Court of Queen's Bench of Alberta

Citation: Doe v Canada (Attorney General), 2022 ABQB 487

Date: 20220713
Docket: 2001 08640
Registry: Calgary

Between:

A.B.

Plaintiff

- and -

Canada (Attorney General), Royal Canadian Legion Alberta-NWT Command, Michael Burgess, Shaun Wood, Marnie Palmer

Defendants

Reasons for Decision
of the
Honourable Justice C.M. Jones

I. Introduction

[1] This matter brings into sharp relief the tension between two competing principles: the public's right to open courts and an individual's right to privacy.

[2] The Plaintiff alleges injury resulting from the Defendants' unauthorized access to and disclosure of their personal information. They have brought an action claiming breach of fiduciary duty, breach of privacy and waiver of tort. They seek, *inter alia*, general damages, aggravated damages, punitive damages, costs and interest.

[3] The Plaintiff now applies for a number of confidentiality orders directed at protecting their personal information pending trial. For the reasons that follow, I am granting the requested relief. For that reason, I have referred to the Plaintiff hereafter as "A.B." and have removed identifying gender references.

II. Background

[4] A.B. is a veteran who served with the Canadian Armed Forces between 2004 and 2013. They allege that they suffered injuries through that service. They sought financial support and medical treatment through Veterans Affairs Canada.

[5] The Defendant, Canada (Attorney General) ("Canada"), is the representative of the Government of Canada and all departments and agencies thereof. A.B. claims that Canada's actions were carried out by representatives or agents of Veterans Affairs Canada.

[6] Veterans Affairs Canada has an arrangement with the Royal Canadian Legion to assist veterans in obtaining access to professional counselling services and with representation regarding disability and injury claims. The objects and purposes of the Royal Canadian Legion include assisting and ensuring the welfare of those who have served in the Canadian Armed Forces.

[7] The Defendant, Royal Canadian Legion Alberta-NWT Command (the "Alberta Legion") is the provincial command of the Royal Canadian Legion responsible for the Alberta and Northwest Territories geographic area.

[8] The Defendants Shaun Wood and Michael Burgess were Command Service Officers with the Alberta Legion. The Defendant Marnie Palmer was case manager for the Calgary District office of Veterans Affairs Canada.

[9] A.B. alleges that Veterans Affairs Canada and the Royal Canadian Legion entered into a memorandum of understanding (the "MOU") that permitted Command Service Officers and assistant Command Service Officers to access veterans' electronic medical records maintained by Veterans Affairs Canada. They allege that the MOU required these officers to obtain both authorization from Veterans Affairs Canada and the veteran's consent to review that veteran's information.

[10] A.B. alleges that in the course of their seeking support, Veterans Affairs Canada acquired extensive medical and financial information about them, including information regarding their service-related injuries. They allege that the Alberta Legion and Mr. Burgess repeatedly accessed and disclosed their personal and confidential information without their authorization and consent. They allege further unauthorized access by Mr. Wood and Ms. Palmer.

III. The Application

[11] The parties entered into a Consent Order (the "Publication Ban") that provides, *inter alia*:

1. All facts and details that could lead to the identification of A.B. by name in this action are subject to a publication ban.

2. A.B.'s medical information disclosed in this action is subject to a publication ban.

3. The remaining relief sought by A.B. is directed to a Justice Special Chambers hearing.

4. In the interim, the application and the evidence tendered by the parties (the "Application Materials") shall be sealed and accessible only by the Court, the parties and their counsel and insurer(s). The sealing order shall remain in place until the determination of the matter in Justice Special Chambers or further Court order.

5. The sealing of the Application Materials on an interim basis does not in any way decide the issue to be determined in Justice Special Chambers.

[12] A.B. now seeks the following:

1. An order that in all pleadings and other materials filed in this action, they be referred to as A.B. and that the style of cause be amended accordingly ("Anonymization Order").

2. An order sealing the materials filed in this action until such time as the parties agree or the Court orders that they be unsealed ("Sealing Order").

