New protocol for notifying media of discretionary publication bans

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Introduction

The Ontario Superior Court has finally implemented a formal protocol for notice to be provided to the media where a discretionary publication ban is sought in civil, criminal or family proceedings. The protocol became effective on July 1 2016.**(1)**

In any civil, criminal and family proceeding in the Ontario Superior Court where a party intends to seek a discretionary publication ban, it must file a notice of request for the publication ban setting out the nature of the ban being sought. The notice will be made available to media outlets which have previously subscribed to a list of media outlets maintained by the court. The statutory provisions relating to discretionary publication bans in civil cases are set out in the Courts of Justice Act.**(2)**

Scope of ban

Media outlets which are notified of a proceeding where a publication ban is sought must undertake to maintain the confidentiality of the proceeding and not take steps that would render the pending request for a publication ban moot by, for example, publishing any information about the proceeding in which the publication ban is sought. The relevant terms and conditions of the subscriber form to be filed by media outlets include the following:

> "*You will use the information provided through the Superior Court of Justice Publication Ban Notification Media Subscriber List for the sole purpose of deciding whether or not you wish to attend and/or seek leave to make submissions at the hearing of the application/motion seeking a publication ban in a court proceeding.*
>
> *You will not publish, broadcast or disseminate any of the information you receive through emails distributed through the Subscriber List in any way that could defeat the purpose of a publication ban being sought. More particularly, you will not publish, broadcast or disseminate any of the information that would be subject to the publication ban being sought, unless and until you have confirmed that the publication ban request has been determined by the Court and that publishing, broadcasting or disseminating the information would not violate the publication ban.*"

That seems straight forward enough. What remains to be seen is what a request for a publication ban actually encompasses. Some may argue that publication bans cover only situations where a publication ban is sought in respect of proceedings in open court on a pending motion, application, trial or appeal to prohibit the reporting of the proceedings held in open court. Others may argue that a publication ban is broad enough to cover any case where there is any encroachment to the open court principle, such a motion for a sealing or protective order which, if granted, would prevent the media or a member of the public in gaining access to documents filed with the court.

The issue is a live one insofar as it is not uncommon for a party in commercial litigation cases to request a sealing order – sometimes referred to as a 'protective order' –in respect of certain documents intended to be filed in court without an accompanying request for a publication ban in respect of the motion, application, trial or appeal otherwise held in open court.

Sierra Club test

The well-known Sierra Club test –named after the leading Supreme Court of Canada case of that name**(3)** –must be satisfied before a court will grant a sealing or protective order. Interestingly, the Sierra Club test uses the words 'publication ban' in describing the test. The issue before the court in *Sierra Club* related to the filing of confidential material. The Sierra Club test provides that a publication ban should be ordered only when:

> "*Such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and*
>
> *The salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.*"

Arguably, the words 'publication ban' should be construed to cover any situation where there is any request to restrict the public's access to:

- any court hearing (eg, motion, application, trial or appeal) through an *in camera* hearing or publication ban; or
- documents in a court file.

If that is the case, media outlets which have filed the prescribed media subscriber form will be informed in advance of every request where there is any type of request putting the open court principle in issue.

On the other hand, it is equally arguable that the new notice to media protocol is more limited, given the express language used in the practice direction, which provides that "any person seeking a discretionary order restricting publication of any Superior Court proceeding must serve and file a notice of motion or application". 'Proceeding' is defined in the Ontario Rules of Civil Procedure as an action or application.

Impetus for ban

One of the drivers behind the recent implementation of the notice to media protocol in Ontario was the Panel on Justice and the Media – Report to the Attorney General for Ontario that was provided to the Ministry of the Attorney General in August 2006.

The Ontario judiciary has been critical of the Ontario government for not having taken timely steps which other Canadian provinces have implemented to ensure the media is formally notified of requests for relief that encroach on the open court principle. In September 2015 Justice Ian Nordheimer, sitting on the Ontario Divisional Court,**(4)** expressed dismay that Ontario lacked a protocol for notifying the media. In that case the applicant in a judicial review application sought an order permitting him to pursue his application using only his initials. The judge determined that the hearing in respect of that relief put the open court principle in issue and should be made on notice to the media. As a consequence, he adjourned the motion and provided directions as to which media outlets should be provided with notice of the motion seeking the request. In his written reasons, the judge stated:

