Index

A: Appellant/Applicant/Moving Party Documents

Master Bundle page reference	Sub Bundle page reference	Document	Date	Court Stamp	Exhibit
A1 - A262	A1 - A262	Pursuant Registrar directions of Taylor MacIver on Jul18 at 1047EDT (upload and submit documents on the same day day) I've re-submitted the electronic documents (direction of Nizhane Para in her email dated 20220719, 1006EDT) so please be advised to disregard row 0001, 0002, 0003 and solely use row 0004 and a file named ONSC_DC-107_22-20220812-Appellant_Binder_of_Authorities-r20220719.pdf which clearly indicates that it is a REVISION to the correctly submitted document of Jul18. -Chad	July 19, 2022		
A378 - A384	A263 - A269	20230515 ONSC-DC 107_22 Medallion Corporation vs Chad & Stacy Status of Motion in Writing	May 16, 2023		
A385 - A387	A270 - A272	20230511 ONSC-DC 107_22 Medallion Corporation vs Chad & Stacy Status of Motion in Writing	May 16, 2023		
A388 - A394	A273 - A279	20211009 ONSC-DC 107_22 Medallion Corporation, and David Bayles vs Chad & Stacy	May 16, 2023		
A395 - A399	A280 - A284	20210503 ONSC-DC 107_22 Tenant's Written Submissions	May 16, 2023		

A400	A285	20220211 ONSC-DC 107_22 Tenant's Written Submissions	May 16, 2023		
A401 - A406	A286 - A291	20220729 ONSC-DC 107_22 Scheduling Concerns and D2 Request	May 16, 2023		
A407 - A408	A292 - A293	20230309 ONSC-DC 107_22 Medallion Corporation vs Tenants	May 16, 2023		
A409 - A419	A294 - A304	20230516 ONSC-DC 107_22 Medallion Corporation vs Chad & Stacy Response to Status of Motion in Writing	May 16, 2023		
A420 - A422	A305 - A307	Can You Stop Multiple LTB Applications by a Vexatious Litigant?	November 05, 2015		
A423 - A427	A308 - A312	Fraud Unravels Everything	May 23, 2017		
A428 - A433	A313 - A318	Ontario Divisional Court Applies Vavilov to Appeals from Ontario Securities Commission	October 06, 2020		
A434 - A437	A319 - A322	Understanding Mask Law Disinformation	October 29, 2020		
A438 - A441	A323 - A326	Mandatory masking requirements in residential complex	October 30, 2020		
A442 - A447	A327 - A332	Mandatory Mask Law Noncompliance Exemptions	December 07, 2020		
A448	A333	Medallion Corporation-Encouraging Wholesale Discrimination	December 07, 2020		
A449 - A454	A334 - A339	Tenant Complaint re Melchers Conduct	December 13, 2020		
A455 - A458	A340 - A343	Complaint re Melchers Vexatious Conduct (reply)	December 14, 2020		
A459 - A462	A344 - A347	Complaint re Melchers Vexatious Conduct (followup)	December 15, 2020		

A463 - A464	A348 - A349	Medallion Corporation Notice-on-Notice of Eviction	February 25, 2021		
A465 - A467	A350 - A352	SCHEDULE “A” TO THE FORM N5 0000-565 Sherbourne Street, Toronto, Ontario M4X 1W7 (the “Rental Unit”)	April 30, 2021		
A468 - A472	A353 - A357	Scope & Meaning or Rosa Parks & Facial Nudity 2	May 03, 2021		
A473 - A477	A358 - A362	Scope & Meaning or Rosa Parks & Facial Nudity	May 03, 2021		
A478 - A488	A363 - A373	Sherbourne Die Statte COVID-19 Euthanasia Clinic	June 18, 2021		
A489 - A492	A374 - A377	Chad to Tribunal re Eviction Hearing Rescheduling	July 25, 2021		
A493 - A499	A378 - A384	Medallion Corporation, and David Bayles vs Chad & Stacy	October 09, 2021		
A500 - A502	A385 - A387	Chad to Tribunal re Evidence Concerns and Written Submissions	October 12, 2021		
A503 - A507	A388 - A392	LTB:TSL-21777-21 - L2 Eviction Order	February 09, 2022		
A508	A393	Tenant's Written Submissions	February 11, 2022		
A509	A394	Pro Forma Ex Parte Eviction	February 15, 2022		
A510 - A512	A395 - A397	TSL-21777-21-RV - February 17, 2022 — STANDARD OF REVIEW (CORRECTED)	February 17, 2022		
A513 - A521	A398 - A406	Motion for Leave to Appeal for Judicial Review	February 18, 2022		
A522 - A523	A407 - A408	ONSC Divisional Court (Osgoode) 107:22 - Stay of L2 Eviction Order	February 18, 2022		
A524 - A527	A409 - A412	Re- Appeal under Statutory Powers Procedure Act	February 18, 2022		

A528 - A529	A413 - A414	Sherman Estates Motion and a Motion Without Notice of 2022Aug12	July 19, 2022		
A530 - A535	A415 - A420	ONSC-DC 107:22 - Scheduling Concerns and D2 Request	July 29, 2022		
A536 - A537	A421 - A422	Canvas re Lawfare	May 15, 2023		
A538 - A541	A423 - A426	Cerebral Boredom and Maniacal Miscreations	May 15, 2023		
A542 - A545	A427 - A430	Email to Krista Young-Wells	May 15, 2023		
A546	A431	Subjugal Tyranny	May 15, 2023		

B: Cross-Appellant/Respondent/Responding Party Documents

Master Bundle page reference	Sub Bundle page reference	Document	Date	Court Stamp	Exhibit
B1 - B150	B1 - B150	Responding Party Motion Record - Responding Party Medallion Corporation -	August 02, 2022		
B151 - B177	B151 - B177	Factum - Landlord and Tenant Board -	August 18, 2022		
B178 - B204	B178 - B204	Factum - Landlord and Tenant Board - 18-AUG-2022 - locked	August 18, 2022		

C: Intervenor Documents

D: Jointly-submitted and/or Consent Documents

Medallion Corporation vs Chad & Stacy

ONSC:DC 107/22 Motion (20220812)

Appellant's Binder of Authorities

- **Tab 1.)** 20210611 Sherman Estate v. Donovan, *2021SCC25*
- **Tab 2.)** 20210628 A. Lawyer v. The Law Society of British Columbia, *2021BCCA284*
- **Tab 3.)** 20210624 United States v. Meng, *2021BCSC1253*
- **Tab 4.)** 20210722 R.F. v. J.W., *2021ONCA528*
- **Tab 5.)** 20210804 2021FC821
- **Tab 6.)** 20210908 Ian Mackenzie
  The Open Court Principle and Privacy
- **Tab 7.)** 20030416 Beverley McLachlin DeakinLawRw 1; (2003) 8(1)
  Courts, Transparency and Public Confidence

Tab 1:
20210611 Sherman Estate v. Donovan, 2021SCC25

SUPREME COURT OF CANADA

CITATION: Sherman Estate *v.* Donovan, 2021 SCC 25

APPEAL HEARD: October 6, 2020
JUDGMENT RENDERED: June 11, 2021
DOCKET: 38695

BETWEEN:

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate
Appellants

and

Kevin Donovan and Toronto Star Newspapers Ltd.
Respondents

- and -

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 108)	Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

A4

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate *Appellants*

v.

Kevin Donovan and Toronto Star Newspapers Ltd. *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee *Interveners*

Indexed as: Sherman Estate *v.* Donovan

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

Present: Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public interest — Privacy — Dignity — Physical safety — Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files — Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files, concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption 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.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them. Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only

where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be

likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a

final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

Cases Cited

By Kasirer J.

Applied: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; **referred to:** *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Lavigne v. Canada (Office of the Commissioner of Official Languages),* 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Attorney General of Nova Scotia v. MacIntyre,* [1982] 1 S.C.R. 175; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 11; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Otis v. Otis* (2004), 7 E.T.R. (3d) 221; *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321; *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880; *R. v. Dyment*, [1988] 2 S.C.R. 417; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial*

Workers, Local 401, 2013 SCC 62, [2013] 3 S.C.R. 733; *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 289 C.C.C. (3d) 549; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *R. v. Paterson* (1998), 102 B.C.A.C. 200; *S. v. Lamontagne*, 2020 QCCA 663; *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357; *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629; *R. v. Pickton*, 2010 BCSC 1198; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561, aff'd [1997] 3 S.C.R. 844; *A. v. B.*, 1990 CanLII 3132; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100; *Fedeli v. Brown*, 2020 ONSC 994; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121; *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410; *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455.

Statutes and Regulations Cited

Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

Canadian Charter of Rights and Freedoms, ss. 2(b), 8.

Charter of Human Rights and Freedoms, CQLR, c. C-12, s. 5.

Civil Code of Québec, arts. 35 to 41.

Code of Civil Procedure, CQLR, c. C-25.01, art. 12.

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5.

Privacy Act, R.S.C. 1985, c. P-21.

Authors Cited

Ardia, David S. "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017), 4 *U. Ill. L. Rev.* 1385.

Austin, Lisa M. "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53.

Bailey, Jane, and Jacquelyn Burkell. "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 *Ott. L. Rev.* 143.

Cockfield, Arthur J. "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 *U.B.C. L. Rev.* 41.

Eltis, Karen. *Courts, Litigants and the Digital Age*, 2nd ed. Toronto: Irwin Law, 2016.

Eltis, Karen. "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 *McGill L.J.* 289.

Ferland, Denis, et Benoît Emery. *Précis de procédure civile du Québec*, vol. 1, 6e éd. Montréal: Yvon Blais, 2020.

Gewirtz, Paul. "Privacy and Speech", [2001] *Sup. Ct. Rev.* 139.

Guillemard, Sylvette, et Séverine Menétrey. *Comprendre la procédure civile québécoise*, 2e éd. Montréal: Yvon Blais, 2017.

Hughes, Kirsty. "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Modern L. Rev.* 806.

Matheson, David. "Dignity and Selective Self-Presentation", in Ian Kerr, Valerie Steeves and Carole Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society*. New York: Oxford University Press, 2009, 319.

McIsaac, Barbara, Kris Klein, and Shaun Brown. *The Law of Privacy in Canada*, vol. 1. Toronto: Thomson Reuters, 2000 (loose-leaf updated 2020, release 11).

McLachlin, Beverley. "Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003), 8 *Deakin L. Rev.* 1.

Paton-Simpson, Elizabeth. "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305.

Perell, Paul M., and John W. Morden. *The Law of Civil Procedure in Ontario*, 4th ed. Toronto: LexisNexis, 2020.

Québec. Ministère de la Justice. *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01*. Montréal: SOQUIJ, 2015.

Rochette, Sébastien, et Jean-François Côté. "Article 12", dans Luc Chamberland, dir. *Le grand collectif*: *Code de procédure civile — Commentaires et annotations*, vol. 1, 5e éd. Montréal: Yvon Blais, 2020.

Rossiter, James. *Law of Publication Bans, Private Hearings and Sealing Orders*. Toronto: Thomson Reuters, 2006 (loose-leaf updated 2020, release 2).

Solove, Daniel J. "Conceptualizing Privacy" (2002), 90 *Cal. L. Rev.* 1087.

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rouleau and Hourigan JJ.A.), 2019 ONCA 376, 47 E.T.R. (4th) 1, [2019] O.J. No. 2373 (QL), 2019 CarswellOnt 6867 (WL Can.), setting aside a decision of Dunphy J., 2018 ONSC 4706, 417 C.R.R. (2d) 321, 41 E.T.R. (4th) 126, 28 C.P.C. (8th) 102, [2018] O.J. No. 4121 (QL), 2018 CarswellOnt 13017 (WL Can.). Appeal dismissed.

Chantelle Cseh and *Timothy Youdan*, for the appellants.

Iris Fischer and *Skye A. Sepp*, for the respondents.

Peter Scrutton, for the intervener the Attorney General of Ontario.

Jacqueline Hughes, for the intervener the Attorney General of British Columbia.

Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Ewa Krajewska, for the intervener the Income Security Advocacy Centre.

Robert S. Anderson, *Q.C.*, for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, for the intervener the British Columbia Civil Liberties Association.

Khalid Janmohamed, for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee.

The judgment of the Court was delivered by

KASIRER J. —

I. Overview

[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.

