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:

ESTATE OF BERNARD SHERMAN AND THE TRUSTEES OF THE ESTATE and ESTATE OF HONEY SHERMAN AND THE TRUSTEES OF THE ESTATE

Appellants

– and –

KEVIN DONOVAN

Respondent

– 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 INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I - OVERVIEW

1. All judicial proceedings, whatever their nature — and the court files associated with them — should presumptively be open to public scrutiny. This presumption of openness "is inextricably tied to the rights guaranteed by s. 2(*b*)" of the *Charter*, *e.g.*, the freedom of expression, the freedom of the press, and "the right of members of the public to obtain information about the courts."[1] Openness fosters the integrity of court proceedings, promotes public comprehension of our system for the administration of justice, and promotes awareness of the matters in that system.[2]

2. Canadians also have *Charter*-protected liberty and security interests in their personal privacy.[3] This Court has recognized the fundamental importance of individuals' "determin[ing] for themselves when, how, and to what extent information about them is communicated to others."[4] As L'Heureux-Dubé J. put it in *O'Connor*, "individual privacy is an essential component of what it means to be 'free.'"[5]

3. Courts must presumptively be open. But they must also have the tools to protect the privacy of individuals who become involved in judicial proceedings. The British Columbia Civil Liberties Association (the "**BCCLA**") intervenes to propose a principled approach to the framework for determining whether such protection is demonstrably justified in a particular case.

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[1] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 [***New Brunswick***], at para. 23. **See also:** *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 [***Edmonton Journal***], at p. 1340.

[2] **See:** *Vancouver Sun (Re)*, 2004 SCC 43 [***Vancouver Sun***], at paras. 23-26; *New Brunswick* (S.C.C., 1996), *supra* note 1, at paras. 20-26; *Edmonton Journal* (S.C.C., 1989), *supra* note 1, at p. 1338.

[3] **See:** *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at p. 369, per La Forest J., citing *R. v. Beare; R. v. Higgins*, [1988] 2 S.C.R. 387, at p. 412. **See also:** *Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502, at para. 29; *Cheskes v. Ontario (Attorney General)* (2007), 87 O.R. (3d) 581 (S.C.), at para. 80; *Toronto Star Newspapers Ltd. v. R.*, 2012 ONCJ 27, at para. 41, quoted in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 [***A.B.***], at para. 18.

[4] A. F. Westin, *Privacy and Freedom* (1970), at 7, quoted in *R. v. Tessling*, 2004 SCC 67, at para. 23, *R. v. Spencer*, 2014 SCC 43, at para. 40, and *R. v. Marakah*, 2017 SCC 59, at para. 39. **See also:** *R. v. Dyment*, [1988] 2 S.C.R. 417 [***Dyment***], at pp. 429-30, per La Forest J.

[5] *R. v. O'Connor*, [1995] 4 S.C.R. 411 [***O'Connor***], at para. 113, per L'Heureux-Dubé J. (dissenting).

4. The BCCLA makes three submissions in this regard.

5. First, open courts limit the right to privacy. They do so out of necessity; judicial openness requires that private information be made public, and some degree of harm to individuals' privacy interests is inherent in curial openness itself. Still, the public disclosure of an individual's otherwise private information in an open court proceeding, however incidental, stands to compromise that individual's constitutionally protected privacy interest in the information. This will not always be justified. The open court principle requires only that it be presumptively so.

6. Second, a serious risk to the public's interest in protecting personal privacy should be sufficient to pass the first, "necessity" stage of the *Dagenais/Mentuck* test.[6] This public interest extends to every individual's privacy. Courts should not be obliged to classify individuals as 'vulnerable' to deem their privacy worthy of judicial protection. Nor should individuals seeking confidentiality orders have to establish, as a threshold matter, that the loss of their privacy would harm them in some additional way. Individuals' particular characteristics and vulnerabilities are properly considered at the second, balancing stage of the *Dagenais*/*Mentuck* inquiry.

7. Third, courts must be particularly careful in conducting the balancing exercise at the second stage of the *Dagenais*/*Mentuck* test in cases in which a confidentiality order is sought to prevent a serious risk of harm to the public interest in protecting personal privacy. Rather than seek criteria to screen out applicants at the first stage, courts should adopt a robust approach at the second stage. They should consider, at least: (a) the interest to be protected; (b) the information to be protected and its role in the proceeding; (c) the nature of the proceeding; and (d) the effect of the order on the values underlying the open court principle.

