IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *X. v. Y.*,
2011 BCSC 943

Date: 20110718
Docket: M99443
Registry: New Westminster

Between:

X.

Plaintiff

And

Y. and Z. Ltd.

Defendants

Before: The Honourable Madam Justice Dardi

Reasons for Judgment – Anonymity Order and Sealing Order

Counsel for the Plaintiff:	T. Spraggs A. Sovani
Counsel for the Defendants:	J. Lindsay, Q.C. P. Tung
Place and Date of Trial:	New Westminster, B.C. February 22-26; March 1-5, 8-12, 17-21; September 7-9; and November 15-16, 2010
Place and Date of Judgment:	New Westminster, B.C. July 18, 2011

INTRODUCTION

[1] I am concurrently issuing reasons indexed at *X. v. Y.*, 2011 BCSC 944. This is a companion judgment arising from the plaintiff's claim for damages sustained in a motor vehicle accident. The accident occurred while the plaintiff, who is an RCMP officer, was operating a motorcycle in the line of duty.

[2] The plaintiff seeks certain measures to protect his identity. At the conclusion of the trial, while not seeking a ban on the publication of the judgment, he brought an application seeking the following orders:

i. In the reasons for judgment, he and his family be referred to by initials, rather than by their full names; and

ii. The court file, including the transcripts, be sealed. Counsel made no submissions on the duration or access conditions to be imposed on the sealing of the file.

[3] The defendants oppose the orders sought by the plaintiff. I note that the defendants' video surveillance tape of the plaintiff was sealed by consent during the course of the trial.

[4] It clearly emerges from the jurisprudence that the orders sought are exceptional: *V.F. v. E.B.*, 2010 BCSC 1870 at para. 18. At the heart of this application lies the balancing of two different public interests: maintaining the openness of these judicial proceedings and protecting the safety and personal security of the plaintiff, who works as a police officer investigating criminal gang activity. The plaintiff's essential contention is that the inclusion in the reasons for judgment of information from which his identity could be discerned would place him and his family at risk of serious harm. Further, without a sealing order, the court file could be searched and the plaintiff's personal circumstances could become a matter of public knowledge and accessible to members of criminal gang organizations.

FACTS

[5] Before turning to the analysis, I will summarize the facts pertinent to this application. I have intentionally not referred to the names of the particular gang members referred to in the plaintiff's evidence. Those names are well-known to the public.

[6] In his affidavit sworn September 8, 2010, which was admitted by consent, the plaintiff deposed that:

> As part of my work, I investigate cases involving gang violence and dangerous firearms. I also write sentencing reports for widely publicized gang members and these reports publish my full name... it is for this reason, among other reasons, that the publication of my full name, my wife's full name and my daughter's full name and personal residential address or any other contact information is a high security risk.

[7] At trial, the plaintiff testified that gang members who have been criminally charged have "thoroughly shown no respect for privacy or the safety of the public", and that the gang members that he deals with "are not adverse to either using private investigators or actually working for private investigative agencies to obtain information". He is aware of threats from criminals to members of the police force, and he stated that "it is a common practice for these [criminals] to verbally state their intentions of causing harm to members and family".

[8] The plaintiff stated that he does his utmost to insulate his family from any risk. His family's address and telephone numbers are unlisted. He has been issued two unmarked police vehicles with different expiry dates in an effort to confuse criminals who may try to track him. He also related an incident in which a known gang associate publicly approached him and attempted to intimidate him by taking his photo.

[9] The plaintiff's evidence on these security concerns was corroborated by Corporal L., a supervisor and investigator with the Greater Vancouver Drug Section, Organized Crime Unit. He testified that he is always cognizant of the counter-surveillance conducted on the police by members of criminal organizations. He

stated that members of criminal organizations set up counter-surveillance to find out personal information about officers' families, where they live, and what type of police vehicles they drive (since many police vehicles have covert plates). He stated that these individuals use such information in an effort to intimidate police officers and their families.

[10] The evidence of the plaintiff and Corporal L. was uncontroverted by the defendants. However, the defendants characterize the evidence as constituting "vague subjective concerns" and assert that they have no way of assessing whether or not the plaintiff's stated concerns are valid.

POSITION OF THE PARTIES

[11] I turn to briefly summarize the position of the parties.

[12] The plaintiff submits that, because of the sensitive nature of his job as a police officer involved in the investigation of criminal activities engaged in by gang members, his personal safety and that of his family will be jeopardized if he is publicly identified in the reasons. The reasons for judgment reference details of the plaintiff's personal life and expose the potential vulnerabilities associated with his medical condition. This is information that would not otherwise be available to the public and in particular to those gang members with an interest in intimidating police officers.

[13] The defendants vigorously assert that none of the proposed measures are necessary or appropriate. They contend that the evidence falls short of demonstrating that the plaintiff's alleged security concerns justify an exception to the principle of openness. Further, they submit that such orders in order to be effective should have been made at the outset of the trial, not after its conclusion.

LEGAL FRAMEWORK

[14] The court has the discretion to make the orders sought pursuant to its inherent jurisdiction. I first address the competing interests that this Court must consider and then the legal principles that guide this Court in making the

determination as to whether the anonymity of litigants should be protected and whether the court file should be sealed.