3. A publication ban on all details that could lead to identification of A.B. by name in relation to these pleadings and on all of A.B.'s medical information disclosed in these proceedings (the Publication Ban referred to above).

4. An order that any individual or organization affected by this order may apply for an order for the release of any of the documents in the Court file or to vary or vacate any order this Court may issue upon proper notice to A.B..

5. In the alternative, an order that A.B.'s affidavit in support of their application be sealed.

[13] I will refer to the Anonymization Order, the Sealing Order and the Publication Ban collectively as the "Requested Orders". The Defendants agree to the continuation of the Publication Ban, but oppose the Anonymization Order and Sealing Order.

IV. The Law

[14] The Supreme Court of Canada has grappled repeatedly with the opposing principles of court openness and individual privacy. In ***Sierra Club v Canada (Minister of Finance)***, 2002 SCC 41, the Court reviewed the prior case law in detail and articulated a two-step test for assessing the necessity and proportionality of a proposed confidentiality order.

[15] Recently, the Supreme Court revisited the issue in ***Sherman Estate v Donovan***, 2021 SCC 25. At para 38 of that decision, the Court expanded the test to three "core prerequisites", stating:

> 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 [reasonable] alternative measures will not prevent this risk; and,

> (3) as a matter of proportionality, the benefits of the order outweigh the negative effects.

[16] The Supreme Court recognized the importance of both the open courts principle and the right to privacy, making these comments at paras 1, 5 and 31:

> 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.
>
> …
>
> This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. …
>
> …this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society. … At the same time, the jurisprudence acknowledges that some degree of privacy loss – resulting in inconvenience, even in upset or embarrassment – is inherent in any court proceeding open to the public… The right of privacy is not absolute; the open court principle is not without exceptions.

[17] Throughout ***Sherman***, the Supreme Court recognized that not all privacy interests warrant abrogating the open court principle. The Court stated as follows at paras 46, 48, 59 and 60:

> …I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness.
> …
>
> Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of ***MacIntyre*** that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under ***Sierra Club***. …
>
> …the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. … Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from ***Sierra Club***, which is the appropriate framework and one which must be preserved.
>
> …a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness … would invite considerable confusion.

[18] The Court then attempted to strike an appropriate balance between these competing principles by narrowing the protection to only certain aspects of privacy, stating at paras 7 and 33:

> For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from [***Sierra Club***]. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.
>
> …
>
> Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under ***Sierra Club***. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

[19] The Court expanded upon the distinction between privacy and dignity at paras 72-77:

> … a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. …
>
> 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.
>
> If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual – what

> this Court has described in its jurisprudence on s. 8 of the *Charter* as the "biographical core" – if a serious risk to an important public interest is to be recognized in this context…
>
> This threshold is fact specific. … By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.
>
> There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions…, stigmatized work …, sexual orientation …, and subjection to sexual assault or harassment… The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

[20] Having identified the preservation of dignity as an important public interest, the Supreme Court reiterated at paras 62 and 63 that a confidentiality order will be appropriate only when that interest is at serious risk:

> …in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.
>
> Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness…

V. Analysis

[21] All parties made extensive reference to ***Sherman***. As the applicant for the Requested Orders, A.B. bears the onus of establishing that abatement of the principle of court openness is justified in this case under the ***Sherman*** analysis.

[22] Before embarking upon that analysis, I feel compelled to express some reservations about its potential breadth.

[23] As set out in para 74 of ***Sherman***, the Supreme Court was of the view that dignity will be at play more rarely than privacy *simpliciter* and that this is sufficient to obviate the criticism that privacy will always be at risk in open court proceedings.

[24] I am not convinced that is the case. To the contrary, I believe the reasoning in ***Sherman*** opens the door to challenges to the open court principle that previously did not exist.

