7, 2023.

[10] The fundamental test remains the same as set out in my initial endorsement. The Supreme Court refined the test for sealing orders in *Sherman Estate v. Donovan*.[1] In that case, the Supreme Court required the party seeking a sealing order to demonstrate that:

i. court openness poses a serious risk to an important public interest;
ii. the sealing order is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
iii. as a matter of proportionality, the benefits of the sealing order outweigh its negative effects.[2]

[11] At the original hearing, the parties to the actions argued that a sealing order was appropriate because the court file contained untested allegations in pleadings, some of which were never served, which make assertions of improper conduct against various parties and that, in the absence of a sealing order, parties would have chosen to prosecute or defend in order to clear their reputations. A sealing order was necessary, they argued, to prevent the characters of the parties from being impugned. The parties further argued that, as a matter of proportionality, there was no public benefit in having allegations that can never be tested or answered remain in the public record. In the summary way in which the motion was argued I accepted those arguments and found that sealing the court file was an appropriate way to allow the parties to complete their settlement and move forward without any

[1] *Sherman Estate v. Donovan,* .2021 SCC 25
[2] *Ibid.* at para. 38.

material compromise of the principle of the open courts system given that the matter appeared unworthy of any public interest.

[12] CBC has now cast the issue in a new light. It submits that it is settled law in Canada that the justice system must be open and transparent in order to allow members of the public the opportunity to see its inner workings and to comment on its efficacy. This principle has been re-stated countless times and was highlighted by the Supreme Court of Canada in *Canadian Broadcasting Corporation v. Canada (Attorney General)*,[3] in the following manner:

> The open court principle is of crucial importance in a democratic society. It ensures citizens have access to the courts and can, as a result, comment on how courts operate and on proceedings that take place in them. Public access to the courts also guarantees the integrity of judicial processes as the transparency that flows from access ensures that justice is rendered in the manner that is not arbitrary, but is in accordance with the rule of law.[4]

[13] The Supreme Court of Canada has found that members of the public, as “listeners” or "readers", also have the right to receive information pertaining to public institutions, and in particular, the courts.[5]

[14] The jurisprudence confirms that:

(a) The burden to curtail the open court principle lies with the party seeking to limit access.[6]

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[3] *Canadian Broadcasting Corporation v. Canada (Attorney General)*, 2011 SCC 2
[4] *Canadian Broadcasting Corporation v Canada (Attorney General)*, 2011 SCC 2 at para 1
[5] *Edmonton Journal v Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 SCR 1326
[6] *R. v. Mentuck*, 2001 SCC 76, [2001] 3 SCR 442 at para. 26.

(b) If access is to be limited, the party seeking to assert or uphold that denial must demonstrate through convincing evidence that the test has been satisfied.[7]

(c) Any limitation of access or disclosure must only impair the media's freedom of expression to the minimum extent possible, or because reasonable alternatives are not available.[8]

[15] The open courts principle is a constitutional right. To seal the court file based on the agreement of the parties would permit private litigants to compromise the public's constitutional rights and the media's role of protecting the public interest in a democratic society.[9]

[16] In *Multiplex Const. Can. Limited v. Princes Gates Hotel Limited Partnership,*[10] the court dealt with issues similar to those of this case. In *Multiplex*, one of the parties sought an order sealing all documents that alleged or addressed fraud. The Court held that potential reputational damage arising out of fraud allegations did not engage a public interest that justified the sealing order. In so doing, the Court stated:

> I would only add that to grant a sealing order in this case would potentially create the precedent that would lead to sealing orders in virtually every case where fraud is alleged. Such allegations are by their nature inflammatory. That is not a precedent that accords with our core value of open courts.[11]

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[7] *Ibid* at para 34
9 *R v Hennessey,* 2008 ABQB 312 (CanLII) at para 65
[8] *R v Hennessey,* 2008 ABQB 312 (CanLII) at para 65
[9] *A.B. v. C.D*. 2021 BCSC 267; *NHK Spring Co v Cheung* 2023 BCCA 23.
[10] *Multiplex Const. Can. Limited v. Princes Gates Hotel Limited Partnership*, 2019 ONSC 4367
[11] *Multiplex Const Can Limited v Princes Gates Hotel Limited Partnership,* 2019 ONSC 4367 at para 8.

[17] In a similar vein, courts have frequently unsealed materials related to search warrants after a search has been conducted even though such materials contain untested allegations and may impugn the character of the people involved.[12]

[18] On this motion, the responding parties advance two reasons to maintain the sealing order. First, that the order seals allegations of fraud that would be embarrassing to the parties and their family members if divulged publicly. Second, that the order put an end to 10 separate court files which would be unduly burdensome for the court system to reopen and have litigated. In this light, the respondents submit that there is an unassailable public interest in promoting settlement.