Competing interests

[15] The principle of openness is a core value of the judicial system. Cases pre-dating the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, such as *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175, emphasized that the principle of openness is essential to accessibility and accountability in the judicial system. As the Court points out in *MacIntyre* at 185, openness fosters public confidence in the integrity of the judicial system and the effective administration of justice. With the advent of the *Charter*, the principle of openness was enshrined in s. 2(b), which prescribes freedom of expression as a fundamental freedom.

[16] The competing interest of the right to privacy has also been accorded constitutional protection in s. 7 of the *Charter*: *A.B. v. C.D.*, 2010 BCSC 1530 at para. 44. Section 7 of the *Charter* provides as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

In *R. v. O'Connor*, [1995] 4 S.C.R. 411 at para. 111, the Court held that “security of the person” is to be interpreted broadly.

Discretionary orders restricting openness

[17] The curtailment of public accessibility to judicial proceedings is justified only where social values of a superordinate importance require protection: *MacIntyre* at 186-187. The common law test for a publication ban, involving twin requirements of necessity and proportionality, was articulated by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and then reformulated in *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 at para. 32.

[18] In *Vancouver Sun (Re),* 2004 SCC 43, [2004] 2 S.C.R. 332, the Court held that although formulated in the context of publication bans, the *Dagenais/Mentuck* framework should be applied to all discretionary judicial orders that limit the principle of openness. Hence, these principles guide the court's exercise of discretion in making anonymity orders and sealing orders as well as publication bans.

[19] *A.B. v. C.D*., 2010 BCSC 1530, is an example of a recent civil case in which the court ordered a publication ban. Although the case involved a sexual assault by a teacher and, therefore, the factors which informed the analysis were somewhat different than in this case, the court provides a helpful formulation of the *Dagenais*/*Mentuck* test at para. 63:

> [63] In my view, the *Dagenais* test, as modified by *Mentuck*, can be further modified to reflect the competing interests in the case at bar as follows:
>
> A discretionary publication ban to protect identification of a person or entity should only be ordered when
>
> (a) such an order is necessary in order to prevent a serious invasion of privacy because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[20] The principle of openness and its exceptions, in light of freedom of expression under the *Charter*, was considered by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; and *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188. In *Sierra Club*, the Court affirmed that although the matter under consideration was a civil proceeding and *Charter* rights were not directly engaged, those rights should inform the exercise of discretion in determining any exceptions to the principle of openness: paras. 37-38.

[21] The courts have recognized exceptions to the fundamental principle of openness when it is necessary to ensure that justice is done between the parties. However, the principle is to be displaced only to the extent required to preserve

"social values of superordinate importance": *MacIntyre* at 186-87. The *Dagenais*/*Mentuck* test is a flexible and contextual one, and as the court in *C.W. v. L.G.M.*, 2004 BCSC 1499, observed at para. 25, the categories of circumstances that may be viewed as constituting a social value of superordinate importance should not be considered closed.

[22] The Court in *Mentuck* also clarified that in terms of "necessity," the risk to the proper administration of justice in question must be a "serious one … [t]hat is, it must be a risk the reality of which is well-grounded in the evidence" (at para. 34). The authorities establish that the standard is not one of mere convenience or expediency; in order to displace the public interest in an open-court process, an applicant must provide cogent evidence to support the alleged necessity for anonymity: *C.W.* at para. 25.

DISCUSSION

[23] The pivotal question is whether the circumstances of this case create an exception to the principle of openness.

[24] The plaintiff asserts that he is seeking these anonymity measures not because of embarrassment or paranoia, but for legitimate safety reasons. Unlike the civil cases in which the identities protected are those of minors as alleged victims, or alleged wrongdoers whose professional reputation depends on the public confidence in their worthiness, this case does not engage a privacy concern to protect the dignity of the parties, nor is embarrassment a factor. Rather, in the unique circumstances of this case, the plaintiff alleges that the release of his personal information would create a security and personal protection risk for him and his family. The plaintiff acknowledges that he testifies in criminal trials as a police witness regarding firearms; however, he contends that testifying as a witness with respect to firearms is different from the online publication of his own personal injury case where he has necessarily revealed many personal details and exposed vulnerabilities about his physical condition. I agree.

[25] Based on the totality of the evidence, I conclude that because of the serious risk of potential harm to him and his family, the plaintiff has demonstrated a need to preserve a social value of superordinate importance. It can be reasonably inferred that there is a real and substantial risk that if members of criminal organizations were in a position to access information about the plaintiff's compromised medical condition, his habits, and information about his family, that information could be used to harm or intimidate the plaintiff or his family members. In summary on this issue, I conclude that there are real and legitimate security concerns engaged in this case and that the exception to the principle of openness ought to be invoked. It is appropriate to limit public access to certain aspects of this legal proceeding to protect the proper administration of justice.