[4] This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

[5] This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that,

on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

[6] This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

[7] For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

[8] In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

[9] Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

[10] The couple's estates and estate trustees (collectively the "Trustees")[1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

[11] When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy

[1] As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

[12] Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star").[2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. *Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)*

[13] In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club*. He noted that a confidentiality order should only be granted when: "(1) such an

[2] The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

order is necessary . . . to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

[14] The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and . . . excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

[15] The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

[16] Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

B. *Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)*

[17] The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

[18] The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have

a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

[19] While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

[20] The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

C. *Subsequent Proceedings*

[21] The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles.

This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

[22] The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

[23] First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club*. The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

[24] Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

[25] The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

[26] The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

[27] The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive.

On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

[28] In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

[29] The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club*.

[30] Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26).

Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Limited*, [2017] UKSC 49, [2019] A.C. 161, at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1326-39, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

[31] The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a

fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

[32] For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing

orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

[33] Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

[34] This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise

than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

[35] I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[36] In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of

physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption 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.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and

understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

[40] The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

[41] The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test

was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

[42] While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[43] The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant

flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 *Ottawa L. Rev.* 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

[44] Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example

by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis* (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

[45] It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. *The Public Importance of Privacy*

[46] As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

[47] I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "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" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the

necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

[48] Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club*. But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns — even "without more" — can coincide with important public interests within the meaning of *Sierra Club*. To invoke the expression of Binnie J. in *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional . . . harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club*. It is true that an individual's privacy is

pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

[49] The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club*.

[50] In the context of s. 8 of the *Charter* and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in *Dagg*, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in *Lavigne*, at para. 25.

[51] Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733

("*UFCW*"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., *Lavigne*, at para. 24; *Bragg*, at para. 18, per Abella J., citing *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

[52] Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41).[3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective

[3] At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

(*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 *U.B.C. L. Rev.* 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Modern L. Rev.* 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev.* 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

[53] The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced,

alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

[54] In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson* (1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect

of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

[55] Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at para. 9 (CanLII)) and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at

p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003), 8 *Deakin L. Rev.* 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. *The Important Public Interest in Privacy Bears on the Protection of Individual Dignity*

[56] While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong

presumption of openness if privacy is cast too broadly without a view to its public character.

[57] Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants requires that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (p. 185).

[58] Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule

and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

[59] The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310 Canada inc. v. Chamberland*, 2004 CanLII 4122 (Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

[60] Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 *Cal. L. Rev.* 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (*R. v. Spencer*,

2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

[61] While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

[62] Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of

openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

[63] Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club*. As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in

particular, in order to protect the parties' privacy . . . . However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

[64] How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

[65] In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial

proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity . . . namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

[66] Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the *Code of Civil Procedure*, CQLR, c. C-25.01 ("*C.C.P.*"), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile*, *chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

[67] The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as

fundamental to a given society (see *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also *A. v. B.*, 1990 CanLII 3132 (Que. C.A.), at para. 20, per Rothman J.A.).

[68] The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif*: *Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its

preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club*'s notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

[69] Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 *McGill L.J.* 289, at p. 314).

[70] It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy and dignity of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

[71] Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from*

the Identity Trail: Anonymity, Privacy and Identity in a Networked Society (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

[72] Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to

other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

[73] I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

[74] Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

[75] If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this

Court has described in its jurisprudence on s. 8 of the *Charter* as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

[76] The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the

structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

[77] There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown*, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

[78] I pause here to note that I refer to cases on s. 8 of the *Charter* above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a

result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

[79] In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

[80] I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious

risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017), 4 *U. Ill. L. Rev.* 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

[81] It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude

further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 *U.T.L.J.* 305, at p. 346).

[82] Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

[83] That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

[84] Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a

restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

[85] To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. *The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest*

[86] As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

[87] As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception

to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

[88] The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

[89] Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the

Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

[90] There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

[91] With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might

well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club*.

[92] The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see *Bragg*, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., *Bragg*, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

[93] Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

[94] Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

[95] Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

[96] Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is

worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

[97] At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

[98] As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious

risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

[99] This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

[100] Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the

Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

[101] The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

[102] Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis.

Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

[103] Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. *There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy*

[104] While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

[105] Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

[106] Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the

harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

[107] The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

[108] For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellants: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the respondents: Blake, Cassels & Graydon, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: DMG Advocates, Toronto.

Solicitors for the intervener the Income Security Advocacy Centre: Borden Ladner Gervais, Toronto.

Solicitors for the interveners Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.: Farris, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: McCarthy Tétrault, Toronto.

Solicitors for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee: HIV & AIDS Legal Clinic Ontario, Toronto.

Tab 2:
20210628 A. Lawyer v. The Law Society of British Columbia 2021BCCA284

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *A Lawyer v. The Law Society of British Columbia,* 2021 BCCA 284

Date: 20210628
Docket: CA47517

Between:

A Lawyer

Appellant
(Petitioner)

And

The Law Society of British Columbia

Respondent
(Respondent)

SEALED IN PART

Before: The Honourable Madam Justice Bennett
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated May 13, 2021 (*A Lawyer v. The Law Society of British Columbia*, 2021 BCSC 914, Vancouver Docket S202432).

Oral Reasons for Judgment

Counsel for the Appellant (via teleconference):	C.D. Veinotte S.U. Hamilton
Counsel for the Respondent (via teleconference):	J.K. McEwan, Q.C. L.J. Smith
Place and Date of Hearing:	Vancouver, British Columbia June 22, 2021
Place and Date of Judgment:	Vancouver, British Columbia June 28, 2021

Summary:

The applicant applies for an order that the Law Society's underlying order, made pursuant to Rule 4-55 of the Law Society Rules, and investigation in relation to the applicant's practice be stayed pending the determination of this appeal. The applicant submits that, in light of the low threshold for merit and the possibility of rendering the appeal moot, the test for a stay of proceedings is met in the circumstances of the case. The applicant also applies for a temporary and partial sealing order and anonymization orders in relation to the appeal. The respondent does not oppose the applications for sealing and anonymization orders. However, the respondent submits that the applicant has not met the test for a stay of proceedings. Held: The application for a stay is granted, with an expedited appeal process; the Sherman Estates test is met, and the applications for a temporary and partial sealing order, and the anonymization orders are granted. This appeal raises novel issues surrounding the Law Society's powers under Rule 4-55, delegation of authority in the investigatory process, and the application of the Charter to such circumstances. The appeal is not frivolous or vexatious. The appeal would in part be rendered moot if a stay is not granted. The balance of convenience favours the applicant, as public confidence in the legal profession would not be harmed by a stay of the inspection of seized documents while the scope of the investigation and seizure is assessed. With respect to the sealing and anonymization orders, the information sought to be sealed and anonymized is sensitive personal information that would strike at the core of the persons sought to be anonymized. Public access to names at this point in the process is a serious risk to such persons' reputational interest, and may cause irreparable harm to those affected. The salutary effects of the temporary and partial sealing order and anonymization orders sought outweigh the deleterious effects.

[1] **BENNETT J.A.**: The underlying appeal is from a judicial review of a decision by the Law Society of British Columbia ("LSBC"), in which the LSBC's Discipline Committee issued an order under Rule 4-55 of the *Law Society Rules* and commenced an investigation into the applicant's entire legal practice. Justice Majawa, in reasons indexed at 2021 BCSC 914, dismissed the petition.

[2] The applicant, A Lawyer, applies for:

a) An order anonymizing the appeal proceedings such that he may use his initials in lieu of his name, with the style of proceeding in the appeal to read "*A Lawyer v. The Law Society of British Columbia*", pursuant to ss. 10(2)(a) and (b) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77;

b) An order that the applicant, the firm and its employees be identified by the terms “A Lawyer”, “the Firm”, “An Associate”, and “A Paralegal” in all documents related to these proceedings, pursuant to ss. 10(2)(a) and (b) of the *Act*;

c) A sealing order limited to the affidavits filed in the proceedings below, pursuant to ss. 10(2)(a) and (b) of the *Act*; and

d) An order that the R. 4-55 Order and Investigation of the applicant’s practice by the LSBC, be stayed pending the determination of this appeal, pursuant to ss. 10(2)(b) and 18 of the *Act*.

[3] The applications are granted for the following reasons.

Background to This Application

The Factual Background

[4] The background facts are laid out in the reasons of Justice Majawa:

> [9] The petitioner has been a member of the Law Society of British Columbia since 1999. He practiced as a securities solicitor at a mid-size firm in Vancouver until April 2008. At that time, the petitioner incorporated his own law firm (“the Firm”) through which he continues to practice primarily as a securities solicitor. The petitioner currently employs six individuals at his Firm: three associate lawyers, one paralegal, one office manager/accountant, and two assistants.
>
> [10] Prior to the matters that give rise to the current proceedings, the petitioner has had some involvement with the Law Society’s Discipline Committee. In June 2017, he was issued a citation wherein it was alleged that he mishandled trust funds on nine occasions over the course of one day in July 2015. The petitioner and the Law Society eventually entered into a joint conditional admission of professional misconduct and disciplinary action. He consented to a two-month suspension from practice and to pay the Law Society’s costs in the amount of $1000. A hearing panel of the Law Society’s Discipline Committee confirmed the disciplinary action on July 24, 2019, and the Petitioner’s two-month suspension ended on October 1, 2019.
>
> [11] Between May 14 and May 16, 2019, the Law Society’s Trust Assurance department conducted a compliance audit of the petitioner’s practice, pursuant to R. 3-85 of the *Law Society Rules*. The Firm’s accounting records were examined for the audit period of October 1, 2017, to May 13, 2019.

[12] During the course of the compliance audit, the auditor uncovered concerns about the petitioner and his practice. On July 9, 2019, the Trust Assurance auditor prepared a memorandum to the Deputy Chief Legal Officer of the Law Society, Gurprit Bains, to refer his concerns for investigation by the Professional Conduct department (the "Referral Memorandum").

[13] On September 28, 2019, following further review of the concerns referred by the auditor in the Referral Memorandum, Ms. Bains prepared an opinion to the chair of the Discipline Committee of the Law Society seeking the issuance of an order, pursuant to R. 4-55 of the *Law Society Rules,* for an investigation of all electronic and physical books, records, and accounts of the petitioner and the Firm (the "Legal Opinion"). While it is not before me, I am told that the Legal Opinion summarizes the conduct supporting the R. 4-55 order, including the grounds for the belief that the petitioner may have committed discipline violations. The petitioner has never been provided with a copy of the Legal Opinion nor a summary of its contents.

[14] On October 2, 2019, the vice-chair of the Discipline Committee of the Law Society issued an order pursuant to R. 4-55 that an investigation be made of the books, records and accounts, including all electronic records and smart phone records of the petitioner and the Firm (the "R. 4-55 Order"). As will be discussed later, the petitioner was not made aware that concerns raised during the compliance audit formed the basis of the referral for the R. 4-55 Order until July 2020.

The Execution of the R. 4-55 Order on October 7, 2019

[15] The R. 4-55 Order was executed on October 7, 2019, one week after the conclusion of the petitioner's two month suspension in relation to the 2015 trust account misconduct. The parties disagree on exactly what occurred on October 7. I will discuss the nature of that dispute in more detail later in these reasons. For present purposes, it is sufficient to highlight the salient points that are, for the most part, not matters of contention.

[16] On October 7, 2019, Ms. Bains, together with Anneke Driessen, a staff lawyer in the Investigations, Monitoring & Enforcement Group, and other Law Society representatives arrived at the petitioner's Firm to execute the R. 4-55 Order. The petitioner was not present at the Firm and Ms. Bains asked that the petitioner be contacted and that he return to the firm, which he did, approximately 20 minutes later.

[17] The petitioner was provided with a letter dated October 7, 2019, addressed to the petitioner and signed by Ms. Bains, the subject matter of which reads: "Law Society Investigation of your books, records and accounts". Among other things, the letter states that a R. 4-55 investigation had been ordered. The following documents were attached to the letter: a copy of the R. 4-55 Order signed by the Vice-Chair of the Discipline Committee; a six-page document entitled "Attachment to Rule 4-55 Order: Information About Forensic Copying and Exclusion Requests", which is referenced as forming part of the R. 4-55 Order (the "Attachment to Rule 4-55 Order"); a list of investigators designated to conduct the R. 4-55 investigation; and, copies of various provisions of the *Legal Profession Act*, S.B.C. 1998, c. 9 [*LPA*], the *Law Society Rules,* and excerpts from the *Code of*

> *Professional Conduct for British Columbia* that the Law Society believed to be relevant to the conduct of the R. 4-55 investigation.

