NOVA SCOTIA COURT OF APPEAL

Citation: *Dempsey v. Pagefreezer Software Inc.*, 2024 NSCA 76

Date: 20240807
Docket: CA 532047
Registry: Halifax

Between:

Nathan Kirk Dempsey

Appellant

v.

Pagefreezer Software Inc. and Michael Riedijk

Respondents

Judge:	Bryson, J.A.
Motion Heard:	June 27, 2024, in Halifax, Nova Scotia in Chambers
Held:	Respondents motion granted; Appellant's motion dismissed
Counsel:	Nathan Kirk Dempsey, self-represented, Noah Entwisle, for the respondents

Introduction

[1] Although this appeal has been dismissed, both the appellant and the respondents advanced competing motions seeking to seal certain materials that have been filed with this Court. Mr. Dempsey says not all of the documents in question should be sealed because they fail the three part test described by the Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25.

[2] The parties were formerly in a business relationship which terminated with a settlement agreement. Then Mr. Dempsey resorted to the British Columbia Supreme Court seeking to set aside the agreement, based on allegations of conspiracy and fraud. Pagefreezer and Mr. Riedijk responded by obtaining a series of confidentiality orders. Judgments followed against Mr. Dempsey, including fines for contempt. He was found to be a "vexatious litigant". Mr. Dempsey attempted to challenge the judgments in the Supreme Court of Canada. He was denied leave to appeal.

[3] The British Columbia Supreme Court and British Columbia Court of Appeal issued a number of sealing orders.[1] Pagefreezer and Mr. Riedijk say these sealing orders were issued to protect commercially sensitive information, shareholder

[1] *Dempsey v. Pagefreezer*, 2022 BCSC 1246, interim order, made permanent in an unreported decision on October 13, 2022 in file S-220956; November 3, 2022 in CA 48392.

information, information covered by settlement privilege, and information covered by contractual confidentiality obligations.

[4] Mr. Dempsey now resides in Nova Scotia. Pagefreezer and Mr. Riedijk successfully sought to have two of the British Columbia judgments recognized in this Province by virtue of the *Enforcement of Canadian Judgments and Decrees Act*, S.N.S. 2001, c. 30 as amended. An Execution Order for the first judgment was issued by the Supreme Court of Nova Scotia on April 27, 2023. Mr. Dempsey unsuccessfully applied for a stay of execution.[2]

[5] Mr. Dempsey then appealed. His appeal was dismissed on December 4, 2023.

[6] Mr. Dempsey's motion to stay execution of the second judgment of January 22, 2024, was dismissed by Justice Anne Smith on March 21, 2024.

[7] Mr. Dempsey appealed again on March 28, 2024. The respondents moved for security for costs. Their motion was granted by Justice Bourgeois (2024 NSCA 53). Mr. Dempsey failed to post security so his second appeal was dismissed.

[2] 2023 NSSC 240.

[8] As the litigation proceeded in Nova Scotia, some of the material that was originally sealed by the British Columbia courts was filed with the courts of this province. Additionally, on December 4, 2023, this Court granted a sealing order. The Registrar issued a supplemental interim sealing order respecting the materials filed on this confidentiality motion.

The Positions of the Parties

[9] Mr. Dempsey moves to redact portions of his affidavits of March 27 and April 10, 2024. He acknowledges sections of these affidavits contain personal biographic information, commercial information, and shareholder settlement information that justify a confidentiality order but he says not all of the information contained in the affidavits can be sealed under the governing law. He adds that the files contain proof of fraud and perjury by the respondents.

[10] Pagefreezer and Mr. Riedijk move to seal entirely the same two affidavits submitted by Mr. Dempsey. Additionally, they ask this Court to seal entirely the affidavits submitted by Noah Entwisle on April 18, 2024, and Christian Garton on June 11, 2024. The “primary basis” for their request is that the material in those affidavits is subject to existing sealing orders issued by the British Columbia Supreme Court and British Columbia Court of Appeal. The respondents also rely

on this Court's December 4, 2023, sealing order. While the respondents acknowledge that not every line of the documents contains confidential information, they note that the confidential information is so integrated in the files that they have to be sealed entirely. They also point out that the integration of confidential information was highlighted by the British Columbia Courts when they issued the original sealing orders.