[25] It is stating the obvious to say that, every day in Canada, in dozens of court rooms and in a multiplicity of actions, intimate personal information is revealed. Personal injury actions often require disclosure of an individual's physical and mental capacity, psychological injury and personal financial distress. Family proceedings often involve allegations of physical or psychological partner abuse, infidelity, financial manipulation and parental alienation. Protection and restraining order applications frequently involve allegations of physical and psychological abuse, harassment, manipulation, emotional damage and suffering. These are intimate and sensitive details that, in my view, can be said to strike at an individual's "biographical core".

[26] The Supreme Court in ***Sherman*** appeared to attach great important to individuals' ability to control how they are perceived by others, stating at paras 65 and 71:

> In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. …
>
> Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner… Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner… Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public.

[27] In balancing conflicts between recognition of the open court principle and an individual's right to control their public presentation, ***Sherman*** tells us that the right to exercise such control predominates. By asserting at para 68 the "superordinate importance of human dignity" and by viewing dignity through the lens of control over how others perceive us and our ability to control disclosure of information which we, as individuals, believe is sensitive or personal, the Supreme Court of Canada has, in my respectful opinion, dramatically expanded opportunities to seek abrogation of the open court principle.

[28] Moreover, I conclude that ***Sherman*** stands for the proposition that an individual's opinion about the sensitivity of their information outweighs the opinion of the courts or anyone else. The Court at para 78 noted that "…one factor in determining whether an applicant's subjective

expectation of privacy is objectively reasonable in the s. 8 [Charter] jurisprudence focuses on the degree to which information is private…".

[29] With respect, this seems to me to beg the question. Under the ***Sierra Club*** analysis, courts assessed requested court openness restrictions based on the nature of the information in question. In my view, by emphasizing an individual's "biographical core" and right to control their public presentation through selective disclosure of information, ***Sherman*** significantly elevates the subjective element. If a party's sense of personal dignity could be compromised by disclosure of the information in question, I read ***Sherman*** as saying that they have the right to seek contraction of court openness.

[30] The Supreme Court of Canada held that an applicant will be able to justify a limit on openness only in exceptional cases, where the threatened loss of control is over information about oneself that is so fundamental that it strikes meaningfully at individual dignity.

[31] It is not clear to me why a threatened loss of control over fundamental information that strikes at a person's dignity would be exceptional. The Supreme Court tells us that an individual's sense of dignity involves that individual's right to delineate the boundaries of disclosure of sensitive and personal information. References to fundamental information about oneself that strikes meaningfully at one's dignity are, with respect, not particularly helpful in resolving the challenge of balancing the public interest in court openness and the preservation of individual dignity in the absence of further detail as to what would constitute such fundamental information.

[32] The Supreme Court of Canada held at paragraph 84 of ***Sherman*** that the threatened disclosure must engage "social values of superordinate importance beyond the more ordinary intrusions to participating in the judicial process." Unfortunately, the Court did not elaborate on what would constitute "more ordinary intrusions".

A. Serious Risk to Important Public Interest

[33] On the facts before me, however, this quandary is readily resolved.

[34] The Supreme Court held at para 77 of ***Sherman*** that sensitive information warranting protection includes stigmatized medical conditions and sexual assault. A.B.'s statement of claim asserts that they suffer from PTSD, major depressive disorder and adult attention deficit disorder. They allege in their affidavit that, during their military service, they were the victim of a sexual assault. Accordingly, I conclude that the information A.B. wishes to keep confidential is of such an intimate and personal nature as to bear directly on their personal dignity. Its protection is an important public interest under ***Sherman***.

[35] I do not think it matters that A.B. revealed the sensitive information about themselves in their pleadings as a plaintiff, as opposed to disclosing it in response to an action commenced by someone else. The important public interest of preserving individual dignity cannot depend on whether one is the party initiating or reacting to litigation. What appears to be of paramount importance is an individual's ability to control their public presentation. This cannot be enjoyed at the expense of one's ability to assert one's legal rights.

[36] Having concluded that the information in question strikes at A.B.'s individual dignity and therefore engages an important public interest, I now must determine whether that interest is at serious risk if the information is disclosed by court proceedings.

