SUPREME COURT OF NOVA SCOTIA
Citation: *Hong v. Lavy*, 2019 NSSC 271

Date: 20190912
Docket: 467757
Registry: Halifax

Between:

Shae Hong and Hong and Co.

Applicants

v.

Danny Lavy, Star Elite Inc. and Elite Group Inc.

Respondents

Decision

Judge:	The Honourable Justice Glen G. McDougall
Heard:	September 6, 2018 in Halifax, Nova Scotia
Counsel:	Roderick Rogers, Q.C., for the Applicants Michelle Awad, Q.C., for the Respondents

By the Court:

Introduction

[1] The Applicants seek to withdraw a set of 18 affidavits from the Court file. The purpose of their request is to maintain the confidentiality of commercial information related to the parties and personal information related to third parties. The Applicants argue that Civil Procedure Rule 85 does not apply because the remedy they seek differs from the remedy contemplated in that Rule. While a discretionary order permitting withdrawal is not an established example of a confidentiality order, both the purpose and effect are the same: the public is no longer able to access information that previously belonged in a court file. As such, it is appropriate to consider the potential impact on Charter rights.

[2] The Applicants acknowledge that there is no basis in statute or in the Rules of Civil Procedure for the remedy sought. There is modest support in Canadian case law for the proposition that the Court has discretion to permit the withdrawal of an affidavit on consent after it has been filed with the Court but before it is "used". Yet, it is important to note that Courts have seldom exercised such discretion. The rare instances on record are most often family law matters which

proceed by a separate set of Rules and which are governed by policy concerns distinct to that area of law.

[3] While a motion on consent does reduce concern over prejudice to either party, consent alone is not sufficient. The Court must also consider policy concerns that militate against withdrawal, including the public interest in the open court principle. In doing so, the Court should consider the *Dagenais/Mentuck* test, which the Nova Scotia Court of Appeal has held "applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceeding". [*Osif v. College of Physicians & Surgeons (Nova Scotia)*, 2008 NSCA 113, 2008 CarswellNS 656 ("*Osif*") at para 14. See also *Vancouver Sun*, Re, [2004] 2 SCR 332 (SCC), at para 23-31; *Toronto Star Newspapers Ltd. v, Ontario*, [2005] 2 SCR 188 (SCC) 2005 CarswellOnt 2613 ("*Toronto Star*") at para 7.] As the remedy requested in the present matter is a discretionary order that would limit public access to court records, application of the *Dagenais/Mentuck* test is appropriate.

[4] Only a public interest in confidentiality of commercially sensitive information will suffice to limit the public interest in open courts. As the parties here plead only their private interests relative to the commercial information, they do not meet the first stage of the test. There is precedent in Nova Scotia to limit

public access to the private information of non-parties but this also is subject to consideration of the importance of the legal interest at stake and the minimal infringement of the proposed order on the open court principle.

Facts

[5] This is a commercial dispute between two wealthy individuals involved in an acrimonious shareholder dispute over the financial management of a closely held company. Danny Lavy and Shae Hong are almost equal shareholders in Sensio Company and Sensio Inc. The company manufactures and distributes small appliances that are made in China with annual revenues in excess of $140,000,000.00 (USD).

[6] On August 31, 2017, the Applicants filed an application against the Respondents seeking relief under the Third Schedule to the *Companies Act*, RSNS 1989, c 81.

[7] The matter was set down for a four day hearing before the Honourable Justice John D. Murphy of this Court starting on June 11, 2018.

[8] In order to prove the merits of their respective positions, the parties filed 18 affidavits (the "Merits Affidavits") prior to the hearing date.

[9] On June 10, 2018, on the eve of the hearing, the parties negotiated a potential resolution subject to certain conditions which the parties intend to remove within 120 days.

[10] On June 29, 2018, Justice Murphy granted the parties' joint motion for a Consent Order adjourning the hearing without day.

[11] The parties further sought a Consent Order permitting the withdrawal of the 18 Merits Affidavits.

[12] Justice Murphy declined to issue a decision on the request to withdraw the Merits Affidavits in part because he wanted the Parties to address the relevance of Civil Procedure Rule 85 (Access to Court Records). The Applicants submit that Rule 85 does not apply because the remedy they seek is not an order for confidentiality as such or an order to seal a court record. The Applicants do not speak to the purpose of the rules governing confidentiality orders and whether the same principles ought to apply to a remedy designed to accomplish similar ends.

