SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Foster-Jacques v Jacques, 2011 NSSC 290

Date: 20110713
Docket: 1201-064463
Registry: Halifax

Between:

Sharon Foster-Jacques

Petitioner

v.

Hector Jacques

Respondent

Judge: The Honourable Justice Beryl A. MacDonald

Heard: June 28, 2011, in Halifax, Nova Scotia

Counsel: Gordon Kelly & Adrienne Bowers, Counsel for the applicant
William L. Ryan, Q.C. & Sarah Scott, Counsel for the respondent
Alan V. Parish, Q.C., Counsel for Coltsfoot Publishing Limited

By the Court:

[1] The Petitioner and the Respondent in this Divorce proceeding have both requested an order to seal the contents of their divorce file. They have done so after receiving a request from the media to examine that file. The media request was made according to the provisions of Civil Procedure Rule 59.60. The relevant provisions of that rule are:

> (4) A person, other than a party or counsel for a party, who requests access to a court file must give written notice to the parties no less than 20 days before obtaining access.
>
> (5) A party may make a motion for an order sealing all or part of the court file after delivery of written notice of the request for access.
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> (6) The person requesting access to the court file must be granted access, subject to any terms or conditions the judge specifies, unless a party makes a motion within the required time.

[2] Civil Procedure Rule 59:60 gives the court discretion to seal a file:

> (3) A judge may order that a court file or any part of the file or any document contained in the file be sealed, treated as confidential, and not made available to the public.

[3] Justice Dixon in *MacIntyre v. The Attorney General of Nova Scotia*, [1982] 1 S.C.R. 175 said:

> 70 Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right.

[4] Neither of the parties to this divorce proceeding is requesting exclusion of the public on the date of the hearing, nor are they seeking a publication ban. Their request is to keep the documents contained in the court file private. However, they recognize that some or all of the contents of the documents in this file may be

disclosed if they are entered as evidence during a hearing or referenced in the decision of this court.

[5] Civil Procedure Rule 59.60 does not provide any factors that are to be considered in the exercise of the discretion provided.

[6] Civil Procedure Rule 85.04 (1) provides some direction:

> A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the Canadian Charter of Rights and Freedoms and the open courts principle.

[7] I take this direction as a requirement for a judge to consider the principles expressed in *Dagenais v. Canadian Broadcasting Corp*., [1994] 2 S.C.R. 835, *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R .480, *R. v. Mentuck*, [2001] 3 S.C.R. 442, *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, and *Re Vancouver Sun*, [2004] 2 S.C.R, 332.

[8] *Dagenais, Canadian Broadcasting, and Mentuck*, involved publication bans in criminal proceedings. *Vancouver Sun* involved an in camera hearing during which the courtroom was closed to the press and the public. *Sierra Club of Canada* discussed the protection to be afforded to “confidential documents”.

[9] The decision in *Sierra Club of Canada* does require the court, in a civil proceeding, when asked to issue a confidentiality order, to consider the underlying principles set out in *Dagenais* and *Canadian Broadcasting*.

[10] These cases suggest a confidentiality order should only be granted when

> (a) the order is necessary to prevent a serious risk to an important interest in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the interest being protected, outweigh its deleterious effects, including the effect on rights of free expression and accessibility to open court proceedings.

[11] The “interest” to be protected must be one in which the public in general has an interest or has a stake. As described in *Sierra Club of Canada*:

> 55....The interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, 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. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be categorized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no “important commercial interest” for the purposes of this test.

[12] The “necessity” branch of these requirements set out in *Dagenais* and *Canadian Broadcasting*, and confirmed in *Sierra Club of Canada* requires consideration of three elements.

> 1. The serious risk in question must be a real and substantial risk well grounded in evidence.
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> 2. References to the “proper administration of justice” must be carefully interpreted so as not to allow the concealment of an excessive amount of information.
>
> 3. Whether reasonable alternatives are available must be carefully explored and any order granted must be restrict only what is necessary to prevent the risk.

