NOVA SCOTIA COURT OF APPEAL
Citation: ***Coltsfoot Publishing Ltd. v. Foster-Jacques***, 2012 NSCA 83

Date: 20120816
Docket: CA 367939
Registry: Halifax

Between:

Coltsfoot Publishing Limited

Appellant

v.

Sharon J. Foster-Jacques and Hector J. Jacques

Respondents

Judges: Saunders, Fichaud and Beveridge, JJ. A.

Appeal Heard: May 22, 2012, in Halifax, Nova Scotia

Held: Appeal allowed, sealing order overturned, and partial publication ban or redaction ordered, with costs, per reasons of Fichaud, J.A.; Saunders and Beveridge, JJ.A., concurring

Counsel: Alan V. Parish, Q.C. and R. Paul Thorne for the appellant
Gordon R. Kelly and Adrienne Bowers for the respondent Sharon J. Foster-Jacques
William L. Ryan, Q.C. and Sara Scott for the respondent Hector J. Jacques

Reasons for judgment:

[1] Ms. Foster-Jacques and Mr. Jacques are divorcing. They have filed financial information with the Supreme Court (Family Division) as required by *Civil Procedure Rule* 59. *Frank Magazine* wants to see that information. A judge of the Family Division refused, because of the risk of identity theft from personal information in the court file. The judge said that public and media access to the hearing and to the judge's written reasons satisfied the open court principle. The judge said that a partial publication ban could not be policed, and that redaction would be cumbersome and costly. So she sealed the court file in its entirety. There was no evidence on the motion, and the judge took judicial notice of the facts that were necessary for her ruling. The magazine's publisher appeals, and invokes the open court principle to seek access to the court file.

1. Background

[2] Ms. Foster-Jacques and Mr. Jacques are the Petitioner and Respondent in a divorce proceeding before the Supreme Court (Family Division), under court file No. 1201-064463. The matter has not yet gone to trial.

[3] Coltsfoot Publishing Limited publishes *Frank Magazine*.

[4] Coltsfoot requested access to the Supreme Court (Family Division)'s file for the divorce. On February 18, 2011, Coltsfoot gave notice under Rule 59.60(4). The Notice, addressed to counsel for Ms. Foster-Jacques, cited Court File No. 1201-064463 and said:

> **TAKE NOTICE** that Frank Magazine wishes to obtain access to your file and gives 20 days advance notice pursuant to Civil Procedure Rule 59.60(4).
>
> **AND FURTHER TAKE NOTICE** that any party to the proceeding may apply to the court by way of motion, as provided in Civil Procedure Rule 59.60(5) for an order sealing all or any part of the Court file.
>
> **AND FURTHER TAKE NOTICE** that if no such motion is made, the non-party may be granted access to the file, subject to any terms or conditions set by the court.

[5] Rule 59 applies to divorce proceedings in the Supreme Court of Nova Scotia (Family Division), in the judicial districts where the Family Division sits. Rule 59.60 governs confidentiality orders:

> **59.60** (1) A proceeding under this Rule 59 shall be held in public, except that a judge who is satisfied on either of the following may exclude members of the public from all or part of the proceeding:
>
> (a) the presence of the public could cause emotional harm to a child who is a witness or a participant in the hearing, or is the subject of the hearing;
>
> (b) it is in the interest of the proper administration of justice.
>
> (2) A judge may make an order prohibiting the publication of the identity of a child, or the name of a party or witness, or of any other information that would identify the child.
>
> (3) A judge may order that a court file or any part of the file or any document contained in the file be sealed, treated as confidential, and not made available to the public.
>
> (4) A person, other than a party or counsel for a party, who requests access to a court file must give written notice to the parties no less than twenty days before obtaining access.
>
> (5) A party may make a motion for an order sealing all or part of the court file after delivery of written notice of the request for access.
>
> (6) The person requesting access to the court file must be granted access, subject to any terms or conditions the judge specifies, unless a party makes a motion within the required time.

[6] On March 2, 2011 Mr. Jacques moved under Rule 59.60 for "an order to seal the Court file in this proceeding, as well as a publication ban". His Notice of Motion said: "There is no evidence in support of this motion."

[7] On March 14, 2011, Ms. Foster-Jacques moved for a an order "sealing the entire court file", citing Rule 59.60(5) among other provisions. Her Notice of Motion said: "Given the nature of the relief requested, an Affidavit is not being submitted with this Motion".

[8] There were no affidavits on the motions. Counsel filed briefs. The briefs from counsel for Mr. Jacques and Ms. Foster-Jacques attached extracts from *Frank Magazine*.

[9] On June 28, 2011, Justice Beryl MacDonald of the Supreme Court (Family Division) heard the motions brought by Mr. Jacques and Ms. Foster-Jacques. No witness testified.

[10] On July 13, 2011, Justice MacDonald issued a written decision (2011 NSSC 290) that granted the motions for a sealing order. The judge took judicial notice of the facts that underpinned her reasons. The decision said mere personal privacy and the prospect of embarrassment to Mr. Jacques or Ms. Foster-Jacques did not justify a sealing order, but the court file contained personal identifier information of Mr. Jacques and Ms. Foster-Jacques that could enable identity theft. The judge said there is a public interest to reduce the risk of identity theft that outweighs the salutary effect of the open court principle. As to alternative measures, the judge concluded that a publication ban would "not properly address" the risk because "[t]he court cannot police the later use of personal identifiers" and it would be "cumbersome and costly" to redact the personal identifier information from the court file. Accordingly, the judge directed (para 38) that "[t]his divorce file shall be sealed in its entirety".

[11] Later I will discuss the judge's reasons in more detail.

[12] The judge's Order of November 23, 2011 said:

> 1. The Court file in the within proceeding shall and is hereby sealed in its entirety and shall be available to the parties, their counsel and the Court.

2. Issues on Appeal

[13] **First Issue:** Coltsfoot's eight grounds in its Notice of Appeal, repeated as Issues listed in its factum, share some common denominators. I will consolidate the issues to analyse whether the judge committed an appealable error (1) by finding there was a risk of identity theft that was of sufficient public interest to support a confidentiality order, and outweighed the deleterious effects of the sealing order, and, in particular, (2) by failing to employ an alternative that is less

restrictive than sealing the entire court file. Features of this analysis will include (1) how the absence of sworn evidence affects the discharge of the onus resting on the party who seeks a confidentiality order, and (2) whether the judge erred by taking judicial notice of the adjudicative facts that are central to the disposition of the disputed issue.

[14] **Second Issue:** I will address the judge's view, reiterated by Mr. Jacques on the appeal, that in matrimonial disputes the open court principle is satisfied by the public's attendance in the courtroom to hear the proceedings and by access to the judge's decision, and otherwise does not apply to documents filed with the court.

[15] **Third Issue:** Mr. Jacques and Ms. Foster-Jacques suggested that the personal and private nature of a divorce supports the sealing order, a submission that the judge had rejected. Though there was no notice of contention, the issue was well canvassed in the appeal hearing.