[13] When the Motion first came before me, I insisted it be adjourned to provide notice to the media in accordance with the protocol established for this purpose. Although opposed to the idea, counsel, somewhat reluctantly, acceded to the

Court's request and gave the requisite notice. No member of the media participated so the Motion went ahead without being opposed.

Rules Governing Public Access to Court Records

[14] Civil Procedure Rule 85 recognizes the public's need to access court records and provides limited exceptions for limiting public access via confidentiality orders. The scope of the rule is set out as follows:

> 85.01 (1) This Rule recognizes the need for the court's records to be open to the public, and provides exceptionally for a record to be kept confidential.
>
> (2) The provisions for confidentiality in Part 13 - Family Proceedings, which are to protect a child, prevail over this Rule.
>
> (3) Court records must be made accessible to the public, directly and through the media, in accordance with this Rule.
>
> (4) A court record may be made the subject of an order for confidentiality, in accordance with this Rule.

[15] The Rules further require a judge to consider the impact of a confidentiality order on section 2 Charter rights and the open courts principle. Confidentiality orders are permitted under Rule 85.04(1), but "only if the judge is satisfied that it is in accordance with the law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle."

[16] The Applicants' argument depends on their distinction between an order permitting withdrawal and a confidentiality order, yet confidentiality is both the purpose and effect of withdrawal. Nor does Rule 85 indicate that its scope is limited to orders with a particular form or content. Rather, Rule 85.04(2) provides examples of a confidentiality order:

> (2) An order that provides for any of the following is an example of an order for confidentiality:
>
> (a) sealing a court document or an exhibit in a proceeding;
>
> (b) requiring the prothonotary to block access to a recording of all or part of a proceeding;
>
> (c) banning publication of part or all of a proceeding;
>
> (d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including in a heading.

[17] The above is not a closed list. The ordinary meaning of the provisions stating the scope of Rule 85 is that the rule governs all orders that infringe on the public interest in access to court records. The Rules explicitly state that any such order is exceptional and may only be granted in accordance with *Charter* principles. In essence, Rule 85 encodes the prevailing jurisprudence from the Supreme Court of Canada on freedom of expression and the open courts principle.

Policy Considerations: The Open Court Principle

[18] The open court principle is well established law that the Supreme Court of Canada has endorsed time and time again. In *Toronto Star Newspapers Ltd, v. Ontario*, Justice Fish for the Court said [*Toronto Star* at para 1]:

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

[19] More recently, LeBel J. provided a brief survey of the principle's underlying purposes in *Application to proceed in camera, Re*. The open court principle requires all participants in legal proceedings to conduct themselves with integrity and encourages public confidence in the administration of justice, particularly regarding the integrity of judges [*Application to proceed in camera, Re*, 2007 SCC 43, 2007 CarsweIIBC 2418 at para 83-4.]:

> [83] Another frequently proposed justification for the principle is that openness fosters the integrity of judicial proceedings (see in particular *Edmonton Journal*, at p. 1360 (per Wilson J.)). Thus, it has been argued that all participants in judicial proceedings will be further induced to conduct themselves properly if they know that they are under the watchful eye of the public. This is what led Bentham to state that "[p]ublicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity" (J. H. Burton, ed., *Benthamiana: or Select Extracts from the Works of Jeremy Bentham* (1843), at p. 115).
>
> [84] Openness ensures both that justice is done and that it is seen to be done. For justice to be seen to be done is necessary to preserve public confidence in the administration of justice. Bentham is often quoted in support of this argument, too:

> The effects of publicity are at their maximum of importance, when considered in relation to the judges; whether as insuring their integrity, or as producing public confidence in their judgments.
>
> (J. Bentham, *Treatise on Judicial Evidence* (1825), at p. 69 (emphasis in original).)

