

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Dempsey v. Pagefreezer Software Inc.*,
2023 BCCA 179

Date: 20230427
Dockets: CA48500; CA48624
Docket: CA48500

Between:

Nathan Kirk Dempsey

Appellant
(Petitioner)

And

Pagefreezer Software Inc. and Michael Riedijk

Respondents
(Respondents)

Docket: CA48624

Between:

Nathan K. Dempsey

Appellant
(Petitioner)

And

Pagefreezer Software Inc. and Michael Riedijk

Respondents
(Respondents)

Sealed File

Before: The Honourable Madam Justice Horsman
(In Chambers)

On appeal from: Orders of the Supreme Court of British Columbia, dated August 12, 2022 (*Dempsey v. Pagefreezer Software Inc.*, Vancouver Docket S220956) and dated October 13, 2022 (*Dempsey v. Pagefreezer Software Inc.*, 2022 BCSC 1939, Vancouver Docket S220956).

The Appellant, appearing in person via
videoconference:

N. Dempsey

Counsel for the Respondents:

H. Mallabone
C. Garton

Place and Date of Hearing:

Vancouver, British Columbia
March 27 and April 14, 2023

Place and Date of Judgment:

Vancouver, British Columbia
April 27, 2023

Summary:

The respondents apply for permanent partial sealing orders over material filed in two related appeals, both of which have been dismissed as abandoned. Held: Application granted. The respondents established that a sealing order is necessary to address a serious risk to an important public interest, there are no reasonable alternative measures to address the risk, and the benefits of the order outweigh its negative effects.

Reasons for Judgment of the Honourable Madam Justice Horsman:

[1] The respondents, Pagefreezer Software Inc. (“Pagefreezer”) and Michael Riedijk, apply for permanent partial sealing orders in two related appeals: CA48624 and CA48500. There is a third related appeal which is not directly in issue on this application: CA48392. All three appeals have been dismissed as abandoned.

Factual background

[2] Pagefreezer is a company that provides monitoring and archiving of online content. Mr. Riedijk is a founder and CEO of Pagefreezer. The appellant Nathan Dempsey was formerly an employee and shareholder of Pagefreezer.

[3] These appeals all arise from the settlement of a dispute between Mr. Dempsey and Pagefreezer. The parties entered into a settlement agreement in relation to the dispute. Mr. Dempsey later filed a petition to set the settlement agreement aside.

[4] The documents filed in the petition include confidential and sensitive information about Pagefreezer. The Supreme Court of British Columbia has issued a series of interim sealing orders over the petition file. As Mr. Dempsey has filed his appeals, sealing orders have also been granted in this Court.

[5] In reasons for judgment issued October 13, 2022, Majawa J. dismissed the petition and placed a permanent sealing order over the entire petition file: *Dempsey v. Pagefreezer Software Inc.*, 2022 BCSC 1939.

[6] This background is sufficient to frame the appeals. The three appeals, in chronological order of filing, may be summarized as follows.

CA48392 – Appeal of Tucker J. order

[7] This appeal is not the direct subject of the present application, but is relevant to the issues raised.

[8] On June 30, 2022, Tucker J. placed an interim sealing order over the entire petition file, to remain in place until the petition was heard. She also issued a protective order, prohibiting Mr. Dempsey from disclosing the items under seal in the court file “to any person other than the parties named in the style of proceeding and any counsel he may retain” without prior leave of the court: 2022 BCSC 1246.

[9] On July 6, 2022, Mr. Dempsey filed an application for leave to appeal Tucker J.’s order.

[10] In reasons for judgment issued August 22, 2022, Willcock J.A. held that Mr. Dempsey did not require leave to appeal, and ordered that he post security for costs. Justice Willcock found that the current and future appeal filings engaged the same confidentiality considerations as the petition filings. He ordered that certain paragraphs and sections of the material filed on the appeal be permanently sealed. He ordered that the second affidavit of Mr. Dempsey made on August 15, 2022, Mr. Dempsey’s response book filed on August 17, 2022, and all future filings in the appeal be sealed for 90 days. He also issued a protective order, prohibiting Mr. Dempsey from disclosing the items under seal in this Court to any person other than parties named in the style of proceedings and his counsel, except by consent or with the prior leave of the Court.

[11] On November 3, 2022, Marchand J.A. dismissed Mr. Dempsey’s appeal as abandoned for failure to comply with Willcock J.A.’s order to post security. He found Mr. Dempsey in contempt of court for intentionally breaching the protective order made by Willcock J.A., and ordered him to pay a fine of \$5,000. Justice Marchand placed a permanent sealing order over all materials filed on or after August 22,

2022, as well as the second Affidavit of Mr. Dempsey made on August 15, 2022, and response material that refers to or contains that affidavit.

