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 –

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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 LP., THE GLOBE AND MAIL INC., CITYTV, A DIVISION OF ROGERS MEDIA INC.
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and
HIV & AIDS LEGAL CLINIC ONTARIO

Interveners

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The question in this appeal is whether privacy should be recognized as an important public interest capable of engaging the first stage of the test for discretionary orders restricting public access to court filings. This issue will also arise in the context of *Criminal Code* applications for search warrants and production orders. Pursuant to the judgment under appeal, concerns about personal privacy alone are insufficient to engage the first stage of the *Dagenais/Mentuck* test and could not justify orders restricting access to, or publication of, the contents of materials filed on applications for judicial authorizations. Ontario submits that the decision in this case, while consistent with earlier authority from the Court of Appeal for Ontario, is inconsistent with well established legal principles from this Court about the importance of personal privacy in respect of similar information in other contexts.

2. The approach of the Court of Appeal for Ontario to the competing constitutional rights to privacy and freedom of expression is wrong. Privacy in respect of sensitive personal information is a sufficiently compelling interest to warrant legal restrictions on access to, or publication of, court documents that contain sensitive information. Holding that privacy interests are *capable* of satisfying the first stage of the *Dagenais/Mentuck* test does not unduly limit s. 2(b) rights. If so recognized, Ontario submits that the existing legal framework is sufficiently flexible to balance the competing rights and interests in any given case.

PART II – POINTS IN ISSUE

3. In Ontario's submission:

i. some material contained in court filings engages such strong privacy interests that permitting unrestricted public access to, or publication of, that material poses a serious risk to the administration of justice and other important public interests;

ii. recognizing that some intrusions on personal privacy are capable of meeting the first stage of the *Dagenais/Mentuck* test does not result in any *per se* infringement of the open courts principle. This recognition merely enables constitutional balancing of the nature of the claim to privacy with the competing claims of openness, transparency and accountability in the particular context of the information in question and the court filing in which it is

contained; and

iii. courts are well-equipped to consider whether the disclosure of private information would occasion "objectively discernable harm" to an affected person, which is the appropriate threshold measure.

PART III – STATEMENT OF ARGUMENT

A. This Court has Consistently Emphasized the Important Constitutional Dimension to Privacy Interests

4. This Court has confirmed the importance of privacy as an underlying value that informs the s. 7 *Charter* right to liberty and security of the person in many contexts.[1] Privacy interests and expectations are understood to be at their strongest where aspects of individual identity are at stake, such as in the context of information "about one's lifestyle, intimate relations or political or religious opinions".[2] In *R. v. Plant*, the majority explained:

> In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.[3]

5. While much of the constitutional discussion of privacy in Canadian jurisprudence has occurred in the context of claims that the state has improperly invaded privacy brought under s. 8 of the *Charter*, in *R. v. Quesnelle* this Court also confirmed a reasonable expectation that the state will *keep* information it has legitimately acquired private from other private individuals. In so holding, the court unanimously affirmed that "privacy interests in modern society include the reasonable expectation that private information will remain confidential to the persons to whom and restricted to the purposes for which it was divulged."[4]

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[1] *R. v. Duarte*, [1990] 1 S.C.R. 30, at para. 25; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *R. v. Jarvis*, [2019] S.C.J. No. 10; *R. v. Dyment*, [1988] 2 S.C.R. 417, at paras. 15-18.
[2] *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 80.
[3] *R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*, [2004] S.C.J. No. 63, at para. 25.
[4] *R. v. Quesnelle*, [2014] 2 S.C.R. 390, at para. 37.

6. All of the cases from this Court that govern the circumstances and conditions upon which third parties may seek access to records – *O'Connor*, *Mills*, *McNeil*, and *Quesnelle* – hold that an individual's right to privacy is not extinguished simply because he or she has voluntarily disclosed information to a third party or because the state has otherwise acquired material that engages privacy interests.[5] Where the right to privacy conflicts with other rights, the conflict is not to be resolved with reference to an absolute hierarchy of rights, but contextually, by defining the scope of the rights at issue in light of the competing claims.[6]

B. Applications for Judicial Authorizations can Contain Extremely Sensitive Private Information

7. There can be no doubt about the sensitive nature of information in criminal investigative files. This Court observed in *R. v. McNeil* that:

> [A]ny number of persons and entities may have a residual privacy interest in material gathered in the course of a criminal investigation. Criminal investigative files may contain highly sensitive material including: outlines of unproven allegations; statements of complainants or witnesses -- at times concerning very personal matters; personal addresses and phone numbers; photographs; medical reports; bank statements; search warrant information; surveillance reports; communications intercepted by wiretap; scientific evidence including DNA information; criminal records, etc.[7]

8. *R. v. Quesnelle* made similar observations about police reports:

> Police occurrence reports may reveal family status, health information (including statements concerning mental health or the use of drugs and alcohol), and details about housing and employment. They may reveal personal conflicts or details about relationships between individuals. ...Moreover, they very often reveal the extent of an individual's engagement with the criminal justice system. Most significantly, they can reveal previous instances where the witness or complainant has been the victim of criminal activity, including previous sexual assaults.[8] [Citations omitted.]

9. Disclosure of this kind of personal information engages complainants', witnesses', and suspects' informational privacy, as it impinges on their ability to determine for themselves when,

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[5] *R. v. Mills, supra* note 2, at para. 108; *R. v. McNeil*, [2009] 1 S.C.R. 66, at para. 12.
[6] *R. v. Mills, supra* note 2, at para. 61; *Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835, at para. 72.
[7] *R. v. McNeil, supra* note 5, at para. 19.
[8] *R. v. Quesnelle, supra* note 4, at para. 33.

how, and to what extent information about them is communicated to others.[9] This Court has recognized that in some circumstances, including where the information in question relates to complainants in sexual assault investigations, disclosure of intimate personal information "may do particularly serious violence to the dignity and self-worth of an affected person."[10]

10. The same kind of sensitive personal information found in investigative files and police reports, and more, can appear in applications for judicial authorization of investigative tools such as search warrants and production orders. The police officer who applies for a judicial authorization is required to make "full, fair, and frank disclosure" of all material facts.[11] The affiant must present the issuing justice with all the relevant and material evidence gathered to date in an investigation, as well as a summary of the investigative steps that relate to the request for the judicial authorization.[12] The requirements of fairness and candour mean that these applications will often reference information that is not even relied on as grounds to support issuance of the order in question, including references to people or events that have little relevance to the material that is sought.

11. Applications for judicial authorizations routinely contain the deeply personal information of victims, complainants, witnesses, persons of interest, and suspects, including:

- information from police reports and witness interviews prepared in the investigation giving rise to the application, or in the investigation of previous incidents;
- summaries of physical and mental health issues and treatments, medication, therapy, or substance abuse;
- current and previous sexual and romantic relationships, extramarital affairs, sexual history, and sexual preferences;
- financial information, including bank and investment account information, account #s, credit card #s, lines of credit, assets, debts, loans, etc.; and
- addresses, phone #s, email addresses, SIN #s, health insurance #s, driver's license #s, dates of birth, etc.

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[9] *R. v. Tessling*, *supra* note 3, at para. 23.
[10] *R. v. Quesnelle*, *supra* note 4, at para. 34; *R. v. O'Connor*, [1995], *supra* note 1, para. 119.
[11] *R. v. Araujo*, [2000] 2 S.C.R. 992, at para. 46.
[12] S.C. Hutchison, *Hutchison's Search Warrant Manual*, 2015 ed. (Toronto: Carswell), at p. 39.

12. *Toronto Star Newspapers Ltd. et al v. Ontario* (2019), a media application to unseal materials relating to authorizations obtained during the Toronto Police investigation that led to the first degree murder charges against Bruce McArthur, is an example of search warrant documents that included many of the various categories of information outlined above. In that application, the court characterized the number of names mentioned in the warrant materials as "extensive" and observed that:

> [M]any of the persons named likely have no idea that their names and information were revealed to police. Information about them was discovered on computers and phones not belonging to them. Witnesses provided personal information about themselves and other people to police even when some of those people took steps to remain anonymous.[13]

13. Applications for judicial authorizations are *ex parte* proceedings that occur *in camera.*[14] As such, none of these people whose privacy interests are affected are *litigants*. They will almost always be unaware of the fact of an application or its contents, let alone that their personal information is contained in a court filing that is presumptively accessible to the public and available for publication. Further, much of the information contained in these applications will likely never be tendered in court because the investigation does not conclude with charges (or any charges are ultimately resolved with a plea or withdrawn), the information would be inadmissible at a trial,[15] or because it is simply irrelevant to proving guilt or raising a doubt.