[19] Turning first to the potentially embarrassing nature of the allegations. Courts have repeatedly rejected this as a basis for sealing court files. In *Ritter v. Hoag*,[13] the Alberta Court of Queens Bench rejected the plaintiff's request for a sealing order based on similar concerns saying:

> It has long been established that, unfortunate as it may be, the principle of open court proceedings can not be compromised to protect the reputation or sensibilities of litigants. In *Scott v. Scott* [1913] A.C. 417… Lord Atkinson said at page 463:
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> The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to

[12] *AG (Nova Scotia) v MacIntyre,* [1982] 1 SCR 175 at para 186 and following.
[13] *Ritter v. Hoag,* 2003 ABQB 88

> found (sic), on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect.[14]

[20] *CBC v Canada*[15] is to similar effect. In that case, police officers sought to have their identities protected from disclosure after a potentially unsavoury source made allegations against them. In dismissing the request, Justice Nordheimer J. (as he then was) quoted from *Rex v. Wright*, 8 T.R. 293, at p. 298 to the following effect:

> Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.[16]

[21] Although this may result in unsavoury allegations that are never proven being made against innocent individuals, as the Ontario Court of Appeal noted in *Guergis v. Novak*:

> A reasonably thoughtful and informed reader would understand the difference between allegations and proof of guilt. Such a person would bear in mind that an accused person is presumed innocent until proven guilty.[17]

[22] With respect to settlement, the moving parties say that without a sealing order, the settlement will be set aside and the court will need to deal with ten highly contentious matters. The moving parties argue that this would create only more delay on the civil list

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[14] *Ritter v Hoag*, 2003 ABQB 88 at para 52.
[15] *CBC v Canada,* [2007] O.J. No. 5436
[16] *CBC v Canada,* [2007] OJ No 5436 at para 298
[17] *Guergis v Novak*, 2013 ONCA 449 at para 57.

in Toronto; a list already plagued by excessive delay. This they say, creates a public interest in upholding settlements even if it requires a sealing order to do so. I do not accept that submission for three reasons.

[23] First, the court should not be frightened into compromising the constitutional principle of open courts by the prospect of ten contentious actions. As noted, many of the actions are duplicative. In addition, if the matters did proceed, at least some of the allegations that the parties are concerned about strike me as being at high risk of being struck out as frivolous and vexatious.

[24] Second, as the CBC pointed out in argument, it is not a foregone conclusion that the settlement is at an end if the sealing order is set aside. The parties may prefer to settle even without the sealing order. In addition, a court order would be required to set aside the settlement. That issue will have to be subject to a separate motion before me.

[25] Third, the cases the moving parties rely on for the public interest in settlement are distinguishable. The moving parties rely principally on *Royal Bank of Canada v. Distinct Infrastructure Group Inc.*,[18] in this regard. That case involved a receivership in the course of which certain disputes were settled. The court granted a sealing order that applied to the terms of the settlement. It did not involve a case where, as here, the parties are seeking to seal the entire court file, including the pleadings.

[18] *Royal Bank of Canada v. Distinct Infrastructure Group Inc.*, 2022 ONSC 5878

[26] The responding parties also rely on *Khan v. Law Society of Ontario,*[19] for the proposition that courts will seal court records "where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public." In *Khan*, once again, the court was not being asked to seal the entire court file but merely to seal medical records of the applicant. Information of that sort has long been held to be subject to sealing orders.

[27] In *Sherman Estate* for example, the Court found that protecting information that would be an affront to basic human dignity could also qualify as an important public interest. The Court indicated that: "[w]hile the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension."[20] As examples of such circumstances the Court singled out stigmatized medical diagnoses, someone's sexual orientation, and having been subjected to sexual assault or harassment, as information that could be so sensitive that it ought not to be made public, even in the service of open proceedings.[21] Bald allegations contained in pleadings do not, however, fit into that category.

Conclusion

[19] *Khan v. Law Society of Ontario*, 2022 ONSC 1950
[20] S*herman Estate v. Donovan*, .2021 SCC 25 at para 32.
[21] *Sherman Estate v. Donovan*, .2021 SCC 25at para. 77.

[28] As a result of the foregoing, I grant the CBC's motion, set aside my order of March 7, 2023 and direct that the court files sealed by that order be unsealed.

[29] Any party seeking costs arising out of these reasons will have three weeks to deliver written submissions. The responding party will have two weeks to deliver its answer with a further one week for reply.

Date: May 7, 2024

Koehnen J.