8. The internet makes the full array of personal information disclosed in court proceedings easier to access and simpler (and cheaper) to share widely.[7] Individuals involved in court proceedings could previously reassure themselves that the broader public was unlikely ever to know about them; even in the age of mass literacy and media, the "public" would generally be

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[6] **See:** *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 [***Dagenais***], at p. 891; *R. v. Mentuck*, 2001 SCC 76 [***Mentuck***], at para. 32; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [***Sierra Club***], at para. 53.

[7] **See:** B. M. McLachlin, "Openness and the Rule of Law", Annual International Rule of Law Lecture (January 8, 2014), at p. 14.

limited to those who attended court or who accessed the physical court file. That is no longer so.[8]

9. The BCCLA's proposed approach to the *Dagenais*/*Mentuck* framework responds to these technological and social developments. It also maintains the appropriately strong presumption in favour of open court proceedings that s. 2(*b*) of the *Charter* requires. The Court should endorse and apply it in this appeal.

PART II - STATEMENT OF ARGUMENT

1. The Open Court Principle Necessarily Limits the Right to Privacy

10. Privacy has "quasi-constitutional" status in Canadian law and plays an essential role in a free and democratic society.[9] Individuals have a reasonable expectation that information about them "w[ill] not be revealed to the general public."[10] Open courts defeat this expectation, and thus necessarily inflict some degree of harm to individuals' privacy interests, and thus to their "dignity, integrity and autonomy."[11] This distinguishes privacy from other legal interests, the protection of which might justify curtailing the application of the open court principle; when individuals are involved in judicial proceedings, their personal privacy is compromised by default.

11. The open court principle presumes that this limit on the right to privacy is justified. It does not require it always to be so. Under the *Dagenais*/*Mentuck* framework, the party seeking to curtail the open court principle's application has the onus of justification, even when a constitutionally protected interest is at stake.[12] This should be true of privacy; an individual should be able to discharge the onus and rebut the presumption of openness by establishing that their loss of privacy would not be justified in the circumstances. This Court should recognize as much here.

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[8] **See:** J. Burkell and J. Bailey, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witness' Personal Information" (2017), 48:1 Ottawa L. Rev. 143, at pp. 170-71. **See also:** *A.B. v. Canada (Citizenship and Immigration)*, 2018 FC 237 [***A.B. v. Canada***], at para. 42.

[9] *Douez v. Facebook, Inc.*, 2017 SCC 33 [***Douez***], at para. 59, per Karakatsanis, Wagner, and Gascon JJ.

[10] *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 71, per La Forest J. (dissenting but not on this point). **See:** *R. v. Jarvis,* 2019 SCC 10 [***Jarvis***], at para. 55.

[11] **See:** *New Brunswick* (S.C.C., 1996), *supra* note 1, at para. 87. **See also:** *Jarvis*, *supra* note 10, at paras. 65-66, citing *Dyment*, *supra* note 4, at pp. 427-29, per La Forest J.

[12] **See:** *Dagenais* (S.C.C., 1994), *supra* note 6, at pp. 890-91; *Mentuck* (S.C.C., 2001), *supra* note 6, at paras. 26, 38-39. **See also:** *New Brunswick* (S.C.C., 1996), *supra* note 1, at para. 71.

2. Necessity To Prevent a Serious Risk of Harm to the Public Interest in Protecting Personal Privacy Should Suffice at the First Step of the *Dagenais*/*Mentuck* Test

12. This Court has historically been reluctant to endorse limits on public access to court proceedings to protect privacy. As Dickson J. (as he then was) stated in *MacIntyre*, "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings."[13] To follow this "general rule", this Court and others have resorted to the somewhat artificial exercise of identifying harms to interests other than personal privacy in order to justify confidentiality orders — even when those orders are, at their core, intended to protect individuals' freedom to decide how their personal information is disclosed and disseminated. Put differently, courts have considered some of the salutary benefits of protecting personal privacy in court proceedings at the first step of the *Dagenais*/*Mentuck* test, rather than at the second step.

