Citation: R v Ostrowski, 2023 MBCA 6
Date: 20230123
Docket: AR14-30-08288

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Mr. Justice William J. Burnett
Madam Justice Jennifer A. Pfuetzner

B E T W E E N :

HIS MAJESTY THE KING	)	***J. B. Kroft, K.C.***
	)	***K. D. Toyne*** *and*
	)	***J. A. Sokal***
	)	*for the Moving Party*
Respondent	)	*Canadian Broadcasting*
	)	*Corporation*
- and -	)	
	)	***D. L. Robins***
STANLEY FRANK OSTROWSKI	)	*for the Appellant*
	)	*(via videoconference)*
(Accused) Appellant	)	
	)	***M. A. Bodner***
- and -	)	*for the Respondent*
	)	*The Attorney General of*
B.B., spouse of the late M.D., and J.D., in his capacity as executor of the estate of the late M.D.	)	*Manitoba*
	)	***R. M. Gosman***
	)	*for the Respondents*
Respondents	)	*B.B., spouse of the late*
	)	*M.D., and J.D., in his*
- and -	)	*capacity as executor of the*
	)	*estate of the late M.D.*
DOUGLAS MCCOY, on his own behalf, and in a representative capacity on behalf of the EMPLOYEES OF THE REGISTRY OFFICE and OTHER SUPPORT STAFF OF THE COURT OF APPEAL OF MANITOBA	)	***A. B. Graham, K.C.***
	)	*for the Interveners*
	)	
	)	*Motion heard:*
	)	***September 29, 2022***
Interveners	)	
	)	*Decision pronounced:*
	)	***January 23, 2023***

NOTICE OF RESTRICTION ON PUBLICATION: There is a ban on publication of any of the content of the affidavit of Richard Posner sworn March 20, 2018 and any reference to that content in these reasons.

BURNETT and PFUETZNER JJA

[1] This is a motion by the moving party (the CBC) for reconsideration of a publication ban ordered by this Court relating to the death [REDACTED] of a witness (the witness). The witness died [REDACTED] after giving testimony in this Court in the wrongful conviction appeal of the accused.

[2] The details of and the circumstances surrounding the witness's death are contained in the affidavit of Richard Posner, together with an accompanying book of materials (the Posner affidavit), that was proffered by the accused as fresh evidence on his appeal. The events are also described in detail in the briefs filed in connection with the accused's fresh evidence motion. A publication ban was ordered at the hearing of this fresh evidence motion with the consent of all parties (the publication ban). This Court subsequently dismissed the fresh evidence motion and ordered a continuation of the publication ban.

[3] For the reasons that follow, the CBC's motion for reconsideration of the publication ban is dismissed. First, we deny the CBC standing to bring the motion as it had notice of the publication ban, and we are not persuaded that the CBC proposes to make novel submissions that could have affected the result if those submissions had been made prior to the publication ban being continued (see *Canadian Broadcasting Corp v Manitoba*, 2021 SCC 33 at para 42 (*CBC v Manitoba*)). Second, we decline to hear the motion as the CBC failed to act with "due dispatch in seeking to set aside" the publication ban (at para 45). Finally, in the event that we are wrong to deny standing to

the CBC or to decline to hear the motion due to delay, we decline to reconsider the publication ban as it is necessary to prevent a serious risk to an important public interest, being the dignity of the witness and the witness's spouse (the spouse). In our view, the benefits of the publication ban outweigh any negative effects on the principle of court openness.

Background

[4] The accused was convicted of first degree murder by a jury in 1987. In 2014, the federal minister of justice referred the conviction to this Court under Part XXI.1 of the *Criminal Code* as the minister was satisfied that there was a reasonable basis to conclude that there had been a miscarriage of justice.

[5] In order to determine the appeal, fresh evidence relating to the trial proceedings was admitted by this Court. The fresh evidence included the evidence of 11 individuals who testified before this Court, one of whom was the witness, [REDACTED]. Some of the fresh evidence was in respect of a deal that prosecutors had made to dismiss drug charges against a key witness in the accused's murder trial (the Lovelace deal). The rest related to notes and a police report of a telephone call made by the key witness to a police officer (the Jacobson report). Neither the Lovelace deal nor the Jacobson report was disclosed to the accused at his trial, hampering his ability to make full answer and defence. On the basis of the fresh evidence, the Crown conceded and this Court found that there had been a miscarriage of justice.

