Docket: 2015-533(IT)I

BETWEEN:

FARZAD PAKZAD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Motion heard on April 3, 2017 at Toronto, Ontario

Before: The Honourable Justice Diane Campbell

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Annie M. Paré

ORDER

The Appellant's motion for a publication ban, with respect to this Court's reasons contained in *Pakzad v The Queen*, 2016 TCC 144, together with the reasons in respect to this Motion, is dismissed, with costs to the Respondent in the amount of $1,000.00, payable forthwith, in accordance with the attached Reasons for Order.

Signed at Ottawa, Canada, this 18th day of May 2017.

"Diane Campbell"

Campbell J.

Citation: 2017 TCC 83
Date: 20170518
Docket: 2015-533(IT)I

BETWEEN:

FARZAD PAKZAD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Campbell J.

Introduction:

[1] The Appellant, Farzad Pakzad, brought a motion under the Informal Procedure Rules for a publication ban in respect to this Court's reasons contained in *Pakzad v. The Queen*, 2016 TCC 144, as well as two prior non-publication requests made to this Court and my reasons in this motion. He requested that none of this information be published on the Tax Court of Canada website because of the consequences that would result from such publication.

[2] Briefly, the Appellant believes that a publication ban is justified because if the reasons, in respect to the decision in his appeal, are published on the Court's website, the personal information and unflattering descriptions of his business acumen, contained in those reasons, would attract the attention of criminals resulting in financial and physical harm to himself, his family and the public.

[3] At the commencement of the motion, the Appellant requested permission to show several short video clips from Global News, CTV News and the RCMP, which referenced instances of identity theft and the importance of protecting against identity theft. The Respondent opposed the admission of these videos into evidence on the basis that they might contain inadmissible hearsay, opinion or expert evidence. I permitted the Appellant to show these clips in Court provided

that they were used to assist the Appellant in explaining his arguments in support of his motion but that they would not be relied upon as expert evidence.

Background:

[4] On March 24, 2014, the Minister of National Revenue (the "Minister") reassessed the Appellant and disallowed the deduction of business expenses against his employment income for the 2010 and 2011 taxation years. The Minister's decision was confirmed on January 26, 2015 and a Notice of Appeal was filed on February 2, 2015, with the hearing of the appeal taking place on November 30, 2015. Mr. Pakzad was represented by legal counsel at the hearing. On June 10, 2016, Deputy Judge Masse issued his reasons and dismissed the appeal because the alleged business activities were not carried on in a sufficiently commercial like manner to constitute a source of business income for which business losses and expenses could be claimed. An amended judgment, dated June 24, 2016, was issued to address spelling errors but it did not affect the reasons for the appeal being dismissed. Mr. Pakzad was the only witness at the hearing of his appeal and he has not appealed the decision.

[5] Mr. Pakzad did not request a publication ban or other similar relief, such as an in-camera hearing or a confidentiality order, either before or during the hearing of his appeal. However, on June 13, 2016, the Appellant made his first request to the Court for a non-publication ban. This request consisted of a telephone call to the Registry Office and a one page fax asking the Court to "…not put any info or details re this matter ONR (sic) my name on the Tax Court Website and the Internet". The Court denied this request on June 17, 2016 and advised the Appellant's legal counsel. On June 20, 2016, Mr. Pakzad advised the Court that he was now representing himself and indicated he would be providing follow-up information. His second request for a publication ban was made by letter dated June 22, 2016 in which he stated that, since his name became listed on the Court's website, unknown individuals had been contacting him to find out more information about him. He further advised that if the reasons respecting his appeal were published on the website, these individuals could then access personal information to perpetrate crimes against him. If this occurs, Mr. Pakzad states that he will then notify the media, file a complaint with the RCMP and commence legal action against this Court. In response to this second request, the Court forwarded a letter dated June 24, 2016 to Mr. Pakzad directing him to present this request by way of a motion with supporting affidavit.

[6] On March 16, 2017, the Appellant brought the present motion, the substance of which is very similar to his second request except that he also argued that the reasons should not be published because it portrayed him as an incompetent businessman which marked him as an "ideal target for various criminals".