13. In *A.B.*, for example, this Court justified limiting the open court principle to protect privacy because disclosure of A.B.'s name would have exposed A.B. to the "objectively discernable" psychological harm of cyberbullying, and would have entailed "inevitable harm to children — and the administration of justice — if they decline to take steps to protect themselves because of the risk of further harm from public disclosure".[14] It should have sufficed to conclude, at the first step of the *Dagenais*/*Mentuck* test, that the anonymity order was necessary to prevent a serious risk of harm to the public interest in protecting A.B.'s personal privacy.

14. Similarly, courts have pointed to a serious risk of harm to the justice system that would arise if the disclosure of private information discouraged victims of crime from coming forward.[15] In endorsing a limit on public access to protect the privacy interest of a homicide victim's parents in photos of their child's autopsy, the British Columbia Supreme Court has pointed to the risk of "serious psychological harm" and the exacerbation of "the physical and psychological symptoms

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

[14] *A.B.* (S.C.C., 2012), *supra* note 3, at paras. 15, 23.

[15] **See:** *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122 [***Canadian Newspapers***], at pp. 129-30; *New Brunswick* (S.C.C., 1996), *supra* note 1, at para. 42; *O'Connor* (S.C.C., 1995), *supra* note 5, at para. 158, per L'Heureux-Dubé J. **See also:** *Criminal Code*, R.S.C. 1985, c. C-46, s. 486.4; J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (2019) [**Rossiter**], at 2.4.2(1), Book of Authorities of the British Columbia Civil Liberties Association [**BOA**], Tab 3.

of Post-Traumatic Stress Disorder."[16] In endorsing a limit on public access to protect the privacy of a non-party's personal health information, the Ontario Superior Court of Justice has pointed to a serious risk that the non-party "would be re-victimized," and suffer "emotional injury" that would "go[] beyond that of being merely embarrassed."[17]

15. None of this reasoning is wrong. Yet, in each of the circumstances just described, courts have obscured the public interest that is ultimately at stake, namely, the public interest in protecting personal privacy. Canadian courts have increasingly (and properly) come to recognize that the public disclosure of private information can result in "devastating harm,"[18] but these harms should be weighed at the second step of the *Dagenais*/*Mentuck* test, not the first. Rather than force courts to avoid Dickson J.'s "general rule", this Court should recognize that there is a public interest in protecting personal privacy, and that a proposed confidentiality order that is necessary to prevent a serious risk of harm to that public interest will satisfy the first, "necessity" step of the analysis.

3. When a Confidentiality Order Is Sought To Protect Personal Privacy, Courts Should Take a Robust Approach at the Second Step of the *Dagenais*/*Mentuck* Test

16. Keeping courts open necessarily affects the public interest in protecting personal privacy. At the same time, protecting personal privacy in court proceedings necessarily limits the application of the open court principle. As such, recognizing the public interest in protecting privacy as sufficient to satisfy the threshold at the first, "necessity" step of the *Dagenais*/*Mentuck* inquiry will make this threshold easier to satisfy in judicial proceedings involving individuals. This is because the risk to this public interest can generally be expected to be "real and substantial,"[19] to be "objectively discernible" even if not "well grounded in the evidence,"[20] and to "pose[] a

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[16] *R. v. G. (W.P.)*, 1999 CarswellBC 1084, [1999] B.C.J. No. 1110 (S.C.) [***G. (W.P.)***], at para. 9 (WL), BOA, Tab 1.

[17] *Fraleigh v. Great-West Life et al.*, 2010 ONSC 2501 [***Fraleigh***], at paras. 58-60, 65. **See also:** *R. v. Sharpe*, 2001 SCC 2 [***Sharpe***], at para. 91, per McLachlin C.J.

[18] *Doe 464533 v. N.D.*, 2016 ONSC 541, at para. 16.

[19] *Sierra Club* (S.C.C., 2002), *supra* note 6, at para. 54; *Dagenais* (S.C.C., 1994), *supra* note 6, at pp. 878, 880; *Mentuck* (S.C.C., 2001), *supra* note 6, at para. 34.

