SUPREME COURT OF NOVA SCOTIA

Citation: *Criminal Investigation Pursuant to the Criminal Code (Re)*, 2025 NSSC 155

Date: 20250505
Docket: CRH No. 535730
Registry: Halifax

IN THE MATTER OF:	A criminal investigation pursuant to the *Criminal Code*;
AND IN THE MATTER OF:	An Application pursuant to section 487.3(1) of the *Criminal Code* for an order prohibiting disclosure of information filed in support of the warrant to search and *Lavallee* Application.
AND IN THE MATTER OF:	An Application by Canadian Broadcasting Corporation to vary the terms of an order granted under s. 487.3(1) pursuant to section 487.3(4) of the *Criminal Code*.

Restriction on Publication: s. 487.3 of the *Criminal Code*

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	February 13 & 18, 2025, in Halifax, Nova Scotia
Counsel:	Peter Dostal, for the Provincial Crown David G. Coles, K.C., for the Canadian Broadcasting Corporation Andrew R. Nielsen, for the Nova Scotia Barristers' Society William L. Mahody, K.C. and Shane McCracken, for Persons D, E & F

Sealing Orders dated March 12, 2024 and April 19, 2024 granted pursuant to s. 487.3 of the *Criminal Code* which reads:

Order denying access to information

487.3 (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament, an order under any of sections 487.013 to 487.018 or an authorization under section 529 or 529.4, or at a later time, a justice, a judge of a superior court of criminal jurisdiction or a judge of the Court of Quebec may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that

(a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and

(b) the reason referred to in paragraph (a) outweighs in importance the access to the information.

Reasons

(2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

(a) if disclosure of the information would

(i) compromise the identity of a confidential informant,

(ii) compromise the nature and extent of an ongoing investigation,

(iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used,

(iii.1) be injurious to international relations, national defence or national security, or

(iv) prejudice the interests of an innocent person; and

(b) for any other sufficient reason.

Procedure

(3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

By the Court:

Introduction

[1] On March 12, 2024, I granted a judicial authorization under s. 487 of the *Criminal Code* ("the Code") to search the private home / law office of (now deceased) lawyer Billy Sparks ("the Warrant"). This was in relation to a criminal investigation involving offences pursuant to ss. 271 and 346 of the Code. Also, on that date, I granted an order under s. 487.3(1) prohibiting disclosure of information filed to obtain the Warrant.

[2] The execution of that Warrant resulted in certain property being delivered to the Prothonotary of this Court, including solicitor-client privileged materials. On April 19, 2024, the Crown commenced an application in accordance with the procedure prescribed in *Lavallee et al. v. Canada (Attorney General)*, 2002 SCC 61 ("the *Lavallee* application"). On the same day, my colleague, Justice Denise Boudreau, granted an order under s. 487.3 of the Code sealing the contents of the *Lavallee* application.

[3] On August 15, 2024, the Canadian Broadcasting Corporation ("CBC") applied to access the Warrant and Information to Obtain ("the ITO") sealed on March 12, 2024, and the *Lavallee* application materials, which were sealed on April 19, 2024.

[4] The most pertinent of the requested relief set forth in CBC's Notice consisted of the following:

1. That the CBC be given a copy of the Warrant to Search granted by this Court on March 12, 2024 and executed at the law office of Billy Sparks Law on March 14, 2024, together with the ITO, each redacted as necessary; and
2. That there be no restriction on CBC's broadcast or publication of the Search Warrant and ITO, except where information is redacted.

[5] The Crown, counsel for the Nova Scotia Barristers' Society ("NSBS") and counsel for one of the former clients of Mr. Sparks, proposed some redactions which, among other things, were felt to sufficiently respect the solicitor-client privilege of Mr. Sparks' former clients. The Court was satisfied that it was in the interests of justice, that these materials, thus redacted, be placed in the Court file,

hence that they become accessible to the public, including, of course, CBC and other members of the media.

[6] In the wake of its receipt of the documents, thus redacted, CBC seeks disclosure of the identities of the three lawyers whose names were anonymized in the ITO as Persons D, E and F. In addition, it seeks the identity of anonymized Person P, a police officer, who was also referenced in the ITO.

[7] There are essentially no factual disputes as to what preceded the preparation of the ITO and the Search Warrant. As a consequence, I will summarize these antecedents, as well as the aftermath of the search, with relative brevity.

Background

[8] On March 12, 2024, this Court issued a Search Warrant on the basis of an ITO sworn by D/Cst. Sullivan. This ITO was the culmination of a joint investigation by Halifax Regional Police ("HRP") and the Royal Canadian Mounted Police ("RCMP") into alleged sexual assault and extortion of multiple young and vulnerable clients by their (then) legal counsel, local lawyer, Billy Sparks.

[9] When the search of Mr. Sparks' law office, as authorized by the Search Warrant, was executed on March 14, 2024, the police were assisted by various representatives of the Nova Scotia Barristers' Society ("NSBS"). Certain electronic devices and non-electronic records were seized from Mr. Sparks' firm under the auspices of the Search Warrant.

[10] HRP has sought access to some of the material seized and delivered to the Court in furtherance of their continuing investigation into the above referenced allegations. This occasioned the need for the *Lavallee* application (mentioned above), in relation to the seized devices and non-electronic records.

[11] In the ITO, the goals and the purposes of the investigation were described as such:

> 1. To obtain evidence to support allegations made against the suspect and to support the laying of criminal charges with respect to the commission of offences pursuant to the *Criminal Code*;
> 2. To identify any other victims, witnesses and/or suspects that are currently not known to the police;

3. Secure any independent evidence identified during the investigation which may implicate or exonerate any person; and

4. Recover any physical evidence that may exist.

(*ITO*, Sch. A, p. 13)

[12] The material facts, contained in D/Cst. Sullivan's Affidavit (*ITO*, Sch. A), which formed the basis upon which the Search Warrant was issued, have been summarized in the responding brief filed on behalf of Persons D, E and F. I will reference this summary in the interest of convenience:

13. Included and marked as Schedule A to the ITO is the affidavit of D/Cst. Sullivan (hereinafter "D/Cst. Sullivan's Affidavit"). D/Cst. Sullivan's Affidavit sets out, in comprehensive detail, the basis to issue the Search Warrant relating to Billy Sparks Law. D/Cst. Sullivan's Affidavit contains the following evidence material to the issuance of the Search Warrant:

    a. Since December 2023, officers of the HRP and RCMP have been involved in an extensive investigation of the allegations of sexual assault and extortion against Sparks (Schedule A, p 10). The lead investigator is D/Cst. Beer (Schedule A, p 7).