This Court adopted a similar argument in *Vancouver Sun*:

> Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts. [para. 25]

[20] The Applicants identify the genesis of their legal argument in Lord Denning's obiter remarks in *Comet Products U.K. Ltd v. Hawkex Plastics Ltd*., [*Comet Products U.K. Ltd. v. Hawkex Plastics Ltd*., [1971] 1 All E.R. 1141 (Eng. C.A.).] where he notes that a defendant may not withdraw an affidavit which had been "used" when he is threatened with cross-examination. In *Gill*, [*Gill v. Gill*, 2004 BCSC 518], *Ariss* [*Ariss v. Ariss*, 2011 ABQB 435] and *Gallagher* [*Gallagher Holdings Ltd. v.. Unison Resources Inc.*, 2017 NSSC 248], the Courts read between the lines to infer that affidavits may be withdrawn in some circumstances and proceeded to identify a non-exhaustive list of factors which ought to be considered. Among those factors, the Court is asked to consider whether there are policy considerations which would militate against the withdrawal of the affidavit.

[21] It is worth noting that Lord Denning's remarks pertained to the common law as it then was, and not to Canada's *Charter of Rights and Freedoms*. Although the principle of open courts was well established in common law, the Charter is the current authority underpinning public access to court proceedings which often occurs by way of media.

[22] Section 2(b) underpins the public's right to the free expression of ideas and opinions regarding all stages of court proceedings. As noted by Wood J. (as he then was) in his recent decision in *Canada (Attorney General) v. Canada Revenue Agency*, the media are "the eyes and ears of the public". [*Canada (Attorney General) v. Canada Revenue Agency*, 2018 NSSC 51, 2018 CarswellNS 155 at para 28.] As most members of the public lack the time to attend court proceedings in person, they rely on media reports for information. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, La Forest J. expressed the relationship between the open court principle and freedom of expression as follows: [*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480 (SCC), 1996 CarswelIN8 462 ("New Brunswick"), at para 23.]

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

[23] Following La Forest J.'s decision in *CBC v. New Brunswick*, LeBel J. wrote in *Application to proceed in camera, Re*, about the public's right to gather information on the operation of the courts in order to freely express their views of the same [*Application to proceed in camera, Re*, 2007 SCC 43, 2007 CarswellBC 2418 at para 88.]:

> The open court principle, which was accepted long before the adoption of the *Charter*, is now enshrined in it. This is due to the fact that the principle is associated with the right to freedom of expression guaranteed by s. 2(b) of the *Charter*. It is clear that members of the public must have access to the courts in order to freely express their views on the operation of the courts and on the matters argued before them. The right to freedom of expression protects not only the right to express oneself on an issue, but also the right to gather the information needed to engage in expressive activity (see *Canadian Broadcasting Corp. v. New Brunswick*, at para. 27).

[24] In the present motion, the Applicants argue that this is not a matter in which freedom of the press would be limited during the proceeding because the matter is presently adjourned without day. This argument misconstrues the scope of public interest in judicial proceedings. Charter rights of freedom of expression do not begin with the trial or hearing of a matter, nor do they end when the matter is settled. The Nova Scotia Court of Appeal found in *Foster-Jacques v. Jacques* that the primary purpose of open courts is "to illuminate the avenue of accountability for the judicial system not only during a hearing or trial, but at every stage of a judicial proceeding [*Foster-Jacques v. Jacques*, 2012 NSCA 83 ("*Foster-*

Jacques"), at para 85.]. In the words of Dickson C.J., "At every stage the rule should be one of public accessibility and concomitant judicial accountability.” [*MacIntyre v. Nova Scotia* (Attorney General), [1982] 1 S.C.R. 175, 1982 CarswellNS 21 at para 62.

[25] In *Toronto Star*, *supra*, Justice Fish placed particular emphasis on the early point at which the public's interest vests in a judicial proceeding [*Toronto Star* at para 29.]:

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

[26] The open courts principle is clearly not confined to the trial or hearing of a matter nor to documents that are relied on in a judicial decision. The public has a constitutionally grounded interest in every stage of a judicial proceeding and in every document that becomes part of the court record. Removal of any document from the court record ought to trigger the same careful attention as any other limitation on the public's constitutional rights.

Prevailing Test: *Dagenais/Mentuck*

[27] The prevailing test for any relief that would limit the open court policy is the *Dagenais/Mentuck* framework developed in *Dagenais v. Canadian Broadcasting Corp.*, [*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.), 1994 CarswellOnt 112.] ; *R. v. Mentuck*, [*R. v. Mentuck*, 2001 SCC 76 (S.C.C.), 2001 CarswellMan 535.] and *Sierra Club of Canada v. Canada (Minister of Finance*). [*Sierra Club of Canada v. Canada (Minister of Finance*), 2002 SCC 41 (S.C.C.) 2002 CarswellNat 822.] Its basic purpose is to ensure that the judicial discretion to place limits on the open courts principle is exercised in accordance with Charter rights. [*Sierra Club* at para 48.]

