IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

FAMILY DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

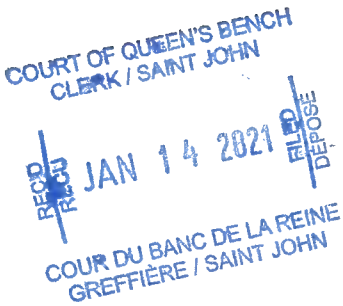
An Application by the Canadian Broadcasting Corporation and New Brunswick Publishing to set aside Publication Bans ordered in the matter of:

Andrik-Oland v. Oland 2021 NBQB 005 **FDSJ-203-2020**
2021/01/14

BETWEEN:

LISA ANDRIK-OLAND,

Applicant/Applicant,



– and –

DENNIS JAMES OLAND,

Respondent/Respondent,

– and –

CANADIAN BROADCASTING CORPORATION, BRUNSWICK NEWS, PUBLISHER OF THE TELEGRAPH-JOURNAL,

Moving Parties.

DECISION

BEFORE:	Chief Justice Tracey K. DeWare
AT:	Saint John, New Brunswick
DATE OF HEARING:	December 23, 2020
DATE OF DECISION:	January 14, 2021
APPEARANCES:	Martha McCarthy, on behalf of the Applicant Tracy Peters, on behalf of the Respondent David G. Coles, Q.C., on behalf of the Moving Parties

DeWare, C. J.

INTRODUCTION

[1] This decision responds to the request of Canadian Broadcasting Corporation and Brunswick News to lift publication bans issued in the present matter. The moving parties, Canadian Broadcasting Corporation and Brunswick News (hereinafter referred to as the "media") are not parties to the proceedings giving rise to the publication bans. The publication bans were issued in the context of an application filed by the Applicant, Lisa Andrik-Oland (hereinafter referred to as "the Applicant", pursuant to the ***Intimate Partners Violence Intervention Act***, S.N.B. 2017, c.5, (hereinafter referred to as the "***IPVIA***"). Both the Applicant and the Respondent to the application filed pursuant to the IPVIA, Dennis Oland (hereinafter referred to as "the Respondent"), oppose the media's request.

FACTS

[2] On June 10, 2020, an Emergency Adjudicative Officer granted an Emergency Intervention Order pursuant to the ***IPVIA***. As required, by the legislation, that order had to be reviewed by a judge of the New Brunswick Court of Queen's Bench within five days of its issue.

[3] On June 11, 2020, I was the justice tasked with the review of the application and recordings leading to the issuance of the Emergency Intervention Order. Following a review of these materials, I was not satisfied that there was sufficient evidence to confirm the order. Based upon my review of the application and the recordings, I was satisfied that domestic violence had likely occurred as is necessary pursuant to section 4(1)(a) of the ***Act***, but was not satisfied that there was urgency warranting the making of the order pursuant to section 4(1)(b) of the ***Act***. As required pursuant to the legislation, I asked that a hearing be fixed pursuant to section 8(a) of the ***Act***.

[4] The pertinent sections of the legislation for the purposes of this matter are as follows:

> **Emergency intervention order**
>
> 4(1) On application in accordance with section 3 and without notice to any other person, a designated authority may make an emergency intervention order if he or she determines on a balance of probabilities that
>
> (a) intimate partner violence has occurred or is likely to occur, and
>
> (b) the seriousness and urgency of the situation warrant the making of the order.
>
> (...)
>
> 4(5) An emergency intervention order may contain one or more of the following provisions:
>
> (a) a provision restraining the respondent from going to or near a specified place or person;
>
> (b) a provision restraining the respondent from communicating with or contacting the applicant or a specified person, either directly or indirectly;

(c) a provision granting the applicant temporary exclusive occupation of the residence;

(d) a provision granting the applicant or respondent temporary possession and exclusive use of personal property;

(e) a provision directing a peace officer or a deputy sheriff to accompany a specified person to the residence to supervise the removal of specified personal belongings;

(f) a provision directing a peace officer to remove the respondent from the residence;

(g) a provision restraining the respondent from taking, converting, damaging or otherwise dealing with property in which the applicant may have an interest;

(h) a provision granting temporary care and custody of a child to the applicant;

(i) a provision directing a peace officer to seize weapons, including firearms and ammunition, and any documents related to the right to possess or purchase firearms;

(j) **a provision prohibiting the publication of the name and address of the applicant or a child or other information that may identify the applicant or a child**;

(k) a provision restraining the respondent from further acts of intimate partner violence;

(l) a provision restraining the respondent from terminating basic utilities for the residence; and

(m) **any other provision that the designated authority considers necessary for the immediate safety of the applicant**.

Review by Court

8(1) Subject to subsection (2), within five days after the receipt of an emergency intervention order and supporting documentation, a judge shall review the order and if the judge is satisfied that there was sufficient evidence before the designated authority to support the making of the order, the judge shall

(a) confirm the order, or

(b) vary the order.

8(2) If a judge is not available within the period of time referred to in subsection (1), an emergency intervention order shall be reviewed by a judge as soon as the circumstances permit.

