Court of Appeal for Saskatchewan
Docket: CACV3941

Citation: *Windels v Canadian Broadcasting Corporation*, 2022 SKCA 72
Date: 2022-06-20

Between:

Donald Windels

Appellant
(Respondent)

And

Canadian Broadcasting Corporation, Postmedia Network, CTV News and Glacier Media

Respondents
(Applicants)

And

Twila Reddekopp, Jerome Hepfner and Ian Hamilton

Respondents
(Applicants)

Before:	Whitmore, Leurer and Barrington-Foote JJ.A.
Disposition:	Appeal dismissed
Written reasons by: In concurrence:	The Honourable Mr. Justice Barrington-Foote The Honourable Mr. Justice Whitmore The Honourable Mr. Justice Leurer
On appeal from: Appeal heard:	QBG 751 of 2021, Saskatoon May 5, 2022
Counsel:	Andrew Mason for the Appellant Maddison Croden and Fred Kozak for the Respondents Canadian Broadcasting Corporation, Postmedia Network, CTV News and Glacier Media Candice Grant for the Respondents Twila Reddekopp, Jerome Hepfner and Ian Hamilton

Barrington-Foote J.A.

I. INTRODUCTION

[1] On July 16, 2021, Twila Reddekopp, Jerome Hepfner and Ian Hamilton applied pursuant to s. 214(1) of *The Non-profit Corporations Act, 1995*, SS 1995, c N-4.2 [*Act*], for an order directing an investigation of The Lighthouse Supported Living Inc. [Lighthouse] and an affiliated corporation, Blue Mountain Adventure Park Inc. [Blue Mountain]. That application, which also sought other interim relief, was based primarily on allegations of misconduct by Donald Windels in his capacity as the Executive Director and a Board member of Lighthouse. It would result in the issuance of an order appointing an inspector to investigate those allegations and, in due course, to a successful application for relief against Mr. Windels and others pursuant to s. 225 of the *Act* [oppression decision].

[2] This judgment is not concerned with the merits of the oppression decision, which was also appealed by Mr. Windels and will be dealt with separately. Rather, this judgment deals with Mr. Windels's appeal of a November 30, 2021, decision [publication decision] of a judge of the Court of Queen's Bench [Chambers judge] to lift a sealing order and publication ban [Orders] in the s. 214 action. One or more of those Orders had, in one form or another, been in place since July 19, 2021.

[3] This appeal turns on the application of the open court principle, which, as Kasirer J. affirmed in *Sherman Estate v Donovan*, 2021 SCC 25 at para 2, 458 DLR (4th) 361 [*Sherman*], creates a "strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press". Like the Chambers judge, I have concluded that this is not a case where exceptional circumstances exist of the kind that would justify a continuing restriction on access to the court file or on publication of information relating to the s. 214 proceeding. I would accordingly dismiss the appeal. My reasons follow.

II. BACKGROUND

A. Sealing orders and the publication ban

[4] Section 214 of the *Act* provides for the appointment of inspectors to investigate non-profit corporations and their affiliated corporations for various forms of misconduct, including oppression. It specifically contemplates applications without notice, and creates an exception to the open court principle in relation to proceedings without notice:

> 214(1) By application without notice or on any notice that the court may require, a member, a security holder or the Director may apply to the court having jurisdiction in the place where the corporation has its registered office for an order directing an investigation to be made of the corporation and any of its affiliated corporations.
>
> (2) Where, on an application pursuant to subsection (1), it appears to the court that any of the following have taken place, the court may order an investigation to be made of the corporation and any of its affiliated corporations:
>
> …
>
> (b) the activities or affairs of the corporation or any of its affiliates are or have been carried on or conducted, or the powers of the directors are or have been exercised, in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a member or security holder;
>
> …
>
> (5) An application without notice pursuant to this section is to be heard in private.
>
> (6) No person may publish anything relating to proceedings without notice pursuant to this section except with the authorization of the court or the written consent of the corporation being investigated.

[5] As noted above, a without notice application pursuant to s. 214(1) was filed on July 16, 2021. It came first before MacMillan-Brown J., who ordered that it proceed with notice and that it be set for hearing on July 29, 2021 [July 19 fiat]. She directed that a copy of her fiat be served on the registered offices of Lighthouse and Blue Mountain, on Mr. Windels, and on all other members of the Lighthouse Board of Directors. She also ordered that the affidavit of Twila Reddekopp that had been filed in support of the application be sealed pending further order by the judge who would hear the application, explaining that she did so "because of the emergent nature of this application". The formal order that was taken out based on her July 19 fiat also provided that "any party upon whom the Court directs service of this application shall not disclose such Affidavit or any exhibits thereto except to that party's professional advisors in connection with the matters related hereto, except with further order of this Court".