[13] Freedom of the press is fundamental to the open court principle. The press provides an important function by informing the public about court proceedings. Family law proceedings are of great interest to the public. The public should be informed about the substance of those proceedings. In *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S. C.R. 1326, (a case involving section 30 (1) and (2) of the *Alberta Judicature Act,* R.S.A. 1980, c J-1 that prohibited publication of most details of matrimonial proceedings), Justice Cory said:

> 13. The sweeping effect of the prohibition can be readily seen. The term “or in relation to a marriage” is a broad one. It encompasses matters pertaining to custody of children, access to children, division of property and the payment of maintenance. All are matters of public interest yet the evidence given on any of these issues cannot be published. The dangers of this type of restriction or

> obvious. Members of the public are prevented from learning what evidence is likely to be called in a matrimonial cause, what might be expected by way of division of property and how that evidence is to be put forward. Neither would they be aware of what questioning might be expected. These are matters of great importance to those concerned with the application a family law. It is information people might wish to have before they even consider consulting a lawyer. The very people who would seem to have the greatest need to know of Family Court proceedings are prevented from attaining important information by the provisions of s. 30
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> ....
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> 27..... Any need for the protection of privacy of witnesses or children could be readily accomplished by far less sweeping measures. For example, it could be accomplished by the exercise of discretion by the trial judge to prohibit publication or to hold in camera hearings [page 1347] in those few circumstances where is would be necessary to do so in order to protect the privacy interest of the parties, their children or witnesses.

[14] Section 30 (1) and (2) of the *Alberta Judicature Act* were struck down by the Supreme Court of Canada because they were too sweeping in effect.

[15] Personal embarrassment or a general expectation that personal, health or financial privacy will be maintained when accessing the courts is not, in itself, a reason to issue a sealing order or publication ban. (*John Doe v. Smith* 2001 ABQB 277 (CanLII))

[16] The privacy of witnesses, victims and innocent parties may be, in certain situations, an important public interest deserving of protection.

[17] In *W. (C.) v. M. (L.G.)* 2004 BCSC 1499, a civil action for damages for sexual assault, the applicant requested that her name appear only by initial in all court documents, that the court limit the persons who could search the court file and place a prohibition against the use or publication of any information that might disclose her identity. Justice Joyce after reviewing a number of decisions said:

> 2 The application requires consideration of two different public interests: maintaining open judicial proceedings and protecting victims of sexual abuse.
>
> ....

9 I am satisfied, however, that this important principle of the openness of the court process is subject to an overarching principle: the fundamental object of the court is to see that justice is done between the parties. There are circumstances where the principle of the open court must give way in order to achieve justice. The question is what those circumstances are and, if they exist, how far the principle of an open court must yield in order to ensure that justice may be done

....

25 I think the following principles can be distilled from the cases I have referred to:

1. The principle that the court's process must be open to public scrutiny must give way when it is necessary to ensure that justice is done.

2. There must be some social value or public interest of superordinate importance in order to curtail public accessibility.

3. The onus is on the person seeking to restrict public accessibility to demonstrate that the order is necessary in order to achieve justice. The test is not one of convenience but of necessity.

4. The mayor private interest of a litigant to avoid embarrassment is not sufficient to displace the public interest in an open court process.

5. The categories of circumstances that may be viewed as constituting a social value of super ordinance importance should not be considered closed. They include:

(a) where disclosure of the litigant's name or identity would effectively destroy the right of confidentiality, which is the very relief sought in the proceeding;

(b) where persons entitled to justice would be reasonably deterred from seeking it in the court if their names were disclosed;

(c) where the administration of justice would be rendered impracticable if the public were not excluded;

(d) where anonymity is necessary in order to ensure a fair trial;

(e) where anonymity is necessary to protect innocent persons and little public benefit would be served by disclosure of the names of the innocent;

> (f) where disclosure of the identity of the plaintiff would cause that person to suffer damages in addition to those already suffered as a result of the wrong for which the plaintiff is seeking compensation.

[18] My first task is to determine whether, in this case, there is a social value or public interest of superordinate importance. If there is not then these applications must be dismissed.

[19] In order to understand many of the arguments advanced by the Applicant and the Respondent knowledge about what typically is in a file processed by the Supreme Court (Family Division) is imperative. It is also important to know that much of the information in the court file contains what, in our electronic age, are called personal identifiers. This is information that can identify an individual and can permit another person to "assume" that individual's identity without their knowledge or consent (identity theft) and then use this information to gain access to bank accounts, insurance information and so on. This can happen when an identifier is used alone, when it is combined with that person's name, or when it is combined with another identifier. Common identifiers are the person's name, birth date, address, parent's names and birth dates, children's names and birth dates, employers names, social insurance numbers, and bank account and investment numbers.

