S.C.C. File No. 38695

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 -

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Interveners

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PART I — OVERVIEW

1. This is the reply of Kevin Donovan to the interveners the British Columbia Civil Liberties Association ("**BCCLA**"); HIV & AIDS Legal Clinic Ontario, HIV Legal Network, and Mental Health Legal Committee interveners (together, the "**Health Coalition**"); and the Income Security Advocacy Centre ("**ISAC**").[1] Certain of the arguments made by these interveners undermine the flexible and contextual *Dagenais/Mentuck/Sierra Club* test for discretionary orders restricting court openness (the "***DM/Sierra Club* test**"), ignoring the importance of the open court principle expressed through, among other things, more than three decades of jurisprudence of this Court.

2. The BCCLA takes a similarly flawed approach to the interaction between openness and privacy as the Appellants by proposing that any assertion of privacy in a court proceeding, no matter the strength or substance of the interest, should be sufficient to bypass the 'necessity' branch of the *DM/Sierra Club* test.[2] Though they purport to acknowledge the importance of openness, they advocate for an approach that removes the presumptive protection of s. 2(b) *Charter*[3] rights in favour of individual privacy concerns. If accepted, their submissions would have the effect of requiring the media and the public to justify access to virtually every court proceeding and court record – a fundamental change in the law that would limit and undermine freedom of expression and public interest journalism, which relies heavily on access to courts.[4]

3. ISAC and the Health Coalition (in the bulk of its submissions) recognize the flexibility and adaptability of the *DM/Sierra Club* test and do not challenge the importance of the necessity branch of the test. Indeed, unlike the BCCLA (and the Appellants), they provide examples of situations that may constitute serious risks of harm to public interests that can, and have, led to confidentiality

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[1] The Respondent generally agrees with the submissions of the Media Coalition and the Canadian Civil Liberties Association. The submissions of the Attorney General of Ontario ("**AGO**") are also briefly addressed.

[2] Factum of the Interveners, British Columbia Civil Liberties Association ("**BCCLA Factum**") at para. 15.

[3] *Canadian Charter of Rights and Freedoms*, s. 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("***Charter***").

[4] To some extent, the factum of the Health Coalition ("**Health Coalition Factum**") advances this same problematic approach: paras. 37-39.

orders under the *DM/Sierra Club* test. Their submissions demonstrate the *DM/Sierra Club* test is working properly to protect both openness and serious risks of harm to other important interests. However, to the extent that these interveners propose categorical or blanket exemptions to the *DM/Sierra Club* test, such an approach is both unnecessary and would be a regression in the law.

PART II — STATEMENT OF ARGUMENT

A. By-passing the "necessity" branch fails to protect freedom of expression

4. While the BCCLA states that it recognizes that open courts necessarily limit privacy,[5] and that the presumption of openness is "'inextricably tied to the rights guaranteed by s. 2(b) of the *Charter*",[6] these principles are abandoned when it effectively argues to do away with the first branch of the *DM/Sierra Club* test. This is the result of proposing that the "public interest in personal privacy"[7] should be sufficient to move to the balancing stage of the test.

5. This argument ignores the constitutional foundation of the *DM/Sierra Club* test, which moved away from a "hierarchy of rights" approach to one based on the test in *R. v. Oakes*[8] in order to ensure the "exercise of judicial discretion to order [restrictions on court openness] is subject to no lower a standard of compliance with the *Charter* than legislative enactment."[9] The BCCLA's test would be akin to stripping away the "pressing and substantial objective" and "minimal impairment" branches of the *Oakes* test.[10] It also attempts to move backward to the days when those seeking access to court records had the onus of showing why they should have them.[11] That pre-*Charter* approach has been explicitly rejected.[12]

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[5] BCCLA Factum at para. 5.
[6] BCCLA Factum at para. 1, citing *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 ("***CBC* 1996**") at para 23. See also Factum of the Respondent, Kevin Donovan at paras. 22, 29.
[7] BCCLA Factum at para. 15.
[8] *R. v. Oakes*, [1986] 1 S.C.R. 103.
[9] *R. v. Mentuck*, 2001 SCC 76 ("***Mentuck***") at para. 27. See also *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 ("***Dagenais***") at 877.
[10] *Mentuck* at paras. 23 and 34-36.
[11] See *Canadian Broadcasting Corp. v. R.*, 2010 ONCA 726 at paras. 17-19, explaining that *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671 was decided before *Dagenais* and *Mentuck* and without reference to the *Charter*, and has been overtaken.
[12] *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3 at para. 11.

6. The BCCLA approach would not protect s. 2(b) rights because the necessity requirement serves as the bulwark against claims that are insufficient to undermine the *systemic* principle of openness.[13] Where there is no serious risk of harm to an important public interest, there is no need to weigh the benefits of the order sought against the public's interest in the specific case at hand. Only where the countervailing risk of harm is sufficiently serious (and it cannot be prevented by alternative measures) does such balancing become justifiable. Far from "obscuring"[14] the relevant countervailing interest, requiring courts to identify the public component of the interest that would be harmed and ensure it is more than the pervasive preference to keep information about oneself private is critical to ensuring openness is not "lightly interfered with".[15]

7. For example, if merely pointing to elements of a court matter that would engage personal privacy on some level were enough, nearly every case would be subject to restrictions on openness.[16] Every day, our civil courts hear cases, and documents are filed, dealing with: employment matters that may include issues of harassment, discrimination and wrongful dismissal; matters involving the capital markets that may involve individual investors or the conduct of officers and directors of public companies; tort claims for negligent investigation against police forces that involve individuals (complainants and police officers); matters involving municipal planning, government procurement or environmental matters where individuals may be witnesses or participants; matters involving public health policy; and disputes on everything from product liability to consumer protection to allegations of price-fixing. In the criminal courts, virtually all matters involve individual circumstances, including accused and witnesses. Media reporting on such matters leads to public awareness of a myriad of policy, regulatory and societal matters, shedding light on systemic issues of great relevance to the public.