14. Ontario submits that the sensitive nature of the private information that is regularly contained in applications for judicial authorizations, and the frequency in which these tools are obtained by law enforcement, represent an important constitutional interest that must be balanced when adjudicating claims of public access to court filings. Any consideration of principles relating to privacy and public access must contemplate this context.

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[13] *Toronto Star Newspapers Ltd. et al v. Ontario*, unreported decision of Justice Mocha in the Ontario Court of Justice dated April 15, 2019, at para. 26.
[14] *Toronto Star Newspapers Lt. v. Ontario,* [2005] 2 S.C.R. 188, at para. 20.
[15] *Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 S.C.R. 721, at paras. 52-54.

C. The *Dagenais/Mentuck* Test as Currently Interpreted in This Context

15. Once a search warrant or other order has been executed, there is a strong presumption that the antecedent application for judicial authorization will be publicly accessible and that its contents will be available for publication.[16] The rationales for the strong presumptive protection of s. 2(b) rights in this context – transparency, scrutiny, and accountability – are of great importance. [17] The key reason for allowing the media to have access to such information is so that the media can inform the public about what has transpired in a legal proceeding. Their ability to do so is dependent on access.

16. This Court's 2005 decision *Toronto Star Ltd. v. Ontario* made clear that the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression in relation to legal proceedings, including materials filed in applications for judicial authorizations. The test is meant to be applied in a flexible and contextual manner having regard to the nature of the demonstrated interest in delaying or limiting or precluding public disclosure.[18] Different considerations will apply in different contexts, *e.g.*, if the order is sought to protect the integrity of an ongoing investigation or to protect fair trial rights. As this Court explained in *R. v. Mentuck*:

> It also bears repeating that the **relevant rights and interests will be aligned differently in different cases, and the purpose and effects invoked by the parties must be taken into account in a case-specific manner**. … **The test exists to ground the exercise of discretion in a constitutionally sound manner, not to command the same result in every case.**[19] [Emphasis added.]

17. The *Dagenais/Mentuck* test provides that discretionary court orders in the context of criminal proceedings that limit s. 2(b) rights should only be imposed when:

a. such an order is necessary in order to prevent a serious risk to the proper administration of

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[16] *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Toronto Star Newspapers Lt. v. Ontario*, [2005] 2 S.C.R. 188, at para. 20.
[17] *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41, at paras. 30 and 52; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. Canada*, 2013 ONSC 6983, at para 58.
[18] *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, at para. 31.
[19] *R. v. Mentuck*, [2001] 3 S.C.R. 442, at para 37.

justice, because reasonably alternative measures will not prevent the risk; and

b. the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

18. *Sierra Club of Canada v. Canada (Minister of Finance)* provides that a functionally equivalent test applies in a non-criminal context. Rather than requiring a serious risk to the proper administration of justice, the party seeking some restriction to the open courts principle must establish a serious risk to an important public interest.[20]

19. The *Dagenais/Mentuck* test has been frequently applied in the context of concerns about the preservation of an accused's fair trial rights[21] or the preservation of the integrity of ongoing criminal investigations.[22] The law, however, provides less guidance as to how this test should operate when the rationale for restricting access or publication is motivated by an interest that is more private in nature. As interpreted by the Ontario Court of Appeal in the instant case, the privacy and dignity of individuals only has relevance at the second stage of the *Dagenais/Mentuck* test once the "necessity" component has been met.[23] "Personal concerns" without a public interest component are insufficient to satisfy the first stage of the test.[24] This reasoning is consistent with the leading Ontario authority *H.(M.E.) v. Williams*, that "very real personal emotional distress or embarrassment" cannot justify limiting publication of or access to court proceedings and records.[25]