[28] The Applicants argue that the rules relating to confidentiality orders do not apply to their matter since the remedy they seek is not expressly identified by Rule 84. Yet in *Osif, supra*, the Nova Scotia Court of Appeal clarified that the Court must apply the *Dagenais/Mentuck* test to any discretionary order that limits the public's 2(b) Charter rights with respect to a legal proceeding:

> While the *Dagenais/Mentuck* test was developed in the context of publication bans, it applies to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceeding. See *Vancouver Sun, Re,* [2004] 2 S.C.R. 332 (S.C.C.), at Il 23-31; *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 (S.C.C.) at 7. The test is meant to be flexible and contextual: *Toronto Star Newspapers* at 8. [*Osif v. College of Physicians & Surgeons (Novo Scotia),* 2008 NSCA 113, 2008 CarsweIINS 656, at para 14.]
>
> [Emphasis added]

[29] In the present motion, permitting the withdrawal of affidavits pertaining to the merits of judicial proceeding would necessarily limit the freedom of the public. Their removal from the Court file would restrict public access and limit the transparency of the proceeding.

Judicial Discretion to Permit Withdrawal

[30] As the Applicants argue, there is some support in case law for judicial discretion to permit the withdrawal of unused documents from court files, but examples are few and the existing precedents are not binding in any jurisdiction.

[31] Among the three Canadian cases cited, two are family law proceedings from other provinces. In *Gill v Gill*, *supra*, Master Brine of the British Columbia Supreme Court considered a joint request to withdraw affidavits filed in support of a corollary relief application within a matrimonial action. The affidavits contained scandalous allegations which the Court was satisfied could have an adverse effect on ongoing settlement discussions. [*Gill v Gill*, at para 38.]

[32] On review of the limited case law which either dealt with or touched on applications to withdraw affidavits, Master Brine noted several factors which courts ought to consider when choosing to exercise their discretion in this way. The factors considered by Master Brine are as follows:

> [36] In summary, it appears that there is discretion in the court to order that affidavits filed in the court file may, upon application, be withdrawn. Among the factors to be considered by the court upon such an application are the following:
>
> 1. Was the affidavit filed by mistake?
>
> 2. Has the affidavit been used, in the sense of having been before the court, during the course of considering an application?
>
> 3. Is there a pending application before the court for which a party has indicated it intends to rely upon the affidavit?
>
> 4. Is the application to withdraw the affidavit made as a strategic or tactical decision to deny the other party access to relevant information or the ability to cross-examine the deponent?
>
> 5. Would the other party be prejudiced in any way by the withdrawal of the affidavit?
>
> 6. Are there policy considerations which would militate against a withdrawal of the affidavit?
>
> 7. Would the administration of justice be adversely affected by the withdrawal of the affidavit?
>
> [Emphasis added]

[33] Neither the cases reviewed by Master Brine nor those cited by the Applicants suggest that the above factors are an exhaustive list or a determinative test. Rather, as the pre-*Gill* cases involve applications that were largely unsuccessful, [For unsuccessful applications to withdraw an affidavit, see *Ominayak v. Bicon Lake Indian Nation Election* (Returning Officer) (2000), 2000

CarswellNat 338, 185 F.T.R. 33 (Fed, T.D.); *R.O.M. Construction Ltd v. Heeley* (1982), 20 Alta, L.R. (2d) 200, 29 C.P.C. 194, 46 A.R. 366, 136 D.L.R. (3d) 717, 1982 CarswellAlta 100 (Alta. Q.B.); *Syntex Inc. v. Canada (Minister of National Health & Welfare)* (1995), 60 C.P.R. (3d) 518, 94 F,T.R. 215, 1995 CarswellNat 2464 (Fed. T.D.); *Clarke v. Law* (1855), 69 E.R. 680, 2 Kay & J. 28 (Eng. V,-C.); *Quartz Hill & Mining co., Exporte Young* (1882), [1882] 21 Ch. D. 642 (Eng. Ch.); *Comet Products U.K. Ltd. v. Hawkex Plastics Ltd.* (1971), [1971] 2 Q.B. 67, [1971] 1 All E.R. 1141, [1971] 2 W.L.R. 361 (Eng. C.A.).] the factors represent reasons courts have given for denying withdrawal.