[6] As previously mentioned, the accused brought a second motion to introduce as fresh evidence the material contained in the Posner affidavit. At the beginning of the hearing of the fresh evidence motions on May 28, 2018, a publication ban on the Posner affidavit was imposed. [REDACTED]. The

details regarding the witness's death and the inferences attributed to the content of the Posner affidavit by the accused's counsel were disclosed during oral submissions. A representative of the CBC was present in court when the publication ban was ordered.

[7] As a result of finding that a miscarriage of justice had occurred, we set aside the accused's conviction, ordered a new trial and entered a judicial stay of proceedings (see 2018 MBCA 125 (*Ostrowski 2018*)). We dismissed the motion to admit the Posner affidavit as fresh evidence as it had no relevance to the only remaining issue before this Court, being the remedy for the accused's wrongful conviction (see para 82). This Court also ordered that the publication ban on the Posner affidavit should remain in effect (*ibid*).

[8] Significantly, the accused did not appeal the dismissal of the fresh evidence motion relating to the Posner affidavit or the publication ban.

[9] *Ostrowski 2018* was released on November 27, 2018. On or before November 29, 2018, the CBC contacted the media relations officer for the Courts and judiciary of Manitoba (the media relations officer) regarding the publication ban and advised that it was considering an application to challenge the ban. Arrangements were made for a senior CBC representative to attend the Court office on December 3, 2018 to review the notice of motion to introduce the Posner affidavit as fresh evidence and the written briefs filed on the motion. After reviewing the motion and briefs, copies were requested by and made available to the CBC. On or before December 6, 2018, the CBC retained counsel to challenge the publication ban.

[10] For reasons that remain unclear, the CBC did not file a motion to set aside the publication ban until May 10, 2019.

[11] At the initial hearing of the CBC's motion to set aside the publication ban on October 28, 2019, the Crown raised a threshold issue of whether this Court had jurisdiction to hear the motion. After hearing argument on that point, we concluded that we did not have jurisdiction as we were effectively *functus officio* (see 2019 MBCA 122 (*Ostrowski 2019*)).

[12] The CBC sought and was granted leave to appeal *Ostrowski 2019* to the Supreme Court of Canada. The Supreme Court allowed the appeal, set aside *Ostrowski 2019* and remanded the CBC's motion to this Court for us to decide in accordance with its reasons (see *CBC v Manitoba* at paras 96, 105).

[13] Prior to the hearing of the motion, the CBC filed written representations suggesting that it was misled by Registry staff and that this was the explanation for or a contributing factor to the delay in filing its notice of motion. The CBC advised that it would "argue that it received incomplete and in some cases incorrect information about the restrictions in place from the Court office" and that this "ultimately led to CBC having to reach out to [Crown counsel] and others for information as to what orders were made and on what basis they were made."

[14] A motion was brought on behalf of the employees of the Registry office and other support staff of the Court of Appeal (the Registry staff) for an order permitting them to intervene on the CBC's motion. The purpose of the motion was to allow the Registrar to address the issues raised relating to communications between representatives of the CBC and the Registry staff and to file an affidavit to ensure that the evidence before this Court was complete.

[15] The motion to intervene was granted with the consent of all parties. The Registrar subsequently filed an affidavit providing a more complete record of the interactions between the representatives of the CBC and the Registry staff.

Issues

[16] The "discretionary and fact-specific" decisions (*CBC v Manitoba* at para 8) remanded to this Court are as follows:

1. Should the CBC be granted standing to challenge the publication ban?

2. Was the motion unreasonably delayed such that it is not in the interests of justice to hear it?

3. Is lifting the publication ban justified taking into account *Sherman Estate v Donovan*, 2021 SCC 25?

(See also para 87.)

[17] The CBC also seeks access to the Posner affidavit, asserting that the sealing order, which was automatically imposed on the affidavit when it was filed in support of the fresh evidence motion pursuant to r 21(4) of the MB, *Court of Appeal Rules*, MR 555/88R (the *CA Rules*), is spent as it only operated until the motion for fresh evidence was decided. This was confirmed by the Supreme Court in *CBC v Manitoba* (see para 81). As a result, in the event that the CBC has not yet accessed the Posner affidavit, it is free to do so.

Standard of Review

[18] This is not an appeal but, rather, a motion to reconsider an order previously made by this Court. As a result, there is no applicable standard of review. At the same time, this is not a hearing *de novo* on the publication ban as the correctness of the initial order is presumed (*ibid* at para 55).