The Applicable Law

[11] In *Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General)*, 2013 NSCA 134 this Court found that a confidentiality order may be issued relying on *Nova Scotia Civil Procedure Rules* 85.04 and 90.02(1). A confidentiality order must be consistent with the freedom of the press and other media under s. 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.[3]

[12] The governing authority regarding the open courts principle is the Supreme Court of Canada's decision in *Sherman Estate*, which slightly modified the rule described in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. Under *Sherman Estate*, court proceedings are "presumptively open to the

[3] *Rule* 85.04

public."[4] However, the courts have discretion to limit the open courts presumption where it is established 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[5]

Is There an Important Public Interest in this Case?

[13] The first prong of *Sherman Estate* is satisfied with respect to all of the affidavits the respondents seek to seal. Aside from the valid interests recognized by the original sealing orders of the British Columbia Supreme Court and British Columbia Court of Appeal, the respondents correctly note that judicial comity is an important public interest that can justify limiting the open courts principle where the relevant information is subject to sealing orders in another jurisdiction. Judicial comity refers to the respect judges give to the decisions of courts from different jurisdictions.[6] In this case, comity favours this Court maintaining the confidentiality of the material covered by the sealing orders issued in British Columbia.

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[4] 2021 SCC 25 para 37.
[5] 2021 SCC 25 para 38.
[6] *R. v. Sullivan*, 2022 SCC 19 at para.75.

[14] Decisions from the Ontario Superior Court and the Federal Court have recognized comity as an important public interest under *Sherman Estate*. For example, in *Citibank, NA v. Alpha Holdings Ltd Partnership et al.*, 2023 ONSC 5403, the Court granted a request for a sealing order under *Sherman Estate* because:

> [34] […] There is an important public interest in preserving confidential financial information, and a public interest in the comity and cooperation pleading courts in different jurisdiction.

[15] Similarly, in *In the Matter of the Companies' Creditors Arrangement Act*, 2023 ONSC 753, the Court stated:

> [61] More fundamental, however, is the fact that the material over which the sealing order is sought is already the subject of a sealing order issued by a court in another jurisdiction. That order, which requires that the contents of the case in that jurisdiction remain sealed until further order of that court, was made in a proceeding commenced by a verified Complaint itself filed under seal. I am satisfied that an important public interest includes comity and cooperation between courts in different jurisdictions.

[16] Judicial comity supports this Court protecting the information that was originally sealed in British Columbia, and satisfies the public interest criterion of *Sherman Estate*.

C. Are there Reasonable Alternative Measures?

[17] Mr. Dempsey's position that the confidential commercial, personal and settlement information in the affidavits can be adequately protected by redaction

(as opposed to complete seals) is best addressed under the second prong of *Sherman Estate*, which requires an evaluation of reasonable alternatives to the order sought.

[18] Mr. Dempsey's argument should be rejected for the following reasons.

[19] First, protecting the public interest in comity requires that any order by this Court should maintain the original confidentiality designations set by the orders in British Columbia.

[20] Second, decisions by this Court and other courts recognize that where redaction is impractical, it is not a reasonable alternative measure.

[21] In *Osif v. College of Physicians & Surgeons (Nova Scotia)*,[7] this Court concluded that "while redaction of the appeal book is an alternative to the granting of a sealing order, it is neither a practical nor a reasonable alternative."[8] Although the materials in *Osif* may have been lengthier (the transcript of the hearing alone was close to 3,000 pages), the decision demonstrates that where a document is entirely suffused with confidential information, redaction may not be a reasonable alternative to a sealing order.