[34] In the main, pre-*Gill* applications turned on the availability of the affiant for cross-examination which is closely tied to the potential for prejudice to the other party. Although *Canadian Workers' Union v. Frankel Structural Steel Ltd.* provides a rare example of a successful application to withdraw an affidavit filed with the Ontario Divisional Court, [*Canadian Workers' Union v. Frankel Structural Steel Ltd.* (1976), 12 O.R. (2d) 560, 76 C.L.L.C. 14,010, 1976 CarswellOnt 508 (Ont. Div. Ct.).] the subject affidavit was not filed as evidence in the proceedings, but "for the limited purposed of introducing the record of the tribunal appealed from into the court's record". [*Gill* at para. 21.] *Gill* incorporates this decision under the third factor, which asks whether a party has indicated intent

to rely on the affidavit with respect to a pending application. A more accurate characterization of the decision in *Canadian Workers Union* might be that the affidavit was introduced for the limited purpose of introducing the procedural history of the matter into the court record.

[35] There is little discussion in the caselaw of potential policy considerations that would militate against withdrawal of the affidavit though it is listed among the factors in *Gill*. Master Brine notes, "there may also be policy considerations as to whether a filed document might become part of the 'public record'" [*Gill* at para. 15.] yet he does not explore the nature or scope of these policy considerations. In that particular fact pattern, involving a matrimonial matter in British Columbia, there was no public right of access to family law records. Under Rule 66 (now Rule 22) of the *British Columbia Supreme Court Family Rules*, a member of the public could not access a matrimonial file without a court order. [*Gill* at para. 37.] On those grounds, the Master found there was no public interest at stake. He did not, however, address the distinction between a record which is only available to the public by court order and a record which is not available by any means following a physical removal from the court file.

[36] Policy concerns were briefly addressed in *Ariss v Ariss*, *supra*, which involves an affidavit submitted in support of an interim order for child support and

spousal support. Lee, J.'s decision in *Ariss* is referred to only once in reported case law, by Lee, J. himself in another matter from 2011. The parties jointly requested the withdrawal of the affidavit when the application was no longer pending before the Court. Lee, J. of the Alberta Court of Queen's Bench allowed the filed affidavit to be withdrawn, though he noted, "There are policy reasons against allowing the Affidavit to be withdrawn, primarily not to allow someone to remove documents from a Court file which is a public record." [Emphasis added]. [*Ariss* at para. 10] Although he noted the policy concern militating against withdrawal, the decision includes no further analysis on that point that would illuminate Lee, J.'s reasoning. The decision recognizes that the Court file is a public record but it fails to consider the Charter implications of granting a discretionary order that limits freedom of expression.

[37] The Applicants further rely on Gabriel, J.'s oral decision in *Gallagher Holdings Ltd. v. Unison Resources Inc, supra,* as the sole example of a Nova Scotia Court exercising discretion to permit withdrawal of an affidavit. In *Gallagher*, Gabriel, J. cites the factors listed by Master Brine in *Gill*, noting that they are "helpful but not exhaustive." [*Gallagher* at para. 16.] Yet in his oral decision, which addressed a number of other matters in addition to the request for withdrawal, he did not address whether there were policy considerations that

militated against withdrawal of the affidavits. Further, it does not appear that counsel in *Gill* directed Gabriel, J. to the relevant authorities regarding discretionary orders that restrict public access and limit the transparency of the proceeding.

Confidentiality of an Affidavit Following Withdrawal

[38] It is worth noting that the remedy of withdrawal does not necessarily achieve the Applicants' stated aim of confidentiality following withdrawal. In the cases relied on by the Applicants, the withdrawn affidavits were not deemed privileged or confidential but remained subject to the same rules as any other court document. In *Gallagher*, Gabriel, J. considered the confidentiality of the unused affidavits following withdrawal. The party seeking an order for withdrawal argued that they should be placed in a sealed envelope separate from the file in the same manner contemplated by Rule 39.04(4):

> A judge who orders that the whole of an affidavit be struck may direct the Prothonotary to remove the affidavit from the Court file and maintain it, for the record, in a sealed envelope kept separate from the file.