[19] Publication bans are susceptible to reconsideration but on narrow grounds, including that an affected party who was not given notice proposes to make novel submissions that could affect the result or that there was a material change in circumstances (*ibid* at para 42). The Supreme Court found that there has been no material change in circumstances. Accordingly, this Court is being asked to reconsider the publication ban, not because it was wrongly made but, rather, because it may have been made without consideration of novel submissions by a media representative, specifically the CBC, that could have affected the result (see para 56).

Analysis

Standing

[20] In *CBC v Manitoba*, Kasirer J, writing for the majority, clearly delineated what is required to determine this motion (see paras 75, 87). As a preliminary matter, we must decide if the CBC should be granted standing.

[21] When an order affecting court openness has been made without notice to the media, a representative of the media generally should have standing to challenge the order if they are able to show that they will make submissions that were not considered and that could have affected the result.

Ultimately, the decision to grant standing to a member of the media is discretionary (*ibid* at para 47).

[22] In oral argument, the CBC contended that it should not be deemed to have notice of the publication ban as no one in the organization, other than one reporter, knew about the imposition of the publication ban until the CBC's counsel obtained a transcript of the hearing after having filed its notice of motion on May 10, 2019. That contention is patently wrong as *Ostrowski 2018* (issued November 27, 2018) specifically notes that "there was also a publication ban in place at the beginning of the hearing to prevent the publication of any of the details of [the Posner affidavit]" (at para 81).

[23] We agree with the submission of the spouse and estate of the witness (the family respondents) that there is no question that the CBC was aware of the publication ban at all times. The CBC had been reporting on every aspect of the proceedings and admitted that it had a reporter in the courtroom when the publication ban was originally ordered on May 28, 2018 (see *CBC v Manitoba* at para 119). There is no affidavit or other evidence from that individual. On May 28, 2018, this Court made it clear to all present that, if the Posner affidavit was not admitted as fresh evidence, the publication ban would remain in place. Although the CBC knew the essential facts in the Posner affidavit and the submissions made at the oral hearing, it abided by the publication ban and made no effort to set it aside.

[24] In our view, the CBC had notice of the publication ban on May 28, 2018, a full six months before the publication ban was continued on November 27, 2018, and nearly one year before it filed its motion.

[25] Notwithstanding the fact that the CBC had notice of the publication ban on May 28, 2018, we will consider the other aspects of the test for standing.

[26] The CBC also asserts that it will make new submissions that could have affected this Court's decision to order the publication ban as it will make arguments regarding the application of the principles in *Sherman*—principles that we could not have considered at the time the publication ban was ordered as the decision in *Sherman* had not been rendered.

[27] The Crown argues that this Court should deny standing to the CBC, noting that we are presumed to have already "balanced the interest of the media in open court proceedings with competing public interests" and that the CBC's submissions merely re-address this balancing. The family respondents emphasize that there is nothing new in the CBC's submissions that could affect the result and that standing should be denied.

[28] In our view, while *Sherman* has recast and explained the test (see para 38), it did not fundamentally change the law and the CBC's arguments on the reconsideration motion, while thorough, are not novel. The CBC relies on the established law set out in *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835; and *R v Mentuck*, 2001 SCC 76, and further refined in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41; and *Sherman*. Ultimately, the CBC argues that the privacy interests of the witness and the spouse do not rise to the level of an important public interest requiring protection and that, in any event, the benefits of the publication ban are outweighed by its negative effects on the constitutionally protected public right to court openness. However, these are the precise issues that this Court

is presumed to have considered, and indeed did consider, when the publication ban was ordered.

[29] In conclusion, having applied the narrow test prescribed in *CBC v Manitoba* for the granting of standing to the circumstances of this case, we would not exercise our discretion to grant standing to the CBC.

[30] However, even if we granted standing to the CBC, the conclusion that this Court should decline to hear this motion becomes inescapable upon consideration of the CBC's delay in bringing this motion.

Did the CBC Act With Due Dispatch?

[31] As noted by Kasirer J in *CBC v Manitoba*, courts may decline to hear a motion to set aside an order "if the moving party was unreasonably slow in bringing that motion after becoming aware of the order, such that it is no longer in the interests of justice to hear it" (at para 48). In the present case, the CBC must show that the delay from the time it became aware of the order to the time it filed its motion in May 2019 was not unreasonable. Kasirer J found that the delay in the CBC bringing its motion was "in the order of six months" (at para 76) as he found that the CBC became aware of the publication ban shortly after November 27, 2018.

