

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

B E T W E E N:

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. 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

Interveners

FACTUM OF THE RESPONDENT
KEVIN DONOVAN

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

BLAKE, CASSELS & GRAYDON LLP

199 Bay Street
Suite 4000, Commerce Court West
Toronto, ON M5L 1A9

Iris Fischer – LSO #52762M

Tel: (416) 863-2408
iris.fischer@blakes.com

Skye A. Sepp – LSO #72385T

Tel: (416) 863-3887
skye.sepp@blakes.com

Ellie Marshall – LSO #78062B

Tel: (416) 863-3053
Fax: (416) 863-2653
ellie.marshall@blakes.com

BLAKE, CASSELS & GRAYDON LLP

340 Albert Street Suite 1750,
Constitution Square, Tower 3
Ottawa, ON K1R 7Y6

Fey Oni – LSO #78094V

Tel: (613) 788-2210
fey.oni@blakes.com

Counsel for the Respondent, Kevin Donovan

Ottawa Agent for the Respondent, Kevin Donovan

ORIGINAL TO: THE REGISTRAR

COPIES TO:

DAVIES WARD PHILLIPS & VINEBERG LLP

155 Wellington Street West
Toronto, ON M5V 3J7

Timothy Youdan – LSO #19390W
tyoudan@dwpv.com

Chantelle Cseh – LSO #60620Q
ccseh@dwpv.com

Elie Roth – LSO #429350
eroth@dwpv.com

Rui Gao – LSO #75470W
rgao@dwpv.com

Tel: (416) 863-0900
Fax: (416) 863-0871

Counsel for the Appellants, the Estate of Bernard Sherman and the Trustees of the Estate and the Estate of Honey Sherman and the Trustees of the Estate

ATTORNEY GENERAL OF ONTARIO

Crown Law Office - Constitutional Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Peter Scrutton

Tel: (416) 326-4582
Fax: (416) 326-4015
peter.scrutton@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

mfmajor@supremeadvocacy.ca

Tel: (613) 695-8855

Fax: (613) 695-8580

Ottawa Agent for the Appellants, the Estate of Bernard Sherman and the Trustees of the Estate and the Estate of Honey Sherman and the Trustees of the Estate

BORDEN LADNER GERVAIS LLP

1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron

Tel: (613) 369-4795

Fax: (613) 230-8842

Email: kperron@blg.com

Ottawa Agent for the Intervener, Attorney General of Ontario

ATTORNEY GENERAL OF BRITISH COLUMBIA

865 Hornby Street
Suite 1301
Vancouver, BC V6Z 2G3

Jacqueline D. Hughes

Katherine Webber

Tel: (604) 660-4602

Fax: (604) 660-6797

jacqueline.hughes@gov.bc.ca

Counsel for the Intervener, Attorney General of
British Columbia

DMG ADVOCATES LLP

155 University Avenue
Suite 1230
Toronto, ON M5H 3B7

Ryder Gilliland

Agatha Wong

Tel: (416) 238-7537

Fax: (647) 689-3062

rgilliland@dmgadvocates.com

Counsel for the Intervener, Canadian Civil
Liberties Association

BORDEN LADNER GERVAIS LLP

Bay Adelaide Centre, East Tower
3400-22 Adelaide St. W.
Toronto, ON M5H 4E3

Ewa Krajewska

Teagan Markin

Mannu Chowdhury

Tel: (416) 367-6244

Fax: (416) 367-6749

ekrajewska@blg.com

Counsel for the Intervener, Income Security
Advocacy Centre

GIB VAN ERT LAW

148 Third Avenue
Ottawa, ON K1S 2K1

Gib van Ert

Tel: (613) 408-4297

Fax: (613) 651-0304

gib@gibvanertlaw.com

Ottawa Agent for the Intervener, Attorney
General of British Columbia

GOWLING WLG (CANADA) LLP

160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695

Fax: (613) 788-3509

lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Canadian
Civil Liberties Association

BORDEN LADNER GERVAIS LLP

1300-100 Queen Street
Ottawa, ON K1P 1J9

Karen Perron

Tel: (613) 369-4795

Fax: (613) 230-8842

kperron@blg.com

Ottawa Agent for the Intervener, Income
Security Advocacy Centre

FARRIS LLP

700 W Georgia St.
25th Floor
Vancouver, BC V7Y 1B3

Robert S. Anderson, Q.C.

Ludmila B. Herbst, Q.C.

Erica C. Miller

Tel: (604) 661-9372

Fax: (604) 661-9349

randerson@farris.com

Counsel 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.

MCCARTHY TÉTRAULT LLP

Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Adam Goldenberg

Kathryn Gullason

Tel: (416) 601-8357

Fax: (416) 868-0673

agoldenberg@mccarthy.ca

Counsel for the Intervener, British Columbia Civil Liberties Association

GOWLING WLG (CANADA) LLP

160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Tel: (613) 786-0171

Fax: (613) 788-3587

jeff.beedell@gowlingwlg.com

Ottawa Agent 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.