8(3) **If, on reviewing an emergency intervention order, the judge is not satisfied that there was sufficient evidence before the designated authority to support the making of the order, the judge shall direct a hearing of the matter in whole or in part before a judge.**

8(4) If a judge directs that a matter be heard, the administrator of the Court in the judicial district where the hearing is to be held shall

(a) issue a summons requiring the respondent to appear before the Court, and

(b) give notice of the hearing to the applicant, and the applicant is entitled to attend and may fully participate in the hearing personally or by counsel.

8(5) The evidence that was before the designated authority shall be considered as evidence at the hearing.

8(6) If the respondent fails to attend the hearing, the emergency intervention order may be confirmed in the absence of the respondent.

8(7) The onus is on the respondent to prove that the emergency intervention order should not be confirmed.

8(8) At the hearing, the judge may confirm, set aside or vary the emergency intervention order.

Confidentiality

13(1) **No person shall disclose to another person any information in a court document or record relating to a proceeding under this Act that identifies or may identify the home or business address of an applicant**, other than information contained in the application for an emergency intervention order or in the order, or that is necessary to enforce the order.

13(2) **The Court may exclude the public from a hearing** or any part of a hearing if, in the opinion of the judge, the possibility of an injustice, harm, hardship or adverse effect to or on the applicant or a child outweighs the desirability of holding the hearing in public.

13(3) **At the request of an applicant, on a review under section 8 or on an application under section 9**, the Court may make an order prohibiting the release of information pertaining to an emergency intervention order or a hearing if the Court believes that the release of the information

(a) is not in the best interests of the applicant or a child,

(b) may identify the applicant or a child, or

(c) may cause hardship or have an adverse effect on the applicant or a child.

> 13(4) An order referred to in subsection (3) does not prohibit access to Court files with the consent of a judge for research or statistical purposes if there is no public disclosure of the name or other information that could identify a person named in a report, hearing or other matter prohibited from being disclosed by the order.
>
> [Emphasis mine.]

[5] In the order issued by the Emergency Adjudicative Officer on June 10, 2020, he included the following other provision: *"Recordings and the application form should not be published."*

[6] The hearing pursuant to section 8(3)(a) of the ***Act*** was scheduled to take place in Saint John on June 17, 2020. At the outset of the hearing, the parties advised that they had resolved certain issues as between themselves and jointly requested that the order issued by the Emergency Adjudicative Officer be set aside pursuant to section 9(1)(f) of the ***Act***, save and except the maintenance of the ban on publication on the application form and the recordings.

[7] On June 17, 2020, following an appearance where both the Applicant and the Respondent were present and represented, a court order was issued setting aside the Emergency Adjudicative Officer's order and maintaining the publication ban "*until further order of the Court.*" On the day of the scheduled hearing, June 17, 2020, members of the media that were present in the courtroom had already made it known to court staff that

there would likely be a challenge to the publication ban issued by the Emergency Adjudicative Officer.

[8] On September 15, 2020, the Canadian Broadcasting Corporation filed an application requesting that the publication bans issued by the Emergency Adjudicative Officer on June 10th and maintained in the court order of June 17, 2020 be set aside. This application was subsequently amended on September 23, 2020, to include the participation of Brunswick News, publisher of the *Telegraph-Journal*. A hearing in this matter was originally scheduled for November 18, 2020. However, the Applicant secured the services of lawyer Martha McCarthy in Toronto who was not available on November 18 and, with the consent of the other parties, the hearing was postponed until December 23, 2020.

ISSUES

[9] In my view, as this issue has yet to be addressed in the New Brunswick Court of Queen's Bench, it is best to frame the questions before the Court as follows:

a) Is the amended application as filed by the media in this matter the appropriate mechanism to request the recision of a publication ban?

b) Did the Emergency Adjudicative Officer have jurisdiction to issue the publication ban on June 10, 2020 over the application form and recordings?

c) Is the court order issued on June 17, 2020 maintaining the publication ban as provided by the Emergency Adjudicative Officer appropriate in the circumstances?

d) Is it appropriate to allow a delay in the lifting of the publication bans, if so ordered, to afford the Applicant the opportunity to file an appeal and request a stay of proceedings?

POSITION OF THE PARTIES

[10] The media maintain that the publication bans issued in this matter are in clear violation of the open-court principle upon which the Canadian judicial system is founded. The media suggest that in issuing these publication bans, the requirements as set out by the Supreme Court of Canada in the leading decisions of ***Dagenais v. Canadian Broadcasting Corp., 1994 CANLII 39 (SCC)*** and ***R. v. Mentuck***, 2001 SCC 76 (CanLII) were not followed. The media argue that, as J. Iacobucci confirmed in ***Mentuck***, the potential hardship to the parties in this matter does not displace the presumption in favor of an open court. Further, the media points out that the burden is upon the party wishing to obtain or maintain a publication

ban to lead the evidence of potential undue hardship, which they suggest has not been met in this case. Finally, the media submit that the issuance of publication bans or sealing orders must only be done in convincing cases. Such exceptional orders must be closely scrutinized meeting rigorous standards so as not to displace the foundational goal of an open court. The media posits that the probity of these publication bans must be determined based upon an analysis of the common law as set out in ***Dagenais*** and ***Mentuck***.

