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Anonymization and sealing requests in Ontario civil proceedings

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Closed proceedings, sealing orders and publication bans are rare in civil actions in Ontario. When a court decision in a civil proceeding is published it normally bears the names of the parties in the title of the court file in accordance with the open court principle and the *Rules of Civil Procedure*. The names of the parties are also published in reported decisions and, if the court decision is available online, the names of the parties may be readily found through Google and other searches.

In some cases, the court will use initials rather than the full names of parties to keep the identities of the parties confidential, particularly in proceedings involving children or other persons where there is a publication ban. For instance, section 87(8) of the *Child, Youth and Family Services Act, 2017* prohibits the publication of the identity of a child who is involved in a child protection hearing or proceeding.

The authority of the courts to initialize or "anonymize" parties, seal court documents, or otherwise protect the identities of individuals in appropriate cases arises from the court's inherent jurisdiction and section 137(2) of the *Courts of Justice Act*.

Where a party to a proceeding wishes anonymity, they generally require a court order. Typically, the order is obtained by motion in a scheduling court (such as Civil Practice Court in Toronto) or in writing before the commencement of the proceeding.

In *Bungie Inc. v. TextNow Inc.*, 2022 ONSC 4181 (CanLII), the court stated that an anonymization order should require the proceeding to be commenced in the parties' legal names but, if there are grounds to do so, the initial material will be sealed immediately and the order will approve the use of pseudonyms to refer to those parties thereafter. In that way, there is a proper record of a proceeding brought by an identified person with capacity to sue. By using pseudonyms, an order sealing the full court file can usually be avoided, thereby protecting the open courts principle.

There is a certain threshold that must be met before a court will agree to anonymize parties in a proceeding set

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out by the Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25 (CanLII), at para. 38. The test for discretionary limits on presumptive court openness rests upon three "core prerequisites" that a person seeking such a limit must establish to overcome the strong presumption of openness, specifically 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.

Based on the Supreme Court of Canada's threshold, neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally warrant interference with court openness if the other criteria aren't present.

In *Medallion Corporation v. Hillier*, 2022 ONSC 6011 (CanLII), tenants who were in a dispute with their landlord over the termination of a tenancy in a residential unit sought to have their names anonymized. The Landlord and Tenant Board (LTB) had determined that the tenants had been having unwanted and inappropriate conversations with other tenants regarding the COVID-19 pandemic and their personal choice on vaccinations and masks. The LTB declined to grant relief from eviction in the circumstances.

In a subsequent Review Order, the LTB noted that the tenants had been asserting a right to be referred to as "Chad" and "Stacy" without providing any evidence that these were their legal names and without seeking an order from the LTB authorizing this practice. The Review Order reproduced a portion from an endorsement of the LTB which stated that "[a]ll orders and correspondence from the Board will use the Tenants' names as they appear on the application until there is an order or direction to do otherwise." There was no evidence that the tenants had applied for an order requiring that they be referred to by pseudonyms.

On appeal, the Divisional Court assessed the tenants' anonymization request in view of the principles in *Sherman Estate* and determined that the tenants failed at the first stage of the test to overcome the presumption of openness. They had not demonstrated a serious risk to an important public interest. They had not filed any evidence nor made submissions arising from the material before the LTB. The LTB's Order only referenced in a general way how one of the tenants had "preach[ed]" and spoken inappropriately to other tenants regarding their personal beliefs related to the COVID-19 pandemic.

The landlord's notices to the tenants, which were before the LTB, provided unflattering conduct about the tenants, alleging that they had engaged in behaviour such as calling a person a "German Nazi's foot soldier", yelling and swearing at staff using offensive language, including referring to them as the "Ku Klux Klan", and mocking and yelling obscenities at another tenant for wearing a face mask. However, the court did not find anything in the material that would lead to the conclusion that the information about the tenants constituted information so sensitive that it was an affront to the dignity of the type the public would not tolerate. Rather, it was not sensitive private information at all, particularly since the alleged conduct occurred in public spaces in the residential complex.

The tenants therefore failed to establish grounds for the court to use pseudonyms rather than their names in the proceeding and the Divisional Court dismissed their application.

In other cases, courts have demonstrated a willingness to recognize the sensitivity of

information related to stigmatized medical conditions and stigmatized work: *e.g. Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100 (CanLII), at para. 28.

Finally, in some situations where a party may be unable to meet the requirements for full anonymization of their identity, they may nevertheless be able to obtain an order sealing some of their personal evidence such as private medical records. Such requests are typically dealt with on a case-by-case basis in view of the open courts principle.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact James Cook, at 416.865.6628 or jcook@grllp.com.

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