

**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**

---

**REPLY FACTUM**

**(THE ESTATE TRUSTEES OF BERNARD SHERMAN AND HONEY SHERMAN,  
APPELLANTS)**

(Pursuant to the Order of The Hon. Sheilah L. Martin dated February 21, 2020)

---

**DAVIES WARD PHILLIPS  
& VINEBERG LLP**  
155 Wellington Street West  
Toronto, ON M5V 3J7

**Timothy Youdan  
Chantelle Cseh  
Elie Roth  
Rui Gao**

**SUPREME ADVOCACY LLP**  
100-340 Gilmour Street  
Ottawa, ON K2P 0R3

**Marie-France Major**  
Tel: (613) 695-8855  
Fax: (613) 695 8580  
Email: mfmajor@supremeadvocacy.ca

Tel: (416) 863-0900  
Fax: (416) 863-0871  
Email: tyoudan@dwpv.com  
ccseh@dwpv.com  
eroth@dwpv.com  
rgao@dwpv.com

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

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

**BLAKE, CASSELS & GRAYDON LLP**  
199 Bay Street, Suite 4000  
Commerce Court West  
Toronto, ON M5L 1A9

**Iris Fischer**  
**Skye A. Sepp**  
Tel: (416) 863-2408  
Fax: (416) 863-2653  
Email: iris.fischer@blakes.com  
skye.sepp@blakes.com

**Counsel for the Respondent,  
Kevin Donovan**

**ATTORNEY GENERAL OF ONTARIO**  
Crown Law Office - Constitutional Branch  
720 Bay Street, 4th Floor  
Toronto, Ontario M7A 2S9