> *"To summarize, whenever a party is seeking to restrict access to a court proceeding, whether by way of seeking permission to use a pseudonym or initials, notice ought to be given to the media of that request. The mere fact that notice is given does not mean, of course, that the media will attend and wish to make submissions. They will choose the cases in which they are interested and the ones in which they are not. Further, the mere fact that notice is given and the media attends, does not mean that the relief will be denied. Equally, the mere fact that the media does not attend does not mean that the relief should be granted. Each case will turn on its particular facts. There will be cases (perhaps arguably like the one here) where the issue is a matter of public interest but the identity of the person seeking relief is not. In another case, both the issue and the person seeking anonymity may be of public interest. Put simply, the discretion called for in deciding whether to give notice to the media engages very different considerations than does the discretion that is called upon when deciding whether the restriction should be granted."*

Justice Conlan subsequently presided over an Ontario Superior Court of Justice case dealing with an application seeking medically assisted end of life assistance in which the applicant moved for relief aimed at ensuring the anonymity of various interested parties. He adjourned the motion so that notice of such request could be provided to the media, stating:

> "*When there is a motion before any court that requests the degree of confidentiality that is asked for here, including a sealing order, it is presumed that the media will be notified before the motion is heard. In other words, as Justice Nordheimer observed fairly recently, the media should always be notified of a request for a sealing order unless there is a court order dispensing with the notice requirement. M. (A.) v. Toronto Police Services, 2015 ONSC 5684 (Ont. Div. Ct.).*"

Comment

If broadly construed and properly observed, the new notice to media protocol will relieve individual judges from having to determine on an *ad hoc* basis which media outlets in any given case should be provided with notice of requests for relief that brings the open court principle into play. With the new regime in place, it stands to reason that there is at least the potential of the media being involved in more proceedings, notwithstanding that the media may not be interested in many proceedings if, for example, only commercial interests are involved where a party seeks a sealing or protective order concerning sensitive financial information.

If the new notice to media protocol is construed narrowly as applying only to requests for traditional publication bans, it will be up to the judge hearing any motion requesting any relief that otherwise potentially encroaches on the open court principle to determine whether notice should be provided to the media under the developing common law. It can fairly be expected that in such cases most judges will determine that notice of any such requests should be made on notice to the media. The fact that the media in any particular case chooses not to take any position will have no impact *per se* on whether the relief sought will be granted, but is nonetheless apt to be raised by the party requesting the relief as a factor to be taken into account.

For further information on this topic please contact Norm Emblem at Dentons Canada LLP by telephone (+1 416 863 4511) or email (norm.emblem@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) The Consolidated Provincial Practice Direction provides as follows:

> "*F. Publication Bans*
>
> *Application of this Part*

104. This part applies to all civil, criminal and family proceedings in the Superior Court of Justice and to proceedings in the Divisional Court.

105. This part applies to all applications or motions for discretionary publication bans. It does not apply to publication bans that are mandated by statute (i.e. those that either operate automatically by virtue of statute or that a statute provides are mandatory on request)

Formal Notice of Application/Motion Required

106. Unless otherwise directed by a judge, any person seeking a discretionary order restricting publication of any Superior Court proceeding must serve and file a notice of motion or application and any supporting materials, in accordance with the applicable procedural rules.

Notification of the Media

107. Unless otherwise directed by a judge, the person seeking the publication ban (the requesting party) must provide notice to the media of the motion/application, using the procedure set out in this section.

108. The requesting party must complete and submit the "Notice of Request for Publication Ban" form available on the Superior Court of Justice website.

109. The length of notice required for the submission of the Notice of Request for Publication Ban is the same as the length of notice required under the applicable procedural rules for the serving and filing of the Notice of Application or Notice of Motion.

110. The information on the Notice of Request for Publication Ban will be distributed electronically to members of the media who have subscribed to receive notice of all publication ban applications/motions in the Superior Court.
Any member of the media who wishes to receive copies of the Notices prepared and submitted under this section should submit a request through the Superior Court of Justice website.

111. The requesting party may be required to produce a copy of the Notice of Request for Publication Ban to the Court at the hearing of the application/motion in order to establish that notice was provided in accordance with this section."

(2) The Courts of Justice Act, RSO 1990, c C 43 codifies the open court principles. Section 135 provides that, subject to Section 135(2) and rules of court, all court hearings shall be open to the public. Section 135(2) provides that the court may order the public to be excluded from the hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings shall be opened to the public. Section 135(3) provides that where a proceeding is heard in the absence of the public, disclosure of information relating to the proceeding is not contempt of court unless the court expressly prohibited the disclosure of the information. Section 137 provides that on payment of a prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an act or an order of the court provides otherwise. Section 137(2) provides that a court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the court record.

(3) *Sierra Club v Canada (Minister of Finance)*, [2002] 2 SCR 522.

(4) *AM v Toronto Police Service*, 2015 ONSC 5684.

(5) *Carter v Ontario (Attorney General)*, 2016 ONSC 2022.


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