20. Under the law as it stands in Ontario, the threshold public interest at the first stage of the

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[20] *Sierra Club of Canada v. Canada (Minister of Finance), supra* note 16, at paras. 52-53.
[21] *Postmedia Network Inc. v. R.*, 2017 ONSC 1433 (*Wettlaufer)*; *MacDonell c. Flahiff* (1998),123 C.C.C. (3d) 79 (Que. C.A.); *R. v. C.T.V. (Esseghaier)*, 2013 ONSC 5779.
[22] *Toronto Star Newspapers Ltd. v. Ontario,* [2018] O.J. No. 7257 (C.J.) (Sherman investigation); *Re Winnipeg Free Press*, 2006 MBQB 43; *National Post v. Canada*, [2003] O.J. No. 2238 (S.C.J.); *Saint John Police Force v. Canadian Broadcasting Corp.*, 2012 NBPC 17;
[23] *Toronto Star Newspapers Ltd. (Appeal by Donovan) v. Sherman Estate,* 2019 ONCA 376, at para. 11.
[24] *Toronto Star Newspapers Ltd. (Appeal by Donovan) v. Sherman Estate*, 2019 ONCA 376, at paras. 10-14.
[25] *H. (M.E.) v. Williams* 2012 ONCA 35, at para. 25.

test is "serious debilitating physical or emotional harm that goes to the ability of a litigant to access the court" established by "expert medical evidence firmly planted in reliable evidence of the specific circumstances and the condition of the litigant."[26] *H. (M.E.) v. Williams* even raises, but does not address, the question of whether orders limiting public access to such information as social insurance numbers, bank account numbers, and dates of birth are justifiable under the *Dagenais/Mentuck* test.[27]

21. The current approach in Ontario sets the bar too high and does not reflect this Court's recognition of the harm that can be occasioned by the disclosure of intimate personal information. The requirement in Ontario for expert evidence is also inconsistent with this Court's decision in *A.B. v. Bragg Communications Inc.*, which found that some privacy interests are sufficiently compelling to prevail over openness and concluded that courts can infer "objectively discernable harm" as a matter of reason and logic, absent expert evidence.[28] Ontario submits that "objectively discernable harm" is the appropriate threshold measure to be applied under the first stage of the *Dagenais/Mentuck* test.

D. Privacy Should Be Recognized as an Important Legal Interest That Can Justify Limitations on the Open Courts Principle

22. Ontario submits that privacy over sensitive personal information ought to be recognized as a sufficiently important public interest for the purposes of engaging the first stage of the *Dagenais/Mentuck/Sierra Club* test. Allowing for the possibility that a privacy interest might warrant some limitation on access to, or publication of, sensitive material would not result in any *per se* encroachment on s. 2(b) rights. It would merely enable judicial balancing of the nature of the claim to privacy with the competing claims of openness, transparency and accountability in the particular context of the information in question and the court filing in which it is contained.

23. Ontario submits that a constitutional balancing of competing interests in this context should afford some room to consider the nature of the personal information in question, the extent to which

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[26] *H. (M.E.) v. Williams*, *supra* note 24, at para. 30.
[27] *H. (M.E.) v. Williams*, *supra* note 24, at paras. 7-8.
[28] *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, at paras. 16 and 28.

it engages a privacy interest, and whether or how that information could contribute to the public's knowledge and understanding of the court filing in which it is contained. As interpreted by the Ontario Court of Appeal in the instant case, following *H.(M.E.) v. Williams*, the existing test affords no such room.

24. Justice Nordheimer (as he then was) recognized the need for analysis of this kind in *R. v. Canadian Broadcasting Corp.*, a media application to unseal search-warrant materials relating to authorizations obtained during a Toronto Police investigation that uncovered a video of then Mayor Rob Ford using illegal substances. The court provided the media parties access to the bulk of the material contained in the ITO but withheld public access to private information that was not relevant to the investigation, explaining:

> … I accept that there are some appropriate and necessary exceptions to the public's right to know. **I see no reason why personal identifiers such as dates of birth, telephone numbers, licence plate numbers, FPS numbers and the like need to be made public. None of that type of information is necessary to evaluate what led to the granting of the search warrants. Public access to the material filed is given so that the public can understand what has gone on in the court proceeding**, not for the possible purpose of tracking people down. Also, in this day where identity theft is a real and substantial risk, it is even more important that the privacy of such personal identifiers be maintained. In fairness, I should add, on this point, that it is not clear to me that the applicants are seeking access to that information.
>
> The other exception I would permit is regarding certain references made in the ITO to events involving the Mayor's wife who apparently had some personal issues during the course of the time covered by the ITO. I do not see any reason at this stage why her personal circumstances need to be made public. They appear only to have been included to place the Mayor at a particular place and/or with respect to contacts at a particular time but **the underlying reasons for the inclusion of those details regarding the Mayor's wife seem to be of no moment whatsoever to the investigation. In that narrow instance, it seems to me that the specific incidence of potential personal embarrassment is sufficiently great, and its assistance to the public's necessary knowledge relating to the search warrants sufficiently low, to justify maintaining the ban on access to those few items.**[29]
> [Emphasis added.]