    b. In August 2023, Person B alleged before the police that his lawyer Billy Sparks forced him to send pictures of his penis in exchange for legal services, and that he wished to sue Sparks. Person B advised at that time that he knew Sparks for approximately ten years, dating back to when Sparks provided legal services through Dalhousie Legal Aid (Schedule A, p 8). Person B was interviewed by the police on multiple occasions (Schedule A, p 42-47).

    c. In the fall of 2023, a Confidential Informant, named in the documentation as "Source A", alleged before the police that Billy Sparks was engaging in sexual contact with minors and that Billy Sparks had pictures and video of sexual nature on his phone (Schedule A, p 14-15).

    d. In December 2023, Person A alleged before the police that his lawyer Billy Sparks had extorted him and sexually assaulted him from 2019 to 2023, including by threatening to terminate his representation if Person A did not send sexually explicit photos to Sparks as a form of payment (Schedule A, p 7). Person A also alleged, amongst other things, that Sparks threatened him numerous times that Sparks would have someone in jail attack Person A, which Sparks stated he had arranged in the past. Person A was interviewed by the police on multiple occasions, including while in custody at the Central Nova Correctional Facility (Schedule A, p 31-42).

e. In January 2024, the mother of Person C alleged before the police that Person C's lawyer Billy Sparks was providing Person C with drugs, contrary to his Court Orders, and was engaged in an inappropriate sexual relationship with Person C (Schedule A, p 8). The mother of person C also filed a complaint with NSBS regarding Sparks.

f. On February 1, 2024, and again on February 26, 2024, D/Cst. Beer interviewed the mother of Person C and acquired additional detail regarding the allegations against Sparks (Schedule A, p 52-63).

g. On February 2, 2024, D/Cst. Beer interviewed the new lawyer for Person A and acquired additional detail regarding the allegations against Sparks (Schedule A, p 48-52).

h. On February 20, 2024, the investigation team initiated surveillance at the law offices of Billy Sparks Law, tailing him, and observing him at several other locations over a period of days (Schedule A, p 67-68).

i. The informant/affiant, D/Cst. Sullivan, was requested to assist Lead Investigator, D/Cst. Beer, with the ongoing investigations on February 16, 2024 (Schedule A, p 7). At that time, D/Cst. Sullivan was asked to review the ongoing investigation being handled by the Integrated Major Crime Special Victims Section – Sexual Assault, and to prepare an application for a search warrant pursuant to s. 487 of the *Criminal Code*.

j. D/Cst. Sullivan reviewed various records, including via CPIC, Versadex, JEIN and Property Online, in relation to the various victims and the accused Sparks, in order to establish details of the relationships between the various victims and Sparks (Schedule A, p 11-13; p 15-19; p 27-30).

k. D/Cst. Sullivan spoke to other police representatives with specialized training and experience to confirm the scope of the search in light of the detailed allegations (Schedule A, p 68-71).

l. D/Cst, Sullivan undertook efforts to ensure the search complied with prevailing guidance on the search of law firms and the use of referees (Schedule A, p 71-80).

(*Respondents' Brief*, January 27, 2025, para. 13)

[13] The document also contains information with respect to the victims and provides names of some witnesses of both the alleged sexual assaults, and the alleged extortions. It also provides details linking the alleged crimes to Mr. Sparks, his law office, and his residence.

[14] For example, D/Cst. Sullivan (in the ITO) deposed that he had reasonable grounds to believe that certain items relevant to these alleged offences by Mr. Sparks were located in his law office. Specifically, these items were said to be:

> a. A mobile phone in a brown coloured leather case;
> b. A blue titanium iPhone 15 Pro Max mobile phone;
> c. A desktop computer system, including a tower, monitor, and keyboard;
> d. Laptop computer;
> e. Router and modem;
> f. Data storage devices, including thumb drives and external hard drive;
> g. Photographs of alleged victims; and
> h. Any documents with respect to passwords, login names, access codes and /or things related to items listed above.
>
> (*ITO*, Sch. A, p. 6)

[15] These facts were those most pertinent to the Court's decision to authorize the Search Warrants. Counsel for Persons D, E and F contend that the additional (objectionable) information in Dt/Cst. Sullivan's sworn ITO (concerning them) is unsubstantiated innuendo, which does not bear on the issue of whether there were reasonable grounds to authorize a search warrant and the invocation of the corresponding judicial process.

[16] These Respondents contend that these details ought never to have been in the ITO in the first place, and that they will sustain irreparable harm to their professional standing and their ability to earn a livelihood if their names are revealed. They contend that they have satisfied the necessary prerequisites to maintain the anonymization of their identities.

[17] The Respondents D, E and F contend that these "immaterial and objectionable details" ("the impugned details") are as set forth below:

> a. On March 5, 2024, Frank Magazine published an article regarding the ongoing investigation into sexual assault and extortion of underaged clients by Halifax lawyer (in private practice who frequently represents troubled teens on Legal Aid certificates) and the attempts by NSBS to prevent the police from accessing the phone of the unnamed lawyer under investigations (Schedule A, p 21-22).
> b. On March 7, 2024, D/Cst. Sullivan spoke with Cst. Person P and learned the following (Schedule A, p 19-20):

i. On March 2, 2024, Sparks messaged Person P to request a call regarding an important matter. Sparks and Person P had a friendly relationship predating Sparks' attendance at law school.

ii. Person P phoned Sparks and was advised the following:

1. Sparks had people staying at his residence in 2023;
2. Sparks had an on and off consensual relationship with Person A at the time;
3. Following an incident between Sparks and Person A, Person A threatened to advance false allegations against Sparks if Sparks did not comply with Person A's demands;
4. Sparks also alleged that Person C had broken into Sparks' residence and stolen things;
5. Sparks continued and said that he had just received a phone call from Person D (a lawyer), asking if Sparks needed representation as Person D heard that Sparks had been arrested for sexual assault. Sparks denied that this was the case, and Person D did not report to Sparks where Person D heard that Sparks was arrested;
6. Sparks asked Person P if Person P knew what Person D was talking about, at which time Person P confirmed that he did not.

