SCC 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
(Respondents)

- and -

**KEVIN DONOVAN**

RESPONDENT
(Appellant)

- 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

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# FACTUM OF 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., CITYTV, A DIVISION OF ROGERS MEDIA INC. (COLLECTIVELY, THE "MEDIA COALITION")

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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## PART I - OVERVIEW

1. This appeal involves an application by the Appellants to have the materials they filed in probate court with respect to the estates of Bernard and Honey Sherman (together, the "**Estates**") "treated as confidential, sealed and not form part of the public record", pursuant to section 137(2) of the *Courts of Justice Act*.[1]

2. The issues raised in this appeal go to the core of the open court principle and freedom of expression. The Media Coalition[2] intervenes in this appeal to assist the Court with respect to the appropriate framework to be applied in such a case.

3. In *R. v. Jarvis*, Wagner C.J. recently described the concept of privacy as being something that "defies easy definition", though "in a general sense and as ordinarily used, the word privacy includes the concept of freedom from unwanted scrutiny, intrusion or attention". It encompasses a number of related types of privacy interests that include territorial, personal and informational privacy interests.[3]

4. All of the "important interests" that have grounded applications under the adaptable test in *Dagenais v. Canadian Broadcasting Corporation*[4] have involved a personal privacy interest: an applicant who does not want scrutiny, intrusion or attention seeks to restrict or deny access to court proceedings of which the applicant's information forms part. This Court, for more than three decades, has consistently held that such a personal privacy interest, alone, does not constitute an adequate interest for the necessity stage of the test. This unbroken line of authority flows from the fundamental principles underpinning a free and democratic society and should be continued.

5. In *Re Vancouver Sun*, this Court held all aspects of court proceedings are presumptively open, describing the open court principle as "a hallmark of a democratic society" and "a

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1 R.S.O. 1990, c. C-43.

2 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. (collectively the "**Media Coalition**").

3 *R. v. Jarvis*, 2019 SCC 10 ("***Jarvis***") at paras. 36 (emphasis added) and 64.

4 *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 ("***Dagenais***").

cornerstone of the common law", with openness being "necessary to maintain the independence and impartiality of the Courts" and the "legitimacy of the judicial process".[5] The Appellants argue that a proceeding before a probate court is not a court proceeding and therefore the presumption should not apply. To accede to that argument would be to erode fundamentally the protections and freedoms that public access to matters that judges are enlisted to decide ensures. The argument should be rejected.

## PART II - QUESTIONS IN ISSUE

6. The Media Coalition addresses the question raised by the Appellants with respect to privacy in the context of the *Dagenais* test, focusing on the following:

(a) a personal privacy right, in and of itself, is not adequate to constitute an important interest for the necessity stage of the *Dagenais* test; and

(b) a probate court is a court, with a presumption of openness.

## PART III - STATEMENT OF ARGUMENT

### A. THE *DAGENAIS* TEST

7. This appeal relates to the appropriate framework that should be applied when a court considers whether to exercise its discretion to issue a sealing order in a probate court proceeding, and the application of this framework.

8. There are over three decades of jurisprudence from this Court on the appropriate considerations when a request is made to limit freedom of expression on account of preserving or promoting other important interests engaged in a court proceeding. In *Dagenais*, in the context of a publication ban, this Court formulated the following framework, with Lamer C.J. holding that a ban may only be ordered when:

> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.[6]

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5 *Re Vancouver Sun*, 2004 SCC 43 ("***Vancouver Sun***") at paras. 23-25.

6 *Dagenais*, *supra* note 4 at 878 (emphasis in original).