25. Ontario submits that this judicial limitation on public access to sensitive personal information that is either irrelevant or tenuously relevant to the object of the court filing is an example of the protection of sensitive personal information that minimally intrudes on s. 2(b)

[29] *R. v. Canadian Broadcasting Corp.*, 2013 ONSC 6983, at paras. 29-30.

rights. So is *Toronto Star Newspapers Ltd. et al. v. Ontario* (2019), *supra*, where the court granted access to the bulk of the sealed warrant material from the Bruce McArthur investigation but redacted identifying information relating to certain categories of people. These included: those with no connections to the suspect or victims, those who had innocuous contact with the suspect or victims, those who advised police they did not want their sexual orientation to be made public or their real names known, and those who had intimate relationships and interactions with a victim, suspect or witness that was detailed in the material. In redacting information that could identify people in these categories, the court reasoned:

> The privacy issue at stake is not orientation but intimate details that are generally among the most private aspects of one's life. Who a person is intimate with, how often they are intimate, the details of how they express their intimacy. These are matters that are fundamental to personal privacy. No direct evidence needs to be presented to the court to establish this assertion. Disclosure of this personal information would present a real and substantial risk to the proper administration of justice. [30]

26. Ontario submits that the examples cited above are consistent with the constitutional analysis of this Court in *A.B. v. Bragg Communications Inc.*, which balanced the harm in revealing a bullied youth's identity against the harm to the open courts principle by allowing her to proceed anonymously. Yet, under the Ontario Court of Appeal's interpretation of the *Dagenais/Mentuck* test in the instant case, this balancing of personal privacy with the s. 2(b) value of openness would be constitutionally impermissible.

E. Recognizing Privacy at This Stage is Consistent With s. 487.3 of the *Criminal Code*

27. Recognizing privacy as a value capable of engaging the first stage of the *Dagenais/Mentuck* test in the context of material filed in applications for judicial authorizations is consistent with the statutory scheme governing public access to sealed warrant materials enacted by Parliament in s. 487.3 of the *Criminal Code*. This Court did not discuss the interplay between the *Dagenais/Mentuck* test and s. 487.3 of the *Criminal Code* in *Toronto Star* (2005) because the warrants at issue were authorized under provincial legislation. It did, however, characterize this *Criminal Code* scheme as codifying the *MacIntyre* principles that "what should be sought is

[30] *Toronto Star Newspapers Ltd. et al v. Ontario* (2019), *supra* note 13, at paras. 28-32, 43.

maximum accountability and accessibility but not to the extent of harming the innocent or of impairing the efficiency of the search warrant as a weapon in society's never-ending fight against crime." [31]

28. Section 487.3(1) provides for an order prohibiting access to, or disclosure of, information relating to a judicial authorization on the ground that a) the ends of justice would be subverted by disclosure for one of the reasons referred to in s. 487.3(2) and b) the reason outweighs the importance of access to the information. Section 487.3(2) provides that an order under s. 487.3(1) may be made:

> **(a)** if disclosure of the information would
>
> > **(i)** compromise the identity of a confidential informant,
> >
> > **(ii)** compromise the nature and extent of an ongoing investigation,
> >
> > **(iii)** endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or
> >
> > **(iv)** **prejudice the interests of an innocent person;** and
>
> **(b)** for any other sufficient reason.

29. Recognizing privacy as a legal interest that is sufficient to engage the first stage of the *Dagenais/Mentuck* test does not derogate from this Court's protection of the importance of the open courts principle. It merely enables the constitutional balancing of these competing interests that was intended by Parliament and which this Court has previously held to be appropriate.