[7] 2008 NSCA 113 at para 27.
[8] 2008 NSCA 113 at para 29.

[22] Subsequent decisions by courts of this province and Ontario have applied the reasoning in *Osif*. For example, in *Patient X v. College of Physicians and Surgeons of Nova Scotia*, 2013 NSSC 32, the Nova Scotia Supreme Court was asked to seal an entire record. The Court refused because the record was only around 120 pages long, and it would be practical to redact parts of the record. But the court did seal one section of the file because "[a]lmost all of the material in that tab is identifying and would need to be redacted, which would be painstaking and prone to error especially since there are a lot of handwritten notes."[9]

[23] Likewise, in *Khan v. College of Physicians and Surgeons of Ontario*, 2023 ONSC 848, the Court rejected redaction as a reasonable alternative to sealing. The exhibit book at issue there was almost 4,500 pages and contained numerous patient records with identifying information. The Court, citing *Osif*, held that "the process would be time-consuming, subject to error and would delay the hearing of the appeal". Thus, the Court concluded it was "not satisfied that there are reasonable alternative measures available."[10]

[24] It is important to remember that, the "test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least

[9] 2013 NSCA 32 at para 49.
[10] 2023 ONSC 848 paras 18, 19.

restrictive option." In *Sierra Club*, the SCC rejected a "more narrowly drawn confidentiality order" as unviable "given the difficulties associated with expungement."[11]

[25] Here, the confidential material pervades the relevant affidavits, undermining the reasonableness of redaction.

[26] Third, and similarly, in assessing the alternative of redaction, this Court may consider how intelligible the material would be after redactions were applied. Where confidential material permeates the file, redaction may not be a reasonable alternative because the un-redacted portion of the file would be difficult to understand, and thus not allow for meaningful public access. The Federal Court's decision in *Bah c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2014 FC 693, exemplifies this principle:

> [27] […] it appears difficult to me, based on the evidence and the stage of the proceedings, to identify the information in the investigation report that could remain in the public domain **without the redacted report being an empty, incomprehensible shell**. Consequently, in light of the information I have, it appears difficult to me to identify a reasonable alternative that would avoid sealing the investigation report […]
>
> [emphasis added]

[11] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para 66.

[27] Similarly, in *Shell Canada Limited v. The Queen*, 2022 TCC 39, the Tax Court of Canada rejected redaction as a reasonable alternative under *Sherman Estate* because the "redacted portions of the documents would exceed the unredacted portions, rendering the remaining portions of the documents difficult to read or understand."[12]

[28] In the present dispute, the affidavits could not be redacted without sacrificing their intelligibility and therefore the utility of public access.

Proportionality:

[29] The benefits of the sealing order outweigh its negative impact on the open courts principle. To begin, as noted by the SCC in *Sherman Estate*:

> [106] […] In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). […]

[30] The appeal here has already been dismissed so the materials sought to be protected cannot reasonably be considered "central" to the judicial process. That process has concluded. The public's ability to understand why it concluded would not be hindered by the respondent's proposed sealing order.

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[12] 2022 TCC 39 at para 34.

[31] Additionally, with respect to the limited non-confidential information that would be subsumed by the requested sealing order, the public interest in such materials is weak. To repeat, even if those materials were not sealed, they would be difficult to understand and divorced from the context of the files from which they originate.

[32] On the other hand, the interest in maintaining comity is strong, particularly because the British Columbia Court decisions remain in full force and effect in that province.

[33] Finally, the sealing orders do not cover the entire record. Instead, they protect those materials already subject to confidentiality orders in British Columbia. The orders sought represent a proportionate balance between judicial comity and the open courts principle.

[34] Accordingly, the third prong of the *Sherman Estate* test is met.

Disposition

[35] The motion of Pagefreezer and Mr. Riedijk for a confidentiality order should be allowed. That of Mr. Dempsey is dismissed.

Conclusion

[36] The respondents' motion is granted, with costs of $750.00.

Bryson, J.A.