[32] Kasirer J also noted that the issue of delay was not fully argued in the Supreme Court (see para 89) and that the Supreme Court had previously remanded matters to a court of appeal where the record and arguments were too sparse to resolve the matter confidently. In reconsidering the question of delay, we have had the benefit of a much more complete record and full argument.

[33] Matters in this Court are expected to proceed with reasonable promptness. Typical timelines under the *CA Rules* call for filings to be made within 30 days—this includes filing a notice of appeal from a judgment of a lower court (see r 11(1)); perfecting an appeal after receiving notice of deemed abandonment from the Registrar (see r 33(4)); and filing a motion for a rehearing of an appeal (see r 46.2(4)).

[34] Failure to meet those timelines is often an absolute bar to further proceedings. At a minimum, it necessitates a motion for an extension of time.

[35] The jurisprudence of this Court setting out the test for granting an extension of time is not applicable in the present case. Nonetheless, in our view, those principles are helpful in assessing the CBC's argument that its delay was reasonable. The relevant test provides that three criteria must be satisfied by the party seeking an extension of time: (i) a continuous intention to appeal from a time before the expiration of the filing period, (ii) a reasonable explanation for the delay, and (iii) arguable grounds of appeal (see *Bohemier v Bohemier*, 2001 MBCA 161 at para 2; and *Campbell v Campbell*, 2011 MBCA 23 at para 6). In addition, this Court has an overriding discretion to grant or refuse an extension of time if it is right and just in the circumstances.

[36] The CBC submits that it was not unreasonably slow to challenge the ban, asserting that it moved with reasonable dispatch in the circumstances. It also alleges that "the Court office was unable to provide accurate and timely information as to the restrictions notwithstanding multiple communications over a two month period." The CBC maintains that its efforts to "focus and refine issues in dispute" before challenging the publication ban served the "interests of efficient justice". The CBC relies on the affidavit of its managing

editor, Melanie Verhaeghe, to set out the circumstances that it says show that its delay was reasonable (the Verhaeghe affidavit).

[37] The Crown's position is that the CBC's unreasonable and unexplained delay began on May 28, 2018 when the publication ban was first ordered. The Crown maintains that the Verhaeghe affidavit demonstrates that the CBC failed to act "promptly and with due dispatch" after the release of *Ostrowski 2018*, and it asserts that "important evidence [was] left out". The Crown submits that the information contained in the Posner affidavit is irrelevant to the accused's wrongful conviction and that this is a contextual factor that this Court should take into account in considering whether to hear the motion on its merits. Finally, the Crown argues that, "[i]n a court where timelines typically involve deadlines of 30 days," this delay goes well beyond what is reasonable.

[38] The family respondents assert that the CBC was neglectful in pursuing its motion and used a "less-than-robust effort" to move things ahead. They note, in contrast, "the promptness demonstrated by the Court of Appeal staff in its dealings with Mr. Kroft," asserting that "[t]he delay here [was] not attributable to them." Ultimately, the family respondents submit that the CBC should be taken to have acquiesced to the existence of the publication ban.

[39] In terms of assessing the CBC's assertion that it acted with reasonable promptness and was hampered by receiving inaccurate and incomplete information from the Registry staff, the affidavit of the Registrar is illuminating. Exhibit B to that affidavit includes relevant email correspondence not included in the Verhaeghe affidavit.

[40] After being advised by the media relations officer on November 30, 2018 that "[t]here [was] nothing preventing [the] media from reviewing the material that [was] protected by the [publication] ban" and that the "[m]edia [could] look at the notice of motion and the briefs filed in relation to the fresh evidence," Cecil Rosner, the CBC's Director, Investigative Journalism (Rosner), wrote to the media relations officer "to make an arrangement to come down Monday to have a look."

[41] On December 3, 2018, Rosner sent the following email to the media relations officer:

> . . .
> Thanks for providing access to the Ostrowski materials.
>
> I would appreciate copies of:
>
> 1. March 23/18 [The accused]'s . . . application for admission of further evidence.
>
> 2. May 22, 2018 [The accused]'s brief pertaining to [the fresh] evidence, along with the [Crown]'s response.
> . . .

[42] By December 6, 2018, Jonathan Kroft (Kroft) had been retained by the CBC to challenge the publication ban and, in an email to the media relations officer on that date, indicated he "gather[ed] [she had] or [was] also copying documents that [Rosner] [had] requested."