3. Standard of Review

[16] Rule 59.60(3) says the judge "may order" that the file be sealed. This Court reviews a *Rules* based discretionary ruling either for an error of law or principle, assessed for correctness, or to determine whether the judge's exercise of discretion would result in a patent injustice: *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, paras 15-29 and authorities there cited. The question for the Court of Appeal that materializes from the parties' submissions is whether the judge erred in law with her interpretation and application of the open court principle, including her appreciation of the standard of proof and her use of judicial notice.

4. First Issue - Risk of Identity Theft under the Open Court Principle

[17] The judge identified the risk of identity theft as the matter of important public interest that justified the sealing order. Her reasons say:

> [19] ...It is also important to know that much of the information in the court file contains what, in our electronic age, are called personal identifiers. This is information that can identify an individual and can permit another person to "assume" that individual's identity without their knowledge or consent (identity

theft) and then use this information to gain access to bank accounts, insurance information and so on.

...

[24] The Applicant and the Respondent have argued that the public has an interest in and expects personal identifier information contained in court documents to be protected in order to prevent identity theft. I have decided this is a public interest of superordinate importance. It is a privacy interest. In addition society values prevention of identity theft.

[18] The judge said the following about the absence of evidence on the motions:

[28] I have accepted the submissions of counsel in respect to their client's expectations. Expectations are not facts. Affidavits are to provide facts. However, in this situation perhaps an expectation is a fact, and if so I accept those expectations without the necessity of proof by way of affidavit because it flows naturally from the applications made by the parties. If this was not their expectation why make the applications to seal the court file? These are facts that should have been admitted by the media if the purpose of the Nova Scotia Civil Procedure Rules are to be properly applied - that purpose is:

> 1.01 These Rules are for the just, speedy and inexpensive determination of every proceeding.

[29] Failure to recognize the obvious and to require "strict proof" may have its place in some proceedings. However, in this court in particular, where parties financial capacities are so often very limited, blind adherence to an adversarial process may work an unnecessary injustice. I believe I am permitted to recognize the obvious.

...

[32] The risk of identity theft is real. I should not have to wait until it occurs to recognize that risk. I do not need a police officer to inform me about this risk. The concern about identity theft is frequently the topic of discussion in newspapers, in government departments, and in judicial committees (for example the Canadian Judicial Council approved a document "Use of Personal Information in Judgments and Recommended Protocol" in March 2005). Considering the devastating consequences that can result to an individual whose identity is stolen, identity theft constitutes a substantial risk though at present it may infrequently occur. It is important that it remain an infrequent event and that all efforts be

> made to protect those who must provide information from losing control over their personal identifiers.
>
> [33] If I am required to place my analysis into an evidentiary context to justify my finding that there is a public interest and social value imbedded in the expectation of privacy and confidentiality for personal identifiers, and the risk of identity theft is real, I do so by taking judicial notice of the facts I have used to support my analysis upon the principles expressed in *R. v. Find*, [2001] 1 S.C.R. 863 and *R. v. Spence*, [2005] 3 S.C.R. 458.

[19] The judge concluded that there was no reasonable alternative measure, other than sealing the complete court file, that would protect against identity theft:

> [26] Forbidding the publication or use of personal identifiers information by those who would examine a court file does not properly address the private and confidential nature of this information, nor the concern about its potential misuse. Little that is filed in the Family Division is filed voluntarily. Most of the material in the file must be filed by the rules of court and, on occasion, court order. The court cannot police the later use of personal identifiers by a member of the public including the media, who has viewed material containing this information. ...
>
> ...
>
> [35] Other than removing the personal identifier information from documents required to be filed in this court, I can think of no means by which to protect this information except to issue an order sealing this file. Any attempt to collect the required disclosure, while removing identifiers so that they would be provided when necessary but remain undisclosed to the public, would be cumbersome and costly to the parties and to the court's administration. It would necessitate filing two sets of these documents, one with all personal identifiers removed, accessible to the public, and one with the identifiers in separate file, not accessible to the public, essentially two files for every proceeding.

[20] Did the judge err in law in her analysis of the open court principle?

Judicial Discretion

[21] The motions for the confidentiality order are under Rule 59.60(3) - the judge "may" order that the file be sealed or treated as confidential - and are "subject to any terms and conditions the judge specifies" under Rule 59.60(6). As the judge

(para 5) noted, “Civil Procedure Rule 59.60 does not provide any factors that are to be considered in the exercise of the discretion provided”.

[22] Rule 59.02(2) states:

> (2) The Rules outside Part 13 - Family Proceedings, with any necessary changes, apply to practice and procedure in the Supreme Court (Family Division) that is not governed by Part 13.

Rule 59 is in Part 13 (Family Proceedings). Rule 85 (Access to Court Records) is outside Part 13, and applies to the Supreme Court of Nova Scotia generally. Rule 85.04(1) says:

> (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle.

[23] The judge (para 7) took Rule 85.04(1) as a direction that she should exercise her discretion in accordance with the standards governing the open court principle that stem from *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, *R. v. Mentuck*, [2001] 3 S.C.R. 442 and the authorities that expand on *Dagenais*/*Mentuck.*

[24] I agree that the *Dagenais/Mentuck* line of authority governs the judge’s discretion under Rule 59.60. This would be so even without Rules 59.02(2) and 85.04(1). The open court principle derived from the common law: *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175, paras 53-63. But it is now constitutionally embedded as an element of freedom of expression, including freedom of the press and other media, in s. 2(b) of the *Charter*: see authorities cited in *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, paras 33 and 81, and *Canadian Broadcasting Corp v. The Queen*, [2011] 1 S.C.R. 65 [“*Dufour”*], paras 11-14. The exercise of judicial discretion under Rule 59.60 must comply with the constitutional standards: *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332 [“*Vancouver Sun* 2004], para 31, per Justices Iacobucci and Arbour for the majority, and authorities there cited; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, para 48; *Globe and Mail v. Canada (Attorney General)*, [2010] 2 S.C.R. 592, para 87; *Dufour*, paras 13-14.

The Open Court Principle

[25] What are the elements of the open court principle?

[26] In *Sierra Club*, Justice Iacobucci for the Court formulated the *Dagenais*/*Mentuck* test as it applied to a request for a confidentiality order for documentary filings under *Federal Court Rule* 151. Rule 151 said:

> **151.** (1) On motion, the Court may order that material to be filed shall be treated as confidential.
>
> (2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

Justice Iacobucci stated:

> 53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:
>
> A confidentiality order under Rule 151 should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right of free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> 54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.
>
> 55 In addition, the phrase “important commercial interest” is in need of some clarification. In order to qualify as an “important commercial interest”, the interest in

> question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. . . . Simply put, if there is no general principle at stake, there can be no "important commercial interest' for the purposes of this test. Or, in the words of Binnie J. in *Re F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para 10, the open court rule yields "where the public interest in confidentiality outweighs the public interest in openness". [Justice Iacobucci's emphasis]
>
> 56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. [citation omitted]
>
> 57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

[27] To summarize, in this case the judge's task was to determine whether (1) the sealing order was necessary to prevent a serious risk to an important interest, because reasonable alternative measures would not alleviate the risk, and (2) the salutary effects of the sealing order outweigh its deleterious effects, that include a limitation on constitutionally protected freedom of expression. On the first point, the important interest must be (a) real, substantial and well grounded in the evidence, and (b) involve a general principle of significance to the public, not just of personal interest of the parties, while (c) the judge's consideration of reasonable alternative measures must restrict the confidentiality order as much as possible while preserving the important interest that requires confidentiality.