[5] The R. 4-55 Order itself, and the attachment to the R. 4-55 Order setting out the applicant's obligations under the R. 4-55 Order, are reproduced at paras. 18 and 19 of the judge's reasons.

[6] With respect to the October 7, 2019 execution of the R. 4-55 Order, the judge wrote:

> [20] The parties dispute whether or not Ms. Bains, or anyone else from the Law Society, verbally explained the reasons for their attendance at the Firm. The petitioner says they refused to provide details of the investigation or the reasons for it. The Law Society says that Ms. Bains explained that it was a comprehensive investigation of the books, records, and accounts of the law practice and that Ms. Bains further told him that the Law Society representatives were present to collect the Firm's electronic and physical documents.
>
> [21] The Law Society says that Ms. Bains asked whether the petitioner would cooperate in the collection of the Firm's records. The petitioner says that he was never informed that he had a choice but to cooperate and takes the view that he did not consent to the collection of the Firm's records (the matter of the petitioner's consent and cooperation will be discussed later in these reasons during the analysis of the petitioner's *Charter* challenges).
>
> [22] Despite the parties' difference in views as to the petitioner's cooperation or consent, it is not disputed that the petitioner provided Ms. Bains with information related to the location of the physical and electronic books, records and accounts of the law practice by responding to questions read out loud from a Law Society acknowledgement form which Ms. Bains filled out, by hand (the "Acknowledgement Form"). There is no evidence before me contradicting Ms. Driessen's evidence that Ms. Bains gave the Acknowledgement Form to the petitioner for his review and signature after she had completed it and that the petitioner reviewed and signed it.
>
> [23] The Acknowledgement Form expressly confirms service of the R. 4-55 Order on the petitioner and identifies the location of the physical and electronic books, records and accounts of the firm. Specifically, the petitioner acknowledged and advised that the electronic books, records and accounts of his law practice were located on a total of ten computers located at the offices of the Firm, the petitioner's home computer, and on smart phones belonging to the petitioner and three other employees of the Firm.
>
> [24] It is also not disputed that the Law Society's representatives did not begin their collection of the Firm's records until after the petitioner executed the Acknowledgement Form at which time they began the process of copying all the firm's hard drives, electronic files, billing/accounting records, and

> smartphones that were identified by the petitioner in the Acknowledgement Form as containing law practice records.
>
> [25] Law Society representatives returned to the petitioner's office from October 8 to October 11, 2019, to continue copying the Firm's hard drives and electronic records. The petitioner provided a large boardroom in the Firm's offices for the use of the Law Society's investigators.

[7] The following day, October 8, 2019, the applicant's counsel and counsel for the LSBC began an exchange of correspondence that "details the petitioner's attempts, through his legal counsel, to have the Law Society provide more details on the scope of the R. 4-55 investigation, ostensibly to enable him to make informed requests that certain documents be excluded from review and collection".

[8] It was clear that the applicant was of the view that the scope of the R. 4-55 investigation was narrower than what the LSBC envisioned. The LSBC's view was that the scope of the R. 4-55 investigation was "essentially the entire practice", except for documents that are both "personal and irrelevant". The applicant took the position that all files, emails, texts, books, records and accounts, vouchers, [and] financial information of the Firm was *prima facie* irrelevant. The applicant's three requests to exclude the entirety of the records collected by investigators were denied. The LSBC agreed to exclude certain privileged materials or materials that were personal and irrelevant.

[9] On December 2, 2019, the applicant requested an independent adjudication of the LSBC's determinations with respect to the denied exclusion requests. On December 12, 2019, an independent solicitor was appointed as adjudicator.

[10] On February 28, 2020, the applicant filed his petition for judicial review of the R. 4-55 Order. The adjudication proceedings have been stayed since. Thus, the LSBC's R. 4-55 investigation has been on hold since October 2019 and LSBC investigators have not accessed any of the electronic records collected from the applicant's practice pursuant to the R. 4-55 Order.

[11] In 2020, the LSBC opened a narrower R. 3-5 investigation into specific conduct concerns regarding use of trust funds. This investigation is not at issue, and

the applicant says he is cooperating with the LSBC with regard to that matter. The judge noted that it was the same (or similar) concerns arising out of the May 2019 audit that led to the R. 4-55 and R. 3-5 investigations.

[12] On June 30, 2020, the applicant sought anonymization and partial sealing orders. The LSBC took no position on the matter and the application judge granted the orders sought.

The Proceedings Below

[13] Justice Majawa summarized what the applicant (then petitioner) was seeking in the matter before him:

> [2] The petitioner in this matter, a member of the Law Society, takes issue with the scope of the R. 4-55 investigation and the way in which the petitioner's firm's records were seized. He also takes issue with the rejection of his requests to exclude certain documents from production to the Law Society. The petitioner seeks relief on administrative and constitutional law grounds and raises a number of issues for this Court's consideration, all of which have the objective of putting a halt to the Law Society's investigation of his practice.
>
> …
>
> [4] Additionally, the petitioner sought orders that he styled as "preliminary orders" in his materials. These include an order to produce a legal opinion written to the chair of the Discipline Committee that summarizes the conduct supporting the R. 4-55 order. The petitioner also sought to stay the adjudication of an independent adjudicator assigned to review the petitioner's requests to exclude documents from production and to restrain the Law Society from inspecting any of the materials that were collected pursuant to the R. 4-55 order. During the hearing, the Law Society advised the Court that they have agreed to stay the adjudication and to not inspect the records until the Court resolves this petition. Therefore, in respect of the preliminary orders sought, it will only be necessary for me to decide whether the legal opinion must be produced.

[14] The judge then summarized the issues before him:

> [5] In addition, the relief sought by the petitioner raises a number of administrative law issues. Those include: whether the decision to make a R. 4-55 order is a judicially reviewable decision; whether the Law Society owed and breached a duty of procedural fairness to the petitioner; whether there has been an impermissible sub-delegation of authority; and whether it was an abuse of process for the Law Society to proceed with an investigation under R. 3-5 of the *Law Society Rules* at the same time the R. 4-55 investigation was underway.

> …
>
> [7] Despite the number of issues raised by the petitioner, there is one fundamental issue that underlies the relief sought, and many of the arguments made, by the petitioner and that is: what is the proper scope of an investigation made under R. 4-55 into the petitioner's "books, records, and accounts"? Must, as the petitioner argues, such an investigation be limited in scope to the specific discipline violation that the chair reasonably believed the petitioner to have committed? Or, as the Law Society argues, is such an investigation not so limited, and rather, properly includes the entirety of a member's legal practice?

[15] In the result, he concluded that "the Law Society's interpretation of the scope of R. 4-55 [was] correct: the scope of an investigation authorized by R. 4-55 of the *Law Society Rules* is not limited to the misconduct that gave rise to the issuance of the R. 4-55 order. Rather, consistent with the context of the legislative scheme and the Law Society's duty to act in the public interest, the proper scope of such an investigation is the entirety of the petitioner's legal practice" (at para. 8). He also dismissed the administrative law and constitutional arguments raised by the applicant (petitioner).

[16] Justice Majawa noted that "[t]he scope of an R. 4-55 investigation is very much at the heart of the dispute between the parties".

[17] The judge noted that it was "the first time that the scope of R. 4-55 has been judicially considered" (at para. 43). He stated, however:

> Although it may not be strictly necessary to answer this question if the decision to issue the R. 4-55 Order is not reviewable under the *Judicial Review Procedure Act,* R.S.B.C. 1996, c. 241 [*JRPA*], the proper scope of the R. 4-55 Order is relevant and necessary for the *Charter* analysis in this case. Moreover, it is clear that the parties require the Court's guidance in respect of the scope of the R. 4-55 investigation so that they can continue the adjudication process regarding the exclusion of documents.

[18] The judge found that R. 4-55 "provides the Law Society with the authority to conduct a broad investigation of a member's legal practice and it is not limited to the concerns that triggered the investigation". He concluded that "the relevant provisions of the *LPA* [*Legal Profession Act*, S.B.C. 1998, c. 9] and the *Law Society Rules* should be interpreted such that the Law Society has the ability to inquire into the

entire practice of a member (where there are reasonable grounds to do so), in order to determine whether further action should be taken to fulfill its duty to protect the public. This broad nature of the Law Society's investigatory power is reinforced by the requirement that the petitioner cooperate with the investigation" (at para. 65).

[19] He found that the applicant's argument that the scope of a R. 4-55 investigation must be related to the specific misconduct concerns giving rise to the chair's reasonable belief would be unworkable as it would require the LSBC to open a new R. 4-55 investigation each time a new area of concern was uncovered in order to conduct a broad investigation of a member's practice. This, he said, "would effectively negate the ability of the Law Society to broadly investigate a member's practice when circumstances warrant it and would render investigations under R. 4-55 essentially the same as investigations under R.3-5" (at para. 74).

[20] Ultimately, he concluded that the scope of the R. 4-55 investigation is of the applicant's entire legal practice. As such, he concluded that there were only grounds of exclusion and that 'relevance' for the purposes of exclusion is not defined by the particular alleged misconduct giving rise to the investigation.

[21] The judge found that the decision of the LSBC to issue the R. 4-55 Order was not reviewable under the *Judicial Review Procedures Act*, R.S.B.C. 1996, c. 241 [*JRPA*]*:*

> [97] In my view, the decision to issue the R. 4-55 Order is an administrative decision made in the preliminary stages of a statutory process. This decision to commence an investigation does not not decide or prescribe any of the petitioner's legal rights, powers, privileges, immunities, duties or liabilities. The outcome of the Law Society's investigation pursuant to the R. 4-55 Order has not yet been determined. It may not proceed to the point where a decision is made that will effect or prescribe the petitioner's rights, power, privileges, etc. The Law Society will only be in a position to make such a statutory power of decision when, or if, the matter proceeds to a hearing panel (*Harrison* at para. 47).

[22] The judge also found that the decisions to reject the applicant's exclusion requests were not judicially reviewable, as internal remedies had not been

exhausted. Thus, judicial review of the decision to deny the applicant's exclusion requests was premature.

[23] Though it was not incumbent on him to do so, the judge also assessed whether the LSBC owed and breached a duty of fairness in dealing with the applicant. He concluded that "the minimal duty of procedural fairness owed to the petitioner in this case was met" (at para. 108). The judge noted that because the investigative and disciplinary processes are at an early stage, there was not yet a case for the applicant to meet.

[24] The judge dismissed the argument that the concurrent investigations of the applicant's practice under R. 4-55 and R. 3-5 was an abuse of process.

[25] The judge also dismissed the argument that the vice-chair of the Discipline Committee handed *unfettered* authority to the LSBC investigators, and thus engaged in an unlawful delegation of authority.

[26] As mentioned earlier, the applicant also sought disclosure of the Legal Opinion (see para. 13 of the reasons, reproduced above). The judge dismissed this, too, stating that the LSBC's duty of procedural fairness during the investigative stage did not extend to the disclosure of the nature of the suspected misconduct giving rise to the R. 4-55 Order. In fact, he noted that the legislation provides for the contrary, and s. 87 of the *LPA* prohibits the LSBC from being required to produce the opinion in these proceedings except with written consent of the executive director. The judge went on to reject the applicant's alternative argument that the LSBC had waived privilege over the Legal Opinion.

[27] The judge then turned to the *Charter* challenges before him. Earlier in his reasons, he summarized them as follows:

> [3] The petitioner seeks declarations that R. 4-55 unjustifiably infringes s. 8 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*]. Alternatively, he seeks a declaration that the Law Society's administration and execution of the R. 4-55 order and investigation unjustifiably infringe s. 8 of the *Charter*. He also asks that this Court quash

> the "decision" to make the R. 4-55 order, and the Law Society's "decision" to reject his requests to exclude certain documents from production, pursuant to ss. 8 and 24 of the *Charter,* or on "the basis of administrative law principles". He also seeks a permanent stay of the R. 4-55 order and investigation.
>
> …
>
> [6] The constitutional issues that this Court is required to determine are whether R. 4-55 is inconsistent with s. 8 of the *Charter* and whether the seizure of the Firm's records was unreasonable such that s. 8 of the *Charter* was breached.