iii. Person P then made enquiries about Billy Sparks, learned of the ongoing investigation, and reported the contents of this conversation to the Lead Investigator D/Cst. Beer.

c. D/Cst. Sullivan asserts that on March 5 and 6, 2024, he undertook online searches into Person D, as well as Persons E and F (Schedule A, p 24-25). D/Cst. Sullivan does not explain why he was conducting online searches regarding those individuals prior to his conversation with Person P on March 7, 2024.

d. D/Cst. Sullivan did not contact Person D to query the source of this (incorrect) information as part of the investigation.

e. Following his online searches, D/Cst. Sullivan concluded that there were apparent personal and/or professional connections between Persons D, E and F (Schedule A, p 23).

f. As an apparent result of his review of the investigation file materials, D/Cst. Sullivan concluded that Person E met with Person A at the Nova Scotia Correction Facility on February 28, 2024 to provide independent legal advice (to Person A) prior to Person A signing a waiver of Solicitor-Client Privilege for the sole purpose of allowing police to conduct their criminal investigation of Mr. Sparks (Schedule A, p 71).

> g. D/Cst. Sullivan was not aware of any communication occurring among Persons D, E and F with respect to the allegations being made by Person A against Sparks or the ongoing police investigation. D/Cst. Sullivan stated his belief that the fact that Person D contacted Sparks to be "more than coincidence", based on the existence of personal and/or professional relationships between Persons D, E and F, as well as the timing of the provision of ILA to Person A by Person E approximately five days prior to Person D contacting Sparks (Schedule A, p 23 & 85).
>
> (*Respondents' Brief*, pp. 6-7)

[18] These Respondents claim that much of the above is rife with speculation and ought not to have been included by D/Cst. Sullivan in the ITO. They conclude by arguing that the revelation of the identities of the respondent lawyers would pose a serious risk to an important public interest, which is to say, the reputational interests of multiple legal professionals. Moreover, revelation of this information would not enhance the ability of an ordinary member of the public to understand why the Search Warrant was issued in the first place, hence their identities and identifying information should remain anonymized.

[19] The Crown takes the position that it was completely proper for D/Cst. Sullivan to say what he did in the ITO, including his provision of the "impugned details". Counsel further argues that it is not for the police to cherry pick the information which they provide, but to be fulsome, frank and fair when they seek a warrant. After all, the process is done on an *ex parte* basis.

[20] If, for example (the Crown's argument continues) there was some possibility known to the police that some or all of the evidence sought might have been moved from the location where they expected it to be (i.e. if Mr. Sparks had been tipped off about the impending search as a result of a possible violation of solicitor-client privilege) then the officer was required to provide this information to the authorizing Justice.

[21] With all of that having been said, the Crown agrees with the Respondents' bottom line position. The identities of the respondent lawyers should remain redacted, again, largely because they are very peripheral to the issue of why the Warrants was issued in the first place.

[22] The Applicant, CBC, submits that "the unnamed lawyers have not met the required test to conceal their identities in this public document" (*CBC Brief*, para. 1).

[23] Constable P did not attend or participate in this proceeding, although he was provided with notice of it.

Issue

[24] Obviously, the single issue in this proceeding is whether the anonymization of the identities of Persons D, E, F and/or P should be maintained. However, it is helpful to review the basic principles involved before that issue is confronted directly.

Analysis

(i) Applicable principles

[25] The "open court principle" creates a strong presumption of just that, an open court. In circumstances such as these, there is a burden cast upon the respondent to an application to unseal an ITO. Such a respondent must establish that each of the requisite criteria for prohibiting disclosure of the information at issue has been met.

[26] This onus flows from, and is premised upon, the distinction between s. 187 and s. 487.3 of the Code. For example, s. 187 provides:

> **Manner in which application to be kept secret**
>
> 187 (1) All documents relating to an application made pursuant to any provision of this Part are confidential and, subject to subsection (1.1), shall be placed in a packet and sealed by the judge to whom the application is made immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be dealt with except in accordance with subsections (1.2) to (1.5).
>
> **Exception**
>
> (1.1) An authorization given under this Part need not be placed in the packet except if, under subsection 184.3(8), the original authorization is in the hands of the judge, in which case that judge must place it in the packet and the copy remains with the applicant.
>
> **Opening for further applications**
>
> (1.2) The sealed packet may be opened and its contents removed for the purpose of dealing with an application for a further authorization or with an application for renewal of an authorization.
>
> **Opening on order of judge**

(1.3) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet.

Opening on order of trial judge

(1.4) A judge or provincial court judge before whom a trial is to be held and who has jurisdiction in the province in which an authorization was given may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet if

(a) any matter relevant to the authorization or any evidence obtained pursuant to the authorization is in issue in the trial; and

(b) the accused applies for such an order for the purpose of consulting the documents to prepare for trial.

Order for destruction of documents

(1.5) Where a sealed packet is opened, its contents shall not be destroyed except pursuant to an order of a judge of the same court as the judge who gave the authorization.

Order of judge

(2) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made pursuant to section 185 or subsection 186(6) or 196(2) may only be made after the Attorney General or the Minister of Public Safety and Emergency Preparedness by whom or on whose authority the application for the authorization to which the order relates was made has been given an opportunity to be heard.

Order of judge

(3) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made under subsection 184.2(2) may only be made after the Attorney General has been given an opportunity to be heard.

Editing of copies

(4) Where a prosecution has been commenced and an accused applies for an order for the copying and examination of documents pursuant to subsection (1.3) or (1.4), the judge shall not, notwithstanding those subsections, provide any copy of any document to the accused until the prosecutor has deleted any part of the copy of the document that the prosecutor believes would be prejudicial to the public interest, including any part that the prosecutor believes could

(a) compromise the identity of any confidential informant;

(b) compromise the nature and extent of ongoing investigations;

> (c) endanger persons engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used; or
>
> (d) prejudice the interests of innocent persons.
>
> **Accused to be provided with copies**
>
> (5) After the prosecutor has deleted the parts of the copy of the document to be given to the accused under subsection (4), the accused shall be provided with an edited copy of the document.
>
> **Original documents to be returned**
>
> (6) After the accused has received an edited copy of a document, the prosecutor shall keep a copy of the original document, and an edited copy of the document and the original document shall be returned to the packet and the packet resealed.
>
> **Deleted parts**
>
> (7) An accused to whom an edited copy of a document has been provided pursuant to subsection (5) may request that the judge before whom the trial is to be held order that any part of the document deleted by the prosecutor be made available to the accused, and the judge shall order that a copy of any part that, in the opinion of the judge, is required in order for the accused to make full answer and defence and for which the provision of a judicial summary would not be sufficient, be made available to the accused.
>
> **Documents to be kept secret — related warrant or order**
>
> (8) The rules provided for in this section apply to all documents relating to a request for a related warrant or order referred to in subsection 184.2(5), 186(8) or 188(6) with any necessary modifications.

