Confidentiality Orders Tips

Kelly Eckert, Rosen Sack LLP

Reviewed on: ***10/17/2019***

Bring Your Motion or Application Early

Counsel considering a confidentiality order must bring their motion as early as possible in the proceedings.

It is not possible to remove identifying information from decisions and endorsements already in the public domain (see: *Bolland v. Bolland*, [2017] O.J. No. 94 at para. 67 (S.C.J.) (*"Bolland"*) and *A.P. v. L.K.*, [2019] O.J. No. 3436 at paras. 68-72 (S.C.J.) ("A.P.")). Information is not only public by the media parties, but on various forums online. The Court will not make an order which cannot be enforced. If the information the litigant seeks to protect is already part of the public record, there may be little value to the confidentiality order.

When responding to an application in which sensitive information has been made public, the responding party can seek an order to re-file the pleadings with initials or to seal the file; however, the damage may have already been done if the information has become known to the public. One remedy is for the court to make an order that any future publications about the proceeding not link to any earlier publications that do not comply with the publication ban, with the goal of having reports which identify the parties or children appear lower in the results of online searches done about the case (A.P. at para. 72).

Consider Other Dispute Mechanisms

As the Consolidated Provincial Practice Direction requires notice be given to the media, counsel must advise their clients to consider the alternative dispute resolution mechanisms available to them, such as closed mediation and arbitration. While both forums provide an opportunity for parties to resolve their dispute privately, any appeal from an arbitral award would require a confidentiality order to maintain the confidentiality of that proceeding.

Evidence

The evidence put forth to justify a confidentiality order must be "convincing" and "subject to close scrutiny and meet rigorous standards" (see: *M.E.H. v. Williams*, [2012] O.J. No. 525 (*"Williams"*) at para. 34 (C.A.), citing to *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 2 at para. 40; *Toronto Star Newspapers Ltd. v. Ontario*, [2003] O.J. No. 4006 at para. 19 (C.A.), affd [2005] S.C.J. No. 41 at para. 41; see also *Ottawa Citizen Group Inc. v. Canada (Attorney General)*, [2005] O.J. No. 2209 at para. 54 (C.A.)).

For example, to meet the necessity branch of the *Dagenais/Mentuck* test, on the basis of harm that would result to a litigant if the confidentiality order is not made, there must be evidence which establishes the serious, debilitating physical or emotional harm that goes to the ability of a litigant to access the court, as distinguished from personal emotional distress or embarrassment (see for example, *Alsaid-Ahmad v. Jibrini,* [2019] O.J. No. 4141 at paras. 21 and 31 (S.C.J.)). The evidence must establish that the harm infringes a litigant's ability to access the court which affects the proper administration of justice. As explained by the Court of Appeal in *Williams*, *"[e]xpert medical*

opinion firmly planted in reliable evidence of the specific circumstances and the condition of the litigant will usually be crucial in drawing that distinction" (*Williams* at paras. 28–30).

Consider providing third-party evidence such as affidavits from treating medical practitioners, that attest to the mental and/or physical state of the petitioning spouse and discuss (insofar as possible) the deleterious effects that may ensue if the confidentiality order is not granted.

Social Media

If your client is a social media user, counsel should consider advising their client at a very early stage to stop using social media in any way related to the case, as ongoing use of social media may serve as a factor on which the court may rely on in not granting a confidentiality order (see: *Bolland* at para. 67).

Tailoring the Draft Order

It is important that the confidentiality order sought is tailored to the interest which it is proposed to protect. Instead of asking for an order which protects "personal information", the draft order should, for example, specify that the moving party is asking to be identified by initials, or that there be a sealing and non-publication order with respect to the parties' social insurance numbers. If the order sought is to protect commercial information, the draft order must specify, again for example, that all books, records and financial documentation relating to a specific company are to be treated as confidential, sealed and not form part of the public record. A proposed confidentiality order which is overly-broad will not meet the balancing requirements of the second branch of the *Dagenais/Mentuck* test.