[26] I now turn to a consideration of the protective measures sought in this case and whether the salutary effects of those measures outweigh the deleterious effects on the rights and interests of the parties. As stated, the principles that govern the limitation of publication are equally applicable to anonymity orders and orders sealing court files, as both types of orders constitute limitations on the openness of judicial proceedings: *K.V. v. T.E.* (1998), 56 B.C.L.R. (3d) 344 at para. 23.

[27] I note that the British Columbia Court of Appeal observed in *B.G. et al v. H.M.T.Q. in Right of B.C.*, 2004 BCCA 345 at para. 26, that replacing names with initials in a judgment minimally impairs the openness of judicial proceedings because it relates only to a "sliver" of information.

[28] I have considered whether the salutary effects of replacing the names of the parties with initials in the judgment would outweigh the negative effects. I am satisfied that in the extraordinary circumstances of this case, the identity of the plaintiff and his family members and their personal details should be protected from public disclosure. Accordingly, I order that the style of cause in this proceeding shall be amended to refer to the plaintiff by the initial X., the individual defendant by the initial Y., and the other defendant by the initial Z. Ltd. It is in the interests of justice that such an order be granted. As well, in order to protect the identity of the plaintiff, in the judgment, I shall refer to all witnesses by their initials.

[29] I turn next to consider whether the court file should be sealed. The courts have recognized that sealing the court file is a more substantive impairment of the openness of judicial proceedings. In *Sahlin v. The Nature Trust of British Columbia,* 2010 BCCA 516, the Court of Appeal considered an application for the sealing of one volume of the appeal book. In reviewing the relevant legal principles, the Court of Appeal cited the statements of Mr. Justice Fish in *Toronto Star Newspapers Ltd.* that, "[i]n any constitutional climate, the administration of justice thrives on exposure to light—and withers under a cloud of secrecy" (at para. 1), and that public access should be "barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would subvert the ends of justice or unduly impair its proper administration" (at para. 4). The Court concluded that it was appropriate to make the sealing order, and noted at para. 8 the conditions of the order:

> [8] ... the proposed sealing order is not absolute in form but, rather, contains provision for application to be made by third parties for the release of the document from the sealing provisions of the order in the appropriate circumstances. ...

[30] With respect to protective orders in a civil law context, although it was not referred to by counsel, I also found *C.L.B. v. J.B*. (2009), 97 O.R. (3d) 544 (S.C.J.), of assistance. The court considered whether the trust proceedings for two minor children whose father had died in the September 11 attacks should be sealed. The concern was that given the notoriety of the September 11 attacks and the attendant media attention, the childrens' victim compensations and financial information could be publicized. Brown J. stated as follows at paras. 10-11:

> ... It is up to the person seeking a sealing order to demonstrate a public interest that outweighs the public interest in openness: *Philion*, para. 30. Courts also may grant sealing orders where the disclosure of the information would cause serious harm or prejudice to the person or party involved, and where the publicity would destroy the very subject matter of the litigation itself: *Towers, Perrin, Forster & Crosby Inc. v.Cantin, supra,* at para. 7.
>
> The phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the interest in question: *Sierra Club*, at para. 57.
>
> [Emphasis added.]

[31] The court in that case refused to grant the sealing order as it concluded that the reference to the litigants by initials rather than by their actual names was a reasonable alternative measure to preserve anonymity. By contrast, in this case, referring to the parties by their initials would not in itself afford sufficient protection to the plaintiff. Members of criminal organizations, once alerted by the judgment to the circumstances of the unidentified plaintiff, could access the court file to ascertain the plaintiff's identity and to review his pertinent personal information. There is a serious risk that disclosure of the information in the court file would cause serious harm or prejudice to the plaintiff and his family. Moreover, if the court seal is filed, there was no suggestion that the defendants would be prejudiced.

[32] In all the circumstances, I conclude that a sealing order is reasonable and appropriate. The alleged positive effects of the sealing order outweigh the negative effects on the presumptive public interest in the openness of judicial proceedings. In the end, the balancing of the competing interests in this case does not create "a cloud of secrecy under which justice will wither" (*Sahlin* at para. 8).

[33] In my view, while this application could have been brought earlier in the proceedings, the timing is not material as the real risk arises with the publication on the internet of the reasons for judgment. In this respect, this is similar to the situation in *R. v. Pickton*, 2010 BCSC 1198, where, post-trial, the court granted a publication ban on the applicant witness's identity. While recognizing that the order would not provide her with perfect anonymity because her name had been previously published, the court concluded that the order would nonetheless provide her with some protection in the future (at paras. 27-28).

CONCLUSION

[34] In summary, I have concluded that the plaintiff has met the burden of showing that the orders sought are necessary to prevent a serious risk to the administration of justice. I make the following orders:

(i) The style of cause in this proceeding shall be amended to refer to the plaintiff by the initial X., the individual defendant by the initial Y., and the other defendant by the initial Z. Ltd.; and

(ii) The whole of the court file shall be sealed on the following condition: third parties may apply to the court for an order for release of any of the documents from the sealing provisions upon notice to the plaintiff and the defendants. Absent court order, only the parties and their counsel will have access to the court file.

[35] In the published reasons for judgment all witnesses shall be referred to by their initials.

"Dardi J."