[27] On the other hand, s. 487.3 provides:

> **Order denying access to information**
>
> (1) On application made at the time an application is made for a warrant under this or any other Act of Parliament … a judge of a superior court of criminal jurisdiction … may make an order prohibiting access to, and the disclosure of, any information relating to the warrant, order or authorization on the ground that
>
> (a) the ends of justice would be subverted by the disclosure for one of the persons referred to in subsection (2) or the information might be used for an improper purpose; and
>
> (b) the reason referred to in paragraph (a) outweighs in importance the access to the information.

Reasons

(2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure

(a) if disclosure of the information would

…

(iv) prejudice the interests of an innocent person; and

(b) any other sufficient reason.

Procedure

(3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).

Application for variance of order

(4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in relation to which the warrant or production order was obtained may be held.

[28] In *R. v. Michaud v. Québec (Attorney General)*, [1996] 3 S.C.R. 3, the eponymous Michaud applied for access to the sealed packet containing the application and supporting affidavits used to obtain a wiretap authorization under s. 187. He had been targeted for investigation, but no charges had resulted. The Court concluded that s. 187 places a burden upon an applicant to access a wiretap ITO to provide "some evidence that the initial authorization was obtained in an unlawful manner" (para. 55).

[29] However, as has been seen, s. 487.3 requires a different approach. The distinction was explained by Wood, C.J.N.S. in *R. v. Verrilli*, 2020 NSCA 64:

> [31] In *R. v. Esseghaier*, 2013 ONSC 5779, Durno, J. considered an application under s. 487.3(4) to unseal ITOs in relation to search warrants. An issue was raised with respect to who bore the burden on the application. In applying *Dagenais/Mentuck*, he concluded that the onus was on the Crown and

accused, both of whom wanted the sealing order to continue. His analysis was as follows:

> 43 First, the sealing order was obtained in an *ex parte* application in chambers at a time when there was a presumption that the ITO would not be public because of the ongoing investigation. That presumption no longer applies after the warrants were executed. The context in which the determination is made has changed. The presumption of sealing no longer applies. *Toronto Star*, 2005, at para. 23. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), at para. 71, LaForest J. held that "[t]he burden of displacing the general rule of openness lies on the party making the application." I am not persuaded the reference in *New Brunswick* to the party making the application relates to an application to unseal because it refers to displacing the general rule.
>
> 44 Second, to put the onus on the media would be to reverse the presumption in *Dagenais-Mentuck*. The effect would be that if a judge was persuaded to seal the ITO during the investigative stage, the presumption of openness would be reversed when the investigation was completed.
>
> 45 Third, *Michaud*, relied upon by Jaser, was a case involving a presumption of secrecy, not one of openness. That Michaud was unsuccessful in overcoming the presumption of secrecy does not assist Mr. Jaser.
>
> 46 Fourth, in *Dagenais*, Lamer C.J.C. provided general guidelines in regard to publication bans including that "the party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation." That party must establish, on a balance of probabilities, that a ban is necessary, as it relates to an important objective that cannot be achieved by reasonably available and effective alternative measures, that its scope is as limited as possible, and that there is a proportionality between the salutary and deleterious effects of the ban. at para. 98(c). Generalized assertions would not support a publication ban. *Toronto Star*, 2005.The party seeking confidentiality must allege a serious and specific risk. See also: *MacIntyre*, at p. 189, *Mentuck*, at para. 38 I appreciate that in *Toronto Star Newspapers Ltd. v. Ontario* (2005), 2005 SCC 41 (CanLII), 197 C.C.C. (3d) 1 (S.C.C.) the court was dealing with a sealing application as opposed to an unsealing application. However, the principles regarding the party opposing openness having the onus remain.
>
> 47 While the argument raised here was not argued in *Dagenais*, there are no qualifications in *Dagenais* about the times when the presumption applies.

> [32] Durno J. distinguished *Michaud* on the basis that the regime under s. 187 of the *Code* involved a presumption of secrecy and not openness, whereas with an executed search warrant the presumption is openness.
>
> [33] It is clear from all these authorities, once a warrant has been executed, there is a presumption that the ITO will become accessible to the public unless the party wishing to limit that access can justify the limitations being sought. This applies not just at the initial application for a search warrant where a sealing order may be requested, but also any subsequent application to vary or terminate that order under s. 487.3(4).
>
> [emphasis added]

[30] Much earlier, in *R. v. Mentuck*, [2001] 3 S.C.R. 442, a unanimous Supreme Court of Canada had stated:

> 32 The *Dagenais* test requires findings of (a) necessity of the publication ban, and (b) proportionality between the ban's salutary and deleterious effects. However, while *Dagenais* framed the test in the specific terms of the case, it is now necessary to frame it more broadly so as to allow explicitly for consideration of the interests involved in the instant case and other cases where such orders are sought in order to protect other crucial aspects of the administration of justice. In assessing whether to issue common law publication bans, therefore, in my opinion, a better way of stating the proper analytical approach for cases of the kind involved herein would be:
>
> A publication ban should only be ordered when:
>
> > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[31] The Court went on to add:

> 34 I would add some general comments that should be kept in mind in applying the test. The first branch of the test contains several important elements that can be collapsed in the concept of "necessity", but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in *Dagenais*, a "real and substantial" risk. That is, it must be a risk the reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a

> serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.