[37] A.B.'s lawsuit is based on the assertion that unauthorized disclosure of their personal information related to their service-related medical injuries has already taken place. They argue that allowing others to access these details while they prosecute their action is self-defeating in that it would reimpose the same harms that are the basis of their lawsuit.

[38] They attach to their affidavit a letter dated July 13, 2020 from their treating psychotherapist to their legal counsel. Having removed their name, I quote that letter below:

> As [A.B.'s] treating psychotherapist, I believe that publication of [A.B.'s] name and identifying information in connection with a legal action for breach of privacy would adversely impact [their] mental health. Throughout our clinical work, it has been evident that non-consensual publicity and disclosure of personal information causes [A.B.] significant distress, and reminders of the alleged breaches of privacy continue to negatively impact [their] mental state.

[39] The Royal Canadian Legion, the Alberta Legion, Mr. Burgess and Mr. Wood (collectively, the "Legion Defendants") note that any serious risk to an important public interest must be real, substantial and well-grounded in the evidence: ***R v Mentuck***, 2001 SCC 76. The Legion Defendants argue that the letter from A.B.'s psychotherapist does not support their position that the Publication Ban is not enough and that an Anonymization Order and a Sealing Order are necessary. I will address this argument in the next section of these Reasons.

[40] The Legion Defendants cite several authorities reiterating the importance of court openness: ***Sherman***; ***Sierra Club***; and ***Canadian Broadcasting Corp v New Brunswick (Attorney General)***, [1996] 3 SCR 480. As A.B. does not challenge the foundational nature of the open court principle, I do not consider it necessary to address the Legion Defendants' arguments on those cases.

[41] Canada and Ms. Palmer (collectively, the "Canada Defendants") make many of the same arguments. In their brief, they assert that "Whether the privacy issues engaged in this case present a serious risk to an important public interest is clearly arguable." They argue that ***Sherman*** "establishes that a higher threshold must be met than was previously the case for restrictions to court access based on privacy concerns."

[42] I disagree with the latter argument. As discussed above, I am of the view that ***Sherman*** may have expanded the availability of court access restrictions.

[43] With respect to serious risk, the Supreme Court of Canada held at para 80 of ***Sherman*** that the seriousness of the risk to an individual's dignity may be affected by the extent to which information would be disseminated without an exception to the open court principle. The Court stated that "…courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced."

[44] I struggle to reconcile this articulation of "serious risk" with the identification of dignity as an important public interest. If the protection of human dignity is superordinate and requires that individuals retain control over how other people perceive them by preventing the disclosure of sensitive or intimate personal information, I do not see how it matters whether that information is disclosed to one person or a thousand. And if the extent of disclosure is relevant, how are courts to determine how much is too much?

[45] In this case, I find that there is a serious risk to A.B.'s dignity because:

(a) the issues disclosed in their pleadings include stigmatized medical conditions and alleged sexual assault;

(b) disclosure of that information to even a single individual would compromise their ability to control how they are perceived by others; and

(c) their right to effect that control is of superordinate importance.

[46] Further, I find that their concerns are objectively reasonable because they engage intimate details of their experiences and about them as a person.

B. Reasonable Alternative Measures Insufficient

[47] A.B.'s claim is that, by accessing and disclosing their personal information, the Defendants have worsened their injuries and created barriers to their rehabilitation. They argue that revealing their identity in a claim premised on unlawful disclosure of their personal information exacerbates the harm their action seeks to remedy and defeats their attempt to repair the damage they already have suffered.

[48] They argue that the Publication Ban alone is inadequate because it would not prevent persons other than the media from accessing or receiving this information and disclosing it to others in private communications or social media. They claim that their concern is with private access to and dissemination of this information. In particular, they are concerned that Veterans Affairs Canada and the Royal Canadian Legion may publish details or documents relating to this lawsuit, including, potentially, their name and medical details.