[11] The Applicant maintains that this matter is unique in that it arises out of her application pursuant to the ***IPVIA***. Given the goals of the ***IPVI*** legislation, the Applicant suggests that setting aside the publication bans in this matter will have a negative impact on other potential applicants who wish to seek the protection the ***Act*** is intended to afford. The Applicant points out that the ***IPVIA*** provides confidentiality provisions which are clearly designed to protect victims of domestic violence and their children from inappropriate public scrutiny and potential public harassment. The suggestion on behalf of the Applicant is that setting aside the publication ban will discourage other victims from coming forward for fear that the intimate nature of allegations of domestic violence could become public. The applicant argues that the need to protect individuals' safety in the context of intimate partner violence supersedes the importance of ensuring an open court. The applicant submits that it is not appropriate to

consider the media's request in this matter pursuant to the common law but rather through the legislative framework established in the ***IPVIA***.

[12] The Respondent suggests that the media have no standing in the present matter. The Respondent maintains that the media ought to have filed a motion to be added as an intervening party pursuant to Rule 15.02 of the New Brunswick ***Rules of Court***. The Respondent further submits that as the media were present on June 17, 2020, they should have objected to the publication ban at that time and asked to be heard immediately. Finally, the Respondent argues that the Notice of Application and Notice of Amended Application filed by the media are inherently flawed in that they do not clearly state the rules and statutory provisions upon which they are relying in requesting the relief sought.

LAW AND ANALYSIS

Has the media followed appropriate procedures in challenging the publication bans in this case?

[13] The Respondent suggests that the media's application is fundamentally flawed as it fails to delineate the rules and statutory provisions they rely upon in seeking the relief requested. In their Amended Notice of Application, the media requests an order for the "*publication bans issued in FDSJ-205-20 be quashed and set aside.*" In setting out the basis of this request, the media states at paragraph 5 as follows:

> The Applicants will argue:
>
> The impugned publication bans were issued without proper authority, and are discretionary orders issued contrary to the open Court principle without the necessary evidence required to satisfy the legal test set forth in R. v. Mentuck, [2001] 3 S.C.R. 422.
>
> The Applicants and their ~~its~~ audience have a legitimate public interest in assuring that the open Court principle is not compromised contrary to law and that the workings of the *Intimate Partner Violence Intervention Act*, S.N.B. 2017 c-5 are understood.

[14] In the absence of a statutory provision that allows for the issuance of a publication ban such as those found in the ***Criminal Code***, a publication ban is discretionary and can only issue on the order of a judge. A judge tasked with determining a request for a publication ban must undertake an analysis as set out in R. ***v. Mentuck***. The judge can only exercise their discretion to order a publication ban if satisfied that the legal test mandating such an order has been met. Further, the media have a right to be heard by the Court when such discretionary publication bans are issued.

[15] A publication ban results in the shielding of information before the courts from the public. As in this case, the "public" is generally represented by the media when challenges of publication bans come before the courts. In this sense, the media play a crucially important role in ensuring that the "public" has access to the courts – an important pillar of our democratic system. Courts should not place procedural barriers between the public or the media in the context of challenging discretionary orders for publication bans.

[16] In my view, the procedural steps taken by the media in this matter were appropriate. The media do not need to be granted standing as an intervenor in a matter before the courts in order to challenge a publication ban. In the present matter, the media have clearly set out the relief they seek and the basis upon which they suggest they are entitled to the requested order. I see no difference by the media proceeding in this fashion than if a representative of the media had stood up in court on June 17, 2020 to challenge the publication ban. In all likelihood, had a member of the media challenged the publication ban on June 17th in person, then a date would have been set at that time to hear submissions on the issue. Procedurally, there would have been very little that would have been different from what has now transpired.

Did the Emergency Adjudicative Officer have jurisdiction to issue the publication ban on June 10, 2020 over the application form and recordings?

[17] Turning to the question of the publication ban issued by the Emergency Adjudicative Officer, it is important to closely review the provisions of the ***IPVIA***. The Emergency Adjudicative Officer gleans their jurisdiction solely from the enabling statute. The Emergency Adjudicative Officer may only issue an order that the legislation has clearly recognized his jurisdiction to consider.

[18] Section 4(5) of the ***Act*** sets out what may be contained within an Emergency Intervention Order. The only provisions that relate to publication bans are found at 4(5)(j) and 4(5)(m), which state as follows:

> 4(5) An emergency intervention order may contain one or more of the following provisions:
>
> (...)
>
> (j) a provision prohibiting the publication of the name and address of the applicant or a child or other information that may identify the applicant or a child;
>
> (...)
>
> (m) any other provision that the designated authority considers necessary for the immediate safety of the applicant.

[19] Section 13 of the ***Act*** also provides particulars with respect to confidentiality. Section 13 states as follows:

> **Confidentiality**
>
> 13(1) No person shall disclose to another person any information in a court document or record relating to a proceeding under this Act that identifies or may identify the home or business address of an applicant, other than information contained in the application for an emergency intervention order or in the order, or that is necessary to enforce the order.
>
> 13(2) The Court may exclude the public from a hearing or any part of a hearing if, in the opinion of the judge, the possibility of an injustice, harm, hardship or adverse effect to or on the applicant or a child outweighs the desirability of holding the hearing in public.
>
> 13(3) At the request of an applicant, on a review under section 8 or on an application under section 9, the Court may make an order prohibiting the release of information pertaining to an emergency intervention order or a hearing if the Court believes that the release of the information
>
> (a) is not in the best interests of the applicant or a child,
>
> (b) may identify the applicant or a child, or
>
> (c) may cause hardship or have an adverse effect on the applicant or a child.
>
> 13(4) An order referred to in subsection (3) does not prohibit access to Court files with the consent of a judge for research or statistical

> purposes if there is no public disclosure of the name or other information that could identify a person named in a report, hearing or other matter prohibited from being disclosed by the order.