CA48500 – Appeal of McNaughton J. orders

[12] On August 12, 2022, Justice McNaughton made orders: (1) scheduling the petition for hearing on September 15 and 16, 2022, (2) granting the respondents leave to file an application for summary judgment, (3) dismissing Mr. Dempsey’s application to add the Canada Revenue Agency as a party, and (4) dismissing Mr. Dempsey’s application for an adjournment of the latter request.

[13] On August 29, 2022, Mr. Dempsey filed a notice of appeal of the McNaughton J. orders.

[14] On September 13, 2022, DeWitt-Van Oosten J.A. denied Mr. Dempsey’s application for a stay of the McNaughton J. orders. Mr. Dempsey also applied for an interim sealing order over all existing and future filings in the appeal. The respondents consented to an interim sealing order and asked for a protective order. Justice DeWitt-Van Oosten ordered an interim sealing order over all materials, subject to further determination by the division. She imposed a condition prohibiting Mr. Dempsey from distributing any sealed material without prior leave of the Court.

[15] On November 3, 2022, Marchand J.A. ordered Mr. Dempsey to post security for costs in the amount of \$8,500 within 30 days and stayed proceedings until the ordered security was posted.

[16] Mr. Dempsey did not post security for costs. The appeal was abandoned on March 9, 2023.

CA48624 – Appeal of Majawa J. order

[17] Mr. Dempsey filed a notice of appeal of Majawa J.’s October 13, 2022 order on October 18, 2022.

[18] On November 16, 2022, DeWitt-Van Oosten J.A. ordered Mr. Dempsey to post security for costs of the appeal in the amount of \$8,500 within 30 days and

stayed proceedings until the ordered security was posted. She imposed an interim sealing order over the entirety of the material in the appeal file until the appeal.

[19] Mr. Dempsey did not post security for costs. The appeal was abandoned on March 9, 2023.

The application

[20] As originally framed, the respondents' application sought permanent orders sealing the entire appeal record in CA48500 and CA48624 on the basis that the files contain commercially sensitive material. Subsequently, the respondents have narrowed the scope of the sealing orders they seek to specific portions of material contained in the two appeal files. The material that the respondents say ought to be sealed is particularized in the third affidavit of Mr. Riedijk in CA48500, made April 4, 2023, and the second affidavit of Mr. Riedijk in CA48624, made April 4, 2023.

[21] The information the respondents seek to permanently seal includes commercially sensitive financial information about Pagefreezer, documents and information that are covered by contractual confidentiality terms, and information covered by settlement privilege.

[22] The material filed in CA48624 and CA48500 includes copies of documents that the Court ordered to be permanently sealed in CA48392. These documents also fall within the scope of the respondents' application for a permanent sealing order.

The legal framework

[23] A sealing order prohibits access to the record. A justice has jurisdiction to order that a file be sealed in whole or in part, pursuant to s. 30 of the *Court of Appeal Act*, S.B.C. 2021, c. 6: *R. v. Klos*, 2022 BCCA 105 at para. 6, citing s. 10(2) of the former *Court of Appeal Act*, R.S.B.C. 1996, c. 77.

[24] Court proceedings are presumptively open to the public: *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 37. The party seeking a sealing order must show 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.

[*Sherman Estate* at para. 38.]

[25] The term “important interest” includes the general commercial interest in preserving confidential information: *Sherman Estate* at para. 41. In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 59, the Supreme Court of Canada held that the preservation of confidential information constitutes a sufficiently important commercial interest provided certain criteria are met. These criteria are that the information has been treated at all relevant times as confidential, the applicant’s commercial interests could reasonably be harmed by its disclosure, and it has been accumulated with a reasonable expectation that it will be kept confidential: *Sierra Club* at para. 60.

Positions of the parties

[26] The respondents say that the permanent sealing orders they seek are necessary to prevent serious risk to Pagefreezer’s commercial interests. They say that material filed in these appeals contains sensitive confidential information about Pagefreezer. The respondents emphasize that there are confidentiality terms in agreements that were signed by Mr. Dempsey. They say the fact that Mr. Dempsey is contractually bound to maintain the confidentiality of information that he has repeatedly disclosed in these proceedings is important context to this application.

[27] The respondents have identified the specific portions of the material filed in the two appeals that they say raise the concerns. They propose to file redacted versions of the relevant material in electronic form, which would then be publicly accessible, in order to ensure minimum infringement of the open court principle.

[28] Mr. Dempsey says that the respondents have not met the high bar for a sealing order, even the partial sealing order that the respondents now propose.

