Court File No: 38695

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

THE ESTATE OF BERNARD SHERMAN AND THE TRUSTEES OF THE ESTATE, and THE ESTATE OF HONEY SHERMAN AND THE TRUSTEES OF THE ESTATE

APPELLANTS
(Appellants)

- and -

KEVIN DONOVAN

RESPONDENT
(Respondent)

- and -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMBIA, CANADIAN CIVIL LIBERTIES ASSOCIATION, INCOME INSECURITY ADVOCACY CENTRE, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, POSTMEDIA NETOWRK INC., CTV, A DIVISION OF BELL MEDIA INC., GLOBAL NEWS, A DIVISION OF CORUS TELEVISION LIMITED PARTERSHIP, THE GLOBE AND MAIL INC. AND 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

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PART I – OVERVIEW

1. Although court proceedings often involve private affairs, they are presumptively public. It has been well understood for centuries that personal privacy interests must, with rare exception, accede to the broader public interest in open courts. If privacy interests, without more, trumped open courts, secrecy, not openness, would be the norm. This would cause great harm to democratic values that underpin the open court principle.

2. This case presents the Court with an opportunity to make clear that privacy interests alone cannot satisfy the first branch of the *Sierra Club* test. It is imperative that it do so. Otherwise, the vital public interest in open proceedings will routinely be subordinated to individual privacy interests.

3. The fact that privacy rights are an increasing concern in the digital age creates an even greater need for clear guidance on the necessarily limited circumstances in which privacy rights will rise to the level of justifying a restriction on access to presumptively open proceedings. As technology evolves, there are times where the Court will address the need to re-balance privacy rights with other compelling interests, but such rebalancing is not called for in relation to the open court principle.

4. This Court has developed a workable analytical framework for evaluating when privacy interests rise to the level of necessitating a restriction on freedom of expression. The Court's reasoning in *A.B. v. Bragg* allows that privacy interests can trump open courts where they represent not just individual privacy interests but also communal or societal interests in privacy. In such circumstances, certain privacy interests may, in exceptional circumstances, rise to the level of an "important public interest" under the first stage of the *Sierra Club* test. The analysis is analogous

to that used to determine whether commercial interests can trump open courts; they can, where the commercial interest is not merely specific to the individual and represents a broader commercial interest.

5. This Court has recognized victims of sexual assault and child victims of sexualized cyberbullying as having interests sufficiently important to necessitate a restriction on the open court principle. In each case, the court has recognized the societal interest in protecting the vulnerable and in encouraging victims to come forward. It is conceivable that other similar or analogous interests will emerge, but the threshold for interfering with the presumptive right to access open proceedings is high. Even where the threshold is met, it is well-established that the interference should be as limited as possible (privacy interests of sexual assault complainants are protected through publication bans, not sealing orders).

6. This Court should reject the suggestion that the open court principle is of lesser, if any, significance in the context of fundamentally administrative matters, such as non-contentious applications for probate. As this Court recognized in *Toronto Star v. Ontario*, openness principles protected by the *Dagenais/Mentuck* test (or the *Sierra Club* test in civil proceedings) apply "to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings".[1] There is no exception for non-adversarial proceedings.

7. The *Sierra Club* test must be applied in a contextual and flexible manner. This does not mean, however, that courts get to decide whether there is a public interest in the matter itself that is before them. Openness is intended to allow for scrutiny of the court itself. The court cannot therefore be the arbiter of whether the proceeding is of public interest. As this Court's decision in

[1] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 [2005] 2 SCR 188 at para. 7.

Toronto Star makes clear, all judicial proceedings are of public interest. It is for Parliament, subject to constitutional constraints, to determine if there is a category of judicial decisions to which the openness principle ought not to apply.

PART II – QUESTIONS AT ISSUE

8. The CCLA's positions are as follows:

(a) Privacy interests alone cannot trump the open court principle, but in exceptional circumstances where a privacy interest is of a communal nature, such as protecting the privacy interests of the inherently vulnerable, it may rise to the level of making a restriction on access to open courts necessary. In such cases, any such restriction should be as limited as possible.

(b) Although the *Sierra Club* test must be applied contextually, the openness analysis cannot include an assessment of the public interest in the proceedings. All judicial proceedings are of public interest. If a class of judicial proceedings are to be excluded from public scrutiny, it should be for Parliament to make this determination, subject to constitutional constraints.

PART III –ARGUMENT

(a) Privacy Interests Alone Do Not Trump Open Courts

9. Although the digital era has increased concern for protecting privacy interests, the tension between individual privacy interests and the open court principle is not new. Litigants have long sought – usually unsuccessfully – to shield their private affairs from public scrutiny in the courts.

Indeed, much of the leading openness jurisprudence arises in the context of matrimonial cases where parties sought to protect their privacy.