The Role of Evidence

[28] There was no evidence before the judge on these motions. So whether there was a need for evidence, to traverse the open court principle, was in serious contention on this appeal. I will elaborate on the applicable principles.

[29] As Justice Iacobucci said in *Sierra Club* (para 54), the risk "must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat".

[30] Some years earlier, in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, Justice La Forest, for the Court, elaborated on the evidentiary onus:

> 71. The burden of displacing the general rule of openness lies on the party making the application. As in *Dagenais*, supra, the applicant bears the burden of proving; that the particular order is necessary, in terms relating to the proper administration of justice; that the order is as limited as possible; and, that the salutary effects of the order are proportionate to its deleterious effects. In relation to the proportionality issue, if the order is sought to protect a constitutional right, this must be considered.
>
> 72. There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially. In some cases in which the facts are not in dispute the statement of counsel will suffice. If there is insufficient evidence placed before the trial judge, or there is a dispute as to the relevant facts, the appellant should seek to have the evidence heard in camera. ...
>
> 73. A sufficient evidentiary basis permits a reviewing court to determine whether the evidence is capable of supporting the decision. ...
>
> > Discretion is an important element of our law. But, it can only be exercised judiciously when all the facts are known.
>
> ...
>
> 75. The information available to the trial judge must also allow a determination as to whether the order is necessary in light of reasonable and effective alternatives, whether the order has been limited as much as possible and whether the positive and negative effects of the order are proportionate.
>
> ...
>
> 78. Where the record discloses facts that may support the trial judge's exercise of discretion, it should not lightly be interfered with. The trial judge is in a better position to draw conclusions from the facts he or she sees and hears, and upon which he or she may exercise the judicial discretion. This, however, presupposes that the judge has a sufficient evidentiary or factual basis to support the exercise of discretion and that the evidence is not misconstrued or overlooked.

...

> 85. The importance of a sufficient factual foundation upon which the discretion in s. 486(1) is exercised cannot be overstated, particularly where the reasons given by the trial judge in support of an exclusion order are scant. ...

[31] The "sufficient evidentiary basis" should include more than just conclusory assertions. In *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188, Justice Fish for the Court said:

> 9 Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption would favour secrecy rather than openness, a plainly unacceptable result.

[32] Similarly, in *Globe and Mail*, Justice LeBel for the Court (paras 92-94, 99) rejected the "bald assertions, without more", with "no tangible proof" of the supposed serious risk that was advanced for the requested publication ban.

[33] There have been matrimonial authorities where the courts have approved confidentiality orders. The severity of the confidentiality order varies with the degrees that the *evidence* established both a serious risk of harm, usually involving children, and that no reasonable alternative measure would alleviate the risk: *e.g.*: *M.S.K. v. T.L.T.* (also known as *Kolesa v. Thomson*), [2003] O.J. No. 352 (C.A.); *Himel v. Greenburg*, 2010 ONSC 2325; *Radtke v. Gibb*, 2009 SKQB 440; *K.V. v. T.E.*, [1998] B.C.J. No. 1150, paras 7 and 20; *S.(C.) v. S.(M.)* (2007) R.F.L. (6th) 373 (O.S.C.); and see discussion in *M.E.H. v. Williams*, 2012 ONCA 35 paras 25-29; *R.F. v. O.B.*, 2006 SKQB 496, paras 39-41; *A.B. v. C.D.*, 2012 BCSC 267, paras 115-17.

[34] Appellate courts have overturned confidentiality orders that were issued without sufficient evidentiary basis: *e.g. CTV Television Inc. v. R.*, 2006 MBCA 132 (*sub nom. R. v. Hogg*) and *M.E.H.* (O.C.A.).

[35] In *CTV*, Justice Monnin said:

> 30 Looking at the judge's reasons in the context of *Dagenais*, *Mentuck* and *Toronto Star*, I can only come to the conclusion that he erred. He did not have before

> him an underlying factual context on which to base his conclusion. With a different factual matrix, he could well have been correct but that is not the reality of this case.
>
> ...
>
> 42 In the present case, when the judge speaks of "compelling common sense and logic" and "judicial experience" he can only be referring to judicial notice under another name. His reasoning, therefore, must be subject to the restrictions that the Supreme Court has expressed in *Spence* [*R. v. Spence*, [2005] 3 S.C.R. 458], as well as the evidentiary requirements referred to therein. In this case, there was no evidence that could permit him to link the difficulty courts have had in convincing police services to videotape statements of accused persons with the release of the respondent's videotaped statement, sufficient to displace the presumption of openness of the courts.

I will return to the *CTV* decision later (para 44) on the topic of judicial notice.

[36] In *M.E.H.*, Justice Doherty said:

> 32 ...A court faced with a case like this one where decency suggests some kind of protection for the respondent must avoid the temptation to begin by asking: where is the harm in allowing the respondent to proceed with some degree of anonymity and without her personal information being available to the media? Rather, the court must ask: has the respondent shown that without the protective orders she seeks there is a serious risk to the proper administration of justice?
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> ...
>
> 34 ...Evidence said to justify non-publication and sealing orders must be "convincing" and "subject to close scrutiny and meet rigorous standards": *R. v. Canadian Broadcasting Corp.* [2010 ONCA 726], at para. 40; *Toronto Star Newspapers Ltd. v. Ontario* (2003), 67 O.R. (3d) 577 (C.A.), at para. 19, aff'd 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 41; see also *Ottawa Citizen Group* [*Ottawa Citizen Group Inc. v. R.* (2005), 75 O.R. (3d) 590], at para. 54.
>
> ...
>
> 62 The motion judge erred in law in exercising her discretion in favour of granting the non-publication and sealing orders. The material presented by the respondent did not provide the kind of convincing evidence needed to satisfy the first branch of the *Dagenais Mentuck* test.

[37] At the hearing of this appeal, counsel for Coltsfoot cited Justice Iacobucci's comments in *Sierra Club* (that the interest be "real and substantial" and the risk be "well grounded in evidence") and *M.E.H.*'s reference to *R. v. Canadian Broadcasting Corp.* (that the evidence be "convincing" and meet "rigorous standards"). Counsel deduced a suggestion that the burden of proof on the applicant for a confidentiality order exceeds the normal civil standard of balance of probabilities.