[43] On December 19, 2018, the media relations officer wrote to Rosner by email (with a copy to Kroft) to advise him as follows: "The pages are copied . . .. I'll put them downstairs before I leave today." Clearly this was a reference to copies of the notice of motion to admit the Posner affidavit and the related briefs.

[44] Curiously, despite the fact that the CBC had reviewed the briefs relating to the Posner affidavit and that copies were made available to it, the Verhaeghe affidavit contains the following statement: "I am further advised by Mr. Kroft and believe that he was advised by the [Registry staff] that the [accused's] Brief filed in respect of the Fresh Evidence Motion was not available to the public." In his affidavit, the Registrar attests that he "did not advise Mr. Kroft that the [accused's] Brief, filed in support of the Fresh Evidence Motion, was not available to the public" and that he does "not believe that any other member of the Court of Appeal Registry staff, or [the media relations officer] so advised Mr. Kroft."

[45] The CBC argues that there was initially confusion as to the nature and terms of the publication ban. Even accepting this argument in the face of the fact that the CBC had a representative in the courtroom on May 28, 2018—when the publication ban was initially imposed and the details of the Posner affidavit were discussed at length—the terms of both the publication ban and the sealing order were set out in paragraphs 81 and 82 of *Ostrowski 2018* and had been explained to Rosner as early as November 30, 2018.

[46] If this were not enough, the situation was again made crystal clear in correspondence from the Registrar to the CBC's counsel on January 21, 2019. The Registrar explained that:

> . . .
> a) . . . just the affidavit containing the fresh evidence is sealed pursuant to rule 21(4) of the Court of Appeal Rules.
>
> b) . . . at the outset of the proceedings on May 28, 2018, the Court imposed a publication ban preventing the publication of any of the details of the proposed fresh evidence. In paragraph 82 of [*Ostrowski 2018*], the Court ordered that the publication ban would remain in effect.
> . . .

[47] Despite the clarity and completeness of the information provided to the CBC's counsel by January 21, 2019, the Verhaeghe affidavit continues as follows: "[O]n or about January 31, 2019, Mr. Kroft called [the media relations officer] with further questions and concerns about the information provided by the Court."

[48] A conference call between Kroft, the media relations officer and the Registrar was arranged for February 8, 2019. The Verhaeghe affidavit states: "During the conference call it appeared that [the media relations officer] and [the Registrar] were not in a position to answer CBC's questions . . .".

[49] The Crown correctly observes that, while the CBC tendered evidence attempting to justify its delay after November 27, 2018, it has not tendered any evidence to explain why it did not challenge the initial publication ban immediately after May 28, 2018. This is an unexplained delay of six months. As we have already indicated, there is no affidavit from the CBC representative, who was present in the courtroom on May 28, 2018, and no evidence of the steps taken, if any, by that representative. This is particularly surprising given that, at the commencement of the hearing on May 28, 2018, this Court stated that there was a publication ban in relation to the Posner affidavit and wanted that fact "to be clear for any member of the media who may be present in the courtroom."

[50] While the evidence shows that the CBC formed an intention to challenge the publication ban after November 27, 2018, the explanation for its delay is not reasonable. In our view, even taking the charitable perspective that the CBC became aware of the publication ban shortly after that date, its delay is unjustified and the explanation offered is entirely unsatisfactory.

[51] There was, in our view, nothing inaccurate or incomplete about the information provided by the Registry staff. The CBC had all of the information that it needed to file a motion to set aside the publication ban prior to January 21, 2019. Certainly, by that date, there is no reasonable basis to suggest that the CBC or its counsel needed further information.

[52] The situation was aptly described by Abella J in *CBC v Manitoba* (at para 126):

> An unexplained six month delay for filing a motion to have a publication ban reconsidered — even a four month delay, on a charitable interpretation of when the CBC had full and complete notice of the nature of the publication ban — is inordinate. Under no definition of "due dispatch" or "prompt action" can this delay be justified, particularly since the CBC was fully aware — and present — from the outset of the proceedings, the ban, and the ban's continuation. . . .

[53] While we agree that the fact that the Posner affidavit was not admitted as new evidence should not shield the publication ban from review (*ibid* at para 82), the significance of the information is still a consideration when deciding whether to hear the motion given the delay. Here, the Posner affidavit played no part in this Court's decision, its relevance was dubious at best and it was open to various interpretations.

[54] Having conducted "a contextual balancing of finality and timely justice against the importance of the matter being heard on its merits" (*ibid* at para 49), and having considered the magnitude of the delay, the attempt to deflect responsibility for the delay onto Registry staff and the need for an assurance of finality for the family respondents, we are satisfied that it is not in the interests of justice to hear the motion.