[49] The Defendants assert that the Publication Ban is sufficient to address A.B.'s concerns. They note that third parties are enjoined from disseminating information that might lead to disclosure of A.B.'s sensitive personal details. They dismiss A.B.'s assertion that the Requested Orders are necessary to prevent them from making further public disclosure of A.B.'s service-related injuries.

[50] I agree that there is little concern that the Legion Defendants will make any unauthorized disclosure. They no longer have access to A.B.'s information and I accept that they intend to respect the Publication Ban.

[51] Nevertheless, A.B. argues that the Anonymization Order and Sealing Order are needed. In essence, they argue that this Court's failure to take active steps to prevent disclosure would amount to *de facto* disclosure.

[52] A.B. argues that the Anonymization Order would protect their dignity by preventing disclosure of personal medical information that is tied to their biographical core. A.B. asserts that this is a minimal constraint on the open court principle and notes that written decisions could still be published without identifying details.

[53] In addition, A.B. argues that a Sealing Order is necessary to prevent access to court documents that reveal their identity and medical information. In argument, their counsel sought to persuade me that only portions of the Court file would need to be sealed. Effectively, someone would have to redact filed documents containing sensitive information so that they could remain available to the public. Unredacted documents containing this information would be sealed.

[54] A.B. argues that the Sealing Order would protect their dignity, as contemplated by ***Sherman***, by preventing continuing access to and disclosure of their personal and confidential information. Absent the Sealing Order, a courthouse search will allow people to access their sensitive personal details.

[55] The Canada Defendants note that the Supreme Court of Canada in ***Sherman*** denied the application for a sealing order. However, the interests addressed in ***Sherman*** were quite different from those at issue before me. The privacy interests advanced by the trustees in ***Sherman*** were too broadly articulated and did not focus on individual dignity.

[56] The Legion Defendants cite ***John Doe v Edmonton Public School District No. 7***, 2019 ABQB 952, in which this Court refused an anonymization order, a partial sealing order and a publication ban. Applying the ***Dagenais-Mentuck*** test, the Court was not satisfied that these measures were necessary because the evidence did not establish a serious risk to the proper administration of justice. I note, however, that this case was decided before ***Sherman***, with its emphasis on an individual's dignity and ability to control the dissemination of information that could affect how people perceive them.

[57] The Canada Defendants point to ***John Doe v Government of Nunavut***, 2022 NUCJ 1, in which the Nunavut Court of Justice applied the ***Sherman*** test and dismissed an application for anonymization and sealing orders respecting the applicant's alleged mental illness. The Court stated that exceptions to the open court principle are narrow and expressed the concern that responding favourably to the applicant's request on the limited medical record before it would "open the floodgates for many plaintiffs to request similar relief". With respect, I believe the Court placed less emphasis on delineating the scope of individual dignity, as was done in ***Sherman***, and more emphasis on the lack of expert medical evidence supporting the applicant's claim.

[58] The Legion Defendants take issue with the evidence in support of A.B.'s application. They argue that the letter from their psychotherapist relates to nonconsensual publication of their information that is addressed by the Publication Ban. These Defendants assert that it does not support an Anonymization Order or a Sealing Order.

[59] In my view, the Legion Defendants read that letter too narrowly and fail to address A.B.'s concerns over *disclosure* of their personal information, not merely its *publication*. The letter also refers to "disclosure of personal information". While failure to anonymize Court papers and to seal the Court file does not amount to active publication of sensitive personal information, the fact that

it would be available to anyone who decided to search the file does, in my view, facilitate disclosure of that information. This erodes A.B.'s ability to control the dissemination of sensitive and private information and, thereby, to control how they are perceived by other people.