The Law and Jurisprudence:

[7] The applicable test for granting publication bans and sealing orders originates from two Supreme Court of Canada decisions contained in *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 and *R v Mentuck*, 2001 SCC 76, [2001] 3 SCC 442. This is sometimes referred to as the *Dagenais/Mentuck* test. The test was slightly reformulated in the Supreme Court of Canada decision in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522 to include commercial interests. This test applies equally to all judicial proceedings, regardless of the forum, nature of the claim or the particular stage of the proceedings. Because such discretionary decisions will affect the openness of court proceedings, this test is a strict one with the burden of establishing the specific circumstances, that would justify departure from the open court principle, resting with the individual who is making the request. The "open court principle" forms the hallmark of a democratic society and a cornerstone of the common law. (*Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 SCR 332, at paragraphs 24-26). At paragraph 25, the Supreme Court of Canada has described the rationale behind this principle in the following manner:

> 25 Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

[8] An applicant who wishes to limit openness to Court proceedings and freedom of expression bears a significant evidentiary burden. The open court principle ensures that the public has access to the court system and the proceedings that occur within these institutions. Restrictions placed on the dissemination of information found in the court system limit the public's freedom to express ideas and opinions about the operation of the courts, contrary to paragraph 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The purpose of the *Dagenais/Mentuck* test is to balance this freedom of expression with other

important interests, including maintaining the legitimacy of the judicial system while protecting the privacy and security interests of affected parties (*Vancouver Sun*, at paragraph 28). Public access to the court's proceedings and decisions also ensures that the courts are administering justice in a consistent manner and in accordance with the rule of law (*Canadian Broadcasting Corp. v Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19, at paragraph 1). Public access instills confidence in a court's proceedings and, specifically in respect to this Court, the public's understanding of the administration of the taxation system largely through its published decisions.

[9] The right of the public to access the courts is considered one of necessity rather than convenience. The application of the *Dagenais/Mentuck* test generally slants heavily against granting publication bans due to their fundamental inconsistency with paragraph 2(b) of the *Charter*, as well as their tendency to impair the open court principle. Under the *Dagenais/Mentuck* test, courts should only grant publication bans when:

> (a) 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 [the "Necessity Requirement"]; and
>
> (b) 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 [the "Proportionality Requirement"].
>
> (References contained in the parenthesis added)

(*Sierra Club*, at paragraph 45)

[10] When applying the first branch of the test, the Necessity Requirement, the Court must review three elements: first, the risk to the applicant must be real, substantial and well-grounded in the evidence such that it is viewed as a serious risk to be avoided and not simply a substantial benefit or advantage to the individual seeking non-publication; second, the phrase, administration of justice, should be interpreted in a manner so as not to allow the concealment of an excessive amount of information, the disclosure of which is compatible with the public interest; third, a publication ban is necessary in order to address the risk because there are no other reasonable alternatives. (*Mentuck*, at paragraphs 34-36).

[11] The primary focus of this first branch of the test is on the existence of a serious risk that can only be addressed by some form of non-publication order. Purely personal risks, such as negative media publicity, damage to personal reputation, embarrassment or potential economic harm, will not be sufficient to displace the open court principle. The risk to be avoided must involve an interest of public significance and not simply a private interest of the applicant (*Sierra Club* at paragraph 55). The decision in *MEH v Williams*, 2012 OACA 35, at paragraph 25, made the following comment on purely personal elements:

> …Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test.

[12] Interests that will engage the Necessity Requirement are typically in respect to those individuals that society recognizes as more vulnerable to public scrutiny such as minors, the elderly and the disabled.

[13] The focus of the second branch of the *Dagenais/Mentuck* test, the Proportionality Requirement, is solely on balancing the interests that will be impacted by a publication ban. *Charter* principles in respect to freedom of speech under paragraph 2(b) may need to be considered. The Supreme Court of Canada in *Sierra Club*, at paragraph 75, identified the following three core values respecting freedom of expression that will be at issue in applications for publication bans: seeking the truth and the common good, prompting self-fulfillment of individuals by allowing them to develop thoughts and ideas as they see fit and ensuring that participation in the political process is open to all persons. The greater the detriment to these core values that the publication ban will be, the less justifiable the issuance of such an order will be. The burden will be on the applicant to establish that the effects of a publication ban outweigh the deleterious effects on the rights and interests of the parties and the public.

<u>The Appellant's Position:</u>

[14] Mr. Pakzad stated that his sole intention for requesting a publication ban was to protect himself, his family and the public from financial and physical harm that could result from the disclosure of personal information. He specifically denied that this motion was motivated by a desire to avoid potential embarrassment from publication of the decisions in his appeal and this motion. He argued three points in support of this motion. First, if his motion is not allowed, it would be contrary to

