

CANADA / JUDGMENT

R. v. Tyabji-Sandana

2025 BCSC 1411

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 1411 R. v. Tyabji-Sandana

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tyabji-Sandana,

2025 BCSC 1411

Date: 20250314

Docket: 16792-2; 16792-5;

16792-6; 16792-10; 16792-11

Registry: Powell River

Rex

v.

Kasimir Tyabji-Sandana

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Before: The Honourable Mr. Justice Brongers

Oral Ruling

on Application for Publication Ban

Counsel for the Crown:

J.C. Young

The Accused, appearing in person:

K. Tyabji-Sandana

Counsel for Dr. Jay Yule:

D.C. Tarnow

Appearing in person:

B. Mackin

Appearing in person:

C. Schreiber

Place and Date of Hearing:

Powell River, B.C.

March 14, 2025

Place and Date of Judgment:

Powell River, B.C.

March 14, 2025

Introduction

- [1] THE COURT: There are two applications for publication bans and sealing orders before the court. They have been brought with respect to material filed in the matter of R. v. Tyabji-Sandana, a criminal proceeding that has otherwise concluded.
- [2] Mr. Kasimir Tyabji-Sandana was found guilty by a jury of one count of sexual interference with a 15-year-old victim at or near Powell River. He was sentenced to two years less a day to be served in the community under a conditional sentence order ("CSO"), to be followed by three years of probation. The sentence was imposed on June 4, 2024, by Justice Edelmann (then of this court) in reasons for sentence published and indexed at R. v. Tyabji-Sandana, 2024 BCSC 1325.
- [3] One of the applicants is Mr. Tyabji-Sandana himself. He seeks a publication ban and sealing order over exhibits filed at the sentencing hearing that have been requested by Mr. Bob Mackin, a journalist who operates an online news website called theBreaker.news. The scope of material requested is described by Mr. Mackin as "presentencing reports, Gladue reports, and character reference letters".
- [4] The other applicant is Dr. Jay Yule. Now retired, he was formerly the Superintendent of Schools for School District 47, which oversees schools in the Powell River area. Dr. Yule provided a character reference letter on behalf of Mr. Tyabji-Sandana at the sentencing hearing. Dr. Yule seeks a publication ban and sealing order in respect of his letter, which falls within the scope of Mr. Mackin's access request. The reference letter is also the subject

of a separate and specific access request made by Ms. Christine Schreiber. She is the coordinator of an organization called the Powell River Police Victim Services Program.

- [5] Both Mr. Mackin and Ms. Schreiber have responded to the applications filed in this case. I find that they both clearly have standing to do so, although Ms. Schreiber's interest is limited to the issue of whether a publication ban and sealing order should be issued in respect of Dr. Yule's letter. Mr. Mackin's standing extends to the issue of whether any and all documents he has requested should be subject to a publication ban and sealing order.
- [6] The two applications were presented today, March 14, 2025, at a common hearing. Mr. Tyabji-Sandana, Mr. Mackin, and Ms. Schreiber all represented themselves. Dr. Yule was represented by counsel. Crown counsel made submissions as well.

The Parties' Positions

Dr. Yule

- [7] In his notice of application filed November 18, 2024, Dr. Yule effectively seeks a publication ban and sealing order with respect to the undated letter of reference he wrote in support of Mr. Tyabji-Sandana. At the hearing, however, Dr. Yule's counsel proposed an alternative position, in case the court is not prepared to issue the primary relief sought. Specifically, he suggests that while the original letter be protected from disclosure, a redacted version could be created that removes any information that could identify Dr. Yule as its author. Such a redacted version could then be accessed and published, so long as there is a prohibition on any mention that Dr. Yule wrote the letter.
- [8] Dr. Yule filed his own affidavit in support of his application. In it, he deposes that he is concerned that if the letter is released to the public, it will be used as a mechanism to degrade his reputation in the court of public opinion. Dr. Yule states that if he had been informed that there was a possibility that his filing of the letter would lead to such consequences, he likely would have elected not to participate in the sentencing process.
- [9] Dr. Yule's application is also supported by another affidavit made by Ms. Karly Tanner, a legal assistant employed by Dr. Yule's counsel. Ms. Tanner deposes that she was informed by an unidentified source and verily believes that Dr. Yule is a respected member of the community and that Dr. Yule is concerned about the reputation impact of releasing the letter to the public.
- [10] In his submissions before the court, counsel for Dr. Yule emphasized the important role played by individuals like his client in our system of justice, namely, those who come forward to provide references in support of offenders at sentencing hearings. Counsel argues that the publication ban and sealing order being sought is needed to address the serious risk that such individuals will not freely participate in sentencing hearings if their support for offenders could become public knowledge. Counsel for Dr. Yule also says that the negative impacts of such an order are few, particularly given the motivations of Mr.