[38] I cannot accept this suggestion. In *F.H. v. McDougall*, [2008] 3 S.C.R. 41, paras 40-49, Justice Rothstein for the Court pronounced "once and for all in Canada" (para 40) that there is only one formal civil standard of proof - balance of probabilities - which is not shaded variably in different types of case, and in all cases the judge is to scrutinize the evidence with the same degree of care. Accordingly, I do not read *Sierra Club* and its progeny as altering either the formal standard of proof or the degree of scrutiny expected from a judge in her fact finding. My reading of the authorities, such as *Globe and Mail*, is that the facts to support a confidentiality order must be established by evidence (that is assessed on the balance of probabilities), not by bald assertions or unsworn generalizations, and those facts in turn must establish a real and substantial risk to an important public interest.

Judicial Notice

[39] The judge said (para 33) "If I am required to place my analysis into an evidentiary context ... I do so by taking judicial notice of the facts I have used to support my analysis based on the principles expressed in *R. v. Find* [2001] 1 S.C.R. 863 and *R. v. Spence* [2005] 3 S.C.R. 458."

[40] The judge was required to place her analysis into an evidential context. That is clear from the authorities I have just discussed.

[41] The judge's reasons neither mentioned nor analysed the elements of the test for judicial notice that appear in *Find* and *Spence.*

[42] In *Find*, Chief Justice McLachlin for the Court said:

> 48 In this case, the appellant relies heavily on proof by judicial notice. Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial

> notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy [citations omitted].

After citing comments in the decision under appeal about the behaviour of victims of sexual abuse, the Chief Justice continued:

> 59 This is, however, merely the statement of an assumption, offered without a supporting foundation of evidence or research. Courts must approach sweeping and untested "common sense" assumptions about the behaviour of abuse victims with caution [citations omitted]. Certainly these assumptions are not established beyond reasonable dispute, or documented with indisputable accuracy, so as to permit the Court to take judicial notice of them.

[43] In *Spence*, Justice Binnie for the Court (para 53) referred to the Chief Justice's statement of the criteria in *Find*. He said (para 54) that *Find*'s approach was based on the writing of Professor E. M. Morgan: "Judicial Notice", (1943-44), 57 Harvard Law Review 269 (the "*Morgan* criteria"). Justice Binnie then cautioned that judicial notice of a general social fact should not, by analytical inertia, slipstream into judicial notice of a particular adjudicative application of that fact which disposes of the case at hand. Any particular application of the dispositive adjudicative fact, by judicial notice, should itself satisfy the criteria of notoriety or indisputability. Justice Binnie observed:

> 56 It could be argued that the requirements of judicial notice accepted in *Find* should be relaxed in relation to such matters as laying a factual basis for the exercise of a discretion to permit challenges for cause. These are matters difficult to prove, and they do not strictly relate to the adjudication of guilt or innocence, but rather to the framework within which that adjudication is to take place. Such non-adjudicative facts are now generally called "social facts" when they relate to the fact-finding process and "legislative facts" in relation to legislation or judicial policy. ...
>
> 57 "Social fact" evidence has been defined as social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case [citation omitted]. As with their better known "legislative fact" cousins, "social facts" are general. They are not specific to the circumstances of a particular case, but if properly linked to the adjudicative facts, they help to explain aspects of the evidence. Examples are the Court's acceptance of the "battered wife syndrome" to explain the wife's conduct in *R. v. Lavallee,* [1990] 1 S.C.R. 852 (S.C.C.), or the effect of the "feminization of

poverty" judicially noticed in *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.), at p. 853.
...

58 No doubt there is a useful distinction between adjudicative facts (the where, when and why of what the accused is alleged to have done) and "social facts" and "legislative facts" which have relevance to the reasoning process and may involve broad considerations of policy [citation omitted]. However, simply categorizing an issue as "social fact" or 'legislative fact" does not license the court to put aside the need to examine the trustworthiness of the "facts" sought to be judicially noticed. Nor are counsel encouraged to bootleg "evidence in the guise of authorities" [citation omitted].

...

61 To put it another way, the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria.

...

63 It is when dealing with social facts and legislative facts that the *Morgan* criteria, while relevant, are not necessarily conclusive. There are levels of notoriety and indisputability. Some legislative "facts" are necessarily laced with supposition, prediction, presumption, perception and wishful thinking. Outside the realm of adjudicative fact, the limits of judicial notice are inevitably somewhat elastic. Still, the *Morgan* criteria will have great weight when the legislative fact or social fact approaches the dispositive issue. For example, in *R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70 (S.C.C.), LeBel J. observed:

> The fact that unions intervene in political social debate is well known and well documented and might be the object of judicial notice. ...
>
> Taking judicial notice of the fact that Quebec unions have a constant ideology, act in constant support of a particular cause or policy, and seek to impose that ideology on their members seems far more controversial. It would require a leap of faith and logic, absent a proper factual record on the question. [paras. 226-27]

See also *Gladue* [*R. v. Gladue*, [1999] 1 S.C.R. 688], at para 83.

...

65 When asked to take judicial notice of matters falling between the high end already discussed where the *Morgan* criteria will be insisted upon, and the low end

> of background facts where the court will likely proceed (consciously or unconsciously) on the basis that the matter is beyond serious controversy, I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute *for the particular purpose for which it is to be used*, keeping in mind that the need for reliability and trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy. ... [Justice Binnie's italics]
>
> ...
>
> 67 ...The facts of which they [the respondent and intervenor] ask us to take judicial notice would be dispositive of the appeal; yet they are neither notorious nor easily verified by reference to works of "indisputable accuracy". We are urged to pile inference onto inference. To take judicial notice of such matters *for this purpose* would, in my opinion be to take even a generous view of judicial notice a leap too far. ... [Justice Binnie's italics]

[44] In *CTV*, *supra*, the Manitoba Court of Appeal applied Justice Binnie's observations to the issuance of a confidentiality order. Justice Monnin said:

> **33** With respect, I am of the view that in the circumstances of this case, the judge erred when he based his conclusion on common sense and logic alone, without the benefit of real and substantial evidence.
>
> ...
>
> **37** To a certain degree, the judge could be said to have taken judicial notice of facts he found central to the resolution of the controversy, and in doing so, he erred. This is even more so since the decision of the Supreme Court of Canada in *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458 (S.C.C.), a case dealing with the racial makeup of juries.
>
> ...
>
> **42** In the present case, when the judge speaks of "compelling common sense and logic" and "judicial experience" he can only be referring to judicial notice under another name. His reasoning, therefore, must be subject to the restrictions that the Supreme Court has expressed in *Spence* [*R. v. Spence*, [2005] 3 S.C.R. 458], as well as the evidentiary requirements referred to therein. In this case, there was no evidence that could permit him to link the difficulty courts have had in convincing police services to videotape statements of accused persons with the release of the

> respondent's videotaped statement, sufficient to displace the presumption of openness of the courts.
>
> **43** The simple fact of this appeal and the Crown's argument in support of the appellant's position demonstrate that reasonable people are debating the accuracy of what the judge concluded as being fact. As such, that fact cannot be taken judicial notice of, based on the first prong of the *Morgan* criteria.
>
> **44** Furthermore, if readily accessible sources were available, they were not advanced before the judge. Satisfaction of this criterion would have required the judge to take judicial notice of the existence of such sources, and then make a further inference that these sources confirmed that releasing the videotape would create reluctance to consenting to future videotaping. Simply piling inference upon inference does not satisfy the second prong of the *Morgan* criteria.
>
> **45** When the judge took judicial notice of the fact that the releasing of the videotape would hinder the producing of videotaped statements before the courts, that conclusion became determinative of the application. Being so central to the issue at hand, the dicta of *Spence* should have been applied and the *Morgan* criteria should have been adhered to strictly. Neither prong of the *Morgan* criteria being satisfied, the social fact that releasing the respondent's videotaped statement would deter the producing of videotaped statements before the courts should not have been a fact accepted without proof.