[20] The rules pertaining to divorce in the Supreme Court (Family Division) require a Petition for Divorce, and an Application and Intake Form to be completed in order to commence the proceeding. The Petition provides place and date of birth, marriage and separation dates, dates of birth for all children, and current residential addresses. The Application contains the same information and in addition it contains cell phone numbers, e-mail addresses, employer's name, address, telephone number and e-mail address. The file will contain the marriage certificate which details the parties parents' names and other identifiers. If claims for division of property or spousal support are made, a complete list of property with identifying numbers, including insurance policy information, must be filed. If financial support is requested, a Statement of Income must be completed to which the last three years income tax returns and notices of assessment from the Canadian Revenue Agency must be attached as well as two recent pay statements from all income sources. These documents disclose social insurance numbers. If a party owns a business or is a controlling shareholder in a corporation, business records, income tax returns etc. must be provided. If children are involved, a Parenting

Statement must be filed detailing the names and addresses of schools and daycare facilities any associated educational or child care costs, details about extracurricular activities and so on. If required documents are not placed in the file for delivery to the other party the Divorce Petition may not be issued. The parties have no choice in this matter. This is because the purpose of proceedings in the Family Division is not to "find fault" or to "right a wrong". It is to solve the problem, (in a case such as this where there are no children), of how to divide property and provide support to an entitled party after a relationship has ended. This work is conducted in an environment that must recognize and assist a significant number of petitioners and respondents who are self represented. Disclosure of all relevant, or potentially relevant, information at the beginning of the process is therefore essential. Some of this information may never become "evidence" at a hearing. For example, it may become outdated or the parties may not need the information to place his or her request before the court or they may have settled as a result of meetings with conciliators or at a judicial settlement conference where the disclosure in the file is used to assist the parties in settlement discussions.

[21] Another purpose for the collection of so much information is to permit the Maintenance Enforcement Program to find a payor of spousal or child support, or to issue a garnishment against wages or income tax refunds, or to suspend driving privileges etc.

[22] The Applicant and the Respondent have raised one proposition that I have decided does not constitute a social value or public interest of superordinate importance in the context of these proceedings. They have argued the file should be sealed to protect their reputation, and in particular the Respondent's reputation against unproven allegations that may be contained in material filed in this proceeding.

[23] Every proceeding initially may consist of "unproven" allegations whether these appear in statements of claim, or affidavits. Those who have been changed with a criminal offence, and later found to be "not guilty" often must suffer, because of publicity, a ruined reputation that in some cases cannot be rehabilitated. Protection of one's reputation has not been considered to be a social value or public interest of superordinate importance justifying diminishment of the open courts principle. As I have noted, personal embarrassment or a general

expectation that personal, health or financial privacy will be maintained when accessing the courts is not, in itself, a reason to seal a file.

[24] The Applicant and the Respondent have argued that the public has an interest in and expects personal identifier information contained in court documents to be protected in order to prevent identity theft. I have decided this is a public interest of superordinate importance. It is a privacy interest. In addition society values prevention of identity theft .

[25] The solicitors for the applicants have argued their clients and the public expect personal identifier information to remain private and confidential. Support for this argument can be found in the way government itself treats some of this information. For example, not every government department has ready access to income tax returns and a person is not, in every case, compelled to provide a social insurance number.

[26] Forbidding the publication or use of personal identifier information by those who would examine a court file does not properly address the private and confidential nature of this information, nor the concern about its potential misuse. Little that is filed in the Family Division is filed voluntarily. Most of the material in the file must be filed by the rules of court and, on occasion, court order. The court cannot police the later use of personal identifiers by a member of the public including the media, who has viewed material containing this information. Identify theft is a known risk and a person should not be exposed to this risk when he or she accesses the justice system as he or she must in order to obtain a divorce. This is not to say the risk of misuse by court staff who have access is not recognized. However, staff are under different regulatory systems than those to which the public may be subject and there are important reasons why they require access to the file that reasonably suggest an access requirement.

[27] The media argues I cannot make any decision about the expectations of the public or the potential risk of identity theft without evidence provided by, for example, a polling company and a police officer. In addition the parties themselves have not provided an “affidavit” with facts supporting the proposition that they have an expectation of privacy in respect to their personal identifiers.