30. Ontario submits that there will be times in which the disclosure of the private information at issue will be necessary to explain and understand the object or purpose of the court filing in which it is included. There will be other times where the information in question will be so personal and private, or so far removed from the object of the court filing in which it is included, that little or none of the interests that animate s. 2(b) will be sacrificed by restricting publication or public access to part of the material. Fortunately, the jurisprudence establishes the availability of a wide

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[31] *Toronto Star Newspapers Lt. v. Ontario,* [2005] 2 S.C.R. 188, at paras. 18-22, citing *Attorney General of Nova Scotia v. MacIntyre*, *supra* note 15, at p. 184

range of remedial measures to reduce s. 2(b) or privacy infringements to a constitutionally tolerable level. These include:

- permitting access to all of the material in question but permitting publication only of information that could not identify an affected person, which this court characterized as occasioning "minimal" harm to the open courts principle in *A.B. v. Bragg Communications Inc.*;
- permitting access to and publication of all material except for that which is very private and/or of tenuous relevance to the object of the proceeding in which the material is contained in a court filing;[32]
- permitting access to all of the material while prohibiting publication of the contents, which permits public scrutiny and affords the media the opportunity to further their reporting;[33] and
- providing the material at issue on a "counsel only" basis to enable informed submissions about the scope of any claim (or the appropriate scope of redactions) while prohibiting publication or distribution.[34]

31. Ontario submits that the appropriate constitutional balancing and remedial measures, if any, must be determined contextually, in reference to the nature of the particular claim in any given case.

F. Sensitive Personal Information Will Often Be Apparent on the Face of the Material in Question

32. Ontario submits that courts are well-positioned to infer objectively discernable harm flowing from the dissemination of private information using reason, logic, and human experience, without the need for direct or expert evidence.[35] In fact, courts are *accustomed* to performing this

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[32] *Canadian Broadcasting Corp. v. Canada,* 2013 ONSC 7309 (Ont. S.C.J.).
[33] *Ottawa Citizen Group* [2005] O.J. No. 2209 (Ont. C.A.), at para 48*; R. v. CTV*, *supra* note 20, at paras 130 and 132.
[34] *Toronto Star Newspapers v. Ontario*, 2013 ONCJ 522, at para 16; *R. v. CTV*, *supra* note 20, at para. 6.
[35] *R. v. Postmedia Network Inc., supra* note 20, at paras. 13-16; *MacDonell c. Flahiff*, 123 C.C.C. (3d) 79 (Q.C.A.), at paras. 32-34; *R. v. C.T.V. (Esseghaier)*, 2013 ONSC 5779 at para. 98; *R. v. Toronto Star Newspapers Ltd.*, 2015 ONSC 1064, at para 14; *R. v. Blackmore*, 2018 BCSC 1225, at para 107: "Where appropriate, a court is entitled to consider matters of general human nature and prediction and is also entitled to accept the submissions of counsel or factor outside the scope of tendered evidence in considering the legally protected interests at play in its application of the

kind of analysis, as they are regularly called upon to consider whether and to what extent the disclosure of private information would unduly prejudice a person's dignity, privacy, or security of the person, and to balance these interests against the right of an accused to make full answer and defence, when deciding whether to order production of third party records.[36]

33. Some applications for judicial authorizations will contain information about a complainant in the investigation of sexual offences that would in substance otherwise engage the s. 278.1 *Mills* regime governing an accused's access to records containing "personal information for which there is a reasonable expectation of privacy."[37] These applications are held *in camera* pursuant to s. 278.4 of the *Criminal Code*. Production is only ordered if the material in question is likely relevant and production is in the interests of justice having regard to the right to make full answer and defence *and* the affected person's privacy, personal security, and equality.

34. Similarly, some applications for judicial authorizations in the investigation of sexual offences will contain information about a complainant's sexual activity or history that could only be tendered by the accused in a criminal proceeding after a successful application under s. 278.93 of the *Criminal Code*, which would be held *in camera*. Ontario submits that it would be anomalous to provide the public with unfettered access to this sensitive material, without restriction on publication, simply because it is contained in a court filing.

35. Ontario submits that the fact that information is contained in a court filing should not be the sole determinant of whether sensitive personal information can be accessed or published. There must be room for judicial consideration of the *content* of the information in the *context* of the court filing in which it is contained.

Dagenais/Mentuck test."

[36] *R. v. O'Connor*, *supra* note 1, at para. 156; *R. v. Mills*, *supra* note 2; *R. v. Quesnelle*, *supra* note 4.

[37] *R. v. Quesnelle*, *supra* note 4.

