# News

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# Court rejects blocking disclosure

**KIM ARNOTT**

Citing the open court principle, the Court of Appeal of British Columbia has rejected a woman's attempt to block the use of information from her contentious family law case in an unassociated labour arbitration proceeding.

The files, being used by the B.C. Public Service Agency to support the dismissal of a child protection social worker who appeared as a witness in the family law case, were properly obtained under the *Supreme Court Family Rules*, the court ruled in its dismissal of Anurahini Chellappa's appeal.

"The appellant enjoys no overriding right of privacy in regard to material filed in her family law case," wrote Justice Richard Goepel, who wrote the unanimous decision in *Chellappa v. Kumar* [2016] BCCA 2.

"While a Supreme Court judge may limit access to a family law file, such an order is contrary to the open court principle and is an exception to the general rule."

In 2011, Chellappa and her then husband Niraj Deepak Kumar went to trial to resolve a family law case launched after a separation in 2007. During the trial, a friend identified only as E.H. testified on Chellappa's behalf.

The trial judge eventually awarded child custody to Chellappa, but in his reasons, made several remarks that were critical of E.H.'s conduct in relation to the case.

E.H., then employed with British Columbia's Ministry of Children and Family Development, was suspended for five days and eventually dismissed in part because of his involvement in the case.

A union grievance of that dismissal is now the subject of arbitration. The lawyer representing E.H. declined to comment on the status of the dispute or the Court of Appeal decision.

Documents related to the family law case were accessed by E.H.'s employer, with the permission of Chellappa's former spouse.

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>
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> Brown Henderson Melbye

Under the *Rules*, documents in B.C. family law cases may be accessed by a party to the case; an individual authorized by a party; or a lawyer, whether or not representing a party.

In addressing Chellappa's claim to privacy rights, Justice Goepel noted direction from the Supreme Court of Canada in *Edmonton Journal v. Alberta (Attorney General)* [1989] 2 S.C.R. 1326 suggests "while a litigant's right of privacy is an important right, it is subject to, and does not take precedence over, the right of the public to an open court process."

While the case largely reiterates established legal principles, it also demonstrates the widespread public assumption that information filed in family court proceedings will be shielded from public view, say several family law experts.

"What strikes me is that most people think that because there are some rules about who can search files, they actually think this is all private and confidential," noted Trudi Brown, partner at Brown Henderson Melbye and co-editor of the annual *British Columbia Family Law Practice.*

Given that the files are open to anyone willing to hire a lawyer or able to convince a disgruntled spouse to give permission, Brown says she warns clients about the potential exposure of personal information that can result from bringing disputes to a courtroom.

"It's a great reminder to people that if you don't want your dirty laundry aired, don't go to court."

John-Paul Boyd, executive director of the Canadian Research Institute for Law and the Family and former Vancouver family law practitioner, agrees that people don't usually recognize the public nature of court proceedings.

"The clash here is really about people's assumptions that matrimonial proceedings, with the intensely personal disclosure in content that goes on, are somehow magically protected from disclosure to other people," he said

Even the current restrictions on accessing family court files are only a few decades old, with divorce and custody disputes previously treated like any other civil action, Boyd added.

A court trend toward identifying family law cases by initial rather than name, which began as judgments became available electronically, also appears to have waned in recent years, said Brown.

While individuals can still request identification by initials, the naming protocol has a limited impact on deterring access by anyone knowledgeable or determined, she added. And obtaining court approval for actually sealing a court file is rare.

"The only time I can see that a court would probably close a file is if there were some horrible allegations that involved kids," Brown said.

For couples seeking to avoid potential public disclosure of embarrassing information, the province's arbitration process—which legislatively binds parties not to disclose documents or even information about an award—is likely more appealing, added Boyd. But he believes the principle of open court access provides necessary transparency to retain public confidence in the rule of law. "It certainly can make some kinds of litigation uncomfortable for the participants. But that, I suggest, is one of the intrinsic risks you face whenever you make the choice to litigate."

## Letter to the editor

# *Procedure should not ever trump substance*

***Re: Gambling on litigation (pages 14-17, The Lawyers Weekly, Dec. 11, 2015)***

Dear editor:

Economics plays a big role in litigation and should be considered in all cases. Given that courts are overburdened these days, the solution is not to create more procedural roadblocks and rules, but rather to better equip the administration of justice.

For example, experienced lawyers can be used at an early stage as umpires or arbitrators to help both sides get all the necessary documents, facts and issues sorted out as quickly as possible. Every case should start not with pleadings, but with what the plaintiff is seeking and the wrong he wishes righted. Then an early conference with the umpire/arbitrator should formulate the real legal issues and necessary factual documents and witnesses. When all is sorted out and the facts are truly discovered through such a process, a settlement should be fairly easy. If not, then a trial will be properly focused and prepared.

Another aspect that seriously needs correcting is the costs awarded to the 'winner'. If one side choses to use a very expensive lawyer, he should be able to, but at his own expense. There should be a minimum amount set that is payable. Better yet, each side should fund their own fight, regardless of who wins.

Mediation is great and works well when both sides are motivated to settle, but not so well when one side is simply stalling, playing games, or being stubborn because of the economic reality that it knows exists in our system. Procedure should never trump substance, might should never trump right, and law should never trump justice.

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