10. The seminal case of *Scott v. Scott* involved a petition for a declaration that a marriage was void due to the husband's impotence. On order of the court, the petition was heard *in camera*. The petitioner and her counsel were subsequently cited in contempt for circulating a transcript of the *in camera* hearing. The House of Lords unanimously overturned the contempt ruling, finding that the petition should not have been heard *in camera*. In so finding, Lord Halsbury found (in 1913) that "every Court of justice is open to every subject of the King…" and that "this has been the rule… for some centuries". Although admitting to exceptions where necessary to secure justice, Lord Halsbury noted that "[a] mere desire to consider feelings of delicacy or to exclude from publicity details which it would be desirable not to publish is not, I repeat, enough…"[2]

11. In his concurring judgment, Lord Atkinson noted that "the hearing of a case in public may be, and often is, no doubt, painful, humiliating or deterrent both to parties and witnesses… but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect".[3]

12. In *McPherson v. McPherson,* the Privy Council condemned the practice that had developed in Alberta of hearing uncontested divorce cases in chambers or in the courthouse library with Lord Blanesburgh noting that having these cases tried in open court was important precisely because

[2] *Scott v. Scott*, [1913] AC 417 at 439, 440.
[3] *Ibid* at 17 [emphasis added].

"…there is no class of case in which the desire of the parties to avoid publicity is more widespread".[4]

13. Commenting on this dictum in *Edmonton Journal v. Alberta (Attorney General)*, Justice Wilson noted that "Lord Blanesburgh's remarks, in my view, provide a stern reminder of the importance of not allowing one's compassion for that limited group of people who are of particular interest to the public (because of who they are or what they have done) to undermine a principle which is fundamentally sound in its general application."[5]

14. These cases highlight not only that personal privacy interests must in the normal course accede to the broader interest in open courts, but also that the natural inclination to protect personal privacy interests, particularly in uncontested and personal matters, makes safeguarding the openness principle more important.

15. That privacy is a quasi-constitutional right and of significant importance in Canadian law is beyond dispute. This alone is not a basis for secrecy in court proceedings to protect privacy interests. Although individuals involved in divorce proceedings (as an example) would often prefer that their personal affairs be shielded from public scrutiny, the broad interest in open courts requires that litigants proceed in public even where doing so is painful and humiliating. Individual harm of this nature cannot outweigh the public benefit openness affords. If it did, secrecy would be the norm.

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[4] *McPherson v. McPherson*, [1936] 1 DLR 321 at 328 [emphasis added].
[5] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at para. 30.

(b) Broader Communal Privacy Interests May Trump Open Courts

16. The openness principle is not absolute, but to outweigh the public interest in open courts, the countervailing interest must not be specific to the party making the request. Justice Iacobucci made this clear in *Sierra Club*, in the context of business interests where he noted that "[i]n order to qualify as 'an important commercial interest', the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality."[6]

17. Like commercial interests, privacy interests can rise to the level of being expressed in terms of a public interest that outweighs the countervailing public interest in openness. This is what occurred in *A. B. v. Bragg,* where this Court found that a victim of sexualized online cyberbullying could bring a defamation claim anonymously.

18. The Court made clear throughout its reasons in *Bragg* that it was not the fact of a privacy interest alone that justified anonymity. As Justice Abella wrote: "[t]he girl's interests in this case are tied both to her age and to the nature of the victimization she seeks protection from. It is not merely a question of her privacy, but of her privacy from the relentlessly intrusive humiliation of sexualized online bullying".[7]

19. As the Court found, the privacy of a child victim of sexualized online bullying is analogous to that of a victim of sexual assault. In both cases the victims are inherently vulnerable and there is a strong public interest in complainants in either case not being prevented from coming forward by privacy concerns.

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[6] *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 at para. 55.
[7] *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 at para. 14 [emphasis added].

20. Although the result in *Bragg* was driven by the fact that the privacy interest in question could be expressed in terms of a public interest, the Court did not explicitly state that privacy interests alone would not suffice to outweigh openness. This case presents an opportunity for it to do so.

21. This Court should make clear that just as a commercial interest specific to a party is not sufficient to justify limiting openness, neither is a privacy interest specific to a party. Absent such a finding, it is fair to expect that privacy interests will whittle down the open court principle.

22. Big data and the commercialization of personal information are real issues that make protecting personal privacy a pressing modern concern. Similarly, the expansion of the global information ecosystem, which facilitates increasingly easy access to formerly local or obscure information once it is posted online, unarguably increases the social tension between free expression and privacy. However, courts ought not focus on the affordances of evolving technologies to the detriment of fundamental principles. When it comes to striking the correct, principle-based weighting between privacy and open courts, such weighting has been successfully established by past jurisprudence. As Justice Wilson noted in *Edmonton Journal,* echoing Lord Blanesburgh's reasons decades before, concern over individuals cannot override a fundamentally sound principle of general application.