PARTS IV AND V – SUBMISSIONS AS TO COSTS AND ORDER SOUGHT

36. Not applicable.

ALL OF WHICH is respectfully submitted by:

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Counsel for the Intervener
Attorney General of Ontario

DATED at Toronto, Ontario, this 9th day of March, 2019.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

37. Not applicable.

PART VII – AUTHORITIES CITED

A. Caselaw:

No.	Authority	Paragraph(s) Referenced
1.	*A.B. v. Bragg Communications Inc.*, 2012 SCC 46	20, 24, 28
2.	*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175	14, 25
3.	*Canadian Broadcasting Corp. v. Canada*, 2013 ONSC 7309	14
4.	*Dagenais v. C.B.C.*, [1994] 3 S.C.R. 835	6
6.	*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326	14
7.	*H. (M.E.) v. Williams*, 2012 ONCA 35	18, 19, 22
8.	*MacDonell c. Flahiff* (1998),123 C.C.C. (3d) 79 (Que. C.A.)	18, 30
9.	*National Post v. Canada*, [2003] O.J. No. 2238 (Ont. S.C.J.)	18
10.	*Ottawa Citizen Group Inc. v. R.*, [2005] O.J. No. 2209 (Ont. C.A.)	28
11.	*Postmedia Network Inc. v. R.*, 2017 ONSC 1433 (*Wettlaufer)*	18, 30
12.	*R. v. Araujo*, [2000] 2 S.C.R. 992	10
13.	*R. v. Blackmore*, 2018 BCSC 1225	30
14.	*R. v. C.T.V. (Chiheb, Esseghaier)*, 2013 ONSC 5779	18, 28, 30
15.	*R. v. Canadian Broadcasting Corp.*, 2013 ONSC 6983	23, 28
16.	*R. v. Duarte*, [1990] 1 S.C.R. 30	4
17.	*R. v. Dyment*, [1988] 2 S.C.R. 417	4
18.	*R. v. Jarvis*, [2019] S.C.J. No. 10	4
19.	*R. v. McNeil*, [2009] 1 S.C.R. 66	7

20.	*R. v. Mentuck*, [2001] 3 S.C.R. 442	15
21.	*R. v. Mills*, [1999] 3 S.C.R. 668	4, 6, 30, 31
22.	*R. v. O'Connor*, [1995] 4 S.C.R. 411	4, 9, 30, 34
23.	*R. v. Plant*, [1993] 3 S.C.R. 281	4
24.	*R. v. Postmedia Network Inc.*, 2017 ONSC 1433	30
25.	*R. v. Quesnelle*, [2014] 2 S.C.R. 390	4, 8, 9, 30, 31
26.	*R. v. Tessling*, [2004] S.C.J. No. 63	4, 9
27.	*R. v. Toronto Star Newspapers Ltd.*, 2015 ONSC 1064	30
28.	*Re Winnipeg Free Press*, 2006 MBQB 43	18
29.	*Saint John Police Force v. Canadian Broadcasting Corp.*, 2012 NBPC 17	18
30.	*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41	14, 17
31.	*Toronto Star Newspapers Lt. v. Ontario*, [2005] 2 S.C.R. 188	12, 14, 15, 25
32.	*Toronto Star Newspapers Ltd. et al v. Ontario*, unreported decision of Justice Mocha in the Ontario Court of Justice dated April 15, 2019	12, 25
33.	*Toronto Star Newspapers Ltd. (Appeal by Donovan) v. Sherman Estate*, 2019 ONCA 376	18
34.	*Toronto Star Newspapers Ltd. v. Canada*, [2010] 1 S.C.R. 721	12
35.	*Toronto Star Newspapers Ltd. v. Ontario*, [2018] O.J. No. 7257 (Sherman investigation)	18
36.	*Toronto Star Newspapers v. Ontario*, [2013] ONCJ 522	28

B. Secondary Sources:

No.	**Secondary Source**	**Paragraph(s) Referenced**
1.	S.C. Hutchison, *Hutchison's Search Warrant Manual*, 2015 ed. (Toronto: Carswell, 2014)	10

C. Statutory Provisions:

No.	Statute	Paragraph(s) Referenced
1.	*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 English French	2, 14, 16, 21, 24, 28
2.	*Criminal Code*, R.S.C., 1985, c. C-46, s. 278.4 English French	31
3.	*Criminal Code*, R.S.C., 1985, c. C-46, 278.93 English French	34
4.	*Criminal Code*, R.S.C., 1985, c. C-46, s. 487.3 English French	25, 26