[28] The judge's reasons on this portion of the petition are extensive (at paras. 138–177). In the result, he concluded:

> [176] Although the petitioner has a reasonable expectation of privacy over the Firm's records, that expectation is diminished. Nonetheless, the Law Society's copying of the Firm's records is a seizure for the purposes of s.8 of the *Charter.* However, the petitioner's s. 8 *Charter* rights were not infringed by neither the law that authorizes the Law Society to seize the Firm's records, nor were his rights infringed by the way in which the Law Society conducted the seizure. Consequently, the petitioner's claim for relief under ss. 8 and 24 of the *Charter* are dismissed.
>
> [177] Given that I have found that the law authorizing the seizure is reasonable, it is not necessary for me to consider whether R. 4-55 would be saved by section 1 of the *Charter*.

[29] Ultimately, he dismissed the applicant's petition, finding that:

a) The decisions to issue the R. 4-55 Order and to subsequently deny the petitioner's requests to exclude certain documents were not properly the subject of judicial review under the *JRPA*;

b) The scope of an investigation authorized by R. 4-55 of the *Law Society Rules* was not limited to the misconduct that gave rise to the issuance of the R. 4-55 Order;

c) The proper scope of the investigation was the entirety of the applicant's legal practice; and

d) The applicant's *Charter* rights had not been infringed by the R. 4-55 Order and investigation.

The Law

Application for Anonymization and a Sealing Order

[30] A sealing order prohibits access to all or part of the record. Section 10(2)(a) of the *Court of Appeal Act* allows a single justice to "make an order incidental to the appeal or matter not involving a decision of the appeal on the merits". Section 10(2)(b) of the *Court of Appeal Act* permits a single justice to "make an interim order to prevent prejudice to any person".

[31] In *Sahlin v. The Nature Trust of British Columbia,* 2010 BCCA 516, Justice Tysoe granted an order sealing certain files. He set out the test for "confidentiality orders" as such:

> [6] The Supreme Court of Canada dealt with an application for a confidentiality order in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Mr. Justice Iacobucci expressed the test for a confidentiality order as follows at para. 53
>
> > A confidentiality order under Rule 151 should only be granted when:
> >
> > > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> > >
> > > (b) The salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
> > >
> > > …
>
> [7] In *Blue Line Hockey Acquisition Co v. Orca Bay Hockey Limited Partnership*, 2007 BCSC 1483, 78 B.C.L.R. (4th) 100, Madam Justice Wedge considered an application by the media for access to an exhibit in litigation between private parties in relation to private interests. She noted that the balancing of competing interests is somewhat different in such litigation as a result of reasonable expectations of privacy. Madam Justice Wedge discussed how the balancing of those interests should be determined in terms of the opening words of the reasons in [*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188]:
>
> > [49] I return then to the words of Fish J. in *Toronto Star*. Will a balancing of the competing interests in this case create a "cloud of secrecy" under which justice will wither? The answer must be "no".
>
> I agree with the way in which Madam Justice Wedge has framed the issue.

[32] In *C.S. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2019 BCCA 406, a division of this Court noted that this framework, as set out in *Sahlin*, guides applications for non-statutory confidentiality orders, such as sealing orders and anonymity orders.

[33] Recently the Supreme Court of Canada, in *Sherman Estate v. Donovan*, 2021 SCC 25, modified the law on sealing orders (and other such limits on the principle of court openness). At paras. 37–38, the Court clarifies the test to be applied:

> [37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).
>
> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption 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.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).
>
> [Emphasis added.]

[34] With respect to determining what is meant by "important public interest", the Court held:

> [42] While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*,

> that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[35] The onus is on the party seeking a sealing order to demonstrate the necessity of such an order. The applicant must demonstrate that a superordinate public interest prevails over the public's interest in open court proceedings.

Stay of Proceedings

[36] The applicable statutory provisions on stays pending appeal are ss. 10(2)(b) and 18 of the *Court of Appeal Act*. They read as follows:

> 10 (2) In an appeal or other matter before the court, a justice may do one or more of the following:
>
> …
>
> (b) make an interim order to prevent prejudice to any person…
>
> …
>
> 18 (1) After an appeal or application for leave to appeal is brought, a justice may, on terms the justice considers appropriate, order that all or part of the proceedings, including execution, in the cause or matter from which the appeal has been taken are stayed in whole or in part.
>
> (2) After an appeal has been decided, a justice may, on terms the justice considers appropriate, order that all or part of the proceedings, including execution, in the cause or matter from which the appeal was taken are stayed and the justice may make any other order to preserve the rights of the parties pending further proceedings.

[37] Justice K. Smith succinctly described the general principles for granting a stay of proceedings in *Gill v. Darbar*, 2003 BCCA 3 at para. 7 (Chambers):

> The applicable principles are not in dispute. Generally, a successful plaintiff is entitled to the fruits of the judgment but this Court may stay proceedings if

> satisfied that it is in the interests of justice to do so: *Voth Brothers Construction (1974) v. National Bank of Canada* (1987), 12 B.C.L.R. (2d) 43 at 44-45 (C.A. [Chambers]). The trial judgment must be assumed to be correct and protection of the successful plaintiff is a pre-condition to granting a stay: *Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority* (1976), 112 D.L.R. (3d) 397 at 404 (B.C.C.A.). The applicant for a stay must satisfy the familiar three-stage test, that is, the applicant must show that there is some merit in the appeal, that the applicant will suffer irreparable harm if the stay should be refused, and that, on balance, the inconvenience to the applicant if the stay should be refused would be greater than the inconvenience to the respondent if the stay should be granted: *British Columbia (Milk Marketing Board) v. Grisnich* (1996), 50 C.P.C. (3d) 249 at 252 (B.C.C.A. [in Chambers]).

[38] The court's power to grant a stay is discretionary and should be exercised only where necessary to preserve the subject matter of the litigation or to prevent irremediable damage or where there are other special circumstances: *Roe, McNeill & Co. v. McNeill* (1994), 49 B.C.A.C. 247 at para. 6 (Chambers), citing *Contact Airways Ltd. v. DeHavilland of Aircraft of Canada Ltd.* (1982), 42 B.C.L.R. 141 at 142 (C.A.). The onus lies on the applicant to establish the right to a stay: *Bancroft-Wilson v. Murphy*, 2008 BCCA 498 (Chambers) at para. 9; *Re Taylor* (1986), 4 B.C.L.R. (2d) 15 at 16 (Chambers).

[39] The ultimate question on any application for a stay of execution concerns the interests of justice: *Coburn v. Nagra*, 2001 BCCA 607.

Positions of the Parties

Appellant/Applicant

Anonymization and Sealing Order

[40] The applicant submits that the important interests at stake here include: protecting the confidentiality and privacy of the LSBC investigation process, and protecting the professional reputation of the applicant and his firm.

[41] He says that "[t]he materials at issue in this matter were created at the early stages of an ongoing LSBC Investigation and contain sensitive information regarding the Appellant and the Firm's Associates and Staff. If they are made public, there is a

real and substantial risk to the Appellant's expectation that these materials be kept confidential, in accordance with the statutory protections".

[42] The applicant states that disclosure of unproven allegations that may cause irreparable reputational harm is an interest that is "sufficiently important to garner protection".

[43] He argues that the importance of confidentiality is broader than his appeal as the LSBC has broad investigatory powers and access to highly sensitive and personal information. The applicant submits that anonymization and sealing orders sought are necessary to preserve confidentiality during the investigation process.

[44] Finally, he says the salutary effects of the partial sealing order outweigh any deleterious effects. He points to the following factors: that he does not seek a blanket sealing order, that the affidavits are sworn with the true names of the affiants (as they must be), and that anonymizing the names only minimally impairs the open court principles "because such an order relates only to a "sliver" of information" (for the 'sliver' proposition, he cites *C.S. v. British Columbia (WCAT)*, 2019 BCCA 406 at para. 37).

Stay of Proceedings

[45] The applicant submits if a stay is not granted, some of the relief sought in the appeal would be rendered moot, as the adjudication would proceed "unconstrained by any considerations of relevance". The applicant submits that since the scope of the inspection itself is at the heart of the appeal, it would render the appeal moot to allow the inspection to go forward.

[46] The applicant submits that the low threshold of merit is met as this appeal is not frivolous or vexatious. The applicant submits at this stage that the resolution of the issues in this appeal is important to him specifically and more broadly, particularly since the proper interpretation of R. 4-55 has never been decided by this Court.

[47] The applicant submits he will suffer irreparable harm without a stay of the investigation. He states that a refusal to grant a stay would "allow the LSBC to use its powers to investigate and review the entire practice of the Appellant at the same time that the scope of those powers is squarely in dispute". He points again to the fact that the appeal would be, at least in part, rendered moot if a stay is not granted, citing *Chandler v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 120 at para. 18, for the proposition that irreparable harm can be established if, in substance, an appeal would become moot if a stay is not granted. He also cites *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 309 at para. 11, for the proposition that, in the context of an appeal of an order for document disclosure, this Court has recognized that allowing access to those documents would make the appeal moot and cause irreparable harm.

[48] The applicant submits that the balance of convenience rests with him. He states that the LSBC is not prejudiced by a stay (pointing to the fact that he is cooperating with the R. 3-5 investigation). He also states that the harm the LSBC would suffer from a short delay is much less than what he would suffer from what may be determined to be an "unauthorized and unlawful investigation into his entire practice". He points out that public confidence in the legal profession is not harmed, given the R. 3-5 investigation.

[49] He argues, in the alternative to a stay, an interim injunction should be granted pursuant to s. 10(2)(b) of the *Court of Appeal Act*, halting the adjudication until the appeal is determined in order to prevent frustration of the appeal.

Respondent

Anonymization and Sealing Order

[50] The LSBC does not oppose the orders sought at this stage with respect to the anonymization and sealing orders. The matter before the LSBC is still in the investigative stage and it is appropriate to anonymize and seal the affidavits.

Stay of Proceedings

[51] While the respondent acknowledges the low threshold for establishing merit on a stay application, the respondent takes the position that the applicant has done "nothing more than identify several 'assertions' … and implicitly asks the court to conclude that one or more of them raises a serious issue to be determined. He does not identify a single error in the reasoning of the chambers judge or outline any other basis on which any one of his 'assertions' might succeed on appeal". The respondent argues that "the court is entitled to an articulation of why the questions identified are, in fact, 'serious' so the bar that does exist can be applied".

[52] Similarly, the respondent goes on to argue that the applicant has not attempted to prove, and thus has not proven, that irreparable harm would occur if the stay is not granted.

[53] The respondent argues that the applicant does not even identify in argument what the alleged irreparable harm to him will be. The respondent states that the applicant's suggestion that he has a privacy interest in the documents that would be the subject of the adjudication and review and that any interference with that interest necessarily amounts to irreparable harm is a suggestion that is unsupported by any authority and "belied by both the appellant's conceded position on his diminished privacy interest and the statutory framework in which the investigation is carried out".

[54] The respondent emphasizes the different interests at stake in a civil litigation matter (thus distinguishing *Soprema*) and regulatory proceedings, emphasizing that the applicant has long demonstrated his understanding that his privacy interest in his files is necessarily diminished by the nature of the field in which he operates.

[55] The respondent further distinguishes *Soprema* stating that "[u]nlike *Soprema*, this case raises no prospect of a loss of privilege over any documents compelled to be produced: the regulatory framework specifically provides otherwise". The respondent states that "*Soprema* addresses a fundamentally different harm (loss of privilege) from that alluded to by the appellant (loss of privacy over allegedly irrelevant documents)" and "does not support the proposition that compelled

production of documents that are alleged to be outside the scope of relevance of a proceeding amounts to irreparable harm".

[56] The respondent urges the Court to face the applicant's arguments on mootness with "serious skepticism". The respondent says that a stay of the investigation will follow if the applicant is successful on appeal, and the "fact that the Law Society could have reviewed certain documents in the meantime cannot be considered to have rendered the appeal moot when its plain purpose is to avoid the investigation (and its consequences, if any) entirely".

[57] The respondent argues that the balance of convenience favours the public interest mandate of the LSBC, and that interference of the LSBC's mandate weighs against the issuance of a stay. The respondent asserts that even where the argument is raised that the mandate is being carried out unlawfully, the strong public interest in having a presumptively-valid enactment "weighs heavily in the balance of convenience".