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

**Counsel for the Intervener, Attorney  
General of Ontario**

**BLAKE, CASSELS & GRAYDON LLP**  
340 Albert Street, Suite 1750  
Constitution Square, Tower 3  
Ottawa, ON K1R 7Y6

**Fey Oni**  
Tel: (613) 788-2210  
Email: fey.oni@blakes.com

**Ottawa Agent for Counsel for the  
Respondent, Kevin Donovan**

**BORDEN LADNER GERVAIS LLP**  
1300-100 Queen Street  
Ottawa, Ontario  
K1P 1J9

**Karen Perron**  
Tel: (613) 369-4795  
Fax: (613) 230-8842  
Email: kperron@blg.com

**Agent for Counsel for the Intervener,  
Attorney General of Ontario**

**ATTORNEY GENERAL OF BRITISH COLUMBIA**

865 Hornby Street, Suite 1301  
Vancouver, British Columbia  
V6Z 2G3

**Jacqueline D. Hughes**

**Katherine Webber**

Tel: (604) 660-4602

Fax: (604) 660-6797

Email: jacqueline.hughes@gov.bc.ca

**Counsel for the Intervener, Attorney  
General of British Columbia**

**DMG ADVOCATES LLP**

155 University Avenue, Suite 1230  
Toronto, Ontario  
M5H 3B7

**Ryder Gilliland**

**Agatha Wong**

Tel: (416) 238-7537

Fax: (647) 689-3062

Email: 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, Ontario  
M5H 4E3

**Ewa Krajewska**

**Teagan Markin**

**Mannu Chowdhury**

Tel: (416) 367-6244

Fax: (416) 367-6749

Email: ekrajewska@blg.com

**Counsel for the Intervener, Income Security  
Advocacy Centre**

**GIB VAN ERT LAW**

148 Third Avenue  
Ottawa, Ontario  
K1S 2K1

**Gib van Ert**

Tel: (613) 408-4297

Fax: (613) 651-0304

Email: gib@gibvanertlaw.com

**Agent for Counsel for the Intervener,  
Attorney General of British Columbia**

**GOWLING WLG (CANADA) LLP**

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

**D. Lynne Watt**

Tel: (613) 786-8695

Fax: (613) 788-3509

Email: lynne.watt@gowlingwlg.com

**Agent for Counsel for the Intervener,  
Canadian Civil Liberties Association**

**BORDEN LADNER GERVAIS LLP**

1300-100 Queen Street  
Ottawa, Ontario  
K1P 1J9

**Karen Perron**

Tel: (613) 369-4795

Fax: (613) 230-8842

Email: kperron@blg.com

**Agent for Counsel for the Intervener,  
Income Security Advocacy Centre**

**FARRIS LLP**

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

**Robert S. Anderson, Q.C.**

**Ludmila B. Herbst, Q.C.**

Erica C. Miller

Tel: (604) 661-9372

Fax: (604) 661-9349

Email: 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, Ontario  
M5K 1E6

**Adam Goldenberg**

**Kathryn Gullason**

Tel: (416) 601-8357

Fax: (416) 868-0673

Email: agoldenberg@mccarthy.ca

**Counsel for the Intervener, British  
Columbia Civil Liberties Association**

**GOWLING WLG (CANADA) LLP**

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

**Jeffrey W. Beedell**

Tel: (613) 786-0171

Fax: (613) 788-3587

Email: jeff.beedell@gowlingwlg.com

**Agent for 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.**

**JURISTES POWER**

130, rue Albert  
bureau 1103  
Ottawa, Ontario  
K1P 5G4

**Darius Bossé**

Tel: (613) 702-5566

Fax: (613) 702-5566

Email: DBosse@juristespower.ca

**Agent for Counsel for the Intervener,  
British Columbia Civil Liberties Association**

**HIV & AIDS LEGAL CLINIC ONTARIO**

1400-55 University Avenue  
Toronto, ON M5J 2H7

**Khalid Janmohamed**

**Ryan Peck**

Tel: (416) 340-7790 ext. 4045/4047

Fax: (416) 340-7248

Email: janmohak@lao.on.ca  
peckr@lao.on.ca

**HIV LEGAL NETWORK**

600-1240 Bay Street  
Toronto, Ontario M5R 2A7

**Richard Elliott**

Tel: (416) 595-1666 ext. 229

Fax: (416) 595-0094

Email: relliot@aidslaw.ca

**SWADRON ASSOCIATES**

115 Berkeley Street  
Toronto, Ontario, M5R 2A7

**Nima Hojjati**

Tel: (416) 362-1234 ext. 230

Fax: (416) 362-1232

Email: nhojjati@swadron.com

**Counsel for the Interveners,  
HALCO, the HIV Legal Network, and  
the MHLC**

**SUPREME ADVOCACY LLP**

100-340 Gilmour Street  
Ottawa, ON K2P 0R3

**Marie-France Major**

Tel: (613) 695-8855

Fax: (613) 695 8580

Email: mfmajor@supremeadvocacy.ca

**Ottawa Agent for Counsel for the  
Interveners, HALCO, the HIV Legal  
Network, and the MHLC**

**TABLE OF CONTENTS**

PART I - OVERVIEW .....1

PART II - STATEMENT OF ARGUMENT .....1

    A.    The Approach Proposed by the BCCLA is Appropriate .....1

    B.    The Assessment by a Court of the Likely Effectiveness of a Confidentiality Order  
          Must be Contextual .....2

    C.    Recognizing that Privacy is Capable of Grounding a Confidentiality Order Does  
          Not Result in "Secrecy Becoming the Norm" .....3

    D.    The Reasons for Public Access to Probate Proceedings Identified by the Media  
          Coalition Are of Limited Relevance .....4

PART III - TABLE OF AUTHORITIES.....7

## PART I - OVERVIEW

1. The Appellants respond as follows to the arguments of certain interveners:
  - (a) The principled approach proposed by the British Columbia Civil Liberties Association ("BCCLA") is generally an appropriate framework;
  - (b) The assessment of the likely effectiveness of a confidentiality order must be contextual;
  - (c) Recognizing that privacy is capable of grounding a confidentiality order does not result in "secrecy becoming the norm"; and
  - (d) The reasons for public access to probate proceedings identified by the Media Coalition are of limited relevance.