9. This Court has since flexibly applied the *Dagenais* test, expanding it to other situations where requests have been made to limit public access to court proceedings in some manner. In *Sierra Club of Canada v. Canada (Minister of Finance)*, Iacobucci J. expressly recognized the "flexibility of the *Dagenais* approach" and that "the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding".[7]

10. In *R. v. Mentuck*, the *Dagenais* test was adjusted "to restate it in terms that more plainly recognize … that publication bans may involve more interests and rights than the right to trial fairness and freedom of expression", with Iacobucci J. identifying that "[t]here may also be other cases which raise interests other than the administration of justice, for which a similar approach would be used, depending of course on the particular danger at issue and the rights and interests at stake".[8]

11. In *Sierra Club*, the *Dagenais* test was refined in the context of a confidentiality order, to require a party seeking confidentiality to demonstrate that:

> (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 reasonable 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.[9]

12. The framework is broad enough to apply, and has been applied, to various types of "important interests".

## B. IS AN ORDER "NECESSARY TO PREVENT A SERIOUS RISK TO AN IMPORTANT INTEREST?"

13. This appeal is centered on the first stage of the framework articulated in *Dagenais* and *Sierra Club*: whether an order is necessary to prevent a serious risk to an important interest.

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7 *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 ("***Sierra Club***") at para. 48 (emphasis added).

8 *R. v. Mentuck*, 2001 SCC 76 ("***Mentuck***") at para. 33 (emphasis added).

9 *Sierra Club, supra* note 7 at para. 53 (emphasis added).

14. The Appellants seek to justify the necessity of a sealing order by alleging that the public disclosure of the materials in the probate files with respect to the Estates would (a) constitute a serious invasion of the privacy of the trustees and beneficiaries of the Estates, and (b) result in a grave physical safety risk to the trustees and beneficiaries of the Estates. With respect to the second ground, the Media Coalition agrees that an established serious physical safety risk is a public interest sufficient to satisfy the necessity phase of the *Dagenais* test, but takes no position on whether the evidence submitted by the Appellants in the present matter is sufficient to demonstrate there is a "serious risk".

15. With respect to privacy, the Appellants argue, *inter alia*, that the "constitutionally protected right to privacy", without more, is of such importance to meet the necessity stage of the test articulated in *Dagenais* and *Sierra Club*,[10] and that the probate process is a "purely administrative process" with limited aims that "do not engage the open court principle".[11] The Media Coalition submits that the approach adopted by the Appellants is not the appropriate basis on which to proceed, irrespective of whether or not a sealing order is appropriate in this particular case.

16. To date, the *Dagenais* test has been considered and applied by this Court in a number of cases that have involved issues of privacy, including in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*,[12] *Mentuck* and *R. v. O.N.E.*,[13] *Sierra Club* and *A.B. v. Bragg Communications Inc.*[14] As in *Dagenais,* these subsequent decisions have each:

(a) engaged a consideration of section 2(b) of the *Canadian Charter of Rights and Freedoms*[15] (the "***Charter***"), which protects freedom of expression, and the inextricably related fundamental principles of open and accessible court proceedings; and

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10 Appellants' Factum at paras. 32(a)(i) and 33.

11 *Ibid.* at paras. 114 and 120.

12 *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] S.C.R. 480 ("***CBC***").

13 *Mentuck, supra* note 8 and *R. v. O.N.E.*, 2001 SCC 77 ("***O.N.E.***").

14 *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 ("***Bragg***").

15 *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, s. 91(24) (the "***Charter***").

(b) expressed the relevant privacy issues as extending *beyond* a purely personal privacy interest, to engage matters of public importance.

17. This Court has repeatedly and rightly confirmed that a purely personal privacy interest is not, in and of itself, sufficient to justify limiting public access and the resulting intrusion on the open court principle. For example, in *CBC*, La Forest J. stated that "mere offence or embarrassment will not likely suffice for the exclusion of the public from the courtroom".[16]

18. Instead, this Court has required something that elevates any personal privacy concerns to a matter of public importance. In *Sierra Club*, Iacobucci J. stated that "[t]he 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"[17] and that the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness".[18]

19. It simply cannot be that any "unwanted scrutiny, intrusion or attention", to use the definition of Wagner C.J. in *Jarvis*, without something more, is the type of "important interest" protected by the necessity phase of the *Dagenais* test. Every applicant seeking a sealing order or otherwise to restrict public access is, by the very nature of the relief sought, seeking to avoid unwanted scrutiny, intrusion or attention. If this were sufficient to constitute an "important interest", the necessity stage of the *Dagenais* test would always, automatically, be satisfied, effectively rendering it non-existent. This result would not only be inconsistent with the current two-step framework, but would fail to recognize the importance of the first stage of the framework to the open court principle.