[58] The respondent submits that "stalling an ongoing investigation into the appellant's practice would undermine public confidence in the legal profession's ability to self-regulate in relation to its members' practices" and that the delay in the investigation "is not ameliorated by the progress of a separate, narrower, investigation" [in respect of the R. 3-5 investigation].

[59] The respondent says that, contrary to the argument of the appellant "the fact that the Law Society agreed to a stay pending the determination of the judicial review at first instance does not properly weigh in favour of another stay now that the appellant's petition has been dismissed". It says that the LSBC's decision, in light of the outcome on judicial review, is now "presumptively correct".

[60] The respondent says that in *Chandler* at para. 30, this Court alludes to the deference owed to the "detailed reasons for judgment in the Supreme Court", and that it provides no support to the applicant's argument on irreparable harm.

[61] The respondent says that the applicant's "silence" on the merits of his own appeal should weigh against him on the balance of convenience. On the balance of convenience factor, the respondent concludes that "even if the appellant's oblique reference to harm to his diminished privacy right could be considered irreparable, the latter is plainly outweighed by the public interest in the Law Society's regulatory mandate".

[62] In conclusion, the respondent asserts that the interests of justice do not favour a stay. They say that the applicant's arguments on merit and irreparable harm are "little more than bald assertions", and that the applicant provides no basis on which this Court *could* grant his application. They submit "public interest in this case plainly favours enforcement of the presumptively-valid enactment".

[63] On a final note, the respondent argues that the appellant has not tried to mitigate the effect of a stay by, for example, moving promptly in this matter or in seeking an expedited appeal.

Application

Application for Anonymization and Sealing Order

[64] It cannot be assumed in this case that because the court below ordered a sealing order and anonymization in the proceedings below, the same will be granted in this case. A Directive of this Court, the *Publication Bans and Sealing Orders* (Civil Practice Directive, 4 June 2018), states:

> If a party wishes to seek an order sealing material, they must immediately apply to a justice in chambers upon filing that material. Parties should not assume that a sealing order made in a court or tribunal below will continue to apply in the Court of Appeal.

[65] The contents of the LSBC investigation necessarily contain sensitive and privileged information. The affidavits contain the true names of the affiants which, according to the applicant, contain sensitive information regarding the applicant, the firm, and its other staff members.

[66] The applicant must demonstrate that such an order is necessary in order to prevent a "serious risk to an important interest".

[67] The applicant seeks only a temporary and partial sealing order over certain affidavits created at the early stages of the investigatory process. He also seeks anonymization of names in the style of proceeding and that the appellant, the firm and its employees be anonymized in all documents as well.

[68] The Court may make a sealing order applicable to only part of a file, such as a certain affidavit: *N.E.T. v. British Columbia*, 2018 BCCA 22 (Chambers), relying on *Sahlin*. In *Grosz v. Guo*, 2021 BCCA 135, for example, Justice Butler granted the LSBC's request to seal three affidavits.

[69] There is support in the jurisprudence for the proposition that risk to reputation may be considered at this stage: *Party A v. British Columbia (Securities Commission)*, 2020 BCCA 88 at paras. 4–5; *Party A v. Party* B, 2013 BCCA 195 at paras. 25–26, 33.

[70] However, *Sherman Estate* has modified the law, and made the test more stringent.

[71] Here, at issue is reputational harm to the applicant, the firm, and the firm's employees. In light of *Sherman Estate*, whether a sealing order is necessary to prevent a "serious risk to an important public interest" is thus questionable, as it is a live question whether reputation is enough to constitute an important public interest. The same would apply to anonymization.

[72] However, at para. 33, the Court in *Sherman Estate* held:

> A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would

> occasion an affront to their dignity that society as a whole has a stake in protecting.
>
> [Emphasis added.]

[73] The question comes down to whether the information sought to be sealed is sufficiently sensitive and "bears on their dignity" in such a way as to displace the strong presumption in favour of the openness of court.

[74] It is not enough that the information disseminated is a "source of discomfort": *Sherman Estates* at para. 56. It must "strike at the core identity of the affected persons": *Sherman Estates* at para. 36. As well, the Court in *Sherman Estates* cautions against too broad a recognition of a public interest in privacy: at para. 57.

[75] The information sought to be sealed and anonymized is sensitive personal information that would strike at the core of the persons sought to be anonymized. It contains serious allegations of dishonesty that is under investigation by the LSBC. It would affect the livelihood of the applicants and other employees at the firm, particularly given that the nature of the firm renders its success dependent on referrals and reputations. As noted, the matter is still under investigation, and the allegations at this point are simply that.

[76] This case implicates an important public interest, namely the reputational interests of multiple legal professionals.

[77] Is the important interest at serious risk? The Court in *Sherman Estate* noted:

> [42] While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests,

> regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[78] I would suggest that it is. Public access to names at this point in the process is a serious risk to the previously mentioned reputational interest, and may cause irreparable harm to those affected.

[79] Thus, it must be decided whether the risk to the applicant's reputation, and that of the firm and its employees, is not only an important public interest, but is one that necessitates a partial sealing order and anonymization of the names. I do not think that an alternative measure would mitigate the risk.

[80] With respect to proportionality, the salutary effects include protection of reputation. The deleterious effects to the open court principle by way of a partial sealing order and anonymization are minimal. The partial sealing order and anonymization can also be temporary, rather than permanent.

[81] In my view, the salutary effects of sealing and anonymization orders outweigh its deleterious effects. In my view, the *Sherman Estates* test is met, and that the sealing and anonymization orders be granted at least during the investigation stage. This may change as the case develops.

Stay of Proceedings

(i) Merits of the Appeal

[82] In my view, this appeal meets the merits test. The following are the issues raised by the applicant in the underlying appeal:

a) R. 4-55 unjustifiably infringes s. 8 of the *Charter*;

b) the LSBC's administration and execution of the R. 4-55 Order and investigation unjustifiably infringes s. 8 of the *Charter*;

c) the decision to issue the R. 4-55 Order on October 2, 2019, and later, the LSBC's decision to reject the appellant's requests to exclude certain

documents from the investigation, ought to be quashed pursuant to ss. 8 and 24 of the *Charter*, or on the basis of administrative law principles;

d) in the alternative, the decision to issue the R. 4-55 Order, and the LSBC's decision to reject the appellant's requests to exclude certain documents breached the duty of procedural fairness owed to the appellant;

e) there was an impermissible sub-delegation of authority by the Vice-Chair to the LSBC investigators;

f) it was an abuse of process for the LSBC to proceed in February 2020 with a parallel investigation of the applicant's law practice under R. 3-5 of the *Law Society Rules* while the R. 4-55 investigation was underway; and

g) there ought to be a permanent stay of the R. 4-55 Order.

[83] The threshold for establishing merit is "a low one", as a court must be satisfied only that the issues being raised on appeal are neither frivolous nor vexatious; "a prolonged examination of the merits is generally neither necessary nor desirable": *Western Forest Products Inc. v. Capital Regional District*, 2009 BCCA 80 (Chambers) at para. 22, quoting *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 at 337–338.

[84] The appropriate question is whether there is a serious question to be tried, not whether the applicant can establish a strong *prima facie* case: see *Tanguay v. Bridgewater Bank*, 2012 BCCA 234 (Chambers) at para. 18. An "arguable case" satisfies the merits threshold: see *Canadian Resort Development Corp. v. Swaneset Bay Resort Ltd.* (1998), 50 B.C.L.R. (3d) 55 (C.A.) at para. 2.

[85] Without evaluating the *prima facie* strength of the applicant's case, I am satisfied that there is a serious issue to be tried.

[86] This appeal raises novel issues surrounding the LSBC's powers under R. 4-55, delegation of authority in the investigatory process, and the application of

the *Charter* to such circumstances. I cannot conclude that the appeal is frivolous or vexatious.

(ii) Irreparable Harm to the Applicant

[87] I am persuaded that if the application for a stay of proceedings is dismissed, the applicant will suffer irreparable harm.

[88] "'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm that either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *Western Forest Products Inc. v. Capital Regional District*, 2009 BCCA 80 (Chambers) at para. 24, quoting *RJR-MacDonald* at 341. "At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": *RJR-MacDonald* at 341.

[89] The appeal would, at least in part, be rendered moot if a stay is not granted. The applicant submits, and I agree, that the scope of investigation and inspection is squarely in issue in the appeal, and that without a stay, the documents that he submits ought not to be inspected will be.

[90] I am not persuaded by the respondent's arguments on this factor. The applicant did more than simply assert irreparable harm, and the cases cited by the respondent do little to assist their argument in this regard. I would suggest that this branch of the test is met on the circumstances of this case.

(iii) Balance of Convenience

[91] In my view, the balance of convenience favours the applicant. Public confidence in the legal profession would not be harmed by a stay of the inspection of seized documents while the scope of the investigation and seizure is assessed.

[92] Harm to the respondent or to the public interest should be examined at the balance of convenience part of the analysis: *RJR-MacDonald* at 341. Furthermore, at this stage of the analysis, the Court may also consider the conduct of the parties: *Canadian Commercial Bank v. Royal Oak Inn*, [1989] B.C.J. No. 65, 1989 CarswellBC 1701 (Chambers) at para. 7.

[93] The public interest mandate of the LSBC weighs heavily in the balance of convenience. However, in the context of this case, given the centrality of the viewing of the documents in question to the appeal itself, the balance of convenience tips in favour of the applicant.

[94] Having said that, the public interest also weighs in favour of an expedited appeal. There are a number of court dates available in October. The parties will set this matter down for hearing forthwith, and then establish a filing schedule for their material. If they are unable to settle on a schedule, they may return before me.

Disposition

[95] The application for a stay is granted, with an expedited appeal process.

[96] The applications for a temporary and partial sealing order, and the anonymity orders are granted.

"The Honourable Madam Justice Bennett"

Tab 3:
20210624 United States v. Meng, 2021BCSC1253

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *United States v. Meng,*
2021 BCSC 1253

Date: 20210624
Docket: 27761
Registry: Vancouver

In the Matter of the *Extradition Act*,
S.C. 1999, c. 18, as amended

and

In the Matter of
The Attorney General of Canada
on behalf of the United States of America

Requesting State/Respondent

and

Wanzhou Meng, also known as
"Cathy Meng" and "Sabrina Meng"

Person Sought/Respondent

Before: The Honourable Associate Chief Justice H. Holmes

Ruling on Application for a Ban on Publication

Restrictions on publication: Pursuant to the Court's inherent jurisdiction, publication bans have been imposed restricting the publication, broadcasting or transmission in any way of any information that could identify HSBC Witness B and the individual referred to as the HSBC global relationship manager

Counsel for the Requesting State/Respondent:	J.M. Gibb-Carsley
Counsel for the Person Sought/Respondent:	T.C. Paisana
Counsel for the Media Consortium described in Exhibit "A":	D.H. Coles
Place and Dates of Hearing:	Vancouver, B.C. June 14, 2021
Place and Date of Judgment:	Vancouver, B.C. June 24, 2021

INTRODUCTION

[1] Wanzhou Meng applies for an order banning the publication of the content of documents she received from HSBC and has filed with the Court. In a fourth application under s. 32(1)(c) of the *Extradition Act*, filed on June 7, 2021, Ms. Meng will seek to adduce the documents in the hearing at which she is sought for extradition by the United States on charges of fraud.

[2] Ms. Meng applies for a ban on publication of the content of the documents because the terms on which she received the documents require her to do so. The ban she seeks would be based on the Court's inherent jurisdiction to so order.

[3] The Attorney General of Canada opposes, as do the members of a consortium of national and international news media organizations listed in Exhibit "A" to this ruling.

[4] Ms. Meng received the documents by virtue of an agreement with HSBC, as then reflected in an order of the High Court of Hong Kong. Some information about this process can be found in the reasons for judgment on an adjournment application: *United States v. Meng*, 2021 BCSC 935.

[5] For the reasons I will give below, I conclude that the circumstances do not meet the law's requirements for banning the publication of the content of these documents.

[6] I will begin by outlining the legal principles that apply to this application.

THE GOVERNING LEGAL PRINCIPLES

[7] The most recent authoritative expression of the governing legal principles is in *Sherman Estate v. Donovan*, 2021 SCC 25, issued shortly before the hearing of this application. There, the Supreme Court of Canada reviewed the legal requirements for any discretionary limit on the openness of courts to the public and the media, such a limit including a ban on publication based on a court's inherent jurisdiction.