[32] However, in a more recent iteration of the *Dagenais*/*Mentuck* principles, they have been restated in a somewhat more nuanced fashion. In *Sherman Estate v. Donovan*, 2021 SCC 25, the Court observed that:

> 38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> > (1) court openness poses a serious risk to an important public interest;
> >
> > (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
> >
> > (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario* 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).
>
> [emphasis added]

[33] These rules must be applied strictly because, as the Court in *Sherman Estate* went on to explain:

> 39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become '"one of the

> hallmarks of a democratic society"' (citing *Re Southam Inc. and The Queen (No.1),* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

[34] Other important points discussed in *Sherman Estate*, for present purposes, include:

(i) The term "important interest" captures a broad array of public objectives (para. 41);

(ii) (Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. "By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context … [they are] theoretically at least, separate and qualitatively distinct operations" (para. 42);

(iii) (iAn order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle (para. 42);

(iv) (Care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk of psychological harm. "But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing" (para. 54);

(v) Jurisprudence indicates that embarrassment or shame is not a sufficient reason to order the proceedings be held *in camera* or to impose a publication ban (para. 63).

[35] These principles culminate in the following observations in *Sherman Estate*:

> 73 I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.
>
> 74 Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.
>
> 75 If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this Court has described in its jurisprudence on s. 8 of the *Charter* as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.
>
> [emphasis added]

(ii) Further elaboration upon the competing arguments

[36] One begins with the fact that the ITO strongly suggests (at the very least) that Persons D, E, and F, three members of the legal community, were involved in a serious breach of legal ethical standards. This follows both from the fact that Person D is said to have called Mr. Sparks to inquire if he required legal representation, and from certain personal and/or professional affiliations said to

exist between the lawyers. If accepted, it would involve a breach of not only solicitor-client privilege, but it also would have amounted to a "tip" to Mr. Sparks that his premises were going to be searched by the police. Counsel for Persons D, E, and F argue that releasing their names will trigger "…negative consequences [which] will impact these people's reputation… [and] also their livelihood and that of their families" (*Brief*, para. 29).

[37] However, counsel for CBC argues that, in order to qualify as a "serious risk to an important public interest", the information at issue must rise to the level where it strikes at a person's dignity, revealing something sensitive about them as an individual, as opposed to generic information that reveals little about who they are as a person. Counsel buttresses this argument with a reference to a previously cited portion of the decision in *Sherman Estate*:

> 75 … Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual – what this Court has described in his jurisprudence on s. 8 of the *Charter* as the "biographical core" – if a serious risk to an important public interest is to be recognized in this context … Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed.

[38] Counsel for CBC extrapolates from the above:

> ...an allegation that an individual has violated a professional/ethical duty does not in and of itself constitute details about an individual describing his/her "biological core". Were this in fact to be the case then lawyers, doctors, engineers – the professional classes – could be shielded from the revealing of public allegations that they allegedly violated an ethical duty. Indeed, arguably such exemption from the Sherman Estate test would extend to politicians, bank tellers, arguably virtually anyone whose business involves some aspect of public trust. The Sherman Estate test would be made effectively meaningless.
>
> (*CBC Brief*, para. 10)

[39] Another case referenced by the parties is *A Lawyer v. The Law Society of British Columbia*, 2021 BCCA 284 ("*A Lawyer*"). That case involved potential reputational harm to the applicant, and also to the law firm with which the applicant was associated, as well as its employees. What the applicant sought was either a sealing order or anonymization to prevent "serious risk to an important public interest".

[40] In *A Lawyer*, the Court began with the principles in *Sherman Estate*:

> 72 … at para. 33, the Court in *Sherman Estate* held:
>
> > A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.
> >
> > [emphasis added]

[41] From there, the analysis in *A Lawyer* proceeded thus:

> 73 The question comes down to whether the information sought to be sealed is sufficiently sensitive and "bears on their dignity" in such a way as to displace the strong presumption in favour of the openness of court.
>
> 74 It is not enough that the information disseminated is a "source of discomfort": *Sherman Estates* at para. 56. It must "strike at the core identity of the affected persons": *Sherman Estates* at para. 36. As well, the Court in *Sherman Estates* cautions against too broad a recognition of a public interest in privacy: at para. 57.
>
> 75 The information sought to be sealed and anonymized is sensitive personal information that would strike at the core of the persons sought to be anonymized. It contains serious allegations of dishonesty that is under investigation by the LSBC. It would affect the livelihood of the applicants and other employees at the firm, particularly given that the nature of the firm renders its success dependent on referrals and reputations. As noted, the matter is still under investigation, and the allegations at this point are simply that.
>
> 76 This case implicates an important public interest, namely the reputational interests of multiple legal professionals.
>
> [emphasis added]

[42] The CBC argues that, in *A Lawyer*, the information with respect to alleged wrongdoing by the applicant was still at the investigation stage with the Law Society. As the Court pointed out in that case "… Public access to names at this point in the process is a serious risk to the previously mentioned reputational interest, and may cause irreparable harm to those affected" (para. 78).

[43] The Applicant's argument is, accordingly, that:

> ... the respondents to the CBC motion are not seeking a **temporary redaction of the names, rather they are seeking a permanent sealing of the names**. There is no evidence of an ongoing investigation to be compromised by the revealing of the individuals' names (disclosure of the impugned documents might make the appeal moot). The CBC is not seeking privileged information. The British Columbia case involved a pending appeal of a judicial review matter concerning an investigation by a statutory authority (The Law Society) which, at that stage was confidential. It was not, as in the case before you, a criminal proceeding subject to the open court principle.
>
> (*CBC Brief*, para. 8, bolding in original)

(iii) Important public interest?

[44] It has long been recognized that there is a public interest in a regulated legal profession. The significance of that public interest is underscored by a plethora of provincial legislation across Canada which provides direction and governance with respect to the regulation of the legal profession in the public interest. This includes mandated processes to determine how complaints involving the conduct of legal professionals will be evaluated, and the manner in which they will be investigated and heard.

[45] In Nova Scotia, for example, one encounters the *Legal Profession Act*, SNS 2004 c.28 ("the Act"), and the Regulations promulgated pursuant to it ("the Regulations"). According to these Regulations, an investigation may be triggered in different ways. This includes a situation where NSBS receives "information … that, in the opinion of the Executive Director, establishes reasonable grounds for the opening of a complaint" (Regulations, s. 9.2.1(b)).

[46] Once a complaint is initiated, the lawyer involved must cooperate with it fully, which cooperation includes:

> 9.2.4 …
>
> (a) unless otherwise directed, [by] providing a full and substantial response which must:
>
> > (i) address all matters in the complaint, unless otherwise directed by the Executive Director,
> >
> > (ii) provide copies of all relevant file materials the member relies upon,
> >
> > (iii) answer any additional questions raised by the Executive Director, and
> >
> > (iv) provide any additional information or materials required by the Executive Director;

(b) Adhering to time limits during the investigation; and

(c) responding to all requests from NSBS during the investigation.