[20] It is important to acknowledge in the context of this ***Act*** that the legislature specifically turned their mind to the issuance of publication bans and confidentiality. Were it otherwise, we would not find the provisions that are in place in sections 4 and 13 of the ***IPVIA***. It is the work of the legislative arm of government to craft, prepare and enact the laws that are, in their view, necessary for the protection of the citizens of this province. It is the role of the courts to interpret and enforce those laws. However, it is not the role of the court to expand legislative provisions beyond their clearly-stated boundaries.

[21] Chief Justice Drapeau, as he then was, eloquently explained the importance of the judiciary recognizing their role in the implementation of the law as opposed to the creation of statutory law at paragraph [106] in ***Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Minister of Education v. Kennedy et al.***, 2015 NBCA 15 (CanLII) as follows:

> This year marks the 800th anniversary of King John's signature of *Magna Carta*, the seminal event in the long and winding road leading to broad acceptance of the principle to which the rule of law is umbilicaly tied: no one is above the law. Under that foundational principle for the unwritten compact that underlies orderly interaction in society, courts may be resorted to whenever governmental decisions are at odds with the law. In these proceedings, the contested ministerial decisions are not only compliant with the law, but reasonable. **The rule of law was never designed to bring about government by judges. As we noted in remarks incidental to the judgment rendered from the bench "[a]bsent a sufficiently weighty juridical basis for intervention, in a parliamentary democracy, judges, none of whom are elected, must**

> **leave standing policy decisions taken by the elected representatives of the people".**
>
> [Emphasis mine.]

[22] It is helpful to review in detail the available publication bans and confidentiality orders that have been incorporated into the ***IPVIA***. Section 4(5)(j) allows an Emergency Adjudicative Officer to ban the publication of the name and address of an applicant or child. The intent of this section is, in my view, plain. In circumstances where an applicant or children have sought refuge in a location unknown to a respondent to ensure their safety, it is important that the respondent not obtain access to that information through the disclosure provisions of the ***IPVIA***. Further, it could be argued that section 4(5)(m) could result in the issuance of a publication ban if, for some reason, it was deemed necessary for the immediate safety of the Applicant. It can not be overlooked that the goal of the ***IPVIA*** is to provide immediate protection to victims of domestic violence who are at risk of imminent harm. The ***IPVIA*** is a very specialized piece of legislation which allows for the issuance of exceptional orders when very specific criteria are met.

[23] In the present matter, the Emergency Adjudicative Officer did not refer to either section 4(5)(j) nor 4(5)(m) in the order. In the circumstances, section 4(5)(j) clearly does not apply as there was no publication ban issued in regards to the name of the Applicant. Arguably, the publication ban pertained to the address as that information is included in the application

form. However, there is no suggestion in the interview with the Applicant, nor in the order, that there was a need to ban the Applicant's address as a result of concerns for the applicant's immediate safety. In this matter, the Applicant wanted to stay in the marital home, at all times. It was understood by all that the Respondent was fully aware of the Applicant's address. The disclosure of the Applicant's address was never raised as a concern.

[24] Section 13(1) of the ***IPVIA*** likewise provides for confidentiality in regards to an applicant's home or business address. Again, the legislative intent of this provision is obvious. In cases where applicants seeking the remedies available under the ***IPVIA*** are residing at a location unknown to the respondent to ensure their safety, it is essential that their whereabouts not be made public. This was not the situation of the Applicant in this matter.

[25] Section 13(2) of the ***IPVIA*** allows the Court to exclude the public from a hearing or part of a hearing if holding the hearing in public could create an injustice, harm, hardship or adverse effect to the applicant or a child. In these circumstances, the Applicant could have requested that the hearing scheduled on June 17, 2020 pursuant to section 8(3) not proceed in public. However, that hearing did not proceed given the agreement reached between the parties. Further, there was no request by either

counsel on June 17th that the hearing not be held in public pursuant to section 13(2). Finally, there are no children involved in this matter.

[26] Section 13(3) provides for the Applicant's ability to request, at a hearing under section 8 or section 9, that an order issue prohibiting the release of information pertaining to the emergency intervention order if the Court is of the view that certain criteria are met. There was no request made to the Court pursuant to section 13(3) of the ***IPVIA*** at the hearing on June 17, 2020. The only order requested on June 17 was that there be no disclosure of the Applicant's home or business address.

[27] I am unable to identify the legislative authority under the ***IPVI Act*** that would have granted jurisdiction to the Emergency Adjudicative Officer in this matter to issue a publication ban on the application form or the recordings. Section 4(5)(j) allows the Emergency Adjudicative Officer to issue an order prohibiting the publication of the name and address of an applicant or a child. However, this is not what the Emergency Adjudicative Officer ordered in this case. Similarly, section 13 of the ***Act*** provides confidentiality to the home or business address of an applicant. Again, this is not what the Emergency Adjudicative Officer ordered in this matter.

