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SCC's Sherman decision: when is privacy a publicly protectable interest?

In the recent case of *Sherman Estate v. Donovan,* [1] the Supreme Court of Canada addressed the difficult dichotomy between the principle of "open courts" and privacy. In doing so the Court provides some important insights into what "privacy" is and how the open courts principle limits the protections that an individual may expect under the rules of privacy.

The Court applied established case law in determining whether the privacy of individuals affected by court proceedings should trump the open court principle and in doing so provided new guidance not only regarding the application of privacy concepts to the existing law but also regarding how the Court – and by extension, the law generally – perceives privacy as a protectable right.[2]

The *Sherman* case addressed the relatively narrow issue of whether probate proceedings – involving court certification of the validity of a will including appointment of estate trustees, identification of beneficiaries and the confirming of property to be transferred to them, normally all public information – should be sealed and kept confidential. The reasons for seeking the sealing of the proceedings were given as twofold: protection of the privacy of the concerned individuals, and protection of them from physical harm.

The Court's determination was that neither the risk to privacy nor the risk to physical safety warranted an exception to the open court principle justifying such an order. In determining that privacy did not trump open courts in this case, the Supreme Court contributed to the recognition of privacy as protectable public interest, in defined circumstances, stating that where a risk to such public interest was engaged, an exception to the open courts principle could be made. The concept of privacy as a public interest at law is interesting since in many instances privacy is considered an individual, personal interest. However protection of a public interest arguably underlies much of the rationale for the statutory privacy protections that exist in Canadian law including the federal private sector privacy law, PIPEDA, and constitutional law such as the *Charter of Rights and Freedoms*. In this regard, there are moral, ethical and even economic public interests in protecting privacy.

Background

The case involved the probate of the wills of Toronto businessman Bernard Sherman and his wife, philanthropist Honey Sherman. The two were found dead in their Toronto home in December of 2017 with no apparent explanation. The investigation of the deaths generated great public interest and press scrutiny. A police investigation was commenced which at the time that probate of the wills was being sought was unsolved.

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[1] 2021 SCC 25 (CanLII)

[2] It is noted that with few exceptions, the protection of privacy in Canada is a product of statutes such as the *Personal Information Protection and Electronic Documents Act,* S.C. 2000, c.5. (PIPEDA), the *Privacy Act* and the *Canadian Charter of Rights and Freedoms* at the federal level and in the provinces the Alberta and BC *Personal Information Protection Act* (PIPA), *the Quebec Private Sector Privacy Act,* and freedom of information and protection of privacy legislation.

The executors of the couple's estates sought to proceed with the administration and transfer of property in private, shielded from what they perceived as armchair crime investigators hoping that the details of the wills could reveal possible motives for the couples' deaths by persons related to the family, or potentially, risk of further harm by the persons involved with the deaths.

The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised so long as the investigation was unresolved. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

The sealing orders were initially granted by the probate court, but then were challenged by Kevin Donovan, a journalist who had written articles on the couple's deaths, and the Toronto Star. The Star argued that the orders violated its rights of freedom of expression and freedom of the press as provided under the *Charter*, as well as the principle that the courts should be open to the public for purposes of guaranteeing the fair and transparent administration of justice – the "open court principle".

The Supreme Court's reasons in upholding unsealing the court file are instructive in that they articulate two key tensions in the evolution of the understanding - and the protection - of privacy rights: firstly, the competing interests in a democratic society between "open courts" and privacy, and secondly, whether or not there are differing levels of privacy, requiring differing levels of protection. In wrestling with these important questions, the Court significantly advances not only the understanding of what privacy is or should be, outside of statutory definitions, but also what status privacy has within the precepts and rights of a democratic society – specifically, should it be recognized as a "public interest" and potentially, a "fundamental right".

Limitations on the Open Courts Principle

In *Sherman*, the Court articulated the rationale of the open court principle and how it may intersect with privacy, as follows: [3]

> [T]he 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.
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> Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.
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> Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting

[3] Note 1, above at paras 1-3.

> constitutionally-protected openness is sought ….. the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts.

In addition to the threshold requirement - that there is a serious risk to an important public interest - the test for limiting court openness, as articulated in the Court's decision in *Sierra Club of Canada v. Canada (Minister of Finance),*[4] also requires that the order sought must be necessary to prevent the risk to the identified interest because reasonably alternative measures do not exist and, as a matter of proportionality, the benefits of the order outweigh its negative effects.

The high bar that these requirements dictate for exercising a court's discretion in each case where a limitation is sought is directed at maintaining the presumption in favour of open courts while at the same time providing sufficient flexibility to protect other public interests, including for example, privacy, where they arise.

Privacy as a public interest, or a fundamental right

In addressing the threshold requirement of the *Sierra* test, the Court made clear that a simple, all-encompassing application of any impingement on the privacy of individuals does not suffice since in many instances protection of that privacy does not rise to the level of protection of a public interest. As explained by the Court, this arguably higher threshold than simple individual, or personal, privacy is necessary to ensure that the circumstances in which the strong presumption in favour of open courts may be overcome are limited to exceptional cases.