[45] Turning to this appeal, in my respectful view, the judge's use of judicial notice offended these principles.

[46] I accept that judicial notice may be taken of the social fact that "identity theft is real", in the judge's words.

[47] I also accept that access to (1) unique personal identifier numbers, namely passport or Social Insurance Numbers, Health Insurance Card or driver's licence numbers, (2) credit or debit card numbers, (3) unique property identifier numbers, namely numbers for bank accounts or other investment assets or for debt instruments or insurance policies, and serial or registration numbers for vehicles, may assist the use of identity theft to fraudulently access property.

[48] I also accept that (4) dates of birth, (5) names of parents, (6) personal addresses, (7) email addresses and (8) telephone numbers sometimes may not already be in the public domain, and therefore access to that information in a court file

possibly could assist with identity theft. I add that this record has no evidence one way or the other whether that information, for Mr. Jacques or Ms. Foster-Jacques, already is in the public domain.

[49] I disagree that access to the respondents' names in the Family Division's court file will add to any risk of identity theft, as the judge feared in her reasons. The respondents' names are already in the public domain for this litigation. They appear in the style of cause of the judge's decision under appeal, which is accessible on the Courts of Nova Scotia website.

[50] If children are involved, the information to be filed under Rule 59 may include a Parenting Statement, with the child's details that may include addresses of schools or daycare facilities. That information is not pertinent here, as there are no children of the respondents' marriage.

[51] The items I have noted in paragraphs 46-48, in my view, can be judicially noticed as social facts that sufficiently satisfy the test in *Find* as that test may be relaxed for social facts according to the comments in *Spence.* It is not uncommon that access to a court file be on condition that either redacts or bans the publication of items that I have mentioned in paras 47-48: *e.g. R. v. Globe & Mail, a division of CTV Globemedia Publishing Inc.*, [2011] A.J. No. 682; *M.E.H., supra*.

[52] The above, in my view, is the generous outer limit of judicial notice in this case. If Mr. Jacques or Ms. Foster-Jacques wished to urge that the risk of identity theft extends beyond the items I have listed in paras 47-48, then they should have discharged their burden of proof by adducing evidence to that effect. They chose not to do so.

[53] Under *Sierra Club*'s test, neither the media nor the public would be deleteriously affected, to any material degree, by not having access to the information I have listed in paras 47-48. On the other hand, a precedent that extends beyond those items, to seal the entire court file as a matter of course in divorce proceedings before the Family Division, would inflict a stinging wallop on the rationale that underlies the open court principle. I will discuss that matter later under the Second Issue.

[54] The key issue in this case is whether, under *Sierra Club*'s test, there is a reasonable alternative, less restrictive than sealing the entire court file, that would guard against the risk of identity theft from information in the items I have listed in paras 47-48.

Reasonable Alternatives to Sealing the File

[55] None of those judicially noticed social facts, mentioned above (paras 46-48), address whether there are reasonable alternative measures that would alleviate the particular risk in *this case*. It is in the assessment of reasonable alternative measures that this appeal encounters the dispositive adjudicative facts, particular to this case, which were the subject of Justice Binnie's comments in *Spence*.

[56] There are two possible alternatives: a partial publication ban and redaction. In my opinion, either is reasonable.

[57] First, a partial publication ban.

[58] The judge appeared to hold the view that, without a sealing order, the media and public, including potential identity thieves, would have uncontrolled access to the respondents' personal identifiers.

[59] That is not my reading of Rule 59.60. Rule 59.60(4) says that a person (other than a party or a party's counsel) who requests access to a court file, must give the parties twenty days notice "before obtaining access". Then the parties may move under Rule 59.60(3) for a confidentiality order that may contain conditions under Rule 59.60(6). Provided the respondents make their motion within the twenty days, nobody will access their court file except on the conditions that are approved by a judge. This motion involved Coltsfoot, nobody else. Nobody other than Coltsfoot would gain access to the court file from a ruling on the respondents' motions that are under appeal.

[60] Coltsfoot, of course, is in the publishing business. If Coltsfoot published the critical personal identifier information, then the risk of identity theft would spread uncontrollably.

[61] But the judge, on the motion under Rules 59.60(3) and (6), can bridle that risk. The judge could issue a partial publication ban, to order that Coltsfoot not publish, disclose, communicate or use the items I have listed above (para 47-48). The brief from Mr. Jacques' counsel to the judge expressed concern about Coltsfoot's obtaining access to account numbers, social insurance numbers, and credit card numbers. Coltsfoot's reply brief to the judge then undertook not to publish those items. The judge's decision makes no reference to this undertaking. Instead, the judge's reasons (para 26) decline to consider a partial publication ban because "[t]he court cannot police the later use of personal identifiers by a member of the public including the media".

[62] Implicit in the judge's reasons is an inferential finding that Coltsfoot would disobey a publication ban, and disseminate personal identifier information contrary to an explicit court order. There is not a molecule of support in this record for such a finding. There is no evidence that Coltsfoot has disobeyed publication bans in the past, or would do so in his case. Publication bans are common for some intensely sensitive matters, such as sexual assault prosecutions under the *Criminal Code* and child protection cases under the *Children and Family Services Act*. Nothing before the judge suggested that Coltsfoot, or any other media organization, had flouted a publication ban.

[63] The judge said (para 33) that she was "taking judicial notice of the facts I have used to support my analysis". Earlier, the judge's reasons say:

> [28] I have accepted the submissions of counsel in respect to their client's expectations. Expectations are not facts. Affidavits are to prove facts. However, in this situation perhaps an expectation is a fact, and if so I accept those expectations without the necessity of proof by way of affidavit because it flows naturally from the applications made by the parties. If this was not their expectation, why make the application to seal the court file? These are facts that should have been admitted by the media...

[64] That Coltsfoot would disobey a court ordered ban does not attain factual status just because counsel for Mr. Jacques and Ms. Foster-Jacques suspect it, nor because Mr. Jacques and Ms. Foster-Jacques have filed a motion. Neither is it something that "should have been admitted" by Coltsfoot. Rather, it is a dispositive adjudicative fact that Justice Binnie addressed in *Spence*. For judicial notice, that fact must satisfy the criteria of notoriety or indisputability set out in *Find* and *Spence*. It is neither

notoriously or generally accepted, nor immediately and accurately demonstrable by sources of indisputable accuracy that Coltsfoot either had, in the past, or would disobey an explicit partial publication ban in a court order.

[65] With respect, the judge misapplied the doctrine of judicial notice. She "piled inference upon inference".