Mackin and Ms. Schreiber for making their access requests, which he says do not justify exposing Dr. Yule to reputational embarrassment.

Mr. Tyabji-Sandana

- [11] In his notice of application filed November 18, 2024, Mr. Tyabji-Sandana indicates that he is not seeking a blanket publication ban and sealing order in respect of the material requested by Mr. Mackin. Instead, he asks for orders that would redact portions of a presentence report, a Gladue report, and a supplemental Gladue report.
- [12] Mr. Tyabji-Sandana filed his own affidavit in support of his application. In it, he notes that he is Indigenous and deposes to the following concerns that underlie his application:
- a) that Mr. Mackin will publish on his website the material requested under headlines that appeal to anti-Indigenous racism rooted in ignorance, thereby generating profit for Mr. Mackin while undermining reconciliation with Indigenous peoples and respect for the justice system;
 - b) that publication of the material will cause pain to persons outside of these legal proceedings; and
 - c) that he participated openly and freely in the pre-sentencing process, and is concerned that allowing the material to be shared, publicized, and commented on will discourage such participation by Indigenous offenders in the future.
- [13] Mr. Tyabji-Sandana's affidavit does not identify persons outside of these legal proceedings whom he alleges will suffer pain if the material is published. That said, his application is also supported by Ms. Tanner, the same legal assistant who provided an affidavit in support of Dr. Yule's application. Ms. Tanner deposes that she was informed by an unidentified source and verily believes the following:
- a) that Mr. Tyabji-Sandana is largely estranged from his paternal family, who do not wish to support him during these criminal proceedings; and
 - b) that if the reports were to be made fully public, it could cause irreparable damage to Mr. Tyabji-Sandana's paternal family, including five half-siblings.
- [14] Ms. Tanner's affidavit also attaches as exhibits the proposed redactions for the three reports.
- [15] In his submissions before the court, Mr. Tyabji-Sandana acknowledged the high evidentiary hurdle that he faces on this application. However, he submits that he has met it in this case. In particular, he says that the publication ban and sealing order he requests are needed to protect the important public interest of encouraging Indigenous offenders to be transparent when providing information to authors of pre-sentence and Gladue reports.

- [16] Mr. Tyabji-Sandana suggests that if the relief he is seeking is not granted, this could cause a chilling effect for Indigenous offenders who are subject to sentencing hearings. While he did not press the argument in oral submissions, Mr. Tyabji-Sandana also maintains his position that a publication ban and sealing order are needed to address mischief that may ensue from Mr. Mackin's intended use of the information in question.

Mr. Mackin

- [17] Mr. Mackin is opposed to the relief sought by Dr. Yule and Mr. Tyabji-Sandana. He notes that, in his capacity as a journalist accredited through the B.C. Courts Media Program, he has been reporting on Mr. Tyabji-Sandana's criminal proceedings in the past. He submits that there is a general public interest in these proceedings given Mr. Tyabji-Sandana's profile and that of his family, and a specific public interest in the question of Dr. Yule's support for Mr. Tyabji-Sandana given Dr. Yule's public position as a school district superintendent. Mr. Mackin's motivation for seeking access to the documents in question is to permit him to prepare and publish news articles about these matters.
- [18] Mr. Mackin also submits that court exhibits are presumptively available to all members of the public. This includes the media, for whom such access is particularly important, given its role in ensuring that the public is informed about the justice system. Mr. Mackin argues that neither Mr. Tyabji-Sandana nor Dr. Yule have overcome their burden to justify denying him or the public access to the documents in question, and urges the court to dismiss the two applications.

