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Wills, Trusts & Estates

The Sherman estate case reaches Supreme Court: Part one

By **James Dunphy**

James Dunphy

(October 15, 2020, 8:35 AM EDT) -- The circumstances surrounding the tragic deaths of Barry and Honey Sherman remain a mystery; so too, do the heirs to their fortunes. This is because the Sherman estate trustees successfully applied to have their probate applications sealed, thus preventing the public from viewing their wills. In 2018, a reporter for the *Toronto Star,* Kevin Donovan, challenged the validity of the sealing order.

On Oct. 6, 2020, *Donovan v. Sherman Estate* 2019 ONCA 376 reached the Supreme Court of Canada where arguments were heard on whether or not to unseal the probate applications. Compelling submissions were made in respect of two mutually exclusive policy goals. On the one hand there is the open court principle, which requires that court proceedings be presumptively open and accessible to the public and the media. On the other hand there is personal privacy, a fundamental right of every Ontarian, which becomes all the more necessary in the wake of a violent crime. The Supreme Court reserved its decision.

This series of articles canvasses the issues now being considered by the Supreme Court including the nature of a probate application, the governing principles related to sealing orders and how those principles were applied in the Sherman litigation.

Probate application

An application for a certificate of appointment of estate trustee with a will, commonly referred to as a probate application, if successful, will serve as proof that an estate trustee has the legal authority to deal with the assets of the estate and is proof that the will is valid. A certificate of appointment is usually required by certain institutions, such as banks, before they will release a deceased person's money, and the Land Registry Office before they will transfer a deceased person's land. A probate application includes a copy of the will. As per the open court principle, a member of the public can generally make a request to the registrar of the Ontario Superior Court of Justice for a copy of the probate application, and thereby obtain a copy of the will. That is, unless a sealing order has been made.

Sealing orders

The test as to whether or not a sealing order should be granted was stated by the Supreme Court in *Sierra Club of Canada v. Canada (Minister of Finance)* [2002] 2 S.C.R. 522 (S.C.C.), at para. 53. First, the party seeking the order must show that the order is necessary to prevent a serious risk to an important public interest which cannot be protected by other reasonable alternative methods. Second, the party seeking the order must establish that the salutary effects of the sealing order outweigh its deleterious effects, including the negative effects on the right to freedom of expression and other public interests served by open and accessible court proceedings.

The test, in *R. v. Kossyrine* 2011 ONSC 6081 at para. 16, is not whether a confidentiality order should be issued in order to "err on the side of caution" or "out of an abundance of caution," the test is whether it is necessary to do so. The principle of open courts is inextricably tied to the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press and

other media of communication, guaranteed by s. 2(b) of the Charter — *Sierra Club* at para. 36. The party seeking a sealing order carries the burden of demonstrating the need for the order: *R. v. Mentuck* [2001] 3 S.C.R. 442, at para. 38.

The Sherman litigation

The sealing order over the Sherman probate applications was initially granted *ex parte* and was ordered based upon the perceived risks to the executors and beneficiaries of the two estates arising from the unsolved murders of the Shermans. In denying the motion of the *Toronto Star* to unseal the probate applications in *Toronto Star Newspapers Ltd. v. Sherman Estate* 2018 ONSC 4706, Justice Sean Dunphy clarified that "the lack of tangible information about the motives and perpetrator or perpetrators of the crime creates a reasonable apprehension of risk to those who are the administrators or beneficiaries of the estate of these two victims." He also referred to the need to protect the privacy and dignity of the victims of violent crime and their loved ones. He ordered that the sealing order expire after two years.

The Court of Appeal viewed the matter differently. In a *per curiam* decision, the court held that the kind of interest that is properly protected by a sealing order must have a public interest component. The court relied on *Sierra Club* at para. 55 and *H. (M.E.) v. Williams* 2012 ONCA 35, at para. 25 to state that personal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle. The court stated in *Donovan v. Sherman Estate* 2019 ONCA 376 at para 16: "In our view, the motion judge's analysis comes down to the proposition that because the Shermans were murdered by some unknown person or persons, for some unknown motive, individuals named as beneficiaries in their estates or as administrators of their estates are at risk of serious physical harm. With respect, the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order."

The Court of Appeal set aside the sealing orders. The court rejected the estate trustees' requests to consider redactions to the probate applications as, in the court's view, the application failed at the "necessity" stage of the analysis, therefore leaving no basis for any redactions.

The Supreme Court heard arguments from counsel for the estate trustees that a "reasonable expectation of privacy" should be enough to meet the first part of the test for a sealing order. Justice Malcolm Rowe balked at this argument. "You've just flipped the open courts principle. You've just said that where someone asserts a privacy interest, it short circuits straight into a balancing act," he said. "To me, saying that we depart from the open courts principle is an extraordinary step, not the ordinary way of doing business." Justice Russell Brown stated that the crucial issue was to understand what evidence is necessary to show there's a reasonable apprehension of harm that could justify restricting access to a court file, and whether such evidence exists in the Sherman case. The Supreme Court reserved its decision.

This is the first of a two-part series.

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