JURISTES POWER

130, rue Albert
Bureau 1103
Ottawa, ON K1P 5G4

Darius Bossé

Tel: (613) 702-5566

Fax: (613) 702-5566

DBosse@juristespower.ca

Ottawa Agent for the Intervener, British Columbia Civil Liberties Association

**HIV & AIDS LEGAL CLINIC ONTARIO
(HALCO)**

1400-55 University Avenue
Toronto, ON M5J 2H7

Khalid Janmohamed

Ryan Peck

Tel: (416) 340-7790 Ext: 4045

Fax: (416) 340-7248

janmohak@lao.on.ca

Counsel for the Interveners, HIV & AIDS Legal
Clinic Ontario, HIV Legal Network and Mental
Health Legal Committee

SUPREME ADVOCACY LLP

100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Tel: (613) 695-8855 Ext: 102

Fax: (613) 695-8580

mfmajor@supremeadvocacy.ca

Ottawa Agent for the Interveners, HIV &
AIDS Legal Clinic Ontario, HIV Legal
Network and Mental Health Legal
Committee

TABLE OF CONTENTS

PART I — OVERVIEW AND FACTS	1
A. Overview	1
B. The facts	3
i) The Shermans’ deaths.....	3
ii) The Sealing Order	3
iii) The Application.....	4
iv) The Appeal	5
v) The New Evidence Motion.....	6
PART II — ISSUES ON APPEAL	7
PART III — STATEMENT OF ARGUMENT	8
A. The standard of review is correctness	8
B. The open court principle applies to all court proceedings	8
i) Open courts and the rule of law.....	8
ii) The guarantees provided by s. 2(b) of the <i>Charter</i>	10
iii) The open court principle applies to probate proceedings.....	12
(a) Probate is a court proceeding.....	12
(b) Function of open courts is engaged by probate matters.....	15
C. The <i>Dagenais/Mentuck/Sierra Club</i> test applies	19
D. Privacy interests are generally attenuated in court proceedings	23
i) Individual privacy interests, “without more”, must yield to open courts.....	23
(a) Privacy is not absolute	24
(b) Not every invasion of privacy results in “harm” to a public interest.....	26
ii) Where there is something “more”, the <i>DM/Sierra Club</i> test protects privacy	27
iii) Canadian privacy legislation does not affect the open court principle	29
iv) The relevance of technological change is limited	31
E. The Appellants’ generalized privacy concerns cannot meet the first branch of the <i>DM/Sierra Club</i> test	32
i) A risk of publicity is not “harm”	32
ii) It is relevant that information is already in the public domain.....	34
iii) Protection of minors’ privacy not absolute	35
iv) Reasonably alternative measures not considered	35
v) Harm to free expression outweighs attenuated privacy interests under the second branch of the <i>DM/Sierra Club</i> test.....	35
F. The Appellants’ speculative security concerns cannot satisfy <i>DM/Sierra Club</i> test .	37
i) The Appellants cannot satisfy the first branch of the test	37
ii) Harm to the public interest outweighs the benefit to speculative security interests.....	39
G. No basis for the Appellants’ requested relief	39
PART IV — COSTS SUBMISSIONS	40
PART V — ORDER SOUGHT	40
PART VI — SUBMISSIONS ON CONFIDENTIALITY	40
PART VII — TABLE OF AUTHORITIES	41

SCHEDULE A – LIST OF FEDERAL AND PROVINCIAL ACCESS TO INFORMATION LEGISLATION THAT DOES NOT APPLY TO COURT RECORDS..47

PART I — OVERVIEW AND FACTS

A. Overview

1. The matter leading to this Appeal began with Kevin Donovan, the Chief Investigative Reporter for the Toronto Star newspaper (the “**Star**”) doing what reporters across the country do every day. Donovan went to the counter at the Estates court in Toronto and asked to see court files. He was investigating the murders of Bernard “Barry” and Honey Sherman (the “**Shermans**”) and had been on the case since shortly after their deaths. In asking for the court files relating to their estates (the “**Estate Files**”), he was engaged in a staple of newsgathering – accessing Canada’s open courts. This principle of openness, constitutionally protected, is foundational to our democracy and critical to the public’s confidence in the administration of justice. Donovan and the Star, as members of the media, were exercising their public interest role as surrogates of the public.

2. Investigative reporters follow many leads and turn over many stones, including while looking into the circumstances of a homicide – an offence against the community in addition to the individual victims.¹ The Star’s investigation into the Shermans’ death also engages broader scrutiny of the justice system, including the actions taken by police, as well as the public interest in the regulation and taxation of large transfers of wealth. When Donovan learned the Estate Files had been sealed, without notice to the media and with no information available, he commenced an application to unseal them.