[28] During the course of the hearing, the Applicant's lawyer spoke to the reference of confidentiality provisions contained in the application forms

prepared and used by the Emergency Intervention Officers in the consideration of a request under the ***IPVIA***. There are three main forms which must be filled out by an applicant or their designate pursuant to the ***IPVIA***. These are the following:

(1) The Application form;

(2) The Confidential Information Sheet – Applicant; and

(3) The Respondent Information Sheet.

[29] At the beginning of the application form, the following directives are provided:

> "You must provide an address on the confidential information sheet at which legal documents can be served on you. You should be aware that the respondent is entitled to a copy of this application and any evidence used in support of this application."

There is nothing indicated in the application form itself to the effect that the document is confidential.

[30] The confidential information sheet filled out by the applicant or their designate which is prepared along with the application form itself is a separate document. At the beginning of this document, the following directive is provided:

> Confidential Information Sheet - Applicant Pursuant to Section 13(1) Intimate Partner Violence Intervention Act of New Brunswick.
> (Personal information that must not be disclosed to the respondent or to the public.)

This form sets out the address of the Applicant. These confidentiality provisions are in conformity with section 13 of the ***IPVIA*** previously discussed.

[31] The Respondent Information Sheet is filled out by the applicant or their designate and sets out a description of the respondent as well as their known addresses. There are no confidentiality provisions contained in the Respondent Information Sheet.

[32] In regards to the forms which must be filled out by an applicant under the ***IPVIA***, the only mention of confidentiality is in the form setting out the applicant's address. This is in conformity with section 13 of the ***IPVIA***. Significantly, there is no mention on the application form itself that the personal information must not be disclosed to the public as we find in the confidential information sheet. In my view, if as the Applicant's counsel suggests, the legislature intended for all applications under the ***IPVIA*** to be confidential, they would have indicated so on the application form and ensured there was a statutory provision confirming this protection.

[33] The difficulties with the analysis as advanced on behalf of the Applicant is that if the legislature had intended for there to be a blanket publication ban on all applications and recordings, it was open for the legislature to incorporate such terms into the statute. The legislature opted not to do

that. The legislature has put in place limited provisions for publication bans and confidentiality in order to protect the immediate safety of an applicant and/or children. The court, as noted by Chief Justice Drapeau in ***Kennedy***, must leave policy decisions in the enactment of legislation to the legislature.

[34] In the present matter, the issue of where the Applicant was residing in terms of her immediate safety does not appear to have been an issue. At all times, the Applicant has sought exclusive possession of the marital home. The location of the marital home is known to all. This is not a situation where the Applicant was residing in a different location in order to ensure her safety or that of her children. At all times, everyone involved in these proceedings was fully aware of the Applicant's address and that was where she expressly wanted to stay. Therefore, this is not a situation where the publication ban and/or confidentiality provisions in the ***IPVIA***, which are clearly in place to protect the physical safety of an applicant or their children were, in my view, triggered.

[35] This case is extremely unique. The ***IPVIA*** has been in place now for over two and a half years. Orders are regularly issued by Emergency Adjudicative Officers under this Act. These orders are frequently confirmed by the judges who review them, at times they are varied, and when the judge is not satisfied there is sufficient evidence to confirm an

order, a hearing is scheduled. There is typically no interest in these matters beyond that of the parties directly involved. I am unaware of any other case which has been before the courts as a result of the enactment of this legislation that has triggered a request for access by the media. Regrettably, the Oland family is one that is of great interest to the media and the population generally, given the high profile murder trials involving the Respondent. I raise this simply to highlight that this case does not reflect the regular application of this ***Act***. Typically, these are private matters and although the open-court principle applies, the fact is that these cases are not of interest to the wider world.

[36] There is a reason that the statute of lady justice always depicts her with a blindfold. Justice is blind. The interpretation of the scope of available publication bans and confidentiality orders available within the ***IPVIA*** framework must be considered in the context of any applicant, not just this applicant. In my view, the ***IPVIA*** does not provide the sweeping publication bans as suggested by the Applicant. This conclusion is reached regardless of the identity of the Applicant or their personal circumstances.

[37] In my view, the Emergency Adjudicative Officer had no jurisdiction to issue the publication ban: "*recordings and the application form should not be published*". The Emergency Adjudicative Officer had no jurisdiction to issue the order in this case nor would he have had the authority to do so in

any other case based upon the jurisdiction granted to him pursuant to section 4(5) of the ***IPVIA***.

Is the court order issued on June 17, 2020 maintaining the publication ban appropriate in the circumstances?

[38] While the ***IPVIA*** itself does not afford the umbrella of privacy that the Applicant and the Respondent suggest, that does not put an end to the question. The common law does afford protection via publication bans to individuals involved in the court system when certain criteria are met. Therefore, it is necessary to determine if the individual circumstances of these parties would warrant the issuance, or in this case, maintenance of the publication bans currently in place pursuant to the common law. Unlike the jurisdiction of the Emergency Adjudicative Officer, which is limited to the authority specifically granted in the statute, this court is a court of inherent jurisdiction with the ability to issue or maintain discretionary publication bans.