[20] *A.B.* (S.C.C., 2012), *supra* note 3, at para. 15; *Sierra Club* (S.C.C., 2002), *supra* note 6, at paras. 46, 54; *Mentuck* (S.C.C., 2001), *supra* note 6, at para. 34.

serious threat to the [privacy] interest in question."[21]

17. Recognizing the foregoing does not require the Court to restrict the role of personal privacy considerations at the first step of the test. Rather, the Court can and should establish principled parameters for the second, balancing step of the analysis, to be applied in cases where a confidentiality order is sought to protect an individual's privacy. The Court can do so by endorsing the following non-exhaustive list of factors, which can guide a robust approach to the balancing that the right to privacy and the open court principle (and thus s. 2(*b*) of the *Charter*) each require: (a) the interest to be protected; (b) the information to be protected and its role in the proceeding; (c) the nature of the proceeding; and (d) the effect of the order on the values underlying the open court principle. Further, and as in any case in which a confidentiality order is sought, the court must consider the likely effectiveness of the order, since, "even if the importance of the objective itself (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual salutary effects … will not be sufficient to justify these negative effects."[22]

A. Courts Should Consider the Interest To Be Protected

18. Privacy is a fundamental right,[23] but not all losses of privacy are equally injurious to individuals' *Charter*-protected interests. The salutary benefit of the proposed order will depend on the extent of the intrusion on personal privacy it would prevent. Courts may assess the extent of the intrusion by considering: (i) the degree to which an individual's liberty or security is threatened by the state's intrusion (through the publicity of a court proceeding) into the individual's private affairs; and (ii) the extent of the individual's reasonable expectation of privacy in the information that would be publicly disclosed.[24]

19. As discussed above, interests beyond privacy may also be at risk without a confidentiality order, and the court should consider the full extent of such risks at this stage of the analysis. As

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[21] *Sierra Club* (S.C.C., 2002), *supra* note 6, at para. 54; *Mentuck* (S.C.C., 2001), *supra* note 6, at para. 34.

[22] *Dagenais* (S.C.C., 1994), *supra* note 6, at p. 888. **See also** *Mentuck* (S.C.C., 2001), *supra* note 6, at para. 49.

[23] **See:** *Douez* (S.C.C., 2017), *supra* note 9, at para. 105, per Abella J.; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, 2001 FCA 56, at para. 20.

[24] *Ruby v. Canada (Attorney General)*, [2000] 3 F.C. 589 (C.A.), at para. 168; *O'Connor* (S.C.C., 1995), *supra* note 5, at para. 117.

La Forest J. stated in *New Brunswick*, "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."[25] It is far more likely today than when La Forest J. wrote those words that a "failure to protect [privacy] will cause significant harm."[26] Such harms may be "objectively discernible"[27] or "well grounded in the evidence."[28] Courts should be attentive to them.

20. The more kinds of harm that a confidentiality order would prevent (in addition to the harm to the right to personal privacy) the more likely it will be that the order's salutary benefits will outweigh its detrimental effects. Similarly, the court should consider whether the order sought would have the salutary benefit of avoiding serious risks to constitutionally protected interests other than privacy. If it would, then this should weigh in the order's favour at the second, balancing step of the *Dagenais*/*Mentuck* inquiry.[29]

B. Courts Should Consider the Information To Be Protected and Its Role in the Proceeding

21. The extent of the salutary benefits and detrimental effects of the proposed confidentiality order will turn on the extent of the individual's expectation of privacy in the information and the information's nexus (or likely nexus) with the court's exercise of its judicial function in the proceeding. In *O'Connor,* L'Heureux-Dubé J. observed that:

> [P]rivacy can never be absolute. It must be balanced against legitimate societal needs… Evidently, the greater the reasonable expectation of privacy and the more significant the deleterious effects flowing from its breach, the more compelling must be the state objective, and the salutary effects of that objective, in order to justify interference with this right….[30]

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[25] *New Brunswick* (S.C.C., 1996), *supra* note 1, at para. 42 (emphasis added). **See, e.g.:** *A.B.* (S.C.C., 2012), *supra* note 3, at paras. 15, 23; *Sharpe* (S.C.C., 2001), *supra* note 17, at para. 91, per McLachlin C.J.; *O'Connor* (S.C.C., 1995), *supra* note 5, at para. 158, per L'Heureux-Dubé J.; *Canadian Newspapers* (S.C.C., 1988), *supra* note 15, at pp. 129-30; *G. (W.P.)* (B.C. S.C., 1999), *supra* note 16, at para. 9, BOA, Tab 1; *Fraleigh* (Ont. C.A., 2010), *supra* note 17, at paras. 58, 59-60, 65. **See also:** Rossiter, at 2.4.2(1), *supra* note 15, BOA, Tab 3.