## PART II - STATEMENT OF ARGUMENT

### A. The Approach Proposed by the BCCLA is Appropriate

2. The BCCLA has proposed "a principled approach to the framework for determining whether the protection of privacy is demonstrably justified in a particular case."<sup>1</sup> The Appellants generally endorse the approach proposed by the BCCLA.
3. The Appellants agree with the BCCLA's proposal that courts do away with the "somewhat artificial exercise" of identifying harms to interests other than privacy in order to justify a confidentiality order that is ultimately intended to protect privacy.<sup>2</sup> Privacy in and of itself should be recognized as an important interest, and a serious risk to privacy should be sufficient to satisfy the first stage of the *Sierra Club* test.
4. The distinction proposed by certain interveners between a "communal interest in privacy" (described as an interest in protecting the privacy of vulnerable groups of people) and an "individual interest in privacy" is unwarranted. In addition to ignoring the growing public interest in safeguarding the privacy of all individuals, the purported distinction between the privacy of certain recognized "categories" of vulnerable people, on the one hand, and the privacy of individuals in general, on the other, invites the Court to adopt an inflexible and unworkable

---

<sup>1</sup> Factum of the BCCLA at para. 3.

<sup>2</sup> Factum of the BCCLA at para. 12.



category-based approach.<sup>3</sup> Instead, this appeal presents an opportunity for this Court to craft a contextual framework that recognizes the evolving threats to privacy of all individuals on account of developments in technology that enable the immediate and widespread dissemination of personal information.

5. The Appellants also agree with the BCCLA's submission that where a confidentiality order is sought to protect against a serious risk to privacy, courts should engage in a robust contextual analysis at the second stage of the test. In particular, courts should consider: (i) the interest to be protected; (ii) the information to be protected and its role in the proceeding; (iii) the nature of the proceeding; and (iv) the effect of the order on the values underlying the open court principle.

6. Specifically, the nature of the proceeding must inform the assessment of the deleterious effects on the open court principle. In that regard, the Canadian Civil Liberties Association (the "CCLA") incorrectly suggests that because openness is intended to allow for scrutiny of the court itself, the court cannot assess the degree of public interest in a court proceeding. That amounts to asserting that the extent of the deleterious effects of a given confidentiality order on the open court principle will be the same in all types of proceedings simply because all proceedings are presumptively open. This position is untenable and contrary to this Court's jurisprudence.<sup>4</sup>

**B. The Assessment by a Court of the Likely Effectiveness of a Confidentiality Order Must be Contextual**

7. The BCCLA suggests that in assessing the salutary effects of the requested confidentiality order at the second stage of the *Sierra Club* test, the Court should consider the likely effectiveness of the order. While this factor is potentially relevant, it should be considered contextually.

8. Indeed, courts should not forget that privacy is not an all-or-nothing concept.<sup>5</sup> The fact that certain personal information about an individual was previously disclosed and exists in the public domain does not automatically mean that this individual cannot suffer further harm to their privacy. Simply because "perfect" privacy may not be possible does not mean that applicants for

---

<sup>3</sup> See the discussion regarding a lack of a recognized "category" of privacy protection for the living victims of crime in: Cameron, Jamie, "Victim Privacy and the Open Court Principle" (Ottawa: Government of Canada, 2013), Commissioned Reports and Studies, Paper 167.

<sup>4</sup> See *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 at para. 74.

<sup>5</sup> *R. v. Jarvis*, 2019 SCC 10 at paras. 41, 61. See also: Appellants' Factum at para. 77.

confidentiality orders are undeserving of protection against a serious risk to their privacy.<sup>6</sup>

9. Indeed, courts have previously recognized that confidentiality orders may be granted even though the information in question may exist in the public domain.