[39] These parties are not entitled to any greater protection of their privacy within any aspect of the court system as would be any other citizen. However, they are likewise entitled to any protection that would be afforded to anyone else in their shoes. They cannot be treated differently because of their background; however, they should also be treated with the same dignity and respect that is afforded to all litigants within the justice system.

[40] The media refer the Court to the pre-***Charter*** decision authored by Justice Dickson, as he then was, ***MacIntyre v. Nova Scotia (Attorney General)*** [1982] 1 S.C.R. 175, paragraphs 59 to 61 where J. Dickson states as follows:

> 59 Let me deal first with the "privacy" argument. This is not the first occasion on which such an argument has been tested in the courts. Many times it has been urged that the "privacy" of litigants requires that the public be excluded from court proceedings. It is now well-established, however, that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. **As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.** The following comments of Lawrence J. in *R. v. Wright*, (1799), 8 Term Rep. 293 at page 298, 101 E.R. 1396 at 1399 (K.B.) are apposite and were cited with approval by Duff J. in *Gazette Printing Co. v. Shallow* (1909), 41 S.C.R. 339 at p. 359, 6 E.L.R. 348:
>
> > Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of Justice should be universally known. **The general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings**.
>
> 60 The leading case is the decision of the House of Lords in *Scott v. Scott*, [1913] A.C. 417. In the later case of *McPherson v. McPherson*, [1936] A.C. 177 at 200, [1936] 1 W.W.R. 33, [1936] 1 D.L.R. 321, Lord Blanesburgh, delivering the judgment of the Privy Council, referred to "publicity" as the "authentic hall-mark of judicial as distinct from administrative procedure".
>
> 61 It is, of course, true that Scott v. Scott and McPherson v. McPherson were cases in which proceedings had reached the stage of trial whereas the issuance of a search warrant takes place at the pre-trial investigative stage. The cases mentioned, however, and many others which could be cited, establish the broad principle of "openness" in judicial proceedings, whatever their nature, and in the exercise of judicial powers. **The same policy considerations upon which is predicated our reluctance to inhibit accessibility at the trial stage are still present and should be addressed at the pre-trial stage.** Parliament has seen fit, and properly so, considering the importance of the derogation from fundamental common law rights, to involve the judiciary in the issuance of search warrants and the disposition of the property seized, if any. **I find it difficult to accept the view that a judicial act performed during a trial is open to**

> **public scrutiny but a judicial act performed at the pre-trial stage remains shrouded in secrecy.**
>
> [Emphasis mine.]

[41] The present matter requests the lifting of a publication ban at a "pre-trial" stage in the sense that it is a request for access to the Applicant's application under the ***IPVIA***. However, as pointed out in ***MacIntyre***, the fact that the disclosure sought is at a preliminary stage of the proceedings does not alter or displace the necessary legal test to determine if the discretionary publication ban is appropriate.

[42] Justice Iacobucci, in ***R. v. Mentuck***, 2001, SCC, 76 (CanLII), discusses the necessary criteria for the issuance of a publication ban at paragraphs 32, 33, 34 and 39 of the decision as follows:

> 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.
>
> 33 This reformulation of the *Dagenais* test aims not to disturb the essence of that test, but to restate it in terms that more plainly

> recognize, as Lamer C.J. himself did in that case, that publication bans may invoke more interests and rights than the rights to trial fairness and freedom of expression. This version encompasses the analysis conducted in *Dagenais*, and Lamer C.J.'s discussion of the relative merits of publication bans remains relevant. Indeed, in those common law publication ban cases where only freedom of expression and trial fairness issues are raised, the test should be applied precisely as it was in *Dagenais*. For cases where concerns about the proper administration of justice other than those two *Charter* rights are raised, the present, broader approach, will allow these concerns to be weighed as well. There may also be other cases which raise interests other than the administration of justice, for which a similar approach would be used, depending of course on the particular danger at issue and rights and interests at stake.
>
> 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.
>
> (...)
>
> 39 **It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban.** Effective investigation and evidence gathering, while important in its own right, should not be regarded as weakening the strong presumptive public interest, which may go unargued by counsel more frequently as the number of applications for publication bans increases, in a transparent court system and in generally unrestricted speech on matters of such public importance as the administration of justice.
>
> [Emphasis mine.]

[43] As noted by Justice Iacobucci in ***Mentuck***, a judge must be provided with a convincing evidentiary basis prior to issuing a publication ban. In support of her position that the application bans be maintained, the Applicant filed an affidavit of Lauren Hanna dated December 17, 2020 attaching several articles from the media concerning the parties and their matters before the

Family Division of the New Brunswick Court of Queen's Bench. The Applicant sought to introduce an affidavit of Dr. Linda Neilsen which was provided to counsel for the media on Friday afternoon, December 18th, prior to the hearing scheduled for December 23rd.

[44] Dr. Neilsen's affidavit attached her professional qualifications and set out various opinions in regards to the ***IPVIA***. Dr. Neilsen's affidavit was, for all intents and purposes, an expert report. The Applicant did not comply with the ***Rules of Court*** of New Brunswick in regards to expert reports, namely, Rule 52, nor the filing of affidavits pursuant to Rule 39. In the circumstances, I would not allow receipt of Dr. Neilsen's affidavit given the Applicant's failure to comply with the ***Rules of Court*** and the significant potential prejudice occasioned to the media while the probative value of the evidence remained unclear.