[6] On July 29, the s. 214 application came before Bardai J., who decided the hearing of the merits of the application should be adjourned to enable parties to file evidence and arguments. On August 3, he heard further submissions as to whether an interim order should issue enjoining Lighthouse from proceeding with an August 5 members' meeting and as to when the application to appoint an inspector should proceed.

[7] In an August 4, 2021, fiat, Bardai J. concluded that the applicants had put forward a serious issue to be tried. He noted, in particular, that Mr. Windels had acknowledged the existence of a loan from Lighthouse to him for the benefit of his daughter, that compiling its financial statements was an "ongoing exercise", that he had struggled during the pandemic, and that Blue Mountain had been struck due to a missed filing. Justice Bardai enjoined Lighthouse from holding the August 5 members' meeting pending the outcome of the application, citing concerns that the applicants – all of whom are members of the Lighthouse Board of Directors – might be removed from the Board by members who supported Mr. Windels, to the prejudice of Lighthouse. He set August 26, 2021, as the date for the hearing of the application to appoint an inspector.

[8] Justice Bardai also dealt briefly with access to the affidavits on the court file:

> The Affidavit of Ms. Reddekopp was sealed by Order of MacMillan-Brown J. but none of the other affidavits have been sealed. The parties have requested that the affidavits be sealed to the next hearing date. Generally, the Court favours the open court principle and for matters to be conducted in an open and transparent fashion. That said, I am prepared to grant interim relief sealing the affidavits as requested by the parties, which relief would come to an end on August 26, 2021 unless extended. Parties are reminded that if they wish to seal the affidavits beyond that date, they will need to apply to do so.

[9] The application to appoint an inspector was finally heard by the Chambers judge on August 26, 2021. With the concurrence of the parties, he expanded the sealing order to all materials on the court file. On September 10, 2021 [September 10 fiat], he issued a fiat appointing MNP LLP as inspector. That fiat also continued the sealing order, based on his conclusion that ss. 214(5) and (6) still applied:

> [98] Section 214(1) authorizes the commencement of a proceeding by way of application without notice. Though notice has now been given to certain parties at the direction of MacMillan-Brown J. and Bardai J., the commencement was nonetheless by application without notice. <u>The nature of this application has not changed. If it had changed, I would have required the applicants to file an Originating Notice.</u>
>
> [99] Subsections 214(5) and (6) combine to create a presumption that on an application without notice, it shall be held completely in private, and that no publication be made of

> any portion of the court file. Accordingly, the entire court file shall be sealed until further order of the Court. When we reconvene as directed below, counsel shall make submissions as to the ongoing sealing order.
>
> (Emphasis added)

[10] On September 17, 2021, the Chambers judge – having heard further submissions as to the sealing order – issued a second fiat [September 17 fiat]. The September 17 fiat amended the September 10 fiat in various respects, including extending and broadening the ban on access to the court file and publication of the proceedings by adding the following provisions:

> [3] …
>
> c. amend para. 14(iii) of para. 144 of the First Fiat by replacing it with the following:
>
> > iii. The entirety of the Court file concerning this matter shall be sealed, and its existence, the existence of this matter, and the underlying disputes and facts, shall be subject to a publication ban.
>
> d. contain a footer that on each page reads as follows: "This decision of the Court of Queen's Bench for Saskatchewan is ordered by the Court to be held confidential by each person who receives it, and shall not be published by any person in any manner, pending further order of the Court."; …

[11] The Chambers judge also concluded that Lighthouse members – who numbered in excess of 40 individuals – should receive additional notice, referring to the fact there was an inequality of information between members and that MNP LLP would soon begin asking questions of Lighthouse and Blue Mountain staff. He pointed out that members would need to see his September 10 fiat when the inspector's report was received in any event. In the result, he ordered as follows:

> [12] I direct as follows:
>
> a. that the Substituted Fiat and the issued order (which shall contain a similar footer, with the word "order" substituted for "decision") be served … on each Member, which may occur by email using the most current email address for each Member contained in the Lighthouse's records. Ms. Grant shall ensure that appropriate admonishments as to Court-ordered confidentiality and publication ban are communicated to each such Member. The foregoing shall be included in the issued order with appropriate modifications and shall form a limited exception to paras. 13 and 14(iii) of Para. 144.