10. By way of example, in *Phillips v. Vancouver Sun*, the British Columbia Court of Appeal noted that although the applicant had been subjected to publicity in the past, he was "entitled to take the position that 'enough is enough' and to seek to persuade the court that whatever interest the media may have in obtaining the further information it seeks, he has a greater interest in being left alone..."<sup>7</sup> The Court also made clear that "the fact that there has already been publicity about this case does not mean that further publicity which may flow from disclosure is of little consequence to [the applicant]".<sup>8</sup>

11. In both *Galloway v. A.B.* and *Stuart v. Doe*, courts granted partial sealing orders, among other confidentiality orders, even though there was previous publicity over the personal information in question. The courts found that the salutary effects of the orders were not vitiated by the previous publication of the personal information at issue.<sup>9</sup>

12. In sum, where a confidentiality order is requested to protect against a serious risk to privacy, courts should not discount the likely effectiveness of the requested order simply because the information is present in the public domain, without regard to the circumstances of the previous disclosure and the nature the information at issue.

**C. Recognizing that Privacy is Capable of Grounding a Confidentiality Order Does Not Result in "Secrecy Becoming the Norm"**

13. The CCLA and the Media Coalition argue that if privacy interests in general were recognized as capable of justifying a confidentiality order, "secrecy would be the norm".<sup>10</sup> This argument overstates the Appellants' position.

---

<sup>6</sup> *R. v. Pickton*, 2010 BCSC 1198 at paras. 27-29. See also: *R. v. Halkett*, 2007 SKPC 136 at para. 12(h); *A.B. v. C.D.*, 2010 BCSC 1530 at paras. 74-75; *R. v. Haevischer*, 2013 BCSC 1085 at para. 52; *Canada (National Inquiry into Missing and Murdered Indigenous Women and Girls) v. Canada (Attorney General)*, 2019 FC 741 at para. 6.

<sup>7</sup> *Phillips v. Vancouver Sun*, 2004 BCCA 14 at para. 88 ("*Phillips*").

<sup>8</sup> *Phillips*, *supra* note 7 at para. 91. The Court did not grant the requested sealing order for other reasons.

<sup>9</sup> *Galloway v. A.B.*, 2019 BCSC 395 at paras. 39-42; *Stuart v. Doe*, 2019 YKSC 53 at paras. 32-34.

<sup>10</sup> Factum of the CCLA at para. 15. See also Factum of the Media Coalition at para. 19.

14. The Appellants do not dispute that the open court principle necessarily limits privacy, in that the presumption in favour of open courts implies that the resulting limit on privacy is *presumptively* justified. But this does not mean that the limit on privacy is *always* justified. Nor does it mean that recognizing privacy as an important interest capable of grounding a confidentiality order will result in confidentiality orders being granted as a matter of course. To be clear, the Appellants do not take the position on this appeal that personally identifiable information should be redacted from all probate files as a matter of course, let alone all court files.

15. If this Court accepts the Appellants' (and the BCCLA's) position that privacy should be recognized as an important interest at the first stage of the *Sierra Club* test, an individual seeking a confidentiality order must still show both that (i) there is a serious risk to privacy, and that (ii) no reasonably alternative measures would protect against that risk, in order to satisfy the first stage of the test. That individual will also need to show that the salutary effects of the confidentiality order outweigh its deleterious effects in the circumstances of a given case in order to satisfy the second stage of the test.

**D. The Reasons for Public Access to Probate Proceedings Identified by the Media Coalition Are of Limited Relevance**

16. The Appellants do not dispute that court proceedings are presumptively open, including probate proceedings. The Appellants' position is that the open court principle and freedom of expression are minimally affected by the sealing order in this case, considering the nature of both the information sought to be protected and the proceedings at issue, as well as the limited public aims served by access to the information.

17. The Media Coalition claims that openness of probate proceedings is critical, namely because: (i) openness increases the likelihood that any third parties who are potentially interested in the estates (such as those listed in the Media Coalition's factum)<sup>11</sup> will become aware of the existence of the probate proceedings; and (ii) "access to probate proceedings may help prevent multiple estate grants from being issued or duplicative proceedings".<sup>12</sup> Both of these reasons are of limited relevance, at least on the facts of this case.

18. Even when a confidentiality order – such as the sealing order in this case – is granted, the public is not denied access to the Court's computer records system and the confidentiality order.