[47] Some direction is provided by the Act itself with respect to the maintenance of confidentiality with respect to the investigation, and all proceedings of the Complaints Investigation Committee. For example:

> 40 (1) All complaints received or under investigation and all proceedings of the Complaints Investigation Committee shall be kept confidential by NSBS.
>
> (2) Notwithstanding subsection (l),
>
> (a) subject to any order of a hearing panel, a complaint or information with respect to a complaint that forms part of the notice of hearing pursuant to the regulations, may be disclosed to the public when the notice of hearing is published in accordance with the regulations;
>
> (b) the Executive Director may disclose to the Minister of Justice and Attorney General of the Province and the Minister of Justice and Attorney General of Canada, or to persons designated by either or both of them, information that the Executive Director considers necessary for the purpose of considering judicial appointments and appointments as Her Majesty's Counsel learned in the law;
>
> (c) the President or the Executive Director, or a person designated by either of them, may disclose
>
> > (i) that a complaint about the conduct or competence of a member of NSBS has been received,
> >
> > (ii) that a complaint is or will be under investigation,
> >
> > (iii) information that is otherwise available to the public, or
> >
> > (iv) where Section 37 applies, that conditions or restrictions have been imposed on a practising certificate, or that a lawyer has been suspended from practising law, pending completion of the investigation, and any disciplinary proceeding that may follow;
>
> …
>
> 44 (1) Subject to subsection (2), a hearing before a hearing panel shall be open to the public.
>
> (2) A hearing panel may order that the public, in whole or in part, be excluded from a hearing or any part of it …

[48] The decision in *Fraser v. Nova Scotia Barristers Society*, 2024 NSCA 94, was one in which our Court of Appeal had occasion to discuss s. 40 of the Act:

> [153] From s. 40, several principles emerge:

- Before the CIC, the default is confidentiality. That is apparent from s. 40(1): *i.e.* the material "shall be kept confidential" unless an exception in s. 40(2) exists. According to s. 33 of the *Act*, a purpose of s. 40 is to "protect the public". The Legislature's appraisal of the public interest, at the interim stage, has assigned weight to confidentiality. In contrast, according to s. 44(1) of the *Act*, "a hearing before a hearing panel shall be open to the public" subject to the exceptions stated in ss. 44(2) through 44(9). Once the charge reaches the hearing panel, the default flips to disclosure.

- If an item is otherwise available to the public, the rationale for confidentiality is spent: s. 40(2)(c)(iii).

- Interim conditions or restrictions on practice may be disclosed: s. 40(2)(c)(iv).

- Disclosure at the interim stage is permitted as an incident of the "administration of this Act": s. 40(2)(g). "Administration of this Act", in our view, includes an appeal under ss. 37(7) and 49.

[154] **The Open Court Principle:** The application of these principles is consistent with the open-court principle. *Sherman Estate v. Donovan*, 2021 SCC 25 summarized the seminal rulings in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41.

[155] In *Sherman Estate*, para. 38, Justice Kasirer for the Court stated a three-step test for the exercise of a discretionary power that would limit the open-court principle. The test requires proof of a proportionate response that addresses a serious risk to an important public interest. Justice Kasirer's passage concluded with:

> … Only where all three of these prerequisites have been met can a discretionary limit on openness – for example a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order – properly be ordered. This test applies to all discretionary limits on court openness, **subject only to valid legislative enactments** (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22). [bolding added]

[156] There is no claim that s. 40 of the *Legal Profession Act* offends the *Charter of Rights and Freedoms*. Section 40 is a "valid legislative enactment" which, according to s. 33 of the *Act*, aims to "protect the public". Section 40 reflects the Legislature's appraisal of the public interest in the balance of confidentiality *versus* disclosure at the interim stage which is administered by the CIC. It is appropriate that this Court defer to the Legislature's appraisal.

> [157] Consequently, we will apply the principles, noted earlier, that underlie s. 40.
>
> [emphasis added]

[49] In this case, the thrust of some of the impugned details is that lawyers D, E and F not only violated fundamental legal ethics (were involved in a breach of solicitor-client privilege) but were complicit in tipping off Mr. Sparks that his premises were about to be searched by the police. The implication is that they are (at the very least) unethical and that they were complicit in an attempt to do an "end run" around the pending warrant by tipping Mr. Sparks off. This strikes at their dignity and professional standing. It could destroy their reputations and their abilities to earn a living.

[50] After all, much of any lawyer's stock in trade resides in their ability to give confidential legal advice to clients with respect to (in many cases) life altering events. Untested information which suggests that Lawyers D, E and/or F do not respect solicitor-client confidentiality, and/or that they would use it for their own private purposes or advantage, would be devastating.

[51] As such, the impugned details implicate an important public interest – "the reputational interests of multiple legal professionals" in a manner very analogous to the situation in *A Lawyer*.

(iv) Does disclosure pose a serious risk to the important public interest identified?

[52] I have the advantage of additional information, provided by counsel, which is pertinent to the Court's analysis. First, that NSBS is in receipt of the impugned details with respect to Persons D, E and F. Second, that representatives of that same Society (as one might expect) played a significant role when the police conducted the search at Billy Sparks Law, as well as in subsequent Court proceedings (including this one) that have ensued (*Respondents' Brief*, para. 34). Third, that there is no evidence of an ongoing (current) investigation initiated by NSBS, of lawyers D, E, and/or F, as a result of the impugned information in the ITO, at least to date.

[53] With that said, CBC points to the fact that the Respondents have neither filed affidavits or called any other evidence to support their contention that disclosure of the impugned details in the ITO would pose a serious risk to the public interest in maintaining the integrity of the legal profession and/or the prevention of an attack on their biological core and/or dignity. Without such

evidence (the argument continues) even if an important public interest has been identified, the existence of a "serious threat" to it cannot be made out.