[39] Although Gabriel, J. exercised his discretion to permit withdrawal, he declined to seal the withdrawn affidavits as there was some possibility that the party requesting withdrawal would file replacement affidavits. Gabriel, J. noted

that the other party and the Court would be entitled to hear from the deponent about the reasons for any material difference in their evidence:

> [22] While still possessed of a discretion to do so, I am not prepared to consider sealing the withdrawn affidavits in this case, where discovery examinations upon the contents of those affidavits have already taken place. Moreover, if the Respondents should chose (sic) to file replacement affidavits, and if the same should differ from the originals on relevant points, then the Applicant (and the Court) is entitled to hear from the deponent(s) as to why this is so.
>
> [Emphasis added]

> [23] Collateral support for this approach may be found in *Gill, supra,* at para. 39, in which the Court states that it is of the view that the (withdrawn) affidavit 'I ... may nonetheless be used for cross-examination at trial, for example, to impugn the credibility of the witness affiant".
>
> The Court then goes on further (in para. 39) to say:
>
> > 39 I agree and would, perhaps, go further to conclude that if an affidavit were to be ordered withdrawn, it remains a document and subject to all the usual applicable rules with respect to documents. It seems unlikely that privilege would attach to the contents due to its having been filed. It would also be subject to production pursuant to Rule 26. It would be available as a prior inconsistent statement for the purposes of cross-examining the deponent at trial. In short, the affidavit could, in my view, still be used by an opposing party as it could use any relevant document in the action.
>
> [Emphasis added by Gabriel J.]

[40] The above excerpts are especially relevant in light of the Applicants' submission that the affidavit evidence would be materially different from the affidavits presently filed with the Court if the conditions of settlement are not met and the matter proceeds to a hearing on the merits. Yet while the parties would retain the right to make use of the affidavits, their removal from the Court file,

which acts as a public record, would effectively limit public access. Any limitation on public access to a court file indicates that the interests of the public are engaged in a manner that was not contemplated in *Gallagher* and did not apply to the facts of *Gill*.

Application of *Dagenais*/*Mentuck* to Commercial Interests

[41] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.) affirmed the *Dagenais/Mentuck* test and applied it to a civil proceeding regarding confidential commercial information. [*Sierra Club* at para. 48.] *Sierra Club* remains the leading case on requests of confidentiality regarding commercially sensitive information in civil proceedings, as affirmed by the Supreme Court of Canada's 2014 decision in *Bombardier Inc c. Union Carbide Canada Inc.* [*Bombardier Inc. c. Union Carbide Canada Inc.*, 2014 SCC 35, 2014 CarswellQue 3600 (S.C.C.) at para 66.]

[42] The steps are best described by Iacobucci J. in *Sierra Club* [*Sierra Club* at para. 53.]

> The *Dagenais/Mentuck* framework involves a two-step test for determining whether a publication ban or confidentiality order is justified:
>
> > 1. Is the order necessary to prevent a serious risk to an important interest? This first question involves three elements: (a) whether the risk is real and substantial, well-grounded in the evidence, and poses a serious threat to the interest in question; (b) whether the interest can be expressed in terms

> of a public interest in confidentiality, as opposed to an interest that is merely specific to the party requesting the order; and (c) whether reasonable alternatives are available to the order sought and, if not, how the court may restrict the order as much as reasonably possible,
>
> 2. Do the salutary effects of the confidentiality order outweigh its deleterious effects, including effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings?

[43] If the first step of the test is not satisfied, the analysis is over. The balancing exercise undertaken in the second step is only necessary where a significant public interest in confidentiality is at stake which cannot be met by less restrictive measures. The requirement to consider the efficacy of less restrictive measures reflects the established principle that any infringement of Charter rights must be minimally impairing.