8. The result of an "upside down" *DM/Sierra Club* test – where the presumption is one of protection of privacy rather than openness – was addressed by the Ontario Superior Court in a

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[13] On the different purpose between the two branches, see *M.E.H. v. Williams*, 2012 ONCA 35 ("***M.E.H.***") at paras. 31-34; *Mentuck* at paras. 34-36.
[14] BCCLA Factum at para. 15.
[15] *Vancouver Sun (Re)*, 2004 SCC 43 at para. 26.
[16] In the context of tribunals, see *Toronto Star v. AG Ontario*, 2018 ONSC 2586 ("***Toronto Star 2018***") at para. 29.

recent decision, in which the Court held that it was a violation of s. 2(b) of the *Charter* for a presumption of non-disclosure to apply to tribunal adjudicative records through the application of Ontario's access and privacy legislation. After reviewing evidence of the impact of such a presumption on journalists' access to tribunal records,[17] Morgan J. held that "[a]n across-the-board presumption …in which privacy and non-disclosure rather than openness and disclosure is the presumptive rule, cannot qualify as a minimum impairment of s. 2(b) of the *Charter*."[18]

9. The BCCLA's proposed approach also ignores the critical role of journalists, who act as the "surrogates"[19] for and "eyes and ears of the public"[20] in relaying information about the administration of justice. Investigative journalism in particular has been recognized by the courts as critical to a functioning democracy.[21] Many important stories could not be researched and will not be told if the media has to bring costly applications to defend public access to information that litigants, or other justice system participants, would prefer to keep private. In the era of attacks on the free press by elected leaders and others, "fake news", and the proliferation of disinformation online, the value of a free and independent press is more important now than it ever was.[22]

B. There should not be blanket exemptions to the *DM/Sierra Club* test

10. The submissions of the Health Coalition[23] and ISAC have limited relevance to the matters at issue in this Appeal, focusing as they do on issues relating to vulnerable groups facing stigmatization and discrimination. The Appellants are not any of those things – and indeed, are the

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[17] *Toronto Star* 2018 at paras. 28-29, 95. See also paras. 115-116, rejecting arguments of a "chilling effect" on tribunal applications due to litigants concerned about privacy. There was "no real evidence" to support this point.

[18] *Toronto Star* 2018 at para. 95.

[19] *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) [**Respondent's Book of Authorities, Tab 7**].

[20] *R. v. White*, 2005 ABCA 435 at para. 6. See also *CBC* 1996 at para. 23.

[21] See e.g. *R. v. National Post*, 2010 SCC 16 at para. 55.

[22] *A.P. v. L.K.*, 2019 ONSC 4010 at paras. 19-21.

[23] Reference in the Health Coalition Factum to survey evidence at paras. 6 and 8 should be disregarded, per the order of Martin J. dated February 21, 2020 (interveners are not to adduce evidence). See also *Kapoor v. Kuzmanovski*, 2018 ONSC 4770 at para. 22.

trustees and beneficiaries of extremely wealthy and privileged individuals. However, these interveners recognize the inherent flexibility of the *DM/Sierra Club* test[24] and demonstrate that it can be and is used to protect privacy with "something more" – e.g. protecting vulnerable individuals with stigmatized health conditions from discrimination.[25] This underlines the appropriateness of the *DM/Sierra Club* test in protecting legitimate harms flowing from the loss of privacy.

11. However, to the extent the Health Coalition and ISAC suggest that confidentiality orders should automatically issue over certain types of information, or for certain groups of people, creation of such blanket or categorical exemptions to the *DM/Sierra Club* test is problematic and unnecessary.[26] It already takes into account countervailing interests like access to justice and other issues facing the vulnerable. In *Dagenais*, Lamer C.J.C. identified the protection of vulnerable groups such as victims and witnesses as a relevant consideration in whether to grant a publication ban.[27] Since then, access to justice has been specifically recognized as "an essential component of the 'proper administration of justice'".[28]

12. While this is not a case about criminal investigative files or police reports, the submissions of the Attorney General of Ontario also affirm that the *DM/Sierra Club* test is already used to appropriately address privacy interests raised in the context of judicial authorizations for search warrants. Indeed, the decision in *McArthur* demonstrates just that – while the Crown initially sought the full redaction of all names and information of witnesses described in the ITOs, the Court applied the *DM/Sierra Club* test, reviewed evidence, and maintained the minimal redactions needed to protect specific public interests in private information.[29]

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[24] Factum of the Interveners, Income Security Advocacy Centre ("**ISAC Factum**") at para. 14; Health Coalition Factum at paras. 18-19.
[25] Health Coalition Factum at paras. 13, 18, 19.
[26] Among other things, blanket exemptions risk becoming outdated, given sometimes rapid change in social norms.

[27] *Dagenais* at 883.
[28] *M.E.H.* at paras. 26-27.

[29] *Toronto Star Newspapers Ltd., et al. v. Her Majesty the Queen in Right of Ontario*, unreported decision of Mocha J. dated April 15, 2019, with addendum ("***McArthur***") at paras. 27-35, [**Respondent's Supplemental Book of Authorities ("RBOA2"), Tab 1**].

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of March 2020.

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PART III — TABLE OF AUTHORITIES

Authorities	**Paragraph(s)**
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