[54] This leads directly to a consideration of *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, [2012] 2 S.C.R. 567 ("*Bragg*"). *Bragg* was an appeal from the Court of Appeal of this Province. It dealt with the case of a 15-year-old girl who had discovered that someone had constructed a Facebook profile using her picture, a slightly modified version of her name, and other particulars identifying her. The post included some unflattering commentary about her appearance, along with some sexually explicit references, and it was removed by the internet provider later that same month. She brought, through her litigation guardian, a preliminary application under the Nova Scotia *Civil Procedure Rules* for an order requiring Eastlink:

> … to disclose the identity of the person(s) who used the IP address to publish the profile to assist her in identifying potential defendants for an action in defamation. She stated in her Notice of Application that she had "suffered harm and seeks to minimize the chance of further harm"… As part of her application, she asked the court for permission to seek the identity of the creator of the fake profile anonymously and for a publication ban on the content of the fake Facebook profile. She did not ask that the hearing be held in camera.
>
> (*Bragg*, para. 3)

[55] While the Court, at first instance, did grant the order requiring Eastlink to disclose the information about the publisher of the fake Facebook profile, it denied the Applicant's request for anonymity and the publication ban on the basis that she had provided insufficient evidence of specific harm should the relief not be granted. This determination was upheld by the Nova Scotia Court of Appeal.

[56] When the case reached the Supreme Court of Canada, the Appeal was allowed in part. In particular, that Court allowed A.B. to proceed with her application anonymously. In so doing, Abella, J., explained:

> 15 The *amicus curiae* pointed to the absence of evidence of harm from the girl about her own emotional vulnerability. But, <u>while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm</u>.
>
> 16 This Court found objective harm, for example, in upholding the constitutionality of Quebec's *Rules of Practice* that limited the media's ability to film, take photographs, and conduct interviews in relation to legal proceedings (in *Société Radio-Canada c. Québec (Procureur général)*, [2011] 1 S.C.R.

> 19 (S.C.C.)), and in prohibiting the media from broadcasting a video exhibit (in *R. c. Dufour*, [2011] 1 S.C.R. 65 (S.C.C.)). In the former, Deschamps J. held (at para. 56) that the *Dagenais/Mentuck* test requires neither more nor less than the one from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). In other words, absent scientific or empirical evidence of the necessity of restricting access, the court can find harm by applying reason and logic: *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), at para. 72; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (S.C.C.), at para. 91.
>
> [emphasis added]

[57] It is certainly true that the Court (in *Bragg*) also recognized the inherent vulnerability of children and the special protections that are in place for young people's privacy under the *Criminal Code*, *Youth Criminal Justice Act*, and child welfare legislation. However, it is clear from the case authorities referenced in the paragraphs above that while direct evidence of risk of harm is relevant, " …the court can find harm by applying reason and logic" (*Bragg*, para. 16) absent affidavit or other empirical evidence. In my respectful view, this is not restricted to cases involving children's well-being. Rather, it may have application in circumstances where there is "objectively discernible harm" (*Bragg*, para. 15).

[58] The Applicant argues that the *Sherman Estate* case has changed the applicable law since *Bragg*, and points to the recent decision in *Reference re iGaming Ontario*, 2024 ONCA 569, in support of the contention. In *iGaming*, the Court said this:

> 21 On the first prong of this test, the CGA argues that the Sensitive Evidence could cause Ontario operators to suffer reputational harm, and that other operators identified by name in the Sensitive Evidence are not involved in the reference and have no opportunity to answer the allegations against them. The CGA asserts that there is an important public interest in limiting court openness when reputational and regulatory harm would result from unproven allegations against non-parties, especially in the reference context, which is not designed to permit the impugned non-parties an opportunity to respond. The CGA says that allowing the public to access the Sensitive Evidence in this context would cause harm to the court's process. Flutter supports the CGA's motion. British Columbia and the Canadian Lottery Coalition Members oppose the motion.
>
> 22 The CGA has not established that public access to the Sensitive Evidence would pose a serious risk to an important public interest. The CGA did not provide any direct evidence of harm, but asserted instead that it would be reasonable to infer that allegations of criminal conduct could entail regulatory consequences for Ontario operators named in the Sensitive Evidence. The alleged regulatory or reputational harm is a private interest that would not justify an order limiting public

> access: *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 55. In any event, the Sensitive Evidence is largely already public. There is little justification or purpose in granting a sealing order over information that is already in the public domain: *Fletcher v. Ontario,*2024 ONCA 148, at para. 141.
>
> 23 Nor am I persuaded that public access to the Sensitive Evidence poses a serious risk of harm to the court's process. On the contrary, given my conclusion above that the proposed evidence may assist the panel in answering the reference question, the integrity of the court process is best served by public access to all of the evidence that will be before the panel: *Sherman Estate*, at para. 39. Since the CGA has not met the first prong of the *Sherman Estate* test, it is not necessary to consider the remaining two prongs.
>
> [emphasis added]

[59] First, and with respect, the decision in *Sherman Estate* does not change the essentials of the *Dagenais/Mentuck* test to be applied when a restriction to the open court principle is sought. It simply recasts what had previously been portrayed as a two-part test, as a tripartite one, without altering the essence of the test itself (*Sherman Estate*, para. 38).

[60] Second, it is very clear that the Court in *iGaming* made a specific finding that the alleged regulatory or reputational harm at issue therein involved a "private interest" (para. 22) as opposed to what I have concluded in this case is an "important public interest".

[61] Third, the Court in *iGaming* concluded that the "sensitive evidence" in question is "largely already public" anyway (para. 22). Moreover, there was a finding that the sensitive evidence in that case did not, in any event, pose a "serious risk of harm" to the Court's process, which was the interest implicated in that case (para. 23).

[62] Consistent with the approach of the Court in *Bragg* and in *A Lawyer*, I am able to apply reason and logic to the issue of whether a serious risk to an important public interest exists. This is a case in which I do not require affidavit or other evidence of the serious risk of harm. In these specific circumstances, I have no difficulty in concluding that the important public interest earlier identified will sustain objectively discernible harm in the event that the identities of Persons D, E and/or F are disclosed publicly.

[63] As noted earlier, it is apparent that public revelation of the identities of Persons D, E and F will stigmatize them as having been complicit in a violation of

solicitor-client privilege, and the "tip off" of Mr. Sparks in advance of the execution of the Search Warrant, in the wake of a police investigation of alleged sexual assault and extortion of multiple young and very vulnerable clients by him.