[55] However, in the event that we are wrong in that conclusion, we will now consider whether, if standing had been granted and we had found the CBC's delay to be reasonable, the publication ban should be reconsidered.

Reconsideration of the Publication Ban

Introduction and Law

[56] As to the substance of the CBC's motion, the Supreme Court directed this Court to apply the test in *Sierra Club* as recast in *Sherman* (see *CBC v Manitoba* at para 77). Under that test, a court can order discretionary limits on court openness only where (1) openness poses a serious risk to an important public interest, (2) the order sought is necessary to prevent that risk, and (3) the benefits of the order outweigh its negative effects (see *Sherman* at para 38).

[57] When deciding whether an important public interest is at stake, Kasirer J noted that, in *Sherman*, the Court held that "there is an important public interest in a narrower dimension of privacy concerning the protection of individual dignity" (*CBC v Manitoba* at para 79). Individual dignity is engaged when the information at issue "is sufficiently sensitive such that it strikes at their biographical core, revealing something 'intimate and personal about the individual, their lifestyle or their experiences'" (*ibid*).

[58] In *Sherman*, the Court provided examples of the types of "sensitive personal information that, if exposed, could give rise to a serious risk" to individual dignity, including stigmatized medical conditions, stigmatized work, sexual orientation and subjection to sexual assault or harassment (at para 77). While acknowledging that publication of this type of private information is a concern felt "first and foremost" by the individual involved,

there is nonetheless a public interest in its protection (at para 48). Personal privacy is considered in our society to be a valuable commodity worthy of safeguarding. As stated by Kasirer J, "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" (at para 33).

[59] The traditional common law principle, reflected in the Latin maxim *actio personalis moritur cum persona*, was that privacy rights terminated with the death of an individual. However, this position has been rejected in Canadian law.

[60] In *Grant v Winnipeg Regional Health Authority et al*, 2015 MBCA 44, Mainella JA, commenting on this principle in the context of the *Canadian Charter of Rights and Freedoms* (the *Charter*), stated: "I see no imaginable reason to borrow such a discredited and outdated principle of the common law to the modern age where key values underlying the *Charter* include the affirmation of individual human dignity and respect for the value of human life" (at para 84).

[61] There is also statutory recognition in Canada that deceased persons have privacy rights. For example, in Manitoba, *The Freedom of Information and Protection of Privacy Act*, CCSM c F175 (*FIPPA*), provides that "disclosure of personal information is not an unreasonable invasion of a third party's privacy if . . . the information is about an individual who has been dead for 25 years or more" (at section 17(4)(h)), the implication being that disclosure of such information would be an <u>unreasonable</u> invasion of privacy if the individual has been dead for less than 25 years.

[62] Under equivalent legislation in British Columbia, an adjudicator at the Office of the Information & Privacy Commissioner upheld the decision of the Office of the Chief Coroner to deny a father access to his adult son's suicide note that shed "light on the deceased's state of mind before he died" (*British Columbia (Chief Coroner), Re*, 2007 CarswellBC 4338 at para 16). The adjudicator concluded that disclosure of the note would be an unreasonable invasion of the son's privacy as it contained personal information relating to "a medical, psychiatric or psychological . . . condition" (*ibid*).

[63] Similar to *FIPPA*, *The Personal Health Information Act*, SM 1997, c 51, allows for disclosure of personal health information to a relative of a deceased individual, but only if that disclosure "is not an unreasonable invasion of the deceased's privacy" (at section 22(2)(d)).

[64] Perhaps most importantly, the Supreme Court has recently recognized that deceased persons have continuing dignity and privacy interests when they are complainants in a criminal case. In *R v Barton*, 2019 SCC 33, the majority commented that "Ms. Gladue's dignity and privacy . . . continued despite her death" (at para 83).

[65] One way that American courts have protected individuals' privacy after death is by recognizing familial or relational privacy interests. In the early case of *Schuyler v Curtis et al*, 147 NY 434 (Ct App 1895), the Court commented (at p 447):

> . . .
> . . . [I]t is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a

> violation of their own rights in the character and memory of the deceased. . . .
> . . .