procedural fairness. Mr. Pakzad claims that prior to the commencement of his appeal, he contacted the Registry office concerning the process and specifically the amount of personal information of taxpayers contained in published decisions on the Court's website. He further claims that he was informed that this Court does not publish every decision and that to avoid having a decision published he would simply have to make that request in writing after the decision is issued. He also stated that it would be unfair to hold the fact that he did not apply for an in-camera hearing against him, as the Court did not inform him of this alternative. Second, he argued that if the reasons in his appeal and this motion are published, he, his family and the public will become targets for fraud, identity theft and physical harm. To support this claim, he referred to the following personal information contained in the reasons of the trial judge: the finding that he had poor business acumen, his current and prior home addresses, payments in respect to home insurance, property taxes and rent, the fact that he had credit cards and RRSPs, his current work hours, his travel destinations, the amount of his business income and the fact that he ran the businesses on a cash basis. The Appellant claimed that during the period immediately after the Court published the decision from the appeal (those reasons were removed when the motion was filed), unknown individuals began contacting him by phone and in person at his residence. They allegedly advised him that they obtained information on him from the published reasons on this Court's website. He suggested that if his motion is denied he will be a "sitting duck". (Transcript, page 74, line 24). To illustrate and support the seriousness of this claimed risk of harm, he relied on the video clips that I permitted him to show during the hearing, as well as various studies conducted by the Canadian Anti-Fraud Centre, which summarized the frequency and financial impact of mass marketing frauds. Third, Mr. Pakzad argued that it was unfair that the reasons in his appeal were far more detailed than other decisions of this Court.

The Respondent's Position:

[15] The Respondent argued that the Appellant has not satisfied the *Dagenais/Mentuck* test, as he did not present sufficient evidence to support his claim that publication would result in serious risks to the Appellant and to the administration of justice. No serious risk of a public nature has been identified and his other claim of becoming a target for criminals is unsubstantiated and purely personal. Personal information, voluntarily introduced at the hearing and by necessity considered by the judge in dismissing the Appellant's appeal, was not sensitive information requiring non-publication. In addition, granting this motion will produce no salutary effects, but potentially will produce numerous deleterious effects. Non-publication will diminish the public's confidence in the integrity of

the income tax system and prevent the public from accessing examples of alleged business activities similar to the Appellant's that do not constitute a source of income and cannot be used to reduce ones tax liability. Finally, the Respondent pointed out that the effectiveness of a publication ban may be moot because the decision is already available on subscription based databases and discussed at length in commentaries.

Analysis:

[16] To be successful in this motion, the Appellant has the burden of establishing, by way of clear and convincing evidence, that the requested publication ban is essential in order to prevent a real and substantial risk of a public nature to himself and his family. He must also demonstrate that there are no alternative measures to address this alleged risk and that the salutary effects of the publication ban outweigh its deleterious effects. Unfortunately, the Appellant has not satisfied either branch of the *Dagenais/Mentuck* test and, consequently, he has been unable to justify this Court imposing a publication ban that would displace the open court principle.

[17] The open court principle, which forms the cornerstone of the common law, applies to all proceedings of the Tax Court of Canada, as a superior Court of record. Accessibility to written decisions of this Court on its website is integral to the public's confidence in the justice system and to the public's understanding of the administration and operation of this country's taxation system. Publication bans by their very nature derogate from the otherwise unrestricted accessibility to the workings of the courts. That openness forms the underlying foundation of impartiality of the judicial system. Availability of courts' decisions to the general public is central to the open court principle.

[18] The central document in this motion is the decision in the Appellant's appeal. That decision does contain some personal information, but no more so than other decisions dealing with similar issues and not as much personal information as some other decisions contain. Deputy Judge Masse did list the Appellant's prior and present address, his employer and his salary in the relevant taxation years. It also contains information regarding his education and details of his alleged businesses. All of the personal information was introduced into evidence by the Appellant through his evidence-in-chief and in cross-examination. The content of the reasons is what one would expect in order for a court to be able to adequately address the issues of such an appeal. None of it could be deemed to be sensitive information. The RCMP website, referenced in the Appellant's motion materials,

in respect to identity theft and fraud, contains a list in respect to the type of personal information that should not be disclosed. Although there is no caselaw from this Court respecting the meaning of the term referred to by the Respondent as "sensitive information", this Court's Practice Note 16, published December 8, 2008, provides guidance in respect to the type of information that parties should refrain from disclosing in pleadings or documents filed in this Court. This Practice Note cautions that all evidence received by the Court is generally part of public records that will be open to inspection by the public. Further, when taxpayers' documents are placed as part of the Court's files, it will be their responsibility to limit the disclosure of personal and confidential information to content which is necessary to dispose of their appeals. It also goes on to provide a list of proposed sensitive information that parties should refrain from disclosing in documentation filed with this Court. That list included the following: personal addresses, social insurance number and employee identification number, business number, GST/HST account number, sensitive medical information, birth data except the year, names of minor children and if identified, only initials should appear and, finally, bank and financial account numbers and if those are provided only the last four digits of the account. With the exception of addresses, none of these examples of sensitive information appeared in the Appellant's appeal decision, nor are any of those examples being included in the reasons for this motion. Although this list is not exhaustive and there are other items that immediately come to mind when thinking of sensitive information, such as passport numbers, driver's license numbers or mother's maiden name, the content of the Appellant's decision contains no such sensitive personal information. Although he did object to the reference to his travel destinations and dates of that travel in the decision, the discussion of that information was necessary because the Appellant had claimed business expenses associated with those trips. He also objected to the judge's discussion of the amount of his business income because it made him a target for criminals. This objection would appear to have no basis as he reported minimal income in each of the taxation years under appeal which would likely deter criminals seeing Mr. Pakzad as a desirable target.