Ms. Schreiber

- [19] Ms. Schreiber is also opposed to the court issuing any order that would deny the public access to Dr. Yule's letter of reference.
- [20] In her submissions, Ms. Schreiber explained that she has been working with and supporting the victim of Mr. Tyabji-Sandana's crime in her capacity as a victim services advocate. She seeks access to Dr. Yule's letter of reference in order to provide it to:
- a) the board of trustees of the school district for the Powell River area as part of a request for an internal investigation into the conduct of Dr. Yule in respect of the R. v. Tyabji-Sandana proceeding; and
 - b) the victim of Mr. Tyabji-Sandana, who has requested the reference letter for her personal records.
- [21] Ms. Schreiber denies that the purpose of her access request is to publish the letter, to share it on social media platforms, or to vilify Dr. Yule. Rather, Ms. Schreiber wishes to encourage the school district to review Dr. Yule's support of Mr. Tyabji-Sandana at the sentencing hearing while he was still the superintendent of the school district. In Ms. Schreiber's view, it was unethical for the head of a school district to provide support for a person found guilty of a sexual offence against a child who, at the time of the offence, was a student enrolled in a

school administered by that school district.

- [22] Ms. Schreiber submits that a blanket denial of public access to the letter is unnecessary, and contrary to the principles of open court and transparency. She argues that the privacy of the person submitting a reference letter on behalf of an offender should not outweigh the public's right to know about court proceedings. She is concerned that shielding Dr. Yule's reference letter could undermine public confidence in the fairness and transparency of the judicial system.
- [23] As such, Ms. Schreiber asks the court not to deny the public access to the letter, subject to any reasonable redactions necessary to protect the privacy of the victim in this case.

The Crown

- [24] Counsel for the Crown indicated that the Crown views its role on this application as assisting the court with identifying the applicable law and ensuring that there is no publication of information that might disclose the identity of the victim in this case. That said, the Crown prepared written submissions which include the following statement:

The Crown is not seeking to restrict access to court exhibits in this matter. Applying the law set out above would appear to support unrestricted third-party access to exhibits.

- [25] Furthermore, counsel for the Crown's submissions were essentially to the effect that the relief sought by Mr. Tyabji-Sandana and Dr. Yule should be denied.
- [26] For example, counsel for the Crown made reference to Justice Edelmann's reasons for sentence in *R. v. Tyabji-Sandana*, 2024 BCSC 1325. In these reasons, some emphasis was placed upon the public stigma Mr. Tyabji-Sandana has experienced as a result of the sexual interference conviction. This was one of the factors that led Justice Edelmann to issue a CSO, as sought by counsel for Mr. Tyabji-Sandana, and reject Crown's plea for a custodial sentence in a penitentiary. Counsel for the Crown submits that it would be incongruous for the court to now restrict public access to exhibits because of any stigma they may cause.
- [27] In addition, counsel for the Crown also noted that significant portions of sentencing reports and other exhibits were read into the court record, portions of which have already been the subject of news reports published by Mr. Mackin. As such, there would appear to be a reduced expectation of privacy with respect to much of the information which Mr. Tyabji-Sandana proposes for redaction from the publicly-available pre-sentencing and Gladue reports.
- [28] I note parenthetically that the court is appreciative of the Crown's effort to assist it with identifying the law that applies to the applications brought by Mr. Tyabji-Sandana and Dr. Yule. I also note that it is open to the Crown to either take a position on these applications, or to refrain from doing so. However, it is disingenuous for the Crown to purport to not take any position, while at the same time making submissions on the evidence that strongly militate in favour of a particular outcome. It would be preferable in the future for the Crown

to give fair notice to the other parties and the court of its actual position, or, if it chooses not to take a position, to refrain from engaging in advocacy that might be viewed as partisan.

Analysis

Legal framework

- [29] The leading authority that now sets out the principles that apply to requests for sealing orders and publication bans such as the ones made here is the Supreme Court of Canada's decision in *Sherman Estate v. Donovan*, 2021 SCC 25.
- [30] The *Sherman Estate* case states unequivocally that the open court principle is a central feature of our democracy that is protected by the constitutionally entrenched right to freedom of expression, and there is a strong presumption against limiting it. All aspects of court proceedings are therefore presumptively open to the public and the press, and an applicant who seeks to limit their access to them faces a high bar.
- [31] Paragraphs 1-3 of *Sherman Estate* read as follows:
- [1] This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press -- the eyes and ears of the public -- is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.
- [2] Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.
- [3] Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought -- for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order -- the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