[26] *New Brunswick* (S.C.C., 1996), *supra* note 1, at para. 42.

[27] *A.B.* (S.C.C., 2012), *supra* note 3, at para. 15.

[28] *Sierra Club* (S.C.C., 2002), *supra* note 6, at paras. 46, 54.

[29] *New Brunswick* (S.C.C., 1996), *supra* note 1, at para. 71.

[30] *O'Connor* (S.C.C., 1995), *supra* note 5, at para. 117 (citations omitted).

22. In *Sierra Club,* the court considered the nature of the information when considering the deleterious impacts of a confidentiality order. The court concluded that the order would only restrict access to a relatively small number of highly technical documents, which the public would be unlikely to understand.[31] Similarly, in *A.B.,* the Court noted that the publication of the identity of a sexual assault victim was "of relative unimportance", and that the limits on openness imposed by the anonymity order were "minimal".[32] In each of these cases, the Court's analysis shows how the nature of the information and its nexus with the issues in the proceeding informs the assessment of the extent of a proposed order's salutary effects and deleterious impacts.

C. Courts Should Consider the Nature of the Proceeding

23. All judicial proceedings, whatever their nature, should presumptively be open. The open court principle is not automatically displaced or diluted in any particular subset of judicial proceedings, such as judicial investigative hearings,[33] or matrimonial disputes.[34] The same should be true in "non-litigious or ... fundamentally administrative" matters.[35] The core value of ensuring open participation in the political process — which underlies the freedom of expression[36] — is always engaged in judicial proceedings,[37] litigious, administrative, or otherwise. The open court principle is not grounded in the nature of particular proceedings, but in the nature of the forum. Judicial power must always presumptively be subject to public scrutiny, even when it is exercised for "administrative" ends.[38]

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[31] *Sierra Club* (S.C.C., 2002), *supra* note 6, at para. 78.

[32] *A.B.* (S.C.C., 2012), *supra* note 3, at paras. 28-29. **See also:** *Re Southam Inc. and The Queen* (1984), 48 O.R. (2d) 678 (S.C.), aff'd (1986), 53 O.R. (2d) 663 (C.A.), leave to appeal refused, [1986] 1 S.C.R. xiv, at p. 698; *N. (F.), Re*, 2000 SCC 35, at para. 12; *G. (B.) v. British Columbia*, 2004 BCCA 345, at para. 26; *John Doe (Re)*, 2020 NLSC 6, at paras. 17-18.

[33] **See:** *Vancouver Sun* (S.C.C., 2004), supra note 2, at para. 4.

[34] **See:** *Edmonton Journal* (S.C.C., 1989), *supra* note 1.

[35] Appellants' Factum, at para. 39 (and para. 113).

[36] *Irwin Toy Ltd. v. Québec (Procureur général)*, [1989] 1 S.C.R. 927, at p. 976; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 762-764, per Dickson C.J.; *Sierra Club* (S.C.C., 2002), *supra* note 6, at para. 75.

[37] *Sierra Club* (S.C.C., 2002), *supra* note 6, at para. 83.

[38] **See:** *Hong v. Lavy*, 2019 NSSC 271, at paras. 24-26; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83 [***Coltsfoot***], at paras. 83-84; *Vancouver Sun* (S.C.C., 2004), *supra* note 2, at paras. 23-27; *MacIntyre* (S.C.C., 1982), *supra* note 13, at pp. 183, 186.

24. Still, the nature of the proceeding will inform the extent of the salutary benefits and detrimental effects of a proposed restriction on public access. For example, *Sierra Club* recognized an elevated public interest in proceedings in which government action is reviewed. The Court held that, "[s]ince cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when considering the merits of a confidentiality order."[39] It follows that limiting public access to "cases involving public institutions" will have heightened detrimental effects on the open court principle, and on the *Charter*-protected interests it protects.