[45] In ***Simms v. Simms***, 2012 NBQB 394 (CanLII), Justice Walsh considered the request for a publication ban in the context of divorce proceedings. In explaining the difficulties with such an order and the need to lift the order currently in place, Justice Walsh commented at paragraphs 21 to 23 as follows:

> [21] At the outset of the hearing the respondent sought a temporary publication ban and sealing order over the file. The argument was that the respondent's pending retirement is not yet public knowledge and its disclosure at this time might have adverse financial consequences for his company. The respondent is the Chairman and CEO and has otherwise served the company for over 47 years. The petitioner consented and the Court granted the order.

> [22] Upon reflection, the Court is concerned that an insufficient evidentiary base was laid by the respondent for the Court to have properly exercised its discretion under the so-called "Dagenais/Mentuck test" (***Dagenais v. Canadian Broadcasting Corp.***, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835 and ***R v. Mentuck*** 2001 SCC 76). **Quite frankly, the vital importance of the open court principle should require more than the conclusionary statements of counsel, regardless if consented to or not by the other party. An evidentiary showing is needed for the Court to properly consider displacing that principle** (See: ***J.W. v. Van Bibber*** 2012 YKSC 63; ***H.T. v. C.T.*** 2004 NUCJ 2; ***M.E.H. v. Williams*** 2012 ONCA 35). The respondent will be given that opportunity.
>
> [23] Consequently, the existing order banning the publication of any information that could disclose the respondent's pending retirement and the sealing of the Court file will continue for 14 days from the date of this Decision, unless in the meantime an application supported by proper affidavit(s) is brought seeking the continuation of the order, in which case the temporary order will continue until a hearing can be held. Failing the filing of a proper application within the time allotted the existing temporary publication ban and sealing order will lapse without further notice.
>
> [Emphasis mine.]

[46] In the present matter, the Court is largely left with the conclusory statements of counsel as to why a publication ban is required. There has been no affidavit filed on behalf of the Applicant to explain the evidence she relies upon to displace the notion that the open court principle should not apply in this case. Similarly, the affidavit of Ms. Hanna chronicles media articles concerning the parties' legal disputes which are understandably upsetting to them. However, Ms. Hanna's affidavit does not furnish evidence in support of the necessity for the maintenance of the publication bans in this case.

[47] In ***L.F.R. v. R.B.H.***, [2020], N.B.J. No. 77, I dealt with a request for a publication ban in the context of a divorce matter. In declining the request,

I had the opportunity to review recent caselaw at paragraphs 19, 20 and 21 as follows:

> 19 Despite the reference to the ***Marital Property Act*** and the ***Rules of Court***, I am left with the applicant's request essentially for a publication ban or a sealing order on the financial information contained in the divorce file. Courts have long accepted the test set out in ***Dagenais*** (***Dagenais v. Canadian Broadcasting Corp.***, 1994 CanLII 39 (SCC), [1994] 3 SCR 835), and ***Mentuck*** (***R. v. Mentuck***, 2001 SCC 76 (CanLII), [2001] 3 SCR 442), by the Supreme Court of Canada as is explained in the comments from Justice Ferguson in ***I.S. v. D.B.*** In reviewing the two-part test, **I must satisfy myself that such an order is necessary to prevent a serious risk to the proper administration of justice. If I am able to overcome that significant hurdle, then I must be satisfied that the salutary effects of the issuance of such an exceptional order are not outweighed by their deleterious effects.**
>
> 20 In ***M.E.H. v. Williams***, 2012 ONCA 35 (CanLII), the former spouse of Colonel Russell Williams had successfully applied for a publication ban on information contained in her divorce file. Colonel Williams had confessed to a series of very serious crimes, including the murder of two women, which precipitated the parties' separation and divorce. **There was intense media interest in this matter given the notoriety of Colonel Williams' crimes. M.E.H.'s request to have medical and financial records under seal was not opposed by Colonel Williams and was issued by a judge of the Ontario Superior Court**. The publication ban was contested by various media outlets and the lower court's ruling was set aside by the Ontario Court of Appeal. The Ontario Court of Appeal's decision, written by Justice Doherty, commented on the first part of the ***Mentuck*** test. Justice Doherty commented at paragraph 25 as follows:
>
> > 25 Mentuck describes non-publication and sealing orders as potentially justifiable if "necessary in order to prevent a serious risk to the proper administration of justice". A serious risk to public interests other than those that fall under the broad rubric of the "proper administration of justice" can also meet the necessity requirement under the first branch of the Dagenais/Mentuck test: Sierra Club of Canada, at paras. 46-51, 55. **The interest jeopardized must, however, have a public component. Purely personal interests cannot justify non-publication or sealing orders**. Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test: Nova Scotia (Attorney General) v. MacIntyre, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175, [1982] S.C.J. No. 1, at p. 185 S.C.R.; Sierra Club of Canada, at para. 55; B. (A.) v. Bragg Communications Inc., [2011] N.S.J. No. 113, 2011 NSCA 26, 301 N.S.R. (2d) 34, at paras. 73-75.