[44] A public interest may exist concurrently with a specific private interest, [*Canadian Financial Wellness Group v. Resolve Business Outsourcing*, 2014 NSCA 98, 2014 CarswellNS 800 at para. 30.] but private interest alone is not sufficient for the first step of the *Dagenais/Mentuck* test. The open court rule is a matter of public interest that only yields to a greater public interest. In the present case, the Applicants have not argued that public access to the Merits Affidavits would adversely impact a public interest in confidentiality but rather that the parties' business and persons connected to it may suffer economic harm. In Sierra Club, Iacobucci, J. foresaw just such an argument and further clarified that only a

public interest is relevant for the purpose of the *Dagenais/Mentuck* test. [*Sierra Club* at para. 55.]:

> [55] In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N.* [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields" where the public interest in confidentiality outweighs the public interest in openness". [Emphasis added by Iacobucci J.]
>
> [56] In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v, Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

[45] It follows that the issue of whether disclosure of sensitive business information contained in the Merits Affidavits could interfere with Sensio's competitive position in the market is not material to the analysis prescribed by the *Dagenais/Mentuck* test. The Applicants have not argued in terms of a public interest in confidentiality but only speculated on future harm to Sensio and its stakeholders. As such, the request to withdraw affidavits on account of sensitive commercial information cannot meet this stage of the *Dagenais/Mentuck* test.

Application of *Dagenais/Mentuck* to Personal Privacy Interests

[46] The remainder of the information that the Applicants seek to protect is the personal information of third parties. The leading Canadian case on personal privacy as a limit on the open court policy is *A.B.* (*Litigation Guardian of) v. Bragg Communications Inc.*, in which the Supreme Court of Canada protected the identity of the applicant who had been subject to cyber bullying at the age of 15 via a fake social media profile. [*AB. (Litigation Guardian of) v. Bragg Communications Inc.* 2012 SCC 46 (S.C.C.) ("*Bragg Communications*"). In keeping with the established principle of awarding the minimum remedy required to mitigate the potential harm, the Court refused the applicant's request for a publication ban on all the contents of the social media profile.

[47] In *Bragg Communications*, the Court paraphrased the *Dagenais/Mentauk* test as follows [*Bragg Communications* at para. 11.]:

> The inquiry is into whether each of these measures is necessary to protect an important legal interest and impairs free expression as little as possible. If alternative measures can just as effectively protect the interests engaged, the restriction is unjustified. If no such alternatives exist, the inquiry turns on whether the proper balance was struck between the open court principle and the privacy rights of the girl.
>
> [Emphasis added]

[48] In *Osif, supra,* Nova Scotia Court of Appeal found that the public has interest in protecting the personal medical records of non-parties when the Court

granted an unopposed application for a sealing order to protect the names and medical information of the applicant's patients. [*Osif* at para. 14.] The facts in *Osif* involved an emergency room physician whose submissions on appeal from an administrative decision included patients charts and hospital records together with their full names. The appeal submissions spanned thousands of pages and were "'filled from one end to the other' with identifying particulars". [*Osif* at para. 27.] In determining the public interest in confidentiality of medical records, the Court considered the *Hospitals Act*, R.S.N.S. 1989, c. 208, s. 71(1), which prohibits disclosure of patient records without their consent. The Court further noted that the *Freedom of Information and Protection of Privacy Act* (FOIPOP), S.N.S. 1993, c. 5. s. 4A(2)(g) specifically provides that prohibitions in s. 71 of the *Hospitals Act* prevails over that legislation.

[49] The public interest in protecting personal information of the nature identified in the Merits Affidavits is less clear. The information at issue in the Merits Affidavits includes financial information, T4s containing Social Security Numbers and personal addresses, information about educational and employment history and credit card numbers of the parties and third parties.

[50] The only legal basis to suggest that the confidentiality of educational and employment history of third parties rises to the level of public interest is subsection

22(3)(d) of FOIPOP, [*Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5] which provides that disclosure of the educational and employment history of individuals is presumptively unreasonable. Yet under FOIPOP s. 22(4), presumptively unreasonable disclosure remains subject to a list of considerations designed to balance private and public interests.

[51] Further, court records are expressly exempt from FOIPOP under s. 4(2)(c). Although the act was considered as part of the analysis in *Osif*, the Court only went so far as to note that the relevant provision was overridden by the *Hospitals Act* which underscored the importance of the overriding statute. The Court did not base their decision on the protections available under FOIPOP. In fact, documents protected by FOIPOP are regularly available to the public as part of a Court file. As Bateman, J.A., for the Nova Scotia Court of Appeal said in *Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)*, 2005 NSCA 158; 2005 CarswellNS 523, at para. 35:

> If the disputed documents remain in the open Court file, they will be available to the public without the protections afforded by the FOIPOP regime.