Citing previous decisions, as well as statutory privacy protections, the Court articulated the precept that privacy may be characterized as not only an individual, or personal, interest but also as a public interest with "quasi-constitutional status".[5] For example, in the *Palace Casino* case, involving the videotaping of strikebreakers by a union, decided under the Alberta private sector privacy law, PIPA, which regulates the use of personal information by organizations, the Court noted that providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values".[6]

To further support this public interest characterization of privacy, the Court referred to *dicta* in its earlier decisions which in the context of s. 8 of the *Charter*[7] and public sector privacy legislation, cited the proposition that privacy is a fundamental value of the modern state.[8]

However not all circumstances engage the public interest aspect. In this regard, the Court drew a line between the public consideration in protecting privacy and the importance of privacy to an individual: while an individual's privacy will be very important to that individual, the protection of privacy also may be in the interest

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[4] 2002 SCC 41 (CanLII), [2002] 2 SCR 522

[5] Note 1, above at paras 50-51.

[6] *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401,* 2013 SCC 62, [2013] 3 S.C.R. 733

[7] The right to be secure against unreasonable search or seizure.

[8] Note 1, above at para. 50; see: *R. v. Dyment*, 1988 CanLII 10 (SCC), [1988] 2 S.C.R. 417, at pp. 427-28; *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC),[1997] 2 S.C.R. 403;, at para. 65.

of society as a whole. In other words, while privacy is clearly a personal interest in certain circumstances it may rise to the level of a publicly protectable interest.

The Court recognized that even in the case before it, involving probate proceedings, a public interest may exist even though the Trustees were advancing primarily or even exclusively, their own privacy interests. Citing its reasons in the case of *F.N. (Re)*,[9] where the personal interest of young offenders in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation was acknowledged, the Court noted that all of society also had a stake in a young person's personal prospect for rehabilitation.

The Court also made clear that in advancing privacy as a potential ground for limiting the open courts, the degree to which a public interest privacy characterization is recognized should be tempered so as not to threaten the strong presumption of openness. As stated by the Court, the privacy of individuals will be at risk in many court proceedings; privacy is a complex and contextual concept, making it difficult for courts to measure. To raise privacy to the level of an important public interest in all circumstances sufficient to limit the operation of open courts would be unworkable, and would compromise the strong presumption inherent in the principle that in a free and democratic society the courts should be open, as the default position.

Having staked out these broad concepts, the Court proceeded to articulate the elements of privacy protection that it considers to rise to the level of protection of a public interest. In the Court's view, these elements must go to the *protection of an individual's dignity*, which it characterized as the right to present core aspects of oneself to others in a considered and controlled manner: as an expression of an individual's unique personality or personhood.

In applying this precept to circumstances where the open courts principle may be restricted, the Court indicated that dignity will be at serious risk only where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's intimate personal self in a manner that threatens their integrity. For an exception to be granted, the information that would be revealed by court openness must consist of intimate or personal details about an individual — what the Court has described in its jurisprudence regarding s. 8 of the *Charter* as the "biographical core". [10]

The Court distinguished the public character of the privacy interest involved in protecting individuals from a threat to their dignity from simply information that an individual might find embarrassing or inconvenient if disclosed publicly:

> 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.[11]

[9] 2000 SCC 35, [2000] 1S.C.R. 880.
[10] See: *R. v. Plant*,1993 CanLII 70 (SCC), [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*, 2004 SCC 67, [2004]3 S.C.R. 432, at para. 60; *R. v. Cole,* 2012 SCC 53, [2012] 3 S.C.R.34, at para. 46.
[11] Note 1, above at para. 74.

The Court cited examples of instances where the courts have found information as sensitive that would rise to the level of a protectable public interest, including stigmatized medical conditions, stigmatized work, sexual orientation, and subjection to sexual assault or harassment.[12]

In *Sherman*, the Court declined to maintain the sealing of the probate documents, finding that the information that would be revealed (identity and related information regarding the executors and beneficiaries, descriptions of properties to be transferred) did not constitute sensitive or intimate information of the nature striking to the dignity, or biographical core, of the individuals such as required protection as a public interest.

Conclusions

The Supreme Court in *Sherman* articulates several insights that will be relevant in applying privacy protections in diverse contexts going forward.

Firstly, privacy is contextual and indicates differing levels of sensitivity or impact depending on the circumstances, with consequences for the levels of protection afforded it. This precept is understood in the statutory privacy context where collection, use or disclosure of sensitive personal information requires clearer, more express treatment than non-sensitive information. What this means in the open courts context, and potentially other non-statutory privacy rules, is that not all instances of privacy will be provided with protection, or that there may be gradations of protection. Only those rising to a level that may be considered as addressing an important public interest will be provided with the maximum protection.

Secondly, importantly, protection of privacy may represent a public interest supervening the more narrow protection of personal interests. This is important not only because it arguably raises privacy protection to a right that is more than simply a private interest but also that it suggests a right not created by statute but by the broader context of law. In advancing the precept that certain levels of privacy protection should be recognized as protecting a public interest, the Supreme Court referred to its consistent treatment of privacy as a fundamental consideration in a free and democratic society.

The potential designation of privacy as a fundamental human right is the subject of debate among privacy experts, privacy regulators, legislators, and other interested stakeholders.[13] The Court's identification of certain levels of privacy rising to the status of a public interest may advance the arguments in favour establishing the fundamental right status of privacy through legislation.[14]

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[12] Note 1, above at para. 77

[13] See, for example, Submission of the Office of the Privacy Commissioner of Canada on Bill C-11, the *Digital Charter Implementation Act, 2020*, May, 2021 to the House of Commons Standing Committee on Access to Information, Privacy and Ethics.

[14] For example, see the treatment of privacy as a right in Quebec law, as referred to by the Court in *Sherman*: *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41