[8] Justice Kasirer for the Court confirmed that the open court principle arises from the constitutionally protected right of freedom of expression. The open court principle also presumes that members of the media may report freely on matters before the courts, in order to carry out the important role of conveying information to the public. These effects help maintain and contribute to the fairness and accountability of the justice system: paras. 1-2.

[9] Nonetheless, there are circumstances that justify a restriction on openness, the Court confirmed. These arise where: there is a serious risk to a competing interest of public importance; the risk cannot be prevented through alternative means; and the benefit from restricting the openness outweighs its negative effects (para. 3):

> […] 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.

[10] Justice Kasirer thus recast the longstanding "*Dagenais/Mentuck* test" (for a discretionary limit on court openness), which had been expressed as a two-step inquiry. However, he emphasized that the essence or substance of the inquiry remains the same. The focus of the inquiry is on the former test's three core prerequisites (as described in such decisions as *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41) in order to help clarify the burden on the applicant seeking an exception to the open court principle (at para. 38):

> The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking

> a court to exercise discretion in a way that limits the open court presumption 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.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[11] Justice Kasirer also explained that the determination of whether an asserted interest is of public importance can be done in the abstract by reference to general principles extending beyond the specific circumstances of the case. However, the determination of whether there is a serious risk to a public interest must be done in context because the answer involves a fact-based finding. These two inquiries are qualitatively distinct and therefore separate. An order may thus be refused if there is an important public interest at stake, but no serious risk on the facts, or, conversely, if there is a serious risk to an identified interest, but the interest does not have the necessary important public character as a matter of general principle: *Sherman Estate* at para. 42.

[12] I will next outline the positions of the parties and the media consortium concerning the application of these principles, before then explaining my conclusion that the principles do not support a ban on publication.

THE POSITIONS OF THE PARTIES AND THE MEDIA CONSORTIUM

Ms. Meng

[13] Ms. Meng's counsel made clear that a publication ban is not a pre-condition to Ms. Meng tendering the HSBC documents in the proceeding. Rather, the agreement with HSBC, and accordingly the order of the Hong Kong court, require

her to use reasonable efforts to keep the information in the documents confidential, including by making this application, but they do not require success in so doing. The application therefore does not itself engage Ms. Meng's rights to a fair extradition process or trial; the objective is, rather, to protect HSBC's interests.

[14] To that end, Ms. Meng submits that a publication ban is in the interests of justice because the broad dissemination of the contents of the HSBC documents would present a serious risk to HSBC's commercial privacy interests. She submits also that dissemination would have a chilling effect on HSBC's willingness to participate in the criminal justice process.

[15] Ms. Meng submits that, on balance, the benefits of a publication ban in maintaining some level of confidentiality over the HSBC documents outweigh any negative effects. This is in part because a publication ban would restrict freedom of expression only to a limited degree: the proceedings would remain open to the public to attend and for the media to report on, and the only restriction would be on reporting the contents of the HSBC documents themselves.

Attorney General of Canada

[16] The Attorney General opposes on the basis that Ms. Meng has not met the high bar required to limit freedom of expression. He submits that the first requirement of the test is not met because nothing in the HSBC documents or elsewhere indicates a serious risk to HSBC's privacy interests, and, indeed, redactions made by HSBC before release of the documents to Ms. Meng suggest that those interests have already been protected.

[17] The Attorney General submits also that the negative effects of a publication ban would outweigh any potential benefit. This is in large part because the content of many HSBC documents, including some of those now in issue, has already been published in relation to this case, such that compliance with a publication ban issued at this stage would be next to impossible.

Media Consortium

[18] The members of the media consortium join with the Attorney General in opposing the application, and adopt the submissions made on his behalf.

[19] The media consortium focuses in particular on the emphasis in *Sherman Estate* that a risk of individual embarrassment or distress, while engaging a privacy interest, will not usually have the exceptional and public character that supports a restriction on freedom of expression. The consortium submits that Ms. Meng's application includes no evidence or indication that the interests in issue here rise to the necessary public level.

[20] The media consortium submits further the media's ability to report on the HSBC documents is all the more important because of the potential significance of the documents, given Ms. Meng's position that the documents, if admitted as evidence in the extradition hearing, could result in her discharge from the extradition process.

ANALYSIS

[21] I will start by explaining that the first, and threshold, requirement of the *Sherman Estate* test is not met. This is because the evidence and circumstances do not establish that an important public interest is engaged in relation to the potential publication of the contents of the HSBC documents, or that publication would place such an interest at serious risk.

[22] As Ms. Meng noted, the Court in *Sherman Estate* at para. 41 recognized that commercial information may engage privacy interests that, in turn, may give rise to an important public interest. However, it is not at all clear that the documents now in issue do so.

[23] On their face, these documents include reports and high level communications within HSBC relating to strategy and decisions about its business with Huawei between 2011 and 2014. Ms. Meng submits that a risk to HSBC's privacy interests can be inferred from the documents themselves, as well as from

the undisputed facts that: the documents are not publicly available; HSBC evidently considers them confidential; and the terms on which Ms. Meng received the documents require this application to be made.

[24] The difficulty is that, as noted earlier, a privacy interest does not of itself meet the requirement of being an important public interest, and there is no basis on which to conclude that these documents engage that latter requirement. In *Sierra Club* at para. 55, Justice Iacobucci for the Court made clear that, to prevail over the public interest in openness, a commercial confidentiality interest must be more than merely specific to the applicant requesting the ban on publication. There must be a general principle at stake. No such general principle is shown to arise here.

[25] Nor do I find that a ban on publication would encourage HSBC's further participation in the proceedings in a way that engages an important public interest. Ms. Meng's submission to that effect has no evidentiary basis, and also runs counter to the evidence that HSBC voluntarily agreed to disclose the documents to Ms. Meng knowing that she wanted to use them in the extradition proceedings.

[26] However, even if HSBC's interest in preserving the confidentiality of its internal documents could be characterized as an important public interest, that interest is not shown to be at serious risk from publication of the documents' contents.

[27] This is in part because some of the contents have already been summarized in the proceedings without any limits on publication, and no harm as a result has been identified. Ms. Meng has not pointed to anything of concern in the contents that have not yet been publicized.

[28] But more significantly, HSBC redacted substantial portions of the documents before providing them to Ms. Meng. One can reasonably infer from the redactions themselves, coupled with the relevant paragraphs of the disclosure agreement to which they refer, that the redactions were designed to protect HSBC's commercial privacy interests, among others.

[29] The application also fails at the second and third *Sherman Estate* requirements.

[30] As a "blanket" ban on the publication of *any* of the content of any of the HSBC documents submitted in support of Ms. Meng's fourth application to adduce evidence, the proposed ban is not tailored to intrude only minimally on freedom of expression. This is particularly so given that some of the subject matter has already been publicized.

[31] Nor would the proposed ban be proportional, in the sense of matching what it seeks to achieve with, on the other side of the balance, the negative consequences.

[32] In this case, the potentially high public interest in the content of the documents is significant in the balance. The Court in *Sherman Estate* at para. 106 explained that the balancing of competing interests should take account of the centrality to the proceedings of the information sought to be protected. If the information is significant to the court's determination of the issues, the importance in conveying it to the public may outweigh the interests in protecting it:

> Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.
>
> [Emphasis added]

[33] As I have noted, Ms. Meng is expected to argue, in her s. 32(1)(c) application, that the evidence in the HSBC documents is essential to her defence in the extradition proceedings, and that it may affect the ultimate decision on committal. Given the high public interest in the case as a whole, the potential centrality of the

documents suggests that banning publication of their contents would have heavy negative effects on freedom of expression. There is a strong interest in the public being informed of the contents in order to understand the positions of the parties and the reasons for the Court's decisions.

[34] I take into account also that the previous publication of some of the documents' content would make a publication ban near-impossible to craft in clear terms, and difficult to implement and enforce. A broad or imprecisely worded ban would place in an untenable situation those persons who have already published information found in HSBC documents, which may or may not be among the many documents now in issue, and yet there is no principled and workable way to tailor the ban to apply only to the content not already in the public domain.

[35] These effects would not serve the interests of justice. A court making an order restricting freedom of expression must do so in terms that the media and the public can be expected to follow, and that are practical to enforce.

[36] Finally, I emphasize that these conclusions should not be seen as out of accord with the order of the Hong Kong court reflecting the agreement between Ms. Meng and HSBC, or as offending the important principle of comity among courts. To the contrary, the agreement underlying the order of the Hong Kong court expressly contemplates that the HSBC documents may be filed in these extradition proceedings, and that an application for a ban on the publication of their content would be subject to applicable laws. These reasons explain that the laws of Canada do not support such a ban in these proceedings.

[37] The application for a ban on publication of the content of the documents to protect HSBC's commercial privacy interests therefore cannot be granted.

[38] The privacy interests of individual HSBC representatives stand on a somewhat different footing. To date, the similar interests of other individuals have been protected in two ways in these proceedings.

[39] First, a "media protocol" was developed by agreement among counsel, including Mr. Coles, at an early stage to provide for the efficient release of filed documents to accredited media representatives. The personal or identifying information of individuals is redacted by counsel before documents are released under the protocol or made available to the public.

[40] Second, some bans on publication have been requested by a party without opposition, and ordered, when names of certain individuals have been used by counsel in court during their oral submissions. For some, but not all, of those individuals, their names are not used at all in the written materials, such as the requesting state's record of the case, and the individuals are referred to instead as HSBC Witness A or HSBC Witness B, for example.

[41] Subject to any further application, I expect that the identities and contact information of HSBC representatives in the HSBC documents now in issue will be redacted before the release of the documents to the media according to the existing protocol or to the public.

[42] As to a ban on the publication of any information that could identify an HSBC representative that may be disclosed in some other way (such as during oral submissions on Ms. Meng's application to adduce the HSBC documents in the extradition hearing), the parties may apply as necessary. Unless Mr. Coles wishes to raise objection to this course of action for the future – in which case he should arrange to appear – the parties may do so informally, in the manner they did before.

CONCLUSION

[43] Ms. Meng's application for a ban on the publication of the contents of the HSBC documents is dismissed.

[44] Counsel are asked to consult and, if they consent, advise in writing on what, if any, steps are appropriate to bring these reasons into compliance with the publication ban(s) concerning, respectively, the document marked as Exhibit 1 in the application (which is a portion of the Schedule to the Hong Kong order), and the full

Schedule itself, or, alternatively, to vacate the publication ban in full or in part. If counsel cannot agree, they should arrange to appear at their earliest convenience.

[45] In the meantime, these reasons should not be distributed beyond the parties, their counsel, and Mr. Coles, and are not to be published.

[46] [Per H. Holmes, ACJ on June 30, 2021: The publication bans referred to in para. 44 were vacated by consent on June 29, 2021. The restriction in para. 45 on distribution or publication of these reasons therefore no longer applies.]

"The Honourable Associate Chief Justice H. Holmes"

Exhibit "A"

MEDIA CONSORTIUM

1. Canadian Broadcasting Corporation (CBC)
2. New York Times
3. Canadian Press
4. Globe & Mail
5. Global News, a Division of Corus Entertainment Inc.
6. CTV News
7. The Vancouver Sun, a Division of Postmedia
8. South China Morning Post
9. The Wall Street Journal
10. Reuters

Tab 4:
20210722 R.F. v. J.W., 2021ONCA528

COURT OF APPEAL FOR ONTARIO

CITATION: R.F. v. J.W., 2021 ONCA 528
DATE: 20210722
DOCKET: C68225

Juriansz, van Rensburg and Sossin JJ.A.

BETWEEN

R.F.

Applicant (Appellant)

and

J.W.

Respondent (Respondent)

Ken Nathens and Denniel Duong, for the appellant

Kirsten Hughes, Mackenzie Dean and Darryl Willer, for the respondent

Heard: May 7, 2021 by video conference

On appeal from the order of Justice Mary Jo McLaren of the Superior Court of Justice, dated February 26, 2020, with reasons reported at 2020 ONSC 1213.

van Rensburg J.A.:

OVERVIEW

[1] The parties R.F. and J.W.[1] are former spouses and the parents of two children, who are now 15 and 11 years old. After 14 years of marriage, they separated in 2014, and divorced in 2017. Both remarried. Although they were able to agree on an equal time-sharing arrangement after their separation, ultimately they became involved in high conflict litigation.