[52] As for the T4s and credit card numbers of third parties, remedies far less restrictive than wholesale withdrawal are readily available. Sealing the Affidavit of Nikki Robar and redacting a total of five paragraphs from select affidavits would

accomplish that end. According to the Affidavit of Danny Lavy, filed July 13, 2018, the paragraphs dealing with T4s or credit card information are as follows:

a) Supplemental Affidavit of Shae Hong, filed May 25, 2018 paras 41, 47 and 62;

b) Affidavit of Danny Lavy, filed May 22, 2018, para 155;

c) Supplemental Affidavit of Shae Hong, filed May 22, 2018 para 117.

[53] For that matter, even redacting the paragraphs concerning employment and education history of non-parties would only engage a handful of paragraphs. According to the Applicants' submissions, the paragraphs dealing with employment and education history of non-parties are as follows:

d) Affidavit of Shae Hong, filed February 12, 2018, para 317;

e) Affidavit of Danny Lavy, filed May 22, 2018, para 192;

f) Affidavit of Danielle Agnew, filed May 22, 2018, paras 156, 160-169.

[54] The Applicants' oral submissions indicated that redacting the sensitive paragraphs would be costly and onerous. Yet, the bulk of the Merits Affidavits speak to business and commercial information rather than the personal information of non-parties. As discussed above, the economic interests of a private company are not an appropriate subject of an order limiting public freedom of expression.

The paragraphs dealing with employment or educational information, together with those dealing with T4s or credit card information engage only six of the eighteen affidavits. Aside from the Affidavit of Nikki Robar, the relevant paragraphs are easily identified and represent a small fraction of the total paragraphs in the affected affidavits. This hardly rises to the level of integration found in *Osif*, where the submissions were "filled from one end to the other" with sensitive information. [*Osif* at para. 27.]

Conclusion

[55] While there is a limited body of case law providing judicial discretion to permit the withdrawal of an affidavit under certain circumstances, the Court must consider not only the interests of the parties but also policy concerns that militate against withdrawal.

[56] The Applicants argue that they do not seek to limit the freedom of expression by the press during the proceeding, as the application is adjourned without date, and in all probability will be dismissed. Yet they have not provided evidence suggesting that the Merits Affidavits are not part of the Court record for the purposes of Rule 85, nor have they cited any authority that indicates the public interest in the open court principle is limited either to ongoing proceedings or to court proceedings that result in a judicial decision.

[57] Although the evidence in the present case does not suggest an attempt to evade cross-examination or to prejudice the other party, it does suggest an attempt to circumvent established remedies and their associated requirements. The Applicants' submissions suggest that their primary aim is to protect the confidentiality of their private commercial interests. It is not appropriate to grant a discretionary order designed to circumvent well-established law nor is it appropriate to infringe on a public interest for anything short of another public interest.

[58] Judicial discretion must be exercised in keeping with constitutional principles, including the minimal impairment of Charter rights. In order to protect the T4s or credit card information of non-parties, or even including their employment and educational history, less invasive remedies are available than withdrawal of 18 affidavits.

[59] That portion of the Consent Order granted by The Honourable Justice John D. Murphy (Now deceased) and issued the 29th day of June, 2018 which sequestered "…all sworn and unsworn versions of the 2018 Affidavits filed on behalf of the Applicants in this application including: affidavits of Shae Hong filed on February 12, 2018, May 22, 2018 and May 25, 2018; an affidavit of Vincent Portera filed on May 25, 2018; and affidavits of Nikki Robar filed on May

29, 2018 and June 1, 2018; and all sworn and unsworn versions of the 2018 Affidavits filed on behalf of the Respondents including: affidavits of Danny Lavy filed on May 22 and 25, 2018; affidavits of Maria Ruttenberg filed on May 22 and 25, 2018; an affidavit of Pieter Kriel filed on May 22, 2018; an affidavit of Danielle Agnew filed on May 22, 2018; an affidavit of Gerald Rutigliano filed on May 22, 2018; and affidavits of James Muccilli filed on May 29, 2018 and June 1, 2018; shall remain in force for a further sixty days from the date of release of this decision. That should give counsel for the applicants and the respondents sufficient time to identify any personal information of third parties they seek to redact.

[60] It will then be up to the Court to decide whether the identifying and personal information should be redacted and whether the affidavit of Nikki Robar should be sealed.

[61] Subject to the foregoing, the joint motion to allow the applicants and the respondents to withdraw the Merit Affidavits is denied.

McDougall, J.