(Emphasis mine)

> 21 **The respondent in *M.E.H. v. Williams* provided to the Court significant medical evidence outlining the emotional distress the effect of publicity would cause upon her if the sealing order was lifted. Despite the respondent's very difficult circumstances, the Court did not accept that there was a serious risk to the proper administration of justice.** Justice Doherty, in explaining that the motion judge had erred, commented at paragraph 62 as follows:
>
> > 62 The motion judge erred in law in exercising her discretion in favour of granting the non-publication and sealing orders. The material presented by the respondent did not provide the kind of convincing evidence needed to satisfy the first branch of the Dagenais/Mentuck test. It is consequently unnecessary to consider the second branch of that test. The orders made by the motion judge must be set aside.
> >
> > [Emphasis mine.]

[48] In the present matter, in order for this court to exercise its jurisdiction and maintain the publication bans currently in place, I must satisfy myself that such an order is necessary to prevent a serious risk to the proper administration of justice. If, and only if I can satisfy myself of this element would I go on to consider if the statutory effects of the maintenance of the publication bans are outweighed by their deleterious effects.

[49] The Applicant, in her written brief, explains the importance of the expectation of privacy for applicants under the ***IPVIA*** at paragraphs 9, 10 and 16 as follows:

> 9. Applicants under the IPVIA have a reasonable expectation of confidentiality in disclosures to a designated authority such as a Domestic Violence Worker. Restricting publication of victims' highly personal information obtained in an explicitly confidential context maintains their safety, encourages reporting, and furthers women's equality. Retroactively rejecting and re-writing the terms of the IPVIA, and its protective philosophy, would be contrary to the proper administration of justice.

> 10. The public has a legitimate interest in monitoring the workings of the court and its handling of intimate partner violence. There is, however, no legitimate public interest in risking the safety of survivors by disclosure of victims' names and addresses, and in requiring the release of highly sensitive information related to intimate partner violence disclosed by applicants in a confidential setting.
>
> (...)
>
> 16. In the context of the IPVIA, unfettered freedom to publish victim" identifying information would (1) discourage disclosure, to the detriment of truth-seeking; (2) deny women, as a group, equal access to the personal security which allows for social and political participation; and (3) threaten victims' personal safety. Rather than fostering the fair administration of justice, in this context, publication would undermine access to the courts by victims. Publication bans under the IPVIA help support the fundamental security, dignity and privacy rights of survivors, a reasonable limit on freedom of expression and the openness of the courts.

[50] The Applicant suggests that the publication of these materials would undermine access to the courts by victims and that such a result would create a serious risk to the proper administration of justice. While I do not dispute whatsoever the laudable goals of the ***IPVIA*** and the importance of providing safe forums for victims of domestic violence, there is no evidence before this Court to support the assertion that the publication of these materials will impede future victims from accessing the protections afforded under the ***IPVIA***. Further, the concerns raised by the Applicant in her brief surrounding the disclosure of the names and addresses of victims have already been specifically addressed within the statutory framework of the ***IPVIA***.

[51] In the present matter, I am unable to conclude based upon the evidentiary record before me that the release of these materials is necessary to prevent a serious risk to the proper administration of justice. Since I

cannot conclude that there is a significant risk to the proper administration of justice, I need not turn my mind to the issue as to whether or not the statutory effects of the maintenance of the order would be outweighed by the deleterious effects.

Is it appropriate to allow a delay in the lifting of the publication bans, if so ordered, to afford the Applicant the opportunity to file an appeal and request a stay of proceedings?

[52] At the conclusion of oral arguments, counsel for the Applicant requested that if the media's request was granted, the Court provide a delay of 14 days prior to the lifting of the publication bans. This delay would afford the Applicant sufficient time to file an appeal and request a stay of proceedings. Once made public, this information will quickly make its way into the news media and social media. In the event the Court of Appeal were to come to a different conclusion as to the probity of maintaining the publication bans, their ruling would be academic as the information at issue would have already been disseminated. In today's digital world, once information has made its way into the public sphere, it really can never be fully withdrawn.

[53] The release of this information is not time-sensitive. I can identify no prejudice to the media should there be a 14-day delay on the release of this information. However, were the information to be released and my analysis found to be in error, there could be considerable prejudice to the

Applicant and the Respondent. Therefore, the implementation of this decision and resulting orders will come into effect on January 28, 2021. There is no publication ban in place on this decision.

CONCLUSION AND DISPOSITION

[54] The Emergency Adjudicative Officer did not have jurisdiction to issue a publication ban on the application form and recordings in this matter. The maintenance of the publication ban, as provided in the court order of June 17, 2020, is inappropriate and not in conformity with the principles as set out in ***R. v. Mentuck***. Therefore, for all the aforementioned reasons, it is the order of the Court as follows:

(a) The publication ban as set out in the Emergency Intervention Order of June 10, 2020 and the court order of June 17, 2020 on the application form and the recordings are lifted;

(b) The publication ban provided in paragraph 2 of the court order of June 17, 2020 concerning the Applicant's home or business address pursuant to section 13 of the ***Act*** remains in place;

(c) Upon request, the public and/or the media may obtain a copy of the transcript of the recordings of the Applicant's application under the ***IPVIA*** of June 10, 2020;

(d) The terms of this order shall come into effect on January 28, 2021; and

(e) In all the circumstances, each party shall bear their own costs.

DATED at Moncton, N.B., this 14th day of January 2021.

Tracey K. DeWare
Chief Justice of the Court of Queen's Bench
of New Brunswick