[66] In my view, an order that prohibited Coltsfoot from publication, disclosure, communication or use of the specific items I have listed above (paras 47-48) was a reasonable alternative to the sealing order under the *Sierra Club* principle. The judge's rejection of this option was an error of law.

[67] The second alternative was redaction. The judge rejected this option as "cumbersome and costly" (para 35).

[68] There is no evidence of what effort or cost would be involved with the redaction of this court file for the items I have listed above (para 47-48). The filings in the Family Division were not included in the record for the motion or the appeal. There is no statement in an affidavit whether the redactions would number in the few or the hundreds.

[69] At the appeal hearing, the respondents' counsel said that redaction would be cumbersome and costly, and urged that the Court of Appeal just trust the judge's instincts to navigate the evidential vacuum. With respect, that's not how it works. The respondents have the onus to establish – with evidence – the facts that traverse the access which is presumptively guaranteed by the constitutional open court principle. If there is evidence, the Court of Appeal defers to the judge's finding unless there is a palpable and overriding error. If, as here, there is no evidence, then we turn to judicial notice.

[70] As to judicial notice, it is neither notorious nor indisputable that the redaction of those limited items, mentioned in paras 47-48, would be cumbersome or costly in this case. The judge erred in law by taking judicial notice of disputed adjudicative facts, that would determine the key issue, in a manner that fails to satisfy the tests in *Find* and *Spence*.

[71] To reiterate the governing principle, *Sierra Club* (para 57) "requires the judge to . . . restrict the order as much as is reasonably possible while preserving the commercial interest in question". In my view, the consideration of reasonable alternative measures leads to the following conclusions. Mr. Jacques and Ms. Foster-Jacques apparently would mistrust an order for a ban on the publication and use of the items I have identified in paras 47-48. So they had two options:

> First, they could have adduced evidence to show that there is sound basis to mistrust the prospect of Coltsfoot's compliance with a partial publication ban. Had they done so persuasively, then the Court would turn to consider whether redaction, to be performed by the Respondents or their counsel, is a reasonable alternative. Given that damning evidence, the cost of any redaction, including reasonable legal fees for the redaction efforts of Respondents' counsel, would have rested with Coltsfoot. As Mr. Jacques and Ms. Foster-Jacques have not adduced such evidence, that option has become immaterial.
>
> Second, they have the option, with the assistance of their counsel, to redact those specific items that I have listed in paras 47-48, and provide the redacted copy to Coltsfoot. As they have adduced no evidence to question the sufficiency of the primary option (the partial publication ban), Mr. Jacques and Ms. Foster- Jacques should bear any redaction cost, if they select this second option. As the Family Division would not perform the redaction, there would be no cumbersome or costly effort by Court staff. But, if there is a dispute respecting the redaction, the judge of the Family Division would hear any motion to resolve that dispute, consistently with these reasons.

5. Second Issue - Application of Open Court Principle to Documents Filed with the Court

[72] The judge's reasons say:

> [36] ...The public may attend the hearing, should there be one, and it may attend to hear any oral decision rendered or read the written decision. ...
>
> [37] The open court principles were crafted at a time when the internet was not a public source of information nor of manipulation. Initially these principles were developed in criminal cases where scrutiny to ensure the state was not abusing it's

> [*sic*] powers of arrest and imprisonment were paramount. This case involves the court as a provider of a dispute resolution process. The state has passed laws that create a framework for that dispute resolution but the potential for state abuse of the parties is limited if nonexistent. The public interest in the process, and in the performance of the judges, remains to be served by the opportunity for the public to attend the hearings and read or listen to decisions rendered. The media can attend and publish what it wishes about that hearing and those decisions.

[73] The judge distinguished the historical development of the open court principle in criminal cases, to avoid abuse of police powers, from its application to modern dispute resolution in matrimonial proceedings. For the latter, according to what appears to be the judge's interpretation, the open court principle is limited to what is audible in the open courtroom or read in the judge's written reasons. The contents of documents filed by the parties with the court, but not vocalized for the attendees' ears at the trial, if there is any, would lie outside the perimeter of the open court principle.

[74] As there was no evidence on this motion, nothing in the judge's ruling is particular to Mr. Jacques or Ms. Foster-Jacques. So that ruling would not be distinguishable on the facts of a later case. The judge deduced her views from judicial notice (of facts that are supposed to be notorious or indisputable), and the nature of the filings that Rule 59 requires in all divorce proceedings. So the judge's ruling would set the precedent generally for divorce proceedings in the Supreme Court (Family Division) of this Province. In every case, upon motion under Rule 59.60 without evidence, the Family Division's court file would be sealed in its entirety.

[75] I have difficulty squaring that result with Rule 59.60(6), which prescribes that "[t]he person requesting access to the court file must be granted access" unless the resisting party persuades the judge to restrict access. The judge's reasoning would convert the *Rule's* presumptive access to invariable sealing of the entire file.

[76] I also disagree that the antecedent jurisprudence limits the open court principle in matrimonial disputes, as the judge suggested. The open court principle is neither a recent nor an ill-suited arrival to matrimonial dispute resolution.

[77] The seminal English authority on the open court principle is *Scott v. Scott*, [1913] A.C. 417 (H.L.), followed and expanded by the Privy Council, on appeal from Alberta, in *McPherson v. McPherson*, [1936] A.C. 177. Both were divorce cases. In

Scott, Lord Halsbury (p. 440) said "every Court of justice is open to every subject of the King". In *McPherson*, Lord Blanesburgh (pp. 200-02), referring to *Scott*, stated:

> ...But publicity is the authentic hall-mark of judicial as distinct from administrative procedure, and it can be safely hazarded that the trial of a divorce suit, a suit not entertained by the old Ecclesiastical Courts at all, is not within any exception.
>
> ...
>
> And their Lordships, in reaching the conclusion that the public must be treated as having been excluded from the library on this occasion, have not been uninfluenced by the fact that the cause then being tried was an undefended divorce case. To no class of civil action is Lord Halsbury's statement more appropriate. In no class of case is the privilege more likely to be denied unless every tendency in a contrary direction, whenever manifested, is definitely checked.
>
> ...
>
> This requirement must be insisted upon because there is no class of case in which the desire of the parties to avoid publicity is more widespread.

[78] In *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, the Court held that provisions in Alberta's *Judicature Act*, that prohibited publication of details of matrimonial proceedings, violated s. 2(b) of the *Charter* and were not justified under s. 1. Justice Cory, for the plurality, said (page 1341):

> The sweeping effect of the prohibition can readily be seen. The term "or in relation to a marriage" is a broad one. It encompasses matters pertaining to custody of children, access to children, division of property and the payment of maintenance. All are matters of public interest yet the evidence given on any of these issues cannot be published. The dangers of this type of restriction are obvious. Members of the public are prevented from learning what evidence is likely to be called in a matrimonial cause, what might be expected by way of division of property and how that evidence is to be put forward. Neither would they be aware of what questioning might be expected. These are matters of great importance to those concerned with the application of family law. It is information people might wish to have before they even considering consulting a lawyer. The very people who would seem to have the greatest need to know of family court proceedings are prevented from obtaining important information by the provisions of s. 30.