[12] The Chambers judge also concluded that the media should receive notice of the application, to enable them to make representations relating to the publication ban. As he put it:

> [14] Section 214 of *The Non-profit Corporations Act, 1995*, SS 1995, c N-4.2, provides that an application without notice under that section is to be held in private, and for a

> publication ban except as authorized by the court or the subject corporation. Thus, the Court has jurisdiction to grant a sealing order and impose a publication ban. The use of pseudonyms to protect the identities of persons involved and of the Lighthouse would be virtually impossible.
>
> …
>
> [16] To paraphrase Chief Justice Popescul in *Patient 0518 v RHA 0518*, 2016 SKQB 175, [*Patient 0518*], the real question is not whether the Court can continue the sealing of the court file and the publication ban, but whether it should. See paras. 7 to 10 of *Patient 0518*.

[13] In the result, the Chambers judge directed that notice of the sealing order and publication ban be provided to the media, together with copies of the application for the appointment of an inspector, and of his amended September 10 fiat. The media notice reiterated the terms of the publication ban and informed the media that they could apply to lift the ban.

[14] On October 15, 2021, the inspector delivered its first report. In an October 18 fiat, the Chambers judge ordered that the report and the October 18 fiat be served on Lighthouse members, with a footer in substantially the same terms as in his previous fiats, which were as follows:

> This decision of the Court of Queen's Bench for Saskatchewan – and its existence, the existence of this matter and the underlying disputes and facts, are subject to a publication ban – is ordered by the Court to be held confidential by each person who receives it, and shall not be published by any person in any manner, pending further order of the Court.

[15] The October 18 fiat also directed that the deadline to file further applications, if any, would be November 1, 2021; that reply affidavits and similar materials be filed by November 5, 2021; that briefs would be served and filed by November 8, 2021; and that all further applications would be heard on November 10, 2021. It noted that an application by members of the media might be returnable on that date. The Orders were again extended pending further order of the Court. The hearing date was later moved to November 17, 2021, at the request of the Court.

[16] The inspector issued a second report on October 25, 2021.

B. The publication decision: lifting the sealing order and publication ban

[17] There were two applications brought by the respondents in this appeal for hearing on November 17, 2021. First, on October 27, the Canadian Broadcasting Corporation, Postmedia Network, CTV News and Glacier Media [Media] applied to lift the Orders. As noted above, it is

the November 30, 2021, fiat of the Chambers judge which granted the Media application – that is, the publication decision – that is the subject of this appeal.

[18] Second, on November 3, 2021, Ms. Reddekopp, Mr. Hepfner and Mr. Hamilton applied by notice of application for various forms of relief. They sought an order pursuant to s. 214 of the *Act* directing a further investigation into the affairs of Lighthouse and Blue Mountain. They also applied pursuant to s. 225 of the *Act* for, among other things, declarations that the affairs of Lighthouse and Blue Mountain had been carried on, and powers of Mr. Windels as Executive Director had been exercised in a manner that was oppressive and unfairly prejudicial to, and had unfairly disregarded the interests of, the members and directors of Lighthouse and Blue Mountain, and the interests of the public generally. A noted above, the December 6, 2021, judgment of the Chambers judge dealing with that application – the oppression decision – is the subject of a separate appeal (CACV3940).

[19] The publication decision began by addressing Mr. Windels's submission that the s. 214 application was still a without notice application, despite that notice had been given to members, directors, and auditors. The Chambers judge did not adopt the Media submission that once notice had been given, ss. 214(5) and (6) no longer applied. Rather, he concluded he "[did] not need to determine the moment when this ceased to be a without notice matter under ss. 214(5) and (6) and became a discretionary ban" (at para 9). As he put it, "[t]he core issue is what to do from here" (at para 10).

[20] The Chambers judge described the submissions of the Media as to whether the Orders should be continued as thorough and persuasive. He adopted key portions of their brief, including their statement of the test to be applied when a party seeks to restrict access to or the publication of information relating to court proceedings:

> [12] …
>
> 20. A discretionary restriction on publication or access must only be ordered where:
>
> a. Court openness poses a serious risk to an important public interest;
>
> b. The order sought is necessary to prevent this serious risk to the identified interest, because reasonably alternative measures will not prevent this risk; and

> c. As a matter of proportionality, the benefits of the order outweigh its negative effects, including the effects on the right to free expression, and the public interest in open and accessible court proceedings.
>
> ● *Sherman Estate* [*Sherman Estate v Donovan*, 2021 SCC 25] at para 38…
>
> ● *Sierra Club* [*Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522] at para 53…

[21] The Chambers judge agreed with the Media's submission that this test is demanding, and reproduced their explanation of the reasons that is so:

> [12] …
>
> 21. The test is onerous for the party seeking to restrict access or publication to meet. That is because the principle of openness in the Canadian justice system is paramount:
>
> > …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 decisions of courts.
> >
> > ● *Vancouver Sun (Re),* 2004 SCC 43 at paras 24-26…
>
> 22. The party seeking a publication ban or restriction on access must adduce *evidence* which establishes that a ban is necessary to prevent a serious risk to the important public interest. The inherent jurisdiction of the Court must only be exercised if the ban is supported by cogent evidence. Without an evidentiary basis setting out the clear and present risk to the important interest identified, the Court should refuse to exercise its discretion to continue the Publication Ban and Sealing Order. [Emphasis in original]
>
> > ● *Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 2 SCR 480, 1996 CanLII 184 at para 22 [*CBC v New Brunswick*] at paras 71-76…
>
> 23. The presumption is that courts are open and accessible to the public and media. This principle is fundamental to democratic society and acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law. The open court principle should only be curtailed "where there is present the need to protect social values of superordinate importance".
>
> > ● *CBC v New Brunswick* at para 22…
> >
> > ● *AG (Nova Scotia) v MacIntyre*, [1982] 1 SCR 175, 1982 CanLII 14 at 186 [*MacIntyre*]…

[22] Finally, the Chambers judge accepted the Media's summary of the reasons the Orders should be lifted, which were as follows:

> [12] …
>
> > 24. The circumstances of this case do not justify the continued imposition of the Sealing Order and Publication Ban. There is no evidence demonstrating that the information sought to be disclosed puts any important public interest at risk. Further, the salutary effects of these restrictions do not outweigh their deleterious effects on freedom of expression and the heightened public interest in these proceedings.
> >
> > 25. The foundational principles of openness and transparency are especially important where proceedings concern a non-profit corporation that receives funding from public and private donors for the purpose of supporting marginalized populations in the community. The public has a legitimate interest in assessing whether a non-profit corporation is acting within its mandate to enable members of the public and corporate and institutional donors to evaluate whether it will provide financial support to the corporation.

[23] Mr. Windels objected to lifting the Orders. His concerns were rooted in the preliminary nature of the inspector's report, and in the potential that publication could jeopardize Lighthouse's acknowledged role in serving "'the needs of the distressed, vulnerable, mentally-ill, those suffering from substance abuse, the homeless and destitute people in our communities" (at para 16). There was a particular concern raised as to the impact on Lighthouse's most important annual fundraising campaign, which was expected to run in November and December.

[24] As to the preliminary nature of the report, the Chambers judge responded by noting that the inspector's investigation was complete in relation to loans from Lighthouse to Mr. Windels from 2008 to 2013, and the financial assistance provided by Lighthouse to Mr. Windels in the amount of $60,000 to purchase a home for his daughter. The Chambers judge found that the view of those who were concerned that publication may cause harm to Lighthouse was "misguided" (at para 22). Although he accepted that damage may occur, he did not consider that to be attributable to publication. Rather, he pointed to the actions of Mr. Windels and others:

> [23] Nonetheless, it is not the lifting of the publication ban that will create that risk. What creates that risk is the conduct of Don Windels and others in the organization, including members of the Board of Directors at the relevant times, who enabled and approved his conduct. I will deal with that in greater detail in another decision to be rendered shortly.
>
> [24] There is no carve-out to the open court principle for protection of dirty laundry that parties would wish to keep secret solely for the purpose of secrecy.

> [25] There is no basis to argue that, once in litigation, a charitable organization that has allowed funds raised by it to be used in ways inconsistent with its charitable objects should be able to keep that a secret (overcoming the open court principle) simply to allow it to fundraise more successfully.

[25] The Chambers judge also rejected the argument that lifting the publication ban was ill-advised as it may have a chilling effect on the use of s. 214 of the *Act*. He noted that similar provisions co-exist with the open court principle and continue to be used in the private corporate context and found that this concern did not warrant keeping a publication ban in place.

[26] As to the three-part test relating to exceptions to the open court principle, the Chambers judge found that there was a real risk that the vulnerable people served by Lighthouse might be put at risk by lifting the publication ban and that this was "a real and substantial risk to an important public interest, not simply a matter of protecting private corporate affairs" (at para 27). He then commented that it was *possible* that the first two branches had been met, but that he had not analyzed the point in detail, as those opposing the Media application could not meet the third branch of the test in any event. As he said:

> [28] … I am in no way satisfied that the salutary effects of continuing the publication ban outweigh the deleterious effects on the public and the right to free expression.
>
> [29] As the Media argues, given the sources of funding and purpose of the Lighthouse, the public interest in open and accessible court proceedings is particularly and justifiably high in