[2] The appeal is from a judgment following a 16-day trial that took place in September 2019. A final order with reasons for decision was released on February 26, 2020. The trial was primarily concerned with parenting time and decision-making responsibility in relation to the parties' children and child support.[2]

[3] The trial judge concluded that it was in the best interests of the children for the parties to have shared parenting time on an alternating weekly time-sharing schedule and for the respondent father to have final decision-making responsibility for the children after consultation with the appellant mother. The trial judge fixed the parties' income for child support purposes for 2018, dismissed the claim for a retroactive adjustment of support, ordered set-off child support to be paid by the

---

[1] I have chosen to initialize the parties' names in the title of proceedings and this decision at the parties' request and to protect the children's privacy, given the particularly sensitive nature of the evidence in this case.

[2] Pursuant to amendments to the *Divorce Act*, R.S.C. 1985, c. 3, which came into effect on March 1, 2021, "custody" and "access" terminology has now been replaced by terms such as "decision-making responsibility", "parenting time" and "contact". Section 35.4 of the Act deems a person who had custody of a child by virtue of a custody order to have parenting time and decision-making responsibility and a spouse or former spouse who had access by virtue of a custody order to be a person to whom parenting time has been allocated.

mother, commencing March 1, 2020 (with the requirement that the father provide an income analysis from a chartered accountant every two years for the preceding two years, commencing in 2021), and s. 7 expenses to be shared proportionate to the parties' incomes.

[4] The mother appeals both the parenting and child support provisions of the trial judge's final order. She asserts that the trial judge made reversible errors in her approach to and consideration of the evidence respecting parenting of the children, in the determination of the father's income for child support purposes (and the sharing of s. 7 expenses), and in failing to order the father to pay support arrears.

[5] The mother also seeks to introduce as fresh evidence in this appeal her affidavit setting out "changes and events [that] have transpired" since the judgment under appeal was made.

[6] For the reasons that follow, I would dismiss the appellant mother's motion to introduce fresh evidence and, except for one issue that I would remit to the trial judge, the appeal.

THE FRESH EVIDENCE MOTION

[7] The mother's proposed fresh evidence is her affidavit, which speaks primarily to events concerning the children since the date of the trial and the final order under appeal. The father opposes the motion, but if the mother's affidavit is

admitted, he asks the court to consider his own affidavit that sets out his post-trial observations, and attaches as exhibits the interim reports of the therapist who was appointed on consent at the conclusion of the trial, Lourdes Geraldo,[3] and of the children's individual therapist.

[8] Evidence about the circumstances prevailing since the date of an order under appeal is not, strictly speaking, "fresh evidence" that would meet the test for admission under *R. v. Palmer*, [1980] 1 S.C.R. 759, at p. 775, or *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.). As Benotto J.A. observed in *Goldman v. Kudelya*, 2017 ONCA 300, the *Palmer* criteria are more flexible where an appeal involves the best interests of a child, in order to provide the court with current information about the condition, means, needs, circumstances and well-being of the child. However, she cautioned that "[t]he more flexible approach to the *Palmer* test in custody matters is not an opportunity for parents to continue an affidavit war": at para. 28. Except for one agreed upon fact, the parties' contradictory affidavits were not admitted as fresh evidence in *Goldman.*

[9] Similarly, in the present case the proposed fresh evidence speaks to events since the trial, and in particular after the parenting regime provided for in the order

[3] Ms. Geraldo was appointed on consent of the parties at the conclusion of the trial on September 26, 2019 to "facilitate any and all therapeutic interventions, therapies and approaches to ensure a balanced relationship as between the children and the parties". The order also provided for the termination of any other counselling or therapy involving the children and prohibited further therapy without it being part of the process undertaken by Ms. Geraldo and specifically recommended by her.

under appeal was implemented. The mother's affidavit repeats and continues themes from the trial: that the father is responsible for the deterioration in his relationship with the children, and that he is ignoring the children's best interests. The mother asserts that, contrary to the trial judge's findings, events since the date of the final order demonstrate that the father is the primary source of conflict between the parties. She recounts incidents with the children that suggest that they are doing less well under the equal time-sharing regime, and she objects to the father's decision to prevent the children from attending in-person dance classes due to COVID-19 restrictions.

[10] I agree with the father that the matters raised in the proposed fresh evidence were either considered by the trial judge at first instance or are matters that are being addressed through the therapy that was ordered by the trial judge on consent at the conclusion of the trial. In a further attendance on November 18, 2020 (to deal with issues of cell phone use and dance registration), the trial judge ordered the parties, through counsel, to arrange a further attendance to speak to the matter in 2021, among other things to advise the court of the status of therapeutic assistance provided by Ms. Geraldo.[4] It is in this context that Ms. Geraldo's interim report will be considered.

---

[4] The parties attended before the trial judge in accordance with paras. 34-35 of her final order that directed she would remain seized of the issue of the therapeutic interventions, and adjourned the issue of mobile phone use for the children, and any time limits for the children's activities.

[11] Although the best interests of the children are engaged in family law appeals of final parenting orders, an appeal is not the place to address ongoing conflict between the parties arising out of the order under appeal. There is a strong interest in finality, not only for the parties, but for the children. This is especially the case where the parties have been involved in years of high-conflict litigation, culminating in a lengthy trial. The order under appeal must be treated as a final order, unless there are demonstrated errors meeting the exacting standard of review on appeal. As this court has emphasized in other cases, the proper place for new evidence about changed circumstances – if in fact the threshold of material change can be met – is a motion to change before the court that has original jurisdiction, and not in the context of an appeal: see e.g., *Katz v. Katz*, 2014 ONCA 606, 324 O.A.C. 326, at para. 75; *Myles v. Myles*, 2019 ONCA 143, at para. 7; and *Gagnon v. Martyniuk*, 2020 ONCA 708, 50 R.F.L. (8th) 266, at para. 3.

[12] Generally, where information about a child's current circumstances is properly considered on appeal, it must be such that it would reasonably be expected to have changed the outcome in the court below: *Children's Aid Society of Oxford County v. W.T.C.*, 2013 ONCA 491, 308 O.A.C. 246, at para. 43; *Ojeikere v. Ojeikere*, 2018 ONCA 372, 140 O.R. (3d) 561, at para. 48. In this case the proposed fresh evidence could not reasonably have changed the outcome of the trial. The mother's affidavit speaks to the circumstances following the trial judge's order, after equal parenting was implemented, and the father assumed

decision-making responsibility for the children. The challenges faced by the children and their relationship with their father were front and centre at the trial, and it is not surprising that there would be some difficulties in the transition. The parties recognized, as early as September 2019, the benefits of therapy with Ms. Geraldo, which is ongoing, and which will be the subject of a further attendance before the trial judge this year. This is the appropriate forum for the consideration of Ms. Geraldo's interim report.

[13] For these reasons I would dismiss the motion to admit fresh evidence.

THE PARENTING DECISION

(1) Brief Background

[14] At the time of separation in 2014 the parties' two children were eight and four years of age. For the first two years the parties operated under a *de facto* equal alternating weekly time-sharing arrangement with the children, sometimes referred to as "week about", which they arranged first on their own, and then with the assistance of a parenting coordinator.

[15] The mother commenced proceedings in November 2016, seeking, among other things, sole custody of the children (decision-making responsibility), primary residence of the children, and child support. The father sought joint or sole custody (decision-making responsibility), primary residence and child support.

[16] As the litigation progressed, the parties remarried – each to a spouse with their own children. Their conflict escalated. As the trial judge observed, both parties contributed to this high conflict case. Each contacted the Catholic Children's Aid Society (the "CCAS") more than once with serious allegations that were never verified. Unfortunately, during the years of litigation the parents also took steps that subjected the children to many interviews with various professionals. They (and the mother's partner, K.) exchanged emails and messages that contributed to the conflict.

[17] In 2017, pursuant to a consent order, a custody and access assessment was performed by John Butt, a registered marriage and family therapist. His report (the "2017 Parenting Plan Report") recommended a joint/parallel parenting arrangement for the children, with primary residence with the mother and time with the father one night during the week and every second weekend, and shared holiday and vacation time. These recommendations were incorporated into the temporary consent order of Mazza J. dated August 17, 2017, which was in place at the date of trial. Mr. Butt had started work on an updated report, however he could not complete it or attend at trial due to illness. The 2017 Parenting Plan Report and his clinical notes for the updated report were admitted in evidence at trial on consent.

[18] At trial each party sought an order for sole custody (decision-making responsibility) and primary residence of the children. By the end of the trial, the mother asked for an order further reducing the father's parenting time.

[19] The evidence at trial consisted of the testimony of 15 witnesses, including 6 professionals who had dealings with the family, and the business records of Mr. Butt, the Hamilton CCAS and Hamilton Police Services.

(2) Standard of Review

[20] The scope of appellate review in family law matters, including those involving parenting orders is intentionally narrow. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge: *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, at para. 11, citing *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at paras. 10, 12.

[21] The trial judge's order must only be disturbed where there are demonstrated errors meeting the exacting standard of review on appeal. An appeal in a case involving parenting time and decision-making responsibility (as in any case on appeal to this court) is not an opportunity for a retrial. Deference is owed to the decision of the trial judge, particularly after a lengthy trial. As the Supreme Court noted in *Van de Perre*, "[c]ase by case consideration of the unique circumstances of each child is the hallmark of the process". Intervention on appeal is warranted

only where there is a material error, a serious misapprehension of the evidence or an error of law: at para. 13.

(3) Alleged Errors of the Trial Judge: The Parenting Order

[22] The mother contends that the trial judge erred in her determination that the parties would have shared parenting time on an alternating weekly time-sharing schedule and that the father would have sole decision-making responsibility for the children.

[23] She makes three main arguments:

- First, the trial judge erred in law by failing to give effect to the children's views and preferences, including those set out in the 2017 Parenting Plan Report and Mr. Butt's more recent clinical notes. In a related argument, she says that the trial judge overlooked the children's legitimate reasons for preferring to live with their mother (and her spouse) because she failed to properly consider Mr. Butt's evidence;
- Second, the trial judge erred in her treatment of evidence of the parties' "alternative" lifestyle and other pre-separation conduct, including in her conclusion that this evidence affected the mother's credibility, but not the credibility of the father; and
- Third, the trial judge erred in permitting the father to change the children's family doctor.

(4) Discussion

[24] I would not give effect to any of these grounds of appeal. No reversible error has been demonstrated in the final order respecting the parenting of the children. As I will explain, it is apparent from a review of the trial judge's lengthy and detailed reasons that she considered all of the evidence at trial, she made all necessary findings of fact – including that both parties were good and loving parents to the children – and she assessed the parties' credibility in the context of determining which of the parties was more likely to encourage the other's relationship with the children. This was a very important factor in this high conflict case, where the children's relationship with their father had deteriorated over time.

[25] In arriving at her decision, the trial judge's focus was without question on the best interests of the children. Consistent with the new legislative provisions on allocating parenting time, she recognized that children should have as much time with each parent as is consistent with their best interests.[5] The trial judge was concerned about how the children had come to align themselves with their mother. She observed that their relationship with their father had deteriorated, in part, because of the actions of the mother, and she was concerned that, if sole decision-making responsibility were awarded to the mother, the children would become

[5] See *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 24(6) and the *Divorce Act*, s. 16(6).

more entrenched in their determination not to see their father, which was not in their best interests.

[26] The trial judge also reasonably concluded that it would not be appropriate to allocate decision-making between the parents: neither party suggested this option, both parties expressed that it would not work, and the trial judge observed that, if areas of decision-making were divided, undoubtedly they would overlap and conflict would result. While the mother's evidence was that she had done nothing to discourage the relationship between the children and their father, the trial judge found the father to be more credible than the mother on this point, and she determined that he would be the party most likely to promote a relationship with the other parent. For those reasons, she ordered equal time-sharing, with decision-making responsibility to the father.

The trial judge's treatment of the children's views and preferences

[27] Turning to the first ground of appeal of the parenting order, I do not agree that the trial judge ignored the evidence of the children's views and preferences, including what was contained in Mr. Butt's 2017 Parenting Plan Report and the notes he took of his discussions with the children in July 2018. Nor do I agree that the trial judge erred in finding the children had aligned themselves with their mother, or that she overlooked the legitimate reasons for the children to prefer their mother's home.