In *Edmonton Journal* (p. 1365), Justice Wilson, concurring, approved the passages from *McPherson* that I have quoted above.

[79] I will turn to the judge's observation that the open court principle does not apply to the contents of court documents, except to the extent the contents are aired in open court. On the appeal, Mr. Jacques' submission reiterated that view. Mr. Jacques' factum says (para 55) that "[t]he issue of public education is at the heart of the open court principle". His factum submits:

> 85. ...The purpose of the open court is for the education of the public. This is met in the present case with an open courtroom and written decisions.

[80] To address this point, I will start with the filing requirements in Rule 59.

[81] Rules 59.19 to 59.24 require that, in matrimonial proceedings before the Supreme Court (Family Division), each party must file with the Court information on income, expenses and property. The filings are mandatory even without a court order. Rules 59.25 to 59.27 then permit the Court to direct or order further disclosure.

[82] There also are filing requirements for information respecting children of the marriage. Those are not in issue on this appeal, because there are no children of the respondents' marriage.

[83] Private disclosure and discovery, purely between the parties, carries an enforceable implied undertaking of confidentiality. Because that private process does not involve the court, it does not engage the open court principle. In *Juman v. Doucette*, [2008] 1 S.C.R. 157, Justice Binnie for the Court (para 22) referred to the principle of judicial accountability that underlies the open court principle, and said:

> No such questions of state accountability arise in pre-trial discoveries. The situations are simply not analogous.

To similar effect: *Lac d'Amiante du Quebec Ltée v. 2858-0702 Quebec Inc.*, [2001] 2 S.C.R. 743, paras 59-72; *Globe and Mail*, para 77.

[84] This appeal, on the other hand, exclusively concerns documents that have been filed with the Court, not the parties' disclosure *inter se*. So the statements in *Juman* and *Lac d'Amiante* do not govern. Instead, Rule 59.60(6) presumes that a party

seeking access to a “court file” of the Supreme Court (Family Division) “must be granted access” unless the judge restricts access under Rule 59.60(3). Clearly the “court file” under Rule 59.60(6) includes the filings with the Family Division that were made under earlier provisions of Rule 59.

[85] I respectfully disagree with Mr. Jacques’ submission that the only purpose of the open court principle is to educate the public. Rather, its primary purpose, stated and reiterated by the Supreme Court of Canada, is to illuminate the avenue of accountability for the judicial system. In *Edmonton Journal*, Justice Cory explained the rationale (pages 1338-40):

> The importance of the concept that justice be done openly has been known to our law for centuries. In Blackstone’s *Commentaries on the Laws of England* (1768), vol. III, c. 23, at p. 373, the following observation appears:
>
> > The open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk . ...
>
> ...
>
> In the United States this principle is not restricted to hearings. The principle embraces the recognition of the existence of a common law right “to inspect and copy public records and documents”. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), at p. 597.
>
> In Canada this Court has emphasized the importance of the public scrutiny of the courts. It was put this way by Dickson J., as he then was, writing for the majority in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185:
>
> > Many times it has been urged that the ‘[p]rivacy’ of litigants requires that the public be excluded from court proceedings. It is now well established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings. ...
>
> He then went on to discuss the application of that same principle to court records. He observed that Canadian law differs somewhat from the law of England which appears to take a more restrictive approach towards the publicity of documents. He said this at p. 189:

> Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny the exercise of the right. ...
>
> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.
>
> There is another aspect to freedom of expression which was recognized by this court in *Ford v. Quebec [Attorney General]*, [1988] 2 S.C.R. 712. There at p. 767 it was observed that freedom of expression "protects listeners as well as speakers". That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings – the nature of the evidence that was called, the arguments presented, the comments made by the trial judge – in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

[86] Immediately following this passage, Justice Cory said that the rationale applied equally to court documents, including those filed with the court before the trial (page 1340):

> It is equally important for the press to be able to report upon and for the citizen to receive information pertaining to court documents. It was put in this way by Anne Elizabeth Cohen in her article "Access to Pretrial Documents Under the First Amendment" (1984), 84 *Colum. L. Rev.* 1813, at p. 1827:

> Access to pretrial documents furthers the same societal needs served by open trials and pretrial civil and criminal proceedings. Court officials can be better evaluated when their actions are seen by informed, rather than merely curious spectators.

This comment reiterated the views, supporting access to documents filed in court, that were made by the Supreme Court of the United States in *Nixon v. Warner Communications* and by (then) Justice Dickson in *MacIntyre*. Justice Cory had cited those views earlier in the passage that I have quoted. Justice Cory then summarized by saying (p. 1340) that his commentary on the rationale "recognizes the crucial importance of both freedom of expression and the openness of courts".

[87] Justice Cory's point was that, as the rationale of accountability applies to the workings of the courts, the open court principle applies to documents that the parties file with the court to engage a function that the State has assigned to the court.

[88] The Supreme Court repeatedly has said that accountability of the justice system is a fundamental purpose of the open court principle. *MacIntyre*, pp. 183-87. *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, paras 17, 23. *Sierra Club*, para 36. *Vancouver Sun* 2004, paras 23-26. *Societe Radio-Canada v. Quebec (Procureur general)*, [2011] 1 S.C.R. 19, paras 1, 27-30. *Named Person v. Vancouver Sun*, paras 31-34 and 81-88.

[89] The authorities, in the Supreme Court of Canada and lower courts, have reiterated the application of the open court principle to the pre trial stage and to documents filed by the parties with the court.

[90] First, the Supreme Court. In *Vancouver Sun* 2004, Justices Iacobucci and Arbour said:

> 27 Furthermore, the principle of openness of judicial proceedings extends to the pretrial stage of judicial proceedings because the policy's considerations upon which openness is predicated are the same as in the trial stage: *McIntyre*, *supra*, at p. 183.
> ...

In *Toronto Star Newspapers*, Justice Fish for the Court said:

> 1 In any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy.

...

> 29 Finally, in *Vancouver Sun*, the Court expressly endorsed the reasons of Dickson J. in *MacIntyre* and emphasized that the presumption of openness *extends to the pre-trial stage of judicial proceedings*. "The open court principle", it was held, "is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein (para. 26)." It therefore applies at every stage of proceedings (para 23-27). [Justice Fish's emphasis]

In *Dufour*, Justice Deschamps for the Court said:

> [12] Access to exhibits is a corollary to the open court principle. In the absence of an applicable statutory provision, it is up to the trial judge to decide how exhibits can be used so as to ensure that the trial is orderly. This rule has been well established in our law for a very long time. As long ago as in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 189, Dickson J. (As he then was) wrote:
>
> > Undoubtedly every court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. [other authorities omitted]

[91] Turning to the lower courts, in *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726, [approved in *Dufour*, para 12], Justice Sharpe for the Court said:

> **28** I do not agree with CSC's submission that the open court principle and the media's s. 2(b) *Charter* rights are limited to attending court and observing and reporting on what actually transpires in the courtroom. Even before the *Charter*, access to exhibits that were used to make a judicial determination, even ones introduced in the course of pre-trial proceedings and not at the trial, was a well-recognized aspect of the open court principle: ...[citation omitted]

To similar effect: *CTV Television Inc. v. Ontario Superior Court of Justice*, [2002] O.J. No. 1141 (C.A.), paras 13-30; *R. v. Global News*, [2011] O.J. No. 3361 (C.J.), at paras 40,44; *Canada (Attorney General) v. Almalki*, [2010] F.C.J. No. 886, at paras 25-29; *Toronto Star Newspapers Ltd. v. Canada*, [2007] F.C.J. No. 165.