---

<sup>11</sup> See Factum of the Media Coalition at para. 28, fn. 31.

<sup>12</sup> Factum of the Media Coalition at para. 28.

Indeed, the public will need to search the Court's computer records system in order to identify the court files of the specific proceeding they wish to access. The computer system will reveal the existence of a proceeding with respect to a specific named estate, the court file number, and the fact that a confidentiality order has been granted in respect of that proceeding. Upon inquiring with the court staff, any member of the public can be provided with the materials other than those that are subject to a confidentiality order.

19. In the present case, the public has access to the *facta* filed by the parties and the Application Decision. These documents reveal that the Certificates of Appointment have been applied for and granted with respect to the estates of the Shermans.<sup>13</sup> The ability to access the sealed materials in this case (in addition to the publicly available materials) has no bearing on the likelihood of potentially interested third parties becoming aware of the existence of probate proceedings. Moreover, any interested third parties can contact counsel for the estate trustees (who are identified in the publicly available materials) to raise any issues concerning the probate proceedings, including in respect of potential multiple estate grants.<sup>14</sup> In that regard, it is highly unlikely to have multiple estate grants in Ontario, because a Certificate of Appointment cannot be issued until the Estate Registrar confirms that no other application for a Certificate has been filed.<sup>15</sup>

20. Contrary to the assertion of the Media Coalition, the importance and relevance of "various record keeping and research functions" served by open access to probate proceedings is questionable. Any record keeping or research would be woefully incomplete given that individuals frequently use a variety of different types of arrangements to pass property on death outside of the probate process.<sup>16</sup>

---

<sup>13</sup> See for example: Application Decision at para. 9.

<sup>14</sup> To the extent that the circumstances of the case change, any confidentiality order may be varied or terminated as appropriate.

<sup>15</sup> See Ministry of the Attorney General, *Estates Procedures Manual* (Ontario: Ministry of the Attorney General, 2019), section 3.2.2 [Reply BOA, Tab 1]. The Estate Registrar also confirms that none of the following documents have been filed: a notice of objection, wills or codicils with a later date, or a request for notice of commencement of proceeding.

<sup>16</sup> See Appellants' Factum at paras. 117-118.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of March, 2020.

Maire E. Kelly, as agent for  
Timothy Youdan, Chantelle Cseh, Elie Roth,  
and Rui Gao

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

**PART III - TABLE OF AUTHORITIES**

	CITATION	At Paragraph(s)
<b><u>Cases</u></b>		
1.	<i>A.B. v. C.D.</i> , <a href="#">2010 BCSC 1530</a>	8
2.	<i>Canada (National Inquiry into Missing and Murdered Indigenous Women and Girls) v. Canada (Attorney General)</i> , <a href="#">2019 FC 741</a>	8
3.	<i>Galloway v. A.B.</i> , <a href="#">2019 BCSC 395</a>	11
4.	<i>Phillips v. Vancouver Sun</i> , <a href="#">2004 BCCA 14</a>	10
5.	<i>R. v. Haevischer</i> , <a href="#">2013 BCSC 1085</a>	8
6.	<i>R. v. Halkett</i> , <a href="#">2007 SKPC 136</a>	8
7.	<i>R. v. Jarvis</i> , <a href="#">2019 SCC 10</a>	8
8.	<i>R. v. Pickton</i> , <a href="#">2010 BCSC 1198</a>	8
9.	<i>Sierra Club of Canada v. Canada (Minister of Finance)</i> , <a href="#">2002 SCC 41</a>	6
10.	<i>Stuart v. Doe</i> , <a href="#">2019 YKSC 53</a>	11
<b><u>Secondary Sources and Other Material</u></b>		
11.	Cameron, Jamie, <a href="#">“Victim Privacy and the Open Court Principle”</a> (Ottawa: Government of Canada, 2013), Commissioned Reports and Studies, Paper 167	4
12.	Ministry of the Attorney General, <i>Estates Procedures Manual</i> (Ontario: Ministry of the Attorney General, 2019)	19