[19] In *Singer* v *Canada (Attorney General)*, 2011 FCA 3, the Federal Court of Appeal held that an individual's social insurance number information contained in Court documents was the type of personal information that should be protected. Despite this finding, the Court still held that a confidentiality order would be overreaching in the circumstances and instead ordered that the sensitive information be redacted. I reach the same conclusion in respect to the one piece of personal information, Mr. Pakzad's addresses, contained in the records. To allow

this motion in these circumstances would dilute the test and expand its application far beyond what the Supreme Court of Canada intended.

[20] Turning now to the first branch of the *Dagenais/Mentuck* test, the Necessity Requirement requires that the Appellant demonstrate that there is a serious risk of financial and physical harm to him, his family and the public that can only be mitigated by the requested publication ban. The Appellant's general assertion that unknown and unnamed criminals will target him and his family using the personal information contained in the appeal and motion decisions is not well grounded in the evidence. Nor does the evidence support a conclusion that the alleged risk is a real and substantial risk as contemplated by the applicable test guidelines. The Appellant has failed to establish a direct nexus between the risk for identity theft and fraud and the availability of his decision on this Court's website. The Appellant did not provide any particulars about his alleged communications with criminals who obtained information from the decision, which had been posted on the Court's website for a short period prior to the filing of the motion. He simply stated that they were attempting "to find out more information" about him. (Appellant's Notice of Motion, dated March 16, 2017). He did not explain what information these individuals were trying to obtain, or how that information would have been used to compromise his financial and personal security, or that of his family, or how there was a risk to the proper administration of justice. With only unsubstantiated assertions of risks before me, I have no justification for making any exception to the open court principle based on the first branch of the *Dagenais/Mentuck* test.

[21] On balance, it appears that the Appellant's concerns are purely personal, and that the information he attempts to shield is related to facts that will be embarrassing to him and his family. Such privacy interests, however, do not justify non-publication, pursuant to the strict *Dagenais/Mentuck* test, such that access by the public should be limited or prevented altogether.

[22] Before addressing the second branch of this test, I want to make several comments concerning contradictory statements made by the Appellant. In his second request for a publication ban by letter dated June 22, 2016, he indicated that the individuals who had contacted him informed him that they found him after reading "his name" on the Court's website. If that statement is correct, then those individuals may have been accessing the Appellant's name as it would be listed on the Court's website as soon as he filed his Notice of Appeal in February of 2015. However, in his submissions during the hearing of the motion, he indicated that those individuals had advised him that they found him after reading "the trial

judgment about him" on the Court's website. At one point, I questioned Mr. Pakzad respecting these phone calls that he alleged he received and he stated that "… I guess he went on your web site"… (Transcript, page 16, line 10, Emphasis Added). Mr. Pakzad then moved from "guessing" or assuming that is where they obtained information on him to his factual statement made shortly thereafter: "Yeah, I said, how do you know these stuff from? He says, Oh, it's on the Tax Court web site about you." (Transcript, page 16, lines 22 – 24, Emphasis Added). In addition, Mr. Pakzad alleged that he contacted this Court, prior to filing his appeal, in respect to his ability to make a non publication request. However, at the time of this alleged inquiry, he would have had no knowledge of what type of information would be included in the final reasons of a judge of this Court. If I take Mr. Pakzad at this word and accept that he did, in fact, make this inquiry prior to filing his Notice of Appeal, then I can only conclude that his interest in a publication ban at that preliminary stage must have been motivated primarily by a desire to protect his personal privacy. If this remained his primary focus in bringing the motion, as the evidence suggests, it is a purely private concern which does not engage public interest that would warrant non-publication.