3. Since that time, the Appellants (the trustees of the Sherman estates and the estates themselves (the “**Estates**”)), have fought unsealing at every stage. They assert that the privacy of the estate trustees and beneficiaries (the “**Sherman Trustees and Beneficiaries**”) and security concerns due to the murders justify overriding the open court principle that assures Canadians of access to court proceedings and records. They continue to advocate for complete sealing of the Estate Files, even after the Ontario Court of Appeal (“**ONCA**”) correctly held that they had not

¹ *R. v. Murdoch*, [1988] O.J. No. 4658 (Ont. H.C.J.) (“**Murdoch**”) at para. 50 [Respondent’s Book of Authorities (“**RBOA**”), **Tab 4**], aff’d 1989 CarswellOnt 2733 (Ont. C.A.); see also *R. v. Turpin*, [1990] O.J. No. 1126 (Ont. H.C.J.) (“**Turpin**”) at 2 [**RBOA, Tab 5**], aff’d 1990 CarswellOnt 2154 (Ont. C.A.); *Re Bradley et al. and The Queen*, 1975 CanLII 766 (ON CA); see also Scott Mair, “Challenging Infanticide: Why Section 233 of Canada’s Criminal Code Is Unconstitutional” (2018) 41:3 Man. L.J. 241 at 264-65 [**RBOA, Tab 24**].

met their onus under this Court's long-standing test for restrictions on court openness (the *Dagenais/Mentuck/Sierra Club*² or the "*DM/Sierra Club test*").

4. In so doing, the Appellants rely on nothing more than a generalized assertion of privacy, advanced by them as a simple and all-encompassing concept that ignores the many nuances recognized by Canadian law and legal theory. They also ignore the jurisprudence, including from this Court, that recognizes – as the ONCA did – that privacy with “something more” is capable of overriding openness under the flexible *DM/Sierra Club* test, but personal concerns “without more” cannot. While the Appellants attempt to describe probate court proceedings as being of “minimal (if any) public interest”,³ this does not withstand basic scrutiny. Probate is a judicial process that impacts rights and obligations between the estate and third parties, in addition to those of beneficiaries and estate trustees.

5. The speculative security concerns advanced by the Appellants similarly cannot ground a restriction on court openness. They rely on a single paragraph of a 13-paragraph sealed affidavit described by the ONCA as containing “conclusory assertions rather than statements of fact”.⁴ While that, and the bald suggestion that the beneficiaries and trustees are at risk simply because the Shermans were murdered and there have been no charges, is reason enough to reject the security argument, the fresh evidence sought to be filed by Donovan provides yet more. That evidence confirms that those believed to be the Sherman Trustees and Beneficiaries are already well known and that Toronto police have no knowledge of any safety issues if the information in the Estate Files were unsealed.⁵

6. Acceding to the Appellants' request here would be “a step too far”.⁶ If given the choice, any one of us might prefer our individual court matter proceed in private. Yet it is fundamental

² *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (“*Dagenais*”); *R. v. Mentuck*, 2001 SCC 76 (“*Mentuck*”); *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (“*Sierra Club*”).

³ Factum of the Appellants filed on January 27, 2020 (“*Appellants' Factum*”) at paras. 39, 113.

⁴ *Donovan v. Sherman Estate*, 2019 ONCA 376 (“*Appeal Decision*”) at para. 13.

⁵ [New Evidence] See below at para. 93.

⁶ *In Re S (FC) (a child)*, [2004] UKHL 47 at para. 26, cited in *R. v. Hosannah*, 2015 ONSC 380 (“*Hosannah*”) at paras. 14, 18, 28.

that this is not how our system works. Rather, “covertness is the exception and openness the rule”,⁷ absent necessity based on a real and substantial risk of harm. In the Shermans’ probate case, like the probate cases of ordinary Ontarians every day, “the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings”.⁸

B. The facts

i) The Deaths

7. On December 15, 2017, Barry and Honey Sherman were found dead in their Toronto home. Barry was the founder of Apotex Inc., the largest generic drug manufacturer in Canada. At the time of their deaths, the Shermans were believed to have a net worth approaching \$5 billion,⁹ and both were well known in philanthropic circles. Though initially pursued as a murder-suicide, the case is now being investigated as a double homicide.

8. Due to the high public profile of the Shermans, the questions raised about the police investigation, and the lack of arrests, the case has generated significant public interest. Their four children made public appearances in the aftermath of the murders. The Sherman Trustees, including the Shermans’ son Jonathon Sherman and their son-in-law Brad Krawczyk, have also appeared on public documents.¹⁰

ii) The Sealing Order

9. On July 11, 2018, Donovan attended at the Ontario Superior Court of Justice, Estates office in Toronto and asked for the Estate Files. Donovan learned that a sealing order had been issued by Dunphy J. on June 26, 2018 (the “**Sealing Order**”), meaning the files that would normally be available for public viewing were not. As a result of an error, the endorsement granting the Sealing Order was also not made part of the public files, meaning Donovan (and the rest of the public) had

⁷ *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 (“*MacIntyre*”) at 185.

⁸ *MacIntyre* at 185.

⁹ Factum of the Applicant, Kevin Donovan, at the Ontario Superior Court of Justice dated July 24, 28 at para. 5 [Respondent’s Record (“**RR**”), **Vol. I, Tab 1**].

¹⁰ [New Evidence] Land Transfer Documents [**RR, Vol. II, Tab 1**] (defined below at footnote 27); Barry Will Article [**RR, Vol. II, Tab 3**] (defined below at footnote 30).