[60] I find that the Publication Ban is not a reasonable alternative measure to prevent serious risk to the important public interest in preserving A.B.'s right to control information which could impact upon how others view them. I note that they specifically raised the concern about their personal information being disseminated on social media. In principle, anyone who decides to search the Court record would be prohibited by the Publication Ban from publishing details, but the fact remains that any number of persons readily could become aware of the intimate personal details contained within the Court record. While publication bans apply to the public at large, the courts have in recent years expressed concern about their effectiveness in restraining parties other than the mainstream media; see, for example, ***R v Globe and Mail Inc***, 2017 ONSC 2407, ***Galloway v AB***, 2019 BCSC 395 and ***Stuart v Jane Doe***, 2019 YKSC 53.

[61] Accordingly, I find that the Sealing Order is warranted. Further, the Sealing Order is of no practical value without the Anonymization Order. If the file is sealed but A.B.'s actual name is utilized in any published decision, disclosure of sensitive and personal information will occur through the publication of that decision.

C. Proportionality

[62] To meet the test for discretionary limits on court openness, an applicant must also show that the benefits of the order sought outweigh its negative impacts.

[63] A.B. states that, through this action, they seek to ensure that what they allege happened to them does not happen to others. They assert that if the Requested Orders are not granted, they will be forced to discontinue their action rather than risk having their medical, personal and other history become more widely known and publicized. In that event, they will lose their access to a remedy for the injury they claim to have suffered as a result of the disclosure of their personal and confidential information. To continue with this litigation would perpetuate that injury.

[64] The Canada Defendants argue that A.B.'s decision about whether to proceed with this lawsuit is not the Court's responsibility and should not be considered for purposes of the ***Sherman*** test.

[65] I disagree. At paragraph 54 of ***Sherman,*** the Supreme Court of Canada stated:

> …care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in ***Bragg*** (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson* (1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). *Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter*

> *an individual from bringing that claim* (see ***S. v. Lamontagne***, 2020 QCCA 663, at paras. 34-35 (CanLII))**.** In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in ***Sierra Club*** (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., ***Himel v. Greenberg***, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of *these related and valid important public interests* does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above. [Emphasis added.]

[66] I conclude from this that removing deterrents from pursuing a claim, such as the requirement to disclose personal information, can be an important public interest.

[67] Further, I do not see a negative impact on the open court principle arising from the Sealing Order and the Anonymization Order. A.B.'s claim is based on an alleged breach of their privacy that strikes at their biographical core and detracts from their dignity. In my view, the advancement of the administration of justice and the development of the law surrounding rights to privacy do not depend in any important way on the dissemination of information surrounding this case.

[68] I find the goals and objectives of the open court principle are not at serious risk of compromise if I grant the Requested Orders. Rather, I find A.B.'s superordinate right to preserve the integrity of their biographical core, as described by the Supreme Court of Canada, takes precedence.

VI. Conclusion

[69] I note that A.B. asks for relief to prevent further injury of a kind they have yet to prove. My decision to grant the Requested Orders should not be taken as an indication that this Court accepts the validity of claims of unauthorized disclosure or injury. The Legion Defendants challenge A.B.'s assertions that they gained unauthorized access to A.B.'s information and devote considerable effort to dispelling the notion that their representatives acted inappropriately in accessing A.B.'s private information. Ultimately, they may be successful in establishing that position at trial. This, however, does not address the potential damage A.B. may suffer to their individual dignity if anyone can access their personal information, either through access to the Court file or through a failure to anonymize pleadings and other Court material.

[70] Therefore, I grant A.B.'s application for the Anonymization Order and the Sealing Order and I direct that the Publication Ban shall remain in effect.

[71] If the parties cannot agree on costs, they are to submit written argument, not to exceed five pages in length, within thirty days of the date of this decision.

Heard on the 10th day of June, 2022.
Dated at the City of Calgary, Alberta this 13th day of July 2022.

C.M. Jones
J.C.Q.B.A.

Appearances:

David W. Wu
for the Plaintiff

Cam Regehr
for the Defendant Canada (Attorney General) and Marnie Palmer

Karen Zimmer
for the Defendants Royal Canadian Legion, Royal Canadian Legion Alberta-NWT Command, Michael Burgess and Shaun Wood