CLIENT PRIVACY vs. THE PUBLIC'S RIGHT TO KNOW

Just how private is your family law court case?

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The right to privacy of family law clients is losing ground to the public's right to an open court system. Bolstered by the fundamental right of freedom of expression, media lawyers have been firing off plenty of Charter of Rights challenges in their battle for more access to courts and court records. Although the challenges started with criminal law cases, they have now moved into the family law arena.

As a result of Charter of Rights challenges the law has been slowly, but surely, evolving. Back in 1982, in the case of *Attorney General of Nova Scotia* v. *MacIntyre*, the Supreme Court of Canada cautioned:

> Many times it has been urged that the 'privacy' of the litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of individuals involved are no basis for exclusion of the public from judicial proceedings.

This majority decision was quoted with favour seven years later in *Edmonton Journal* v. *Alberta (Attorney General)*, when considering whether a section of Alberta's Judicature Act that prohibited publication of many details of family law proceedings, violated section 2(b) of the Charter. The Supreme Court of Canada voiced concern that the legislation worked against the very people it was intended to protect. How could members of the public know what evidence was relevant in family law cases, or what to expect on a division of property, if they had no access to the details of cases? In 1935 when Alberta's legislation was enacted, it was intended to "safeguard public morals from allegations of adultery and misconduct of the parties" said Cory J., but this objective was no longer relevant in today's society where such allegations "…can hardly raise an eyebrow".

In Ontario, court documents are public records and courts are normally open to the public. Requests for privacy by family law clients include asking the court for an order preventing the media from publishing information on a file (a publication ban), or to seal a court file to prevent access by the public or to use initials instead of names to identify a court file. These requests are not a daily

occurrence in family law matters, but are considered necessary from time to time. A party in a family law case must produce full and complete financial disclosure of their income and property, financial information that for any other purpose would be considered private and confidential and certainly not for public consumption. Or, a family law case may contain sensitive information in court documents (pleadings), including allegations of abuse involving a spouse or child.

If we fast-forward through court decisions from 1989 to 2003 we begin to see the results of the Supreme Court of Canada favouring the public's right to know over the privacy of family law litigants. In 2003 in the Ontario decision of T. v. T., Greer J. considered the request of a former husband (the defendant) in a family law action to limit identity of the parties to initials. He claimed his reputation would be irreparably damaged by the plaintiff's (his former wife's) "significant and dreadful" allegations. The Globe and Mail was allowed to make submissions to the court in response to this request. In rejecting the defendant's request, Greer J. reviewed relevant court decisions, including the above Supreme Court of Canada cases. Her reasons came out strongly in favour of open courts:

> "To seal a file, or to use initials for the reason that a litigant has been irresponsible in her pleadings, is in my view simply not sufficient to grant such an Order. I adopt the principles set out in *Edmonton Journal* v. *Alberta (Attorney General)*....that it is crucial to the rule of law that the courts are seen to function openly, and that the public has a right to information pertaining to public institutions and particularly the Courts...
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> The fact that the Plaintiff is attempting to now, 15 years later, go behind a matrimonial settlement, based on her current medical and emotional condition, is of general interest to the public in seeing how the Courts look at such settlements. In my view, the public interest far outweighs the Defendant's claim for privacy. The press and other media are the means by which the public, in today's society, obtain information about the justice system. Only a minute fraction of the public has the time to personally access a case before the Court and sit, in what is called the public gallery.... to witness the proceedings first hand. The press and media, on the other hand, have representatives who can do just that and report their findings to the general public...
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> I cannot see how the Defendant's argument as to irreparable harm should displace the Plaintiff's right to an open trial. Humiliation of one party does not warrant the right to anonymity."

It is very clear that we should never take the media's interests for granted when we ask the court to exclude them. The 1994 Supreme Court of Canada decision in *Dagenais* v. *Canadian Broadcasting Corporation*, considered not only the appropriateness but also the *process* of obtaining publication bans in criminal cases. In his decision, Chief Justice Lamer made some preliminary comments on guidelines for this process:

> "The judge hearing the application thus has the discretion to direct that third parties (e.g., the media) be given notice. Exactly who is to be given notice and how notice is to be given should remain in the discretion of the judge to be exercised in accordance with the provincial rules of criminal procedure and the relevant case law."

Lawyers for the media have been following these cases closely. The Canadian Bar Association's Media and Communications Law Section relied heavily on *Dagenais* when they introduced a Resolution at CBA Council in February of 2003; a Resolution that may come as a wake-up call for many family law clients and their lawyers. The CBA was asked to urge federal, provincial and territorial authorities, *in consultation with various practice areas of the bar* (this was added to counter objections from the CBA Family Law Section), to adopt procedures to *notify the media in advance* of applications for publication bans, sealing orders and orders for "in camera" proceedings and to record all orders made in writing, to make them accessible to the public and the media on a timely basis.

The CBA National Family Law Section initially opposed the Media and Communication Law Section's Resolution. However, since some courts were starting to order family lawyers to notify the media when they made applications for publication bans or sealing orders, the Family Law Section could not ignore this trend in the law. They took the position that if any notification process was to be instituted, it must be sensitive to the needs of their family law clients. This CBA Resolution does not change the law, and it still remains to be seen if the media will be able to come up with sufficient support from governments and courts to set up notification processes across Canada.

While it is not likely every judge in every jurisdiction will immediately require family litigants to notify the media *before* the hearing of applications for publication bans and sealing orders, family law clients need to know this is a possibility. Clients who are worried about their privacy may fare better in preserving it by doing nothing. If they choose to apply for a publication ban or a sealing order and have to notify the media first, they may just be increasing the risk of attracting media attention; and family law lawyers can offer no guarantee that an application to protect their clients' privacy will be successful, given the trend in case law favouring open courts.

C Judith L. Huddart