- [32] Also worth noting is the Supreme Court of Canada's more recent judgment in *Canadian Broadcasting Corp. v. Named Person*, 2024 SCC 21, at paras. 27-29:
- [27] This Court has repeatedly affirmed that the open court principle, which is protected by the constitutionally entrenched right of freedom of expression, is a pillar of our free and democratic society
- [28] The open court principle has two aspects: first, the public nature of hearings and court records, and second, the right to report on court proceedings. Under this principle, every person, as a general rule, has the right to access the courts, to attend hearings, to consult court records and to report on their content
- [29] Coupled with the existence of free, robust and independent news media, the open court principle performs a number of important social and democratic functions. Among other things, it allows for informed debates and conversations in civil society about the courts and their workings, which helps ensure the accountability of the judiciary. As a result, this principle promotes both judicial independence and an administration of justice that is impartial, fair and in accordance with the rule of law. Open justice also facilitates the public's understanding of the administration of justice and enhances public confidence in the integrity of the justice system and all of its participants

[Citations omitted]

- [33] It is clear from these authorities that affording the media access to court records so that it may fairly and accurately report on court proceedings is a societal interest of the highest order that must be protected and promoted. It is also clear that persons who are not professional journalists have the same right to consult documents that are filed in court and to report on their content to others.
- [34] However, the open court principle is subject to limits. It can be restricted if the court is satisfied that it is necessary to do so to address a serious risk to other important public interests.
- [35] The specific test to be applied in considering such restrictions is set out in *Sherman Estate* at para. 38. It provides that the party seeking restrictions must establish 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.

- [36] There is no closed list of important public interests for the purpose of this test: *Sherman Estate* at para. 42. However, individual sensitivities alone do not qualify if they do not arise above those inconveniences and discomforts that are inherent to court openness. The fact that such openness is disadvantageous, embarrassing, or distressing to certain individuals does not generally warrant court intervention: *Sherman Estate* at paras. 38-39.
- [37] Furthermore, there must be a factual foundation for the alleged public interest and limiting access to information filed in court proceedings. While direct evidence is not necessarily required to establish a serious risk to an important interest if it can be done on the basis of logical inferences, mere speculation that there may be harm will not suffice: *Sherman Estate* at para. 97.
- [38] Finally, the onus is on the party seeking to restrict access to the courts to justify such exceptional relief. This is because there is a presumption in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right: *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 at 189.
- [39] Having set out the governing principles, I turn now to the specific applications in the case at bar. I will begin with Dr. Yule's application and then address Mr. Tyabji-Sandana's application. Before doing so, I confirm that it is Mr. Tyabji-Sandana and Dr. Yule who bear the burden of demonstrating that the orders they seek should be issued. It is not up to Mr. Mackin or Ms. Schreiber to justify their presumptive entitlement to access records that were filed in open court.

Dr. Yule's Application

- [40] As a preliminary observation, I do not accept that Dr. Yule's concern for the potential impact on his reputation should his letter of reference be released is an important public interest that could warrant issuing a sealing order or a publication ban. Such a subjective individual concern, nothing more, manifestly does not rise to the threshold required for justifying an exception to the open court principle.
- [41] To his credit, however, Dr. Yule does not insist upon this as the basis for his application. Rather, it is his assertion that if his letter and the fact that he wrote it were to be known by the public, this may discourage others from writing letters of support for offenders at sentencing hearings.
- [42] I accept that it is laudable for individuals with relevant knowledge of an offender's personal circumstances to prepare letters of reference to assist courts with sentencing. This is a practice that ought to be encouraged. Conversely, I also accept that ensuring such participation is not discouraged may be an important interest that might justify placing limits on the open court principle. However, I am not persuaded, on the very limited evidence before me, that denying the public access to Dr. Yule's letter of reference on behalf of Mr. Tyabji-Sandana is necessary to avoid such a chilling effect.

[43] Indeed, the only aspect of Dr. Yule's very brief affidavit that addresses this issue is an assertion of his fear that the reference letter will be used to "degrade [his] reputation in the court of public opinion" and "could be weaponized by uninvolved parties", followed by this statement:

THAT if I had been informed of this possibility at the outset of my involvement in these proceedings, I likely would have elected not to participate.

[44] This falls far short of indicating that there is a justifiable concern that unless anonymity can be assured for persons who provide references at sentencing hearings, there will be a general reluctance for potential referees to come forward. To the contrary, letters of reference are commonly provided at sentencing hearings without any assurance of confidentiality for their authors.

[45] Furthermore, Dr. Yule does not depose that he had any expectation of confidentiality when he voluntarily tendered his letter of reference, one in which he cited his public position as superintendent of the school district as a basis for his ability to persuasively vouch for Mr. Tyabji-Sandana's character. Therefore, this is also not a case where relief might be warranted in order to give effect to the legitimate expectations of a voluntary participant in the justice system.