20. The open court principle safeguards the integrity of the judicial process, acting as "the security of securities" and demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law".[19] It is the engagement of a matter of public concern that is needed to elevate an issue to an "important issue", sufficient to justify the resulting attack on the open court principle that is protected by section 2(b) of the *Charter*.

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16 *CBC, supra* note 12 at para. 41.
17 *Sierra Club, supra* note 7 at para. 55.
18 *Ibid.* at para. 55, quoting *F.N. (Re)*, 2000 SCC 35 at para. 10 (emphasis in *Sierra Club)*.
19 *Vancouver Sun, supra* note 5 at para. 25 and *CBC, supra* note 12 at para. 22.

21. By their very nature – involving as they do situations in which an applicant wishes to avoid unwanted scrutiny, intrusion or attention – the cases that have applied the *Dagenais* test have each involved a personal privacy interest; however, it was the existence of a public interest that animated the necessity analysis. For example:

(a) In *Dagenais*, a publication ban was sought to protect the accuseds' fair trial rights, on the basis that they would be undermined by adverse, pre-trial publicity. The fact that the unwanted scrutiny, intrusion or attention could have jeopardized those rights was relevant. Lamer C.J. recognized that the objective of safeguarding fair trial rights "reflects the interest that the accused persons shared with both the public and the courts in ensuring both that a trial be held and that it be fair";[20]

(b) *CBC* considered an exclusionary order that restricted public access to a courtroom for a portion of a sentencing proceeding for sexual assault and sexual interference, which dealt with the specific acts committed by the accused. La Forest J. recognized that "privacy interests are more likely to be protected where it affects some other social interest or where failure to protect it will cause significant harm to the victim or to witnesses", and that society had a "legitimate interest in encouraging the reporting of sexual assault and that this social interest is furthered by protecting the privacy of complainants".[21] The public interest considered was the proper administration of justice, on the basis that an exclusionary order could avoid undue hardship to the persons involved, being both the victims and the accused. The unwanted scrutiny, intrusion or attention could have jeopardized that public interest;

(c) In *Mentuck* and *O.N.E.*, a publication ban was sought to protect the identity of several police officers, as well as the details of their operational methods. Iacobucci J. considered whether the ban was necessary to prevent a serious risk to the proper administration of justice.[22] Again, the unwanted scrutiny, intrusion or attention could have jeopardized that objective.

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20 *Dagenais*, *supra* note 4 at 879 (emphasis added).
21 *CBC*, *supra* note 12 at paras. 42 and 44.
22 *Mentuck*, *supra* note 8 at 466 and *O.N.E.*, *supra* note 13 at 484.

(d) *Sierra Club* considered a confidentiality order over certain documents containing commercially sensitive information. Iacobucci J. noted that, without a confidentiality order, the appellant in that case would be prevented from disclosing the documents, such that it would be unable to present its case, hindering its right to a fair trial: "Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to fair trial".[23] There was a relationship between the scrutiny, intrusion and attention that were unwanted, and the protection of that public interest; and

(e) In *Bragg*, the appellant sought a publication ban and the right to bring her claim anonymously under the initials "A.B." Abella J. considered whether the interests in privacy and the protection of children from sexualized cyberbullying were sufficient to justify restricting the open court principle, finding that there was a sufficient interest, in light of the likelihood that a child's ability to protect himself or herself would be greatly enhanced and the likelihood children would report such conduct increased if the protection could be sought anonymously.[24] The unwanted scrutiny, intrusion and attention would jeopardize that.

22. In each of the above cases, the party seeking to restrict the open court principle of course did not want the scrutiny, intrusion and attention that a successful application would minimize or avoid; however, this interest alone was not sufficient to satisfy the necessity stage of the *Dagenais* test.