[64] These impugned details, as of yet, have not been investigated (as far as anyone is aware) by a responsible body. At the same time, their dissemination would pose a serious risk to an important public interest, which is to say, "the reputational interests of multiple legal professionals" (*A Lawyer*, para. 76). As pointed out earlier, it would constitute an affront to their dignity and personal integrity, coupled with what would likely be devastating consequences to their ability to continue to practice in the profession.

[65] The thrust and tenor of the Act, and the Regulations passed pursuant thereto, implicitly recognize that revelation of allegations of misconduct on the part of lawyers, unless and until they are investigated, and unless and until those investigations lead to a hearing under the Act, may undermine public confidence in the legal profession as a whole, and that this is contrary to the public interest (*Fraser*, para. 156). The regulatory scheme provides safeguards against disclosure once a complaint has been received and is being investigated. Disclosure is only available in the event that a hearing on the merits is required, in which case the hearing is held publicly.

[66] In this case, there is no suggestion before the Court that the NSBS has treated the information in the ITO as constituting a complaint, or that it is investigating what is contained in the ITO as it pertains to Persons D, E and F. If such an investigation has been undertaken, s. 40(1) of the Act provides that all complaints received or under investigation shall and must be kept confidential by NSBS.

[67] CBC's position seems to be that one of the things which removes this case from the ambit of s. 40 of the Act, and distinguishes it from *A Lawyer*, is that in the latter, there was an ongoing Barristers' Society investigation, whereas there is no evidence of such ongoing investigations into the allegations in this case.

[68] With great respect, it defies logic and commonsense to conclude that secrecy must prevail with respect to allegations or complaints deemed by the NSBS to be significant enough to warrant investigation (while at the investigative stage) while those (such as in this case) where there is no evidence (at least to date) that the impugned details in the ITO have been considered substantial enough, by that same body, to even bother with an investigation, must be disclosed publicly. If an

investigation does eventually ensue, and if after investigation, a hearing is deemed by the NSBS to be necessary, the allegations may be made public pursuant to processes already provided in the Act (s. 40). This will include the names of Respondents D, E, and F, unless an Order to the contrary is made under s. 44(2) of the Act.

(v) A redaction order is necessary and there are no alternative measures which will prevent the risk that has been identified

[69] The relief sought by Persons D, E and F is minimal. It consists simply of the redaction of their identifying information in response to the serious risk which publicization poses to the public interest implicated in this matter. It is necessary. Moreover, nothing less will prevent the serious risk that has been identified.

[70] I conclude that there are no other available measures which will prevent the risk.

(vi) The benefits of the order outweigh its negative effects

[71] In *Toronto Star Newspapers Limited v. Ontario*, 2005 SCC 41, Fish, J. put it thus:

> 1 In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
>
> 2 That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(*b*) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.
>
> 3 The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.
>
> 4 Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice or unduly impair its proper administration*.

[72] This has been interpreted as requiring a balancing or assessment as to whether the benefits of the sealing order, or anonymization, outweighs its negative impact upon the open court principle. Some additional guidance is offered in *Sherman Estate* with respect to this portion of the analysis:

> [106] … In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process … There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interest in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

[73] In *Dempsey v. Pagefreezer Software Inc.*, 2024 NSCA 76, Bryson, J.A. reasoned:

> [29] The benefits of the sealing order outweigh its negative impact on the open courts principle. To begin, as noted by the SCC in *Sherman Estate*:
>
> > [106] […] In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). […]
>
> [30] The appeal here has already been dismissed so the materials sought to be protected cannot reasonably be considered "central" to the judicial process. That process has concluded. The public's ability to understand why it concluded would not be hindered by the respondent's proposed sealing order.
>
> [31] Additionally, with respect to the limited non-confidential information that would be subsumed by the requested sealing order, the public interest in such materials is weak. To repeat, even if those materials were not sealed, they would be difficult to understand and divorced from the context of the files from which they originate.
>
> [32] On the other hand, the interest in maintaining comity is strong, particularly because the British Columbia Court decisions remain in full force and effect in that province.
>
> [33] Finally, the sealing orders do not cover the entire record. Instead, they protect those materials already subject to confidentiality orders in British Columbia. The orders sought represent a proportionate balance between judicial comity and the open courts principle.

> [34] Accordingly, the third prong of the *Sherman Estate* test is met.

[74] The Respondents have referenced *P1 v. XYZ School*, 2022 ONCA 571, where that Court noted:

> [67] … the only issue at this stage is whether the confidentiality measures that I have identified as necessary and appropriate to prevent the risk that the minor parties will be identified are proportional under the third stage of the *Sherman Estate* test. I am satisfied that the anonymization of the names of the minors and their litigation guardians, the redaction of specific identifying information, and a publication ban over the redacted information and information that would tend to identify the minors — represents a proportionate balancing between protecting the minor litigants' identities and the open court principle. The specific details are peripheral to the issues in the litigation and their exclusion from the public record in the interest of protecting the identity of the minor litigants outweighs any interest in their disclosure as part of court openness.

[75] I conclude that the identities of Persons D, E and F do not form an integral part of the judicial process represented by the ITO and Warrant. Members of the public will easily be able to understand that process, and why it was invoked, by reference to the unredacted information. In this sense, the identities of the three lawyers are clearly peripheral or incidental to that process, and the harm engendered by revelation of the identities of those individuals would vastly outstrip the harm to the open court principle which is occasioned by the mere removal of their identifying information.

[76] The application by CBC, insofar as it pertains to the identities of Persons D, E and F, is dismissed. The disputed redactions with respect to those individuals shall be maintained.

(vii) Person P

[77] As has been noted earlier, Person P is a police officer, and, though notified, did not participate in these proceedings in any way. His identity, *simpliciter*, was also clearly very peripheral information in the ITO, insofar as the issuance of the Warrant was concerned.

[78] With that said, it would appear that the most which could ensue upon the release of his identity, should any media outlet, for some reason, feel the need to do so, would be to occasion some measure of embarrassment to him predicated upon the revelation of the fact of his prior friendship with Mr. Sparks. It is not

evident that there would be any consequence beyond that, and as such, case law is very clear that this would not rise to the level of an attack upon his dignity and/or core biographical data (*Sherman Estate*, para. 63). Therefore, it does not equate to an "important public interest" as the authorities have defined the phrase for present purposes. Without this threshold criterion being met, no reason for the curtailment or a restriction of the open court principle with respect to his identity is apparent. The application by CBC, insofar as it pertains to the identity of Person P, is accordingly granted.

Gabriel, J.