[28] I have accepted the submissions of counsel in respect to their client’s expectations. Expectations are not facts. Affidavits are to provide facts. However,

in this situation perhaps an expectation is a fact, and if so I accept those expectations without the necessity of proof by way of affidavit because it flows naturally from the applications made by the parties. If this was not their expectation why make the applications to seal the court file? These are facts that should have been admitted by the media if the purpose of the Nova Scotia Civil Procedure Rules are to be properly applied - that purpose is:

> 1.01 These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[29] Failure to recognize the obvious and to require "strict proof" may have its place in some proceedings. However, in this court in particular, where parties financial capacities are so often very limited, blind adherence to an adversarial process may work an unnecessary injustice. I believe I am permitted to recognize the obvious.

[30] I have before me no polling information about the public's expectation that personal identifier information will be kept private and confidential by those who gather it. If the court could only determine public interest or recognize a social value after receiving information from an organization providing polling information, or from learned researchers or other "experts", the legal process might come to a halt or become completely redundant because most people could not afford the financial burdens placed upon them to bring forth this evidence.

[31] I am satisfied in determining this issue I do not have to be a blank slate. There is information available to me that is available to every person in this province. Of particular significance is the fact that the Province of Nova Scotia and the Government of Canada have enacted legislation to protect personal identifiers, for example, the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993 c.5 , the *Personal Information International Disclosure Protection Act*, S.N.S. 2003 c.3. and the *Personal Information Protection and Electronic Documents Act*, S.C. 2000 c.5. I accept this as evidence about the public's expectation and the public and social interest in this issue.

[32] The risk of identity theft is real. I should not have to wait until it occurs to recognize that risk. I do not need a police officer to inform me about this risk. The concern about identity theft is frequently the topic of discussion in newspapers, in government departments, and in judicial committees (for example the Canadian

Judicial Council approved a document "Use of Personal Information in Judgments and Recommended Protocol" in March 2005). Considering the devastating consequences that can result to an individual whose identity is stolen, identity theft constitutes a substantial risk though at present it may infrequently occur. It is important that it remain an infrequent event and that all efforts be made to protect those who must provide information from losing control over their personal identifiers.

[33] If I am required to place my analysis into an evidentiary context to justify my finding that there is a public interest and social value imbedded in the expectation of privacy and confidentiality for personal identifiers, and the risk of identity theft is real, I do so by taking judicial notice of the facts I have used to support my analysis based upon the principles expressed in *R. v. Find* [2001] 1 S.C.R. 863 and *R. v. Spence* [2005] 3 S.C.R. 458.

[34] Having decided there is a social value to protect and a public interest to advance that is of superordinate importance I must next decide whether it is necessary to completely seal the court file to protect that interest or whether there are other means to achieve this purpose. I have already commented on why orders forbidding wrongful use of this information offer little protection.

[35] Other than removing the personal identifier information from documents required to be filed in this court, I can think of no means by which to protect this information except to issue an order sealing this file. Any attempt to collect the required disclosure, while removing identifiers so that they would be provided when necessary but remain undisclosed to the public, would be cumbersome and costly to the parties and to the court's administration. It would necessitate filing two sets of these documents, one with all personal identifiers removed, accessible to the public, and one with the identifiers in a separate file, not accessible to the public, essentially two files for every proceeding.

[36] I have decided the salutary effects of a sealing order do outweigh its deleterious effects in these circumstances particularly because the public interest in an open court is not completely circumscribed by this order. There is no publication ban of these proceedings. The public may attend the hearing, should there be one, and it may attend to hear any oral decision rendered or read the written decision. In this way the public will learn what facts were accepted as proven by the court. It will understand how the court conducted the process of

dividing property between the parties and how it reached its conclusions about entitlement to spousal support and the quantum to be paid by the Respondent, if any.

[37] The open court principles were crafted at a time when the internet was not a public source of information nor of manipulation. Initially these principles were developed in criminal cases where scrutiny to ensure the state was not abusing it's powers of arrest and imprisonment was paramount. This case involves the court as a provider of a dispute resolution process. The state has passed laws that create a framework for that dispute resolution but the potential for state abuse of the parties is limited if nonexistent. The public interest in the process, and in the performance of the judges, remains to be served by the opportunity for the public to attend the hearings and read or listen to decisions rendered. The media can attend and publish what it wishes about that hearing and those decisions.

[38] I grant the applications requested. This divorce file shall be sealed in its entirety.

J.