[66] One author has observed that the principle behind these cases is "the theory that a decedent's survivors have a right to privacy separate from the right of a decedent" (Natalie M Banta, "Death and Privacy in the Digital Age" (2016) 94:3 NCL Rev 927 at 972). Similarly, Clay Calvert explains that the law attempts to strike a balance between the public's "right to newsworthy information about the dead, and concerns for the family's privacy rights, emotional tranquility, solemn respect, and dignity" (Clay Calvert, "The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture" (2006) 26:2 Loy LA Ent LR 133 at 134-35 [footnotes omitted]). This Court's decision in *Grant* left the door open to such claims.

[67] Having mentioned American law on this topic, we will briefly refer to the civilian position. As explained by Lilian Edwards & Edina Harbinja, "Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World" (2013) 32:1 Cardozo Arts & Ent LJ 83 (at pp 103-4, 109):

> . . .
> By contrast, many states whose legal system derives partly or wholly from civilian tradition have historically been more inclined to recognise both the principled existence of personality rights, and their persistence after death, for reasons related to the historical respect for notions of liberty, dignity and reputation, especially of creators. In such a tradition, the main driver of respect for personality rights is arguably non-economic (though the two are of course inextricably intermixed) so the likelihood of transmission of the right on death is much greater than in common law. . . .
> . . .

> In civilian systems, as might be expected following their more dignitary tradition, the law provides for actions to protect the memory of the deceased, and the honour of his heirs, spouse or legatees. . . .
> . . .

[68] In our view, if a privacy interest meets the *Sherman* threshold and there is a public interest in protecting it, that public interest should survive the person's death. In essence, if the privacy interest transcends the individual and is recognized as a social good, the biological status of the deceased person is far less relevant.

The Parties' Positions

[69] Both the CBC and the accused say that the publication ban should be set aside.

[70] The CBC argues that there is no serious risk to an important public interest that is protected by the publication ban. It submits that the witness does not have a dignity interest that continued after death. As for the spouse, the CBC asserts that there is no evidence before this Court regarding [REDACTED] circumstances and how publication of the Posner affidavit would pose a serious risk to [REDACTED] dignity. Alternatively, the CBC suggests that the publication ban is too broad and could be limited to banning publication of the name of the witness or be limited in duration. Finally, the CBC maintains that the public's interest in access to the Posner affidavit outweighs any public interest in the dignity of the family respondents because of the relevance of the Posner affidavit to the miscarriage of justice that occurred.

[71] The accused asserts that, in making the publication ban, "this Court did not give any consideration to the well-established principles that apply to publication bans." He argues that the "facts" set out in the Posner affidavit "are relevant to how [the accused] came to be wrongly convicted" and should have been considered by this Court in determining both whether there had been a miscarriage of justice and the appropriate remedy. Finally, he submits that publication of the Posner affidavit would not "occasion an affront to [the] dignity" of the family respondents.

[72] We pause to make a few preliminary observations about the accused's submissions. First, the accused consented to the publication ban and has never appealed it. Second, his arguments run contrary to the presumption that the publication ban was correctly ordered. Third, he contends that the "publication ban deprive[s] [him] of important information pertaining to his miscarriage of justice"—yet he is the one who filed the Posner affidavit, and he has been and remains in possession of the information.

[73] The Crown says that the Posner affidavit [REDACTED]. The Crown notes that this is precisely the type of sensitive stigmatized condition recognized in *Sherman* (see para 77), the dissemination of which would impact individual dignity. It asserts that the information in the Posner affidavit does not support an inference that the witness was engaged in wrongdoing relevant to the accused's wrongful conviction and that a "failure by courts to protect the dignity of the dead would undermine confidence in the integrity of the justice system." Ultimately, the Crown argues that the irrelevance of the Posner affidavit to the court proceedings makes the potential intrusion on the privacy and dignity of the family respondents unwarranted

and "poses a more serious risk to the important public interest in protecting [their] privacy and dignity" than would be the case if the circumstances of the witness's death were the subject of the court proceedings.

[74] The family respondents assert that the accused is attempting to elevate the witness's involvement in the wrongful conviction to something it was not, and they characterize his position as a collateral attack on this Court's decision in *Ostrowski 2018*. [REDACTED]. They submit that the privacy rights and dignity interests of the witness and the spouse are inextricably linked because of their close familial relationship. At the end of the day, they argue that the Posner affidavit is irrelevant, inadmissible and "worthless in any evidentiary sense" in that it is not "capable of advancing any reasoned public analysis of the case".

Analysis and Decision

[75] [REDACTED].

[76] [REDACTED].