Mr. Dempsey cites *United States v. Meng*, 2021 BCSC 1253, in which the Court found that HSBC's commercial confidentiality interest did not engage an important public interest. As to settlement privilege, Mr. Dempsey says that there are exceptions to settlement privilege, including where there is impropriety such as threats and fraud: *Nguyen v. Dang*, 2017 BCSC 1409 at para. 23.

[29] Mr. Dempsey consents to modest redaction of discrete information referenced in his affidavits, such as numerical data and personal information. Beyond that, Mr. Dempsey says that the respondents have not established that a sealing order is necessary to address a serious risk to Pagefreezer's commercial interests.

Discussion

Serious risk to an important public interest

[30] Other decisions arising from this litigation have considered whether sealing orders should be granted over the same or similar material. Three justices of this Court have held that sealing orders were necessary in relation to a risk to an important public interest. As summarized by DeWitt-Van Oosten J.A. in her reasons on the interim sealing application in CA48500, the appeal record is likely to include "confidential financial information, commercially sensitive material, shareholder information and material that may be subject to settlement privilege or contractual confidentiality obligations": at para. 28.

[31] For the same reasons, I am also satisfied that Pagefreezer has established a sealing order is necessary to address a serious risk to an important public interest. The material that Pagefreezer seeks to seal contains information covered by contractual confidentiality obligations and settlement privilege. The interest at stake here is not Pagefreezer's particular interest in profiting as against its competitors, but rather the important and general commercial interest of preserving confidential information, and information subject to settlement privilege. Additionally, portions of the material that Pagefreezer seeks to seal are subject to permanent sealing orders issued in CA48392.

Reasonable alternative measures

[32] There are no reasonable alternative measures to the partial sealing ban order sought by the respondents that would address the risk to the important public interest at stake.

Benefits of the order weighed against its negative effects

[33] As most recently highlighted in *Sherman Estate*, open judicial proceedings are important to “...maintaining the independence and impartiality of the courts, public confidence, and understanding of their work and ultimately the legitimacy of the process...”: at para. 39. Even where an applicant for a sealing order has established that court openness poses a serious risk to an important public interest and there are no reasonable alternative measures available to address the risk, they must still show that, as a matter of proportionality, the benefits of the order outweigh its negative effects.

[34] In my view, the benefits of the partial sealing order in the circumstances of this case outweigh its negative effects. A redacted appeal record will remain publicly accessible. The public does not have a strong interest in accessing the material that will be sealed. That material consists mainly of information regarding Pagefreezer’s private commercial transactions, which is protected from disclosure by contractual confidentiality terms. The underlying appeals have been abandoned, and thus the information the respondents seek to seal is not central to an ongoing judicial process.

Disposition

[35] For the foregoing reasons, I order as follows:

In CA48500

- (1) The following material shall be permanently sealed:

- (a) the current unredacted versions of the material listed at para. 9(a)-(q) of the third affidavit of Mr. Riedijk, made April 4, 2023;
 - (b) the current unredacted version of the third affidavit of Mr. Riedijk;
- (2) The respondents will file an electronic version of the sealed material, with the following redactions:
- (a) in relation to the material listed in para. 9(a)-(q) of Mr. Riedijk’s third affidavit, the redactions set out at para. 10(a)-(q) of Mr. Riedijk’s third affidavit, with the exception of pages 66–70 of the Horton Affidavit #1;
 - (b) in relation to Mr. Riedijk’s third affidavit, pages 1–2 and Exhibits A and B will be redacted;
- (3) The redacted versions of the material will be accessible to the public;

In CA48624

- (4) The following material shall be permanently sealed:
- (a) the current unredacted versions of the material listed at para. 9(a)-(i) of Mr. Riedijk’s second affidavit, made April 4, 2023;
 - (b) the current unredacted version of Mr. Riedijk’s second affidavit;
- (5) The respondents will file an electronic version of the sealed material, with the following redactions:
- (a) in relation to the material listed in para. 9(a)-(i) of Mr. Riedijk’s second affidavit, the redactions set out at para. 10(a)-(i) of Mr. Riedijk’s second affidavit;

(b) in relation to Mr. Riedijk’s second affidavit, pages 1–2 will be redacted;

(6) The redacted versions of the material will be accessible to the public;

In both appeals

(7) A permanent sealing order will be issued over any future filings in either of these appeal files, subject to further order of this Court;

(8) The current interim sealing orders will remain in effect for 14 days from the date of this order, and will apply to these reasons for judgment;

(9) Within 14 days of the date of this order, the parties will advise the registry in writing if they object to the public release of any portion of these reasons on the basis that the reasons contain confidential information that presents a risk to an important public interest;

(10) If the parties do not raise any objection, the interim sealing orders will be lifted and these reasons for judgment will be publicly released 14 days after the date of this order;

(11) The requirement for the appellant’s signature on the form of order is dispensed with.

“The Honourable Madam Justice Horsman”