[92] Further to the passage from *Dufour*, quoting *MacIntyre*, there is no finding, evidence or suggestion that Coltsfoot's access to the court filings would "subvert the ends of justice". Rather, the issue, in the words of *MacIntyre*, is whether "the judicial

documents might be used for an improper purpose", namely to enable identity theft. This point is to be determined according to the principles of the open court principle, that I have discussed in the First Issue.

[93] Rules 59.19 to 59.27 advertently engage the court in the mandatory pre-trial acquisition of evidence. The court is enlisted as a warden to ensure that, in family proceedings, obtaining the information which is essential to the court's fact finding is not a costly battleground, lever of procrastination or "game of hide-and-seek": *O'Brien* v. *O'Brien*, 2007 NBCA 22, para 15; *Chernyakhovsky v. Chernyakhovsky*, [2005] O.J. No. 944 (S.C.) , para 6. The parties' court filings under Rule 59 are vital to the workings of the court's administration of justice for the divorcing litigants. So the rationale of accountability applies to those workings.

[94] I disagree with the judge's view and with Mr. Jacques' submission that, in matrimonial disputes, the open court principle encompasses only what is audible to attendees in the courtroom and readable in the judge's decision.

6. Third Issue - Personal Privacy in Divorce Proceedings as the Protected Interest

[95] Mr. Jacques and Ms. Foster-Jacques submitted that the personal and private nature of divorce supported the issuance of the sealing order. For instance, Mr. Jacques' factum (para 74) refers to "the potential vulnerability of the parties, both in a financial and emotional sense" and says:

> Only because they have chosen to end their marriage are the Respondents forced to face the potential that intimate details of their personal and financial lives may be made public.

[96] Justice MacDonald (para 15) determined that general expectations of personal financial privacy, or relief from embarrassment, in divorce proceedings were not of superordinate importance and did not justify a confidentiality order. The judge said:

> [13] Freedom of the press is fundamental to the open court principle. The press provides an important function by informing the public about court proceedings. Family law proceedings are of great interest to the public. The public should be informed about the substance of those proceedings. ...

...

> [15] Personal embarrassment or a general expectation that personal, health or financial privacy will be maintained when accessing the courts is not, in itself, a reason to issue a sealing order or publication ban.
>
> ...
>
> [22] The Applicant and the respondent have raised one proposition that I have decided does not constitute a social value or public interest of superordinate importance in the context of these proceedings. They have argued that the file should be sealed to protect their reputation, and in particular the Respondent's reputation against unproven allegations that may be contained in material filed with this proceeding.
>
> [23] Every proceeding initially may consist of "unproven" allegations whether these appear in statements of claim, or affidavits. Those who have been charged with a criminal offence, and later found to be "not guilty" often must suffer, because of publicity, a ruined reputation that in some cases cannot be rehabilitated. Protection of one's reputation has not been considered to be a social value or public interest of superordinate importance justifying diminishment of the open courts principle. As I have noted, personal embarrassment or a general expectation that personal. health or financial privacy will be maintained when accessing the courts is not, in itself, a reason to seal a file.

[97] I agree with the judge that the respondents' preference for personal and financial privacy, and to be free from embarrassment during their divorce is insufficient, in this case, to constitute a serious risk to an important public interest which outweighs the deleterious effect of confidentiality, under the principles from *Dagenais*, *Mentuck* and *Sierra Club*. I refer to the passages from *Scott*, *MacPherson* and *Edmonton Journal*, quoted above, and to *M.E.H. v. Williams*, para 25.

[98] That is not to say that a divorce file never may be subject to a partial or complete sealing order. I refer to the examples in the authorities set out earlier (para 33) that discuss various gradations of confidentiality orders. Such an order would require evidence that establishes a serious risk of harm beyond mere embarrassment, particularly but not exclusively where children are involved, and the inadequacy of alternative measures to alleviate that risk. Here, that identified risk is identity theft,

and there is no evidence that a partial publication ban or redaction would inadequately protect the respondents from any risk of identity theft.

7. Conclusion

[99] In my view, the judge erred in law in her interpretation and application of the open court principle.

[100] I would allow the appeal, and overturn the sealing order.

[101] I would dismiss the respondents' motions for the sealing order on the following conditions, to be included in the Court of Appeal's Order:

(a) Coltsfoot and its employees or agents are to be prohibited from publishing, disclosing, communicating or using any item of information that Coltsfoot obtains from the disclosed documents and that is listed in paras 47 and 48 of these reasons. The Court of Appeal's Order would list those items.

(b) If either Mr. Jacques or Ms. Foster-Jacques chooses not to rely on the prohibition in condition (a), then either may, at his or her own cost, make a copy of their filings with the Court under Rule 59 and redact from that copy the items listed in paras 47-48 of these reasons. Then the redacted copy will be the only material to be provided to Coltsfoot.

(c) Mr. Jacques and Ms. Foster-Jacques shall have ten days from the date of the Court of Appeal's Order that accompanies these reasons, to notify the Family Division and Coltsfoot, whether they wish to utilize option (b) and, if either gives notice, until twenty days from the date of the Order to make the copy and perform the redaction, at the expense of the party who gives notice.

(d) Until twenty days from the Court of Appeal's Order, Coltsfoot shall not be entitled to access any material in the Court file.

(e) Twenty days from the date of the Court of Appeal's Order, if neither Mr. Jacques nor Ms. Foster-Jacques has selected option (b), Coltsfoot, at

Coltsfoot's expense, will be entitled to access or copy the material filed by the parties with the Supreme Court (Family Division).

(f) Twenty days from the Court of Appeal's Order, if either Mr. Jacques or Ms. Foster-Jacques has selected option (b), Coltsfoot will be entitled to obtain the redacted copy.

(g) The redaction under option (b) would not be performed by the Family Division. But, if there is a dispute respecting that redaction, the judge of the Family Division would hear a motion to resolve that dispute, consistently with these reasons.

[102] The Supreme Court judge ordered Coltsfoot to pay costs of $850 to each of Mr. Jacques and Ms. Foster-Jacques. I would overturn those costs awards. Instead I would order that each of Mr. Jacques and Ms. Foster-Jacques pay Coltsfoot costs of (1) $750 for the proceeding in the Supreme Court and (2) a further $500 for the appeal.

Fichaud, J.A.

Concurred: Saunders, J.A.

Beveridge, J.A.