[77] Applying the first branch of the test set out in *Sherman*, we find that there is a strong public interest in protecting the privacy of the witness and the spouse [REDACTED]. Moreover, disclosure [REDACTED] serves no public purpose. The content of the Posner affidavit is highly sensitive, acutely personal, and goes to the core of both the witness and the spouse as human beings at their most vulnerable. Their dignity interests are most definitely at stake. We conclude that dissemination of this material would result in an affront to their dignity that the public would not tolerate "even in service of open proceedings" (*Sherman* at para 34; see also para 33) and, as we explain below, would not serve any public interest.

[78] The second facet of the *Sherman* test is to determine whether the publication ban is necessary to prevent what we have concluded would be a serious risk to the important public interest of protecting the dignity of the witness and the spouse.

[79] This aspect of the test requires a court to "consider whether reasonable alternatives are available" to the publication ban and also to "restrict the order as far as possible without sacrificing the prevention of the risk" (*Mentuck* at para 36).

[80] We are not persuaded that the publication ban is overbroad, vague or should not be permanent.

[81] In our view, publication of any of the details [REDACTED], even with the redaction of the witness's name, would risk associating the information with the witness and making the publication ban moot. [REDACTED]. It is neither possible nor necessary to perfectly tailor a publication ban to allow for the maximum possible dissemination of information while still ensuring that it achieves its goal.

[82] Nor are we convinced that the publication ban is vague. It prevents publication of the information contained in the Posner affidavit. To the extent that the information is repeated in the various briefs and other documents in the Court record, including in these reasons, it is subject to the publication ban. Due to the sensitivity of the information and its irrelevance to the accused's wrongful conviction, we are not persuaded that the publication ban should be limited in time.

[83] In conclusion, we are not persuaded that there is a reasonable alternative available to the terms of the publication ban.

[84] Finally, the third part of the *Sherman* test requires a court to weigh the benefits of the publication ban against its negative effects and, in particular, its "effects on the right to free expression, which in turn is connected to the principle of open and accessible court proceedings" (*Sierra Club* at para 69).

[85] As we have already explained, the benefit of the publication ban is to protect the intensely private information of the witness and the spouse from dissemination and from the affront to their dignity that would result.

[86] On the other hand, the publication ban has a minimal, if any, negative effect on the principle of open and accessible court proceedings.

[87] The accused has argued that [REDACTED] are "indicative of wrong-doing on [the witness's] part, and therefore relevant to the formation and subsequent suppression of the Lovelace deal." He also asserts that these facts "are relevant to how [the accused] came to be wrongly convicted."

[88] We disagree.

[89] Looking at the Posner affidavit as a whole, it does not support the inference that the witness had a guilty conscience or was aware of wrong-doing that had any relevance to the wrongful conviction. As we have explained, the only reasonable inference that can be drawn from the Posner affidavit is that [REDACTED].

[90] The Posner affidavit has nothing to do with the wrongful conviction or with the legitimacy of the accused's appeal. [REDACTED].

[91] As previously indicated, the Posner affidavit was not admitted as evidence in these proceedings. The fresh evidence motion was dismissed on the basis that the Posner affidavit was not relevant to the only issue left for this Court to decide, being the remedy to which the accused was entitled for his wrongful conviction. However, in our view, it would not have been admissible in connection with the issue of whether a wrongful conviction occurred because it is irrelevant and unreliable. Simply put, it is capable of proving nothing. And it certainly does not, in any possible way, support the inference pressed upon this Court by the accused and the CBC. Moreover, we agree with the family respondents that "[r]eleasing [the Posner affidavit] would serve to distort the public analysis and mislead."

[92] There is no question that the public interest in court proceedings is critically significant. Indeed, the "importance of the open court principle is difficult to overstate" (*R v Nygard*, 2021 MBCA 42 at para 17). However, publication of the Posner affidavit would not advance the public interest in open court proceedings.

[93] To summarize, the benefits of the publication ban significantly outweigh the minimal deleterious effect on the right to free expression.

Conclusion

[94] The witness was [REDACTED] with, by all accounts, an unblemished professional and personal reputation. Nothing about the Posner affidavit changes that. It sheds no light on the wrongful conviction of the accused. Instead, it opens a window into excruciatingly personal details [REDACTED]. This is a devastating private tragedy, the publication of which would not advance the public purpose of court openness but, rather, would

harm the public interest of protecting the dignity of individuals [REDACTED].

[95] We would dismiss the motion without costs.

Burnett JA

Pfuetzner JA

I agree: Beard JA