[23] Since the Appellant did not meet the first branch of the test, the motion could be dismissed on this basis alone. However, even if the Appellant had met the first branch of the test, he has not satisfied the second branch of the test, the Proportionality Requirement. This part of the test requires a balancing of the salutary effects of a publication ban against the deleterious effects. This balancing includes a consideration of the right to free expression, the right to a fair trial and the efficacy of the administration of justice. The decision in the Appellant's appeal is, or at least was, available on other subscription based databases and has had commentaries published on free public websites. Ordering a publication ban of this Court's decision will be ineffective in providing confidentiality to the personal information contained in those reasons. His hearing has been completed and he did not appeal. Further, although the Appellant stated that he had contacted these websites and that they agreed to delete the decision on those sites, there was no evidence that they agreed to his request based on proof of risk of identity theft as opposed to simply following his request. This means that, even if I were inclined to order a publication ban, it would have little effect on protecting the Appellant's personal information. In these circumstances, there can be very few salutary effects and based on the evidence, the only benefit that may flow from a publication ban would be the Appellant's satisfaction in maintaining his anonymity.

[24] On the other hand, allowing a ban in respect to the decision in the appeal, or in this motion, would, however, produce a number of deleterious effects on the

administration of justice and would detract from the public's confidence in the integrity of the judicial system, all of which would be inconsistent with the open court principle. In a self-assessing income tax system, it is particularly pertinent that the public have access to decisions of this Court, so that they can better ascertain the state of the law, particularly as it relates to issues which directly affect their daily activities. In this case, a discussion of business activities which do not constitute a source of income for which a taxpayer can claim losses and expenses may be particularly helpful to a segment of the population in organizing their own personal matters when engaging in similar activities. This allows the public to access further clarification and developments in the law and instills the public's confidence in the operation of the legal system.

[25] The Appellant also argued that he had a reasonable expectation of privacy which he coupled with a fairness argument. Where the Appellant has failed to satisfy the *Dagenais/Mentuck* test, he cannot succeed on this motion. The policy document, "Protecting Your Privacy" published by Office of the Privacy Commissioner of Canada, which the Appellant referenced, does not assist him here as it does not apply to this Court's decisions or the public's access to the Court's proceedings. He also referred to various statistical studies by the Canadian Anti-Fraud Centre on the frequency and financial impact of mass marketing frauds in Canada. While these may be interesting, they do not link such frauds to the content of decisions of this Court or any other court.

[26] With respect to the Appellant's complaint that the Court did not inform him of the ability to apply for an in-camera proceeding, the Appellant was represented by legal counsel during the hearing. If he did have concerns regarding disclosure of his personal information at that time, he could have, through his counsel, requested an in-camera proceeding pursuant to section 16.1 of the *Tax Court of Canada Act*.

Conclusion:

[27] Most appeals coming before this Court require taxpayers to divulge some personal information to the extent required to support their case particularly where they bear the burden of proof. The facts that the Appellant introduced in open court were deemed necessary and appropriate by him and his counsel. The trial judge's discussion of this information and his findings of fact in respect to the alleged business activities were within the normal parameters of what would be expected in this type of hearing. The only personal information that might need to be protected is the Appellant's address for which the alternative measure of redacting this information could be considered. However, where this information is available

elsewhere to the public, granting the relief sought by the Appellant would not be beneficial to him.

[28] The Appellant has not convinced me that any of the information could be used for illicit purposes by criminals. Since he has not adduced evidence that would satisfy the *Dagenais/Mentuck* test, I must dismiss this motion. The Appellant's desire to shield his privacy cannot trump the public's right to an open and accessible court system.

[29] The Respondent asked for costs of $1,000.00 and pursuant to the inherent authority set out in Rule 10 of the *Tax Court of Canada Rules*, I am awarding that amount to the Respondent payable forthwith. The Appellant submitted the same request twice before bringing this motion. In the Appellant's June 22, 2016 request, he states that if this Court allowed publication then he warned of the following: "…when it causes any issues for me, then I will take **Legal Actions Against You for Any Damages**. And also I will inform many organizations such as the following that you could have easily prevented the issue but you would not prevent it." Again, at the hearing of the motion, he strongly suggested that I should decide favorably to his arguments or suffer negative media publicity and other consequences. This also warrants the award of costs of $1,000.00 to the Respondent.

Signed at Ottawa, Canada, this 18th day of May 2017.

"Diane Campbell"

Campbell J.

CITATION:	2017 TCC 83
COURT FILE NO.:	2015-533(IT)I
STYLE OF CAUSE:	FARZAD PAKZAD AND THE QUEEN
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 3, 2017
REASONS FOR ORDER BY:	The Honourable Justice Diane Campbell
DATE OF ORDER:	May 18, 2017

APPEARANCES:

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COUNSEL OF RECORD:

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