25. Finally, courts may distinguish between limiting public access to a court proceeding and limiting public access to a court file. The open court principle applies to both,[40] but the public interest in the former may be more significant than the public interest in the latter.[41] Courts should be mindful of the differences between unrestricted public access to a courtroom and unrestricted public access to a court file; information in a court file may more easily be decontextualized, digitized, disseminated, and permanently recorded, all instantaneously and cheaply.[42]

D. Courts Should Consider The Effect of the Proposed Order on the Values Underlying The Open Court Principle

26. As this Court has recognized, whether a confidentiality order is justified may depend on "the *particular* deleterious effects on freedom of expression that the confidentiality order would have."[43] Similarly, this Court has consistently recognized that the degree of constitutional

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[39] *Sierra Club* (S.C.C., 2002), *supra* note 6, at paras. 82-83. **See also:** *British Columbia (Director of Civil Forfeiture) v. PacNet Services Ltd.*, 2018 BCSC 2070, at paras. 40-48; *Edmonton (Police Service) v. Law Enforcement Review Board*, 2013 ABCA 236 [***Edmonton (Police Service)***], at para. 14; *Blue Line Hockey Acquisition Co. v. Orca Bay Hockey Ltd. Partnership*, 2007 BCSC 1483, at paras. 43-44.

[40] *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726, at paras. 28, 44; *Coltsfoot* (NSCA, 2012), *supra* note 39, at paras. 81-91.

[41] **See:** *A.B. v. United Kingdom (Attorney General)*, 2019 NSSC 289, at paras. 16, 45-47; *Named Person v. Vancouver Sun*, 2007 SCC 43, at para. 96, per LeBel J. (dissenting in part).

[42] **See:** K. Eltis, "The Open Courts Principle, Litigant Privacy, and Electronic Court Records", in K. Eltis, *Courts, Litigants, and the Digital Age: Law, Ethics, and Practice* (2d ed., 2016), at pp. 72-73, BOA, Tab 2. **See also:** *A.B. v. Canada* (F.C., 2018), *supra* note 8, at para. 42.

[43] *Sierra Club* (S.C.C., 2002), *supra* note 6, at para. 74 (emphasis in original).

protection to which expression is entitled varies with the nature of the expression.[44] The purpose of the second step of the *Dagenais/Mentuck* test is to weigh the specific incursion on the freedom of expression — which is "undoubtedly a fundamental value"[45] — with the other values implicated by the public disclosure of private personal information in a court proceeding. The outcome of this exercise should depend on the effect of the proposed order on the core values underlying the freedom of expression, and thus the open court principle.

27. In *Sierra Club*, for example, the Court noted that, "without the confidentiality order, the ability of the appellant to mount a successful defence [would] be seriously curtailed," since "the appellant [could not] disclose the documents without putting its commercial interests at serious risk of harm."[46] Thus, "[b]y facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression."[47] By contrast, courts have considered the deleterious effects of a proposed order to be diminished when only limited information is sought to be shielded from public scrutiny, such that the order "would respect the core values underlying the freedom of expression."[48]

PART III - SUBMISSIONS CONCERNING COSTS AND ORDER SOUGHT

28. The BCCLA requests that no costs be awarded for or against it, and takes no position with respect to the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of March, 2020.

Adam Goldenberg / Kathryn Gullason

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[44] *New Brunswick* (S.C.C., 1996), *supra* note 1, at para. 63. **See also:** *Vancouver Sun* (S.C.C., 2004), *supra* note 2, at para. 26; *Sierra Club* (S.C.C., 2002), *supra* note 6, at para 75; *Osif v. College of Physicians & Surgeons (Nova Scotia)*, 2008 NSCA 113 [***Osif***], at para. 33; *Edmonton (Police Service)* (ABCA, 2013), *supra* note 39, at para. 14.

[45] *New Brunswick* (S.C.C., 1996), *supra* note 1, at para. 63, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 72.

[46] *Sierra Club* (S.C.C., 2002), *supra* note 6, at para. 71.

[47] *Sierra Club* (S.C.C., 2002), *supra* note 6, at paras. 71-72.

[48] *Barnes (Re)*, 2016 NLTD(G) 106, at para. 35; *Sierra Club* (S.C.C., 2002), *supra* note 6, at paras. 74-75; *Edmonton (Police Service)* (ABCA, 2013), *supra* note 39, at para. 14; *Osif* (NSCA, 2008), *supra* note 44, at para. 33.

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