[46] In sum, I find that Dr. Yule has not met his burden to demonstrate why the public should not have access to the reference letter he provided at Mr. Tyabji-Sandana's sentencing hearing.

Mr. Tyabji-Sandana's Application

[47] As has been noted, Mr. Tyabji-Sandana advanced three potential "public interests" that would be served should his application for a publication ban and sealing order be granted.

[48] The first is to avoid unspecified "pain" and "irreparable damage" to persons who were not involved in the R. v. Tyabji-Sandana legal proceedings. These persons were not identified in Mr. Tyabji-Sandana's affidavit. While Ms. Tanner's affidavit, made on information and belief, refers to unspecified potential suffering by members of Mr. Tyabji-Sandana's paternal family, no specific details of how and why they would suffer is provided either. Without clear evidence of harm, this vague submission cannot be accepted to justify a derogation from the open court principle.

[49] The second is to prevent Mr. Mackin from using the reports to prepare and publish articles that will appeal to anti-Indigenous racism and ignorance of the justice system in order to generate revenue for Mr. Mackin, thereby undermining reconciliation with Indigenous peoples. In his oral submissions before the court, Mr. Tyabji-Sandana did not seriously press this argument. He was right not to do so as it, too, is unfounded.

[50] The only evidence Mr. Tyabji-Sandana provided in support of this alleged public interest is a screenshot of online comments made in response to one of Mr. Mackin's articles about the R. v. Tyabji-Sandana proceeding, along with screenshots indicating that this article received

significantly more "views" than another article of Mr. Mackin's that dealt with an unrelated subject. Such evidence does not persuasively demonstrate that Mr. Mackin's motivations in reporting on Mr. Tyabji-Sandana's case are improper. It also does not show that redactions need to be made to publicly available copies of Mr. Tyabji-Sandana's pre-sentence and Gladue reports in order to ensure that Indigenous reconciliation is not undermined.

- [51] Unfortunately, disrespectful and ignorant online comments posted in response to media articles are a fact of modern life. However, the evidence before me does not show that denying public access to court documents will prevent this from occurring, or that the benefits of doing so outweigh the harm it would inflict on the open court principle.
- [52] The third and final public interest invoked by Mr. Tyabji-Sandana is an alleged chilling effect similar to the one invoked by Dr. Yule. However, I find that this submission is also not persuasively supported by the evidence before the court. For essentially the same reasons as are set out above in respect of Dr. Yule's assertion, the evidence tendered before me does not demonstrate that publicly available copies of the pre-sentencing reports must be redacted in order to ensure that Indigenous offenders participate candidly and transparently in sentencing hearings.
- [53] In sum, I find that Mr. Tyabji-Sandana has not met his burden to demonstrate that Mr. Mackin specifically and the public generally ought not to have access to unredacted copies of the pre-sentence and Gladue reports in issue.

Disposition

- [54] For all of these reasons, the applications of Mr. Tyabji-Sandana and Dr. Yule are dismissed.
- [55] Mr. Mackin and Ms. Schreiber shall have access to the documents sought as requested. Furthermore, there shall be no restriction on their publication, with the exception of the reference to Dr. Yule's telephone number which is to be redacted.
- [56] Finally, Mr. Mackin and Ms. Schreiber are reminded that a publication ban is in effect pursuant to s. 486.4 of the Code, and they may not publish, broadcast, or transmit any information contained in the documents that could identify the victim in this case.
- [57] Unless there are any questions, this matter is concluded.
- [58] CNSL D. TARNOW: Justice, I have a request.
- [59] THE COURT: Yes, Mr. Tarnow?
- [60] CNSL D. TARNOW: Would the court consider staying the order for the 30-day appeal period so that we consider the situation and thereby allowing a potential appeal that would be -- that would not be moot.
- [61] THE COURT: Thank you, Mr. Tarnow. I will hear submissions from the other parties before I make a decision on this.

[SUBMISSIONS AT 4:03:44 P.M. TO 4:08:47 P.M.]

[62] THE COURT: I have considered the request by Dr. Yule and Mr. Tyabji-Sandana for a stay pending appeal of this judgment. I will grant that stay pending appeal in order to prevent this matter from becoming moot. I am not satisfied that there is a particular urgency to Mr. Mackin or Ms. Schreiber's request to access this information during the relatively brief appeal period that would outweigh the concern that the appeal would become moot if a stay was not granted.

[63] Therefore, the terms of my order are that a stay is granted pending the filing of an appeal or 30 days from today, whichever is sooner.

"Brongers J."

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