[28] Several witnesses reported that, based on conversations with the children and their observations, the children preferred the home environment with their mother and her new spouse to the environment at their father's home. They also reported that there was conflict between the children and the father's spouse, D.[6]

[29] The trial judge noted that a significant part of the mother's case at trial related to the children's views and preferences, and she recited the evidence in her reasons. The trial judge explained why she considered such evidence to be of limited value in this case: it was not obtained through a professional whose job it was to consider the independence of the views, and to look for external influences. The potential for influence was noted by Mr. Butt, who observed that the children's views and preferences, although consistent with the observations he made, could not reasonably be deemed to be fully independent and should be cautiously considered.

[30] The trial judge concluded that she was not inclined to rely on the expressed views and preferences of the children, other than to make time sharing a "week about" rather than giving the father the majority of the time, which would be "too contrary to what the [children] would like, and what they are used to". She concluded that the children had likely been influenced by their mother, and that they had become increasingly aligned with her.

---

[6] The proposed fresh evidence discloses that the father has since separated from D.

[31] In so concluding, the trial judge considered the evidence of the mother's witnesses that they never heard the mother speak negatively about the father, and that she promoted a relationship between the children and their father. However, the trial judge also referred to evidence at trial that contradicted this assertion. What was squarely before the trial judge was whether the deterioration of the children's relationship with their father – which was reflected in their stated preference to live only with their mother and her partner, K. – was, as was alleged by the mother, the natural result of the father's conduct (as well as that of his spouse at the time, D.). Ultimately the trial judge concluded that the evidence at trial did not support this conclusion.

[32] This conclusion was open to the trial judge on the evidence. She reasonably concluded that the children's views had not been ascertained independently and that the children had become increasingly aligned with their mother against their father.

The trial judge's treatment of the parties' pre-separation conduct evidence

[33] This takes us to the mother's second ground of appeal of the parenting order: that the trial judge erred in her assessment of the evidence of the parties' "alternative" lifestyle before separation: their involvement in a "swingers" club and sexual infidelities. The mother asserts that the trial judge, after finding that this was irrelevant past conduct, wrongly took the evidence into consideration as affecting

the mother's credibility and not the father's. She asserts that one particular aspect of the evidence, the father having retained nude photos of her, ought to have been considered as "family violence", which is a relevant factor in determining a child's best interests under s. 24(4) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12.

[34] There was a lot of evidence about the parties' pre-separation "alternative" lifestyle. The thrust of the mother's evidence, which was contradicted by the father's account, was that she was not a willing participant in many of these activities, including an incident resulting in nude photos of her with another man, and on a "girls' weekend" – photos that ended up in the father's possession. Unfortunately, and unnecessarily in my view, a great deal of time at trial was devoted to the parties' contradictory evidence about these events and allegations. It is also unfortunate that, despite her conclusion that the evidence was not ultimately relevant to the parenting orders, the details of this evidence were recounted at length in the trial judge's reasons.[7]

---

[7] It is unclear why it was necessary to have 16 days of evidence in this trial, including a great deal of evidence that the trial judge concluded was irrelevant to the issues she had to determine. A trial judge has an important role in determining as the trial progresses the relevance of the evidence which is led: see e.g. *R. v. Forrester*, 2019 ONCA 255, 375 C.C.C. (3d) 279, at para. 16; *Burton v. Howlett*, 2001 NSCA 35, at para. 15; *Canada (Attorney General) c. JTI-MacDonald Corp.*, 2012 QCCA 2017, at para. 8. There is also a concern about the length and style of the trial judge's reasons in this case, which include a *seriatim* review of the evidence of each witness, and many details that are not only embarrassing to the parties but reveal medical and other confidential information about the children. Setting out the detailed evidence of each witness in the reasons for judgment is typically unhelpful: see *Welton v. United Lands Corporation Limited*, 2020 ONCA 322, at paras. 56-63. And the inclusion of confidential information that is unnecessary to the

[35] At para. 347, the trial judge noted that she was "very mindful of the fact that none of these activities prevented the parties from entering into a joint custody arrangement with an equal timesharing that was arranged with the help of a qualified parenting coordinator and which lasted for over two years". She concluded:

> Give[n] the ability of the parties to initially overlook these activities, and the contradictory evidence, I cannot say that these activities have impacted either party's ability to parent. As such they are not something that helps or hurts the claims made by either party with the exception of credibility, which I will address. I am also mindful that both parties appear to be in stable new relationships now, and have been for a few years. Both have re-married.

[36] The trial judge stated that she made no determination as to who was the instigator of the trips to the "swingers" club or whether it was a mutual decision, and that neither this nor the mother's extra-marital relationship was a factor in her decision. In addition to a lack of independent evidence, "there [was] no reason to believe that the children were affected in any way": at para. 360.

[37] I see no error in the trial judge's conclusion that the evidence about the parties' pre-separation lifestyle would not affect her decision on parenting, except in the sense she described as relevant to "credibility".

---

determination of the case should be avoided. As the Supreme Court noted recently, "[proceedings] in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but is an affront to the affected person's dignity": *Sherman Estate v. Donovan*, 2021 SCC 25, at para. 7.

[38] First, the trial judge did not err in failing to find that the father's retention of nude photos of the mother was an incident of "family violence". This was not the argument at trial; rather the mother's counsel referred to s. 162.1 of the *Criminal Code* (making it an offence to knowingly publish an intimate photo of someone without their consent). The trial judge reasonably concluded that this provision was not relevant: there was no suggestion that the photos were made available to anyone other than private individuals and no witnesses were called to say they saw them. One witness said the father offered to show some photos to her, but the father denied this. The trial judge's treatment of the evidence about the nude photos was appropriate. She noted that, although the mother was "understandably upset" that the father kept the photos, there was contradictory evidence about how they came to be, and there was no evidence at trial that they had been shared by the father, although she accepted that he had told people about them. The trial judge also appropriately observed that there was no reason why the photos should not be destroyed.

[39] Nor in my view did the trial judge err in her limited consideration of the "alternative" lifestyle evidence, including the evidence about the photos, to assess credibility. She had to determine which of the two parents was more likely to encourage a relationship with the other. She concluded that the father would be more likely to facilitate contact with the mother than the reverse. In arriving at this decision, she identified certain aspects of the mother's testimony that lacked

credibility: that the father had harassed her and her adult friends into taking nude photos of themselves on their "girls' weekend"; that the complimentary comments in greeting cards she wrote to the father were written, not because they reflected her feelings, but because "it was expected"; and that the mother was forced by the father to travel by cab to another man's house for sex and photos, contrary to what appeared in the mother's own explicit text messages. By contrast, the trial judge stated that she did not find specific areas where the father lacked credibility on substantive issues, and she was more inclined to accept his evidence overall.

[40] The trial judge's assessment of credibility is entitled to deference. It is supported by the evidence and reveals no reversible error.

The father's ability to change the children's family doctor

[41] Finally, I see no merit in the mother's argument that the trial judge erred in permitting the father to change the children's family doctor. The trial judge stated that, since the father was going to have custody (decision-making responsibility), it was not unreasonable for him to change the family doctor. The trial judge noted that while she did not doubt the family doctor's sincerity (the family doctor had testified as a witness at trial for the mother and recounted detailed conversations with the children about their preference for their mother's home), the father might want to start with someone new, who had not had the history of hearing the children's complaints about the father and his spouse. The trial judge, who had the

benefit of hearing and considering all the evidence, provided a sensible reason for refusing the mother's request that the children remain with their current family physician. There is no reason to interfere.

CHILD SUPPORT

[42] From October 1, 2017 until August 1, 2019 the father had been paying the mother $1,416 per month voluntarily based on an estimated annual income of $100,000. He stopped paying child support one month before trial. At trial both parties sought retroactive adjustments to child support. The mother asserted that she was owed child support for 2017, 2018 and 2019 based on the father having earned more than $150,000 in each of those years. The father argued that he had overpaid child support and was entitled to repayment over time given that the children were with him more than 40% of the time between October 2017 and August 2019.

[43] The trial judge ordered support on a set-off basis from March 1, 2020 based on her determination of the 2018 income for the mother of $152,314.81 and of the father of $93,341. Although she fixed child support going forward based on the parties' 2018 incomes, she ordered the father to provide an income analysis from a chartered accountant every two years for the preceding two years, commencing in 2021 (for 2019 and 2020).

[44] The trial judge refused to make any retroactive adjustments to child support. She acknowledged the parties' contradictory calculations of the amount of time the children had spent with their father. Noting that the court has discretion and the child support is the right of the child, she observed that both parties knew the time-sharing schedule when child support was agreed to, and that if the father had the children over 40% of the time, she was not prepared to say that he had no obligation to pay child support. She concluded that the estimated income of $100,000 was close to what the father actually earned, and it was a fair amount under all the circumstances. She concluded: "I will use my discretion and leave child support on a retroactive basis, in the amount that was agreed to".

[45] The mother asserts that the trial judge made two errors in her determination of child support: the first relates to the calculation of the father's income for child support purposes for 2018. The second is that the trial judge erred by failing to award retroactive support for the six-month period from September 2019 to February 2020.

The father's 2018 income for child support purposes

[46] With respect to the father's income, the mother makes the same arguments on appeal that were rejected at first instance. She says that, in determining the father's income for 2018, no deduction ought to have been allowed for his rental and home office expenses. She contends that the trial judge ought to have

included in the father's income the amount that was allowed as a deduction for rent and home office expenses plus gross up for taxes (an amount exceeding $6,000), as well as pre-tax corporate earnings ($50,114.62). She seeks to impute income of over $150,000 to the father for 2018 (and for the preceding year, 2017).

[47] I would not give effect to this argument. The trial judge accepted the opinion of the father's expert, R. Andrew MacRae, a chartered accountant and business valuator, who provided an income report for the year 2017 and testified at the trial. Mr. MacRae's opinion was that, although the father's line 150 income for 2017 was $84,000, he had an income of $90,000 for child support purposes. Adopting the same approach, the father's income for 2018 for child support purposes was $93,341. The trial judge accepted Mr. MacRae's calculation and rationale for adding back the sum of $6,431 for certain personal expenses that had been included in corporate deductions for meals and entertainment, telephone, travel, rent and home office expenses, with a gross up at 34%. And, although she acknowledged that there was a good argument that retained earnings should be included in the determination of income for support purposes, the trial judge elected not to attribute pre-tax corporate income in 2018 as there were substantial losses in 2017 and the father had been drawing on his cash reserves and line of credit to pay himself his monthly draw. The trial judge accepted Mr. MacRae's opinion that the prior year's losses had to be considered as part of the analysis. His evidence was not seriously challenged and the mother "provided no

professional opinion to the contrary". There is no reason to interfere with the trial judge's determination of the father's income for 2018.

The child support arrears from September 2019 to February 2020

[48] Second, the mother argues that the trial judge erred by failing to order the father to pay arrears of child support in respect of a six-month period. She seeks payment of support for the period between September 1, 2019 and February 1, 2020. The father paid no child support during this period.

[49] The mother points to the fact that the father was paying child support of $1,416 per month based on the parenting regime that was in place up to trial, which continued until the end of February 2020, when the new equal time parenting arrangements ordered by the trial judge were put in place. The father's last child support payment was made in August 2019. The father renews the argument made at trial that he had overpaid child support because the children were living with him more than 40% of the time. This argument however had been rejected by the trial judge in refusing the father's request for a retroactive adjustment to child support.

[50] Although the final order states that there is no adjustment to child support as of February 29, 2020, the trial judge's reasons do not address the question of child support for the six-month period between September 2019 and February 2020. I would remit the issue of child support for this period to the trial judge in the particular circumstances of this case, in which the parties are to reattend before

the trial judge in any event to address the status of the therapeutic assistance provided by Ms. Geraldo.

DISPOSITION

[51] For these reasons I would dismiss the motion to introduce fresh evidence and, except for the one issue I would remit to the trial judge, the appeal. If the parties are unable to agree on costs, the court will receive written submissions limited to three pages each exclusive of any costs outline, with no right of reply. The respondent's submissions are to be served and filed within 15 days of these reasons and the appellant's submissions within ten days thereafter.

Released: July 22, 2021 "R.G.J."

"K. van Rensburg J.A."
"I agree. R.G. Juriansz J.A."
"I agree. Sossin J.A."

Tab 5:
20210804 2021FC821