(c) The Openness Principle Applies to All Judicial Proceedings

23. This Court has stated on many occasions that the *Dagenais/Mentuck* test is flexible. By extension, so is its civil variant, the *Sierra Club* test. The flexibility in the test is intended to allow for the fact that it is applied in all judicial contexts and that evidence of harm can be harder to muster at early stages of proceedings.

24. The flexibility in the test is not intended to, and cannot, allow for a judge to determine that openness is not important in a particular class of proceeding. This court has repeatedly stated the exact opposite – openness principles apply to "all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings" and "at every stage of proceedings".[8]

25. The danger of allowing a judge to determine that openness is not important in a particular context is that it allows the judge an easy way to side-step the analytical and constitutional rigour that the *Sierra Club* test provides. This would be highly problematic.

26. A core purpose of openness is to allow for public scrutiny of the judiciary itself. As Justice Dickson stated in *MacIntyre*, there is "a strong public policy in favour of 'openness' in respect of judicial acts", noting that centuries before, Bentham had expressed a key rationale for openness as that "[w]here there is no publicity there is not justice. Publicity is the very soul of justice…[i]t keeps the judge himself while trying under trial."[9]

27. The policy objective of ensuring judicial accountability is undermined if the judge can make a discretionary determination that openness is not important because of the nature of the proceedings before him or her. This is particularly problematic where, in the criminal context at least, the discretionary decision is often only reviewable on obtaining leave to this Court.

28. It is also problematic because the determination of whether a proceeding is of an administrative or procedural nature is not easy. Indeed, in the administrative context, this Court

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[8] *Toronto Star Newspapers Ltd. v Ontario*, 2005 SCC 41at para. 30; *Vancouver Sun (Re)*, 2004 SCC 43 at paras. 23-27.
[9] *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 at para. 53 [emphasis added].

abandoned the distinctions because "the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least".[10] The classification of functions is no easier in the judicial context.

29. The practice of hearing uncontested divorce applications in private, which the Privy Council condemned in *McPherson*, developed precisely because it was thought to be harmless. Faced with sensitive personal information and no apparent dispute of substance, judges saw no harm in excluding the public. As the Privy Council noted in its reasons, this is precisely the kind of complacence that must be guarded against.

30. If this Court were to find that openness principles do not apply to certain probate proceedings, it will have carved the thin edge of the wedge. It will have paved the way for an unknowable number of cases to be heard in private on judicial determination that the nature of the proceedings made secrecy acceptable. This would be inconsistent with the law as it has developed today and harmful to open court principles and their underlying democratic values.

31. If there is a class of proceedings to which the open court principle ought not apply, it should be for Parliament or the Legislature to decide, which decision can ultimately be reviewed by the courts for constitutional compliance. This will ensure that the constitutional protection and analytical rigour afforded by the *Sierra Club* test is protected.

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[10] *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police*, [1979] 1 S.C.R. 311, at para. 23.

(d) Conclusion

32. Since *Dagenais*, this Court has diligently protected the open court principle. It has resisted calls to have the test not apply in particular judicial contexts such as investigative hearings and search warrant applications. In doing so, it has consistently recognized the central importance of openness in allowing for public oversight of the judiciary and, by extension, protecting democratic values. It would be a grave error for the Court to allow individual privacy concerns to undo this. Privacy concerns that rise to the level of outweighing the public interest in open courts can be protected using the existing analytical framework. As they have for centuries, individual privacy interests must continue to cede to the broader public interest in openness.

33. The safeguards developed to protect open courts would also be greatly undermined if courts were empowered to classify particular proceedings or classes or proceedings as not worthy of openness. For good reason, the law has never allowed openness to be so easily side-stepped. It should not now.

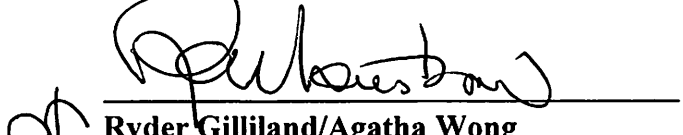
PART IV – SUBMISSION ON COSTS

34. The CCLA does not seek costs in this matter and asks that no award of costs be made against it.

PART V – ORDER SOUGHT

35. The CCLA takes no position on the merits of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of March, 2020.



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PART VI: TABLE OF AUTHORITIES	
Authority	**Paragraph Reference in Memorandum of Argument**
CASE	
A.B. v. Bragg Communications Inc., 2012 SCC 46	4, 17, 18, 20
A.G. (Nova Scotia) v. MacIntyre, [1982] 1 S.C.R. 175	26
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