23. In the present case, the Appellants argue that personal privacy interests alone should be elevated to an "important interest" required by the *Dagenais* test. However, the question should not be, as posed by the Appellants, whether "the constitutionally protected right to privacy" is "an important interest recognized at the first stage of the *Sierra Club* test".[25] This would be to reverse decades of uninterrupted case law from this Court that continues to reflect the imperatives of the free and democratic society that open courts safeguard. To use the words of Fish J. in *Toronto Star Newspapers Ltd. v. Ontario* (in 2005), any other conclusion would be "inconsistent with an

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23 *Sierra Club, supra* note 7 at para. 50.
24 *Bragg, supra* note 14 at paras. 13 and 25.
25 Appellants' Factum at para. 32(a)(i).

unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(b) of the *Charter*".[26] Nothing in the present matter suggests that a departure is necessary, or appropriate; to the contrary, the importance of open access to the courts has increased importance in these tense and fractured times when our democratic institutions appear under threat.

24. Instead, the question must be whether there is anything about the nature of probate proceedings, or the personal privacy interests at play in this matter, to raise these interests to the level of being a public concern. This requires demonstrating that the issue transcends the individual interest to become a public interest.

25. Contrary to the suggestion of the Appellants, the nature of probate proceedings does not justify different considerations. First, probate proceedings are still matters that involve the court, and the open court principle continues to serve a vital purpose in this context. As stated by Cory J. in *Edmonton Journal v. Alberta (Attorney General)*:

> In Canada, this Court has emphasized the importance of the public scrutiny of the courts. It was put in this way by Dickson J., as he then was, writing for the majority in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185:
>
> > Many times it has been urged that the 'privacy' of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. …[27]

26. While probate proceedings, as well as certain other types of court proceedings (for example, the approval of a consensual divorce, or the approval of a settlement involving minors), may proceed in a non-contentious manner, this does not undermine the fact that the judiciary is still being engaged and a judicial decision is still being made. There must be public confidence in, and understanding of, that process, with which the courts remain tasked.

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26 *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 ("***Toronto Star***") at para. 7.

27 *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S.C.R. 1326 at 1338.

27. Additionally, a probate proceeding is not "purely administrative", as suggested by the Appellants.[28] The distribution of a deceased's property on their death is undoubtedly an important matter, and the probate process serves a critical role, by determining – and authenticating to third parties – which document or documents constitute the last will and testament of a deceased person, the validity of these documents, and who is entitled to be constituted the personal representative of the deceased.[29] While an application for probate may sometimes be unopposed, this does not undermine the purpose that probate serves, or convert it to somehow merely being "administrative" in nature. Additionally, an unopposed probate matter can easily become contentious in nature, either before or after a grant has been issued.[30]

28. There are also a number of reasons, specific to probate proceedings, why openness of the courts is critical. Specifically, public access increases the likelihood that potentially interested members of the public will become aware of the proceeding,[31] enabling those persons to assess their potential interest in the relevant estate, assess whether they have information or documents relevant to the proceeding, and determine whether they should become involved in the proceeding.

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28 Appellants' Factum at para. 114.

29 Ian Hull and Suzana Popovic-Montag, *Macdonell, Sheard and Hull on Probate Practice*, 5th ed. (Toronto: Carswell, 2016) ("***Hull on Probate***") at 295; George Thompson, *The Law of Wills*, 3rd ed. (Indianapolis: The Bobbs-Merrill Company, 1947) at 288; and Albert H. Oosterhoff et al., *Oosterhoff on Wills*, 8th ed. (Toronto: Carswell, 2016) at §2.4.1.

30 For example, issues can arise as to the existence of a will or other testamentary documents, the capacity of the testator, the form of the will and whether it was properly executed and witnessed, whether the person seeking probate is the appropriate person, and the identity of appropriate beneficiaries (*Hull on Probate*, at 457-458). In British Columbia, certain parties also have the right to seek to vary the terms of a will. This type of claim must be brought within an abbreviated limitation period of six months from the grant of probate, reflecting the importance of third parties knowing the status of probate in a timely manner (*Wills, Estates and Succession Act*, SBC 2009, c. 13, ss. 60 and 61(1)).

31 These parties could include potential beneficiaries (including on an intestacy or under a competing will), individuals who are aware of the existence of competing wills or documents that revoke a will, individuals aware of the circumstances at the time a will was executed or revoked, alternative executors or administrators, and debtors of the deceased.

It also enables third party scrutiny of the probate application, supporting evidence, and resulting grant, which could bring to light problems, such as applications made on the basis of forged documents or brought by improper persons. Further, access to probate proceedings may help prevent multiple estate grants from being issued or duplicative proceedings, particularly in situations where assets or wills are located in multiple jurisdictions. Beyond the estate context, public access to probate proceeding serves various record keeping and research functions,[32] that are important to society. It is incorrect for the Appellants to suggest that there is "no legitimate public interest" in private testamentary affairs or a resulting probate proceeding.[33]

29. Accordingly, nothing about the nature of probate proceedings raises privacy to the level of being a public concern, or lessens the importance of the open court principle.

## PART IV - SUBMISSIONS ON COSTS

30. The Media Coalition does not seek costs and asks that no costs be ordered against it.

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

**Robert S. Anderson, Q.C.**
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**Ludmila B. Herbst, Q.C.**

**Erica C. Miller**

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32 For example, historical probate records can be used for record keeping or genealogical research or to shed light on social and legal conditions that existed in the past; see Linda Tollerton, *Wills and Will-Making in Anglo-Saxon England* (Rochester: York Medieval Press, 2011) and Frederick Furnivall, *The Fifty Earliest English Wills in the Court of Probate* (London: Early English Text Society, 1882). More recent records could be used in studies by economists (*e.g.*, on the distribution of wealth or assets), studying trends in the prevalence of wills and how assets are bequeathed under them, social studies (*e.g.*, into how money is controlled between partners or land transmission trends), or to assist research by lawyers or authors (*e.g.*, into situations where probate has been granted or refused).

33 Appellants' Factum at para. 116.

## PART V - TABLE OF AUTHORITIES

| TAB | AUTHORITY | PARAGRAPH(S) |
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| **Case Law** | | |
| 1. | *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 | **16, 21(e)** |
| 2. | *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175 | **25** |
| 3. | *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] S.C.R. 480 | **16, 17, 20, 21(b)** |
| 4. | *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 | **4, 8, 16, 21(a)** |
| 5. | *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 | **25** |
| 6. | *R. v. Jarvis*, 2019 SCC 10 | **3, 19** |
| 7. | *R. v. Mentuck*, 2001 SCC 76 | **10, 16, 21(c)** |
| 8. | *R. v. O.N.E.*, 2001 SCC 77 | **16, 21(c)** |
| 9. | *Re Vancouver Sun*, 2004 SCC 43 | **5, 20** |
| 10. | *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 | **9, 11, 16, 18, 21(d)** |
| 11. | *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 | **23** |
| **Legislation** | | |
| 12. | *Canadian Charter of Rights and Freedoms*, s. 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 91(24)<br>*Charte Canadienne des Droits et Libertés*, a. 2(b), Partie 1 de la Loi Constitutionnelle de 1982, Annexe B de la *Loi de 1982 sur le Canada* (RU), 1982, c 11, a. 91(24) | **16(a), 20** |
| 13. | *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 137(2)<br>*Loi sur les tribunaux judiciaires*, L.R.O. 1990, chap. C.43, a. 137(2) | **1** |
| 14. | *Wills, Estates and Succession Act, SBC 2009, c. 13*, ss. 60 and 61(1) | **27** |
| **Secondary Sources** | | |
| 15. | Furnivall, Frederick, *The Fifty Earliest English Wills in the Court of Probate* (London: Early English Text Society, 1882) | **28** |
| 16. | Hull, Ian and Popovic-Montag, Suzana, *Macdonell, Sheard and Hull on Probate Practice*, 5th ed. (Toronto: Carswell, 2016) | **27** |
| 17. | Oosterhoff, Albert H. et al., *Oosterhoff on Wills*, 8th ed. (Toronto: Carswell, 2016) | **27** |
| 18. | Thompson, George, *The Law of Wills*, 3rd ed. (Indianapolis: The Bobbs-Merrill Company, 1947) | **27** |
| 19. | Tollerton, Linda, *Wills and Will-Making in Anglo-Saxon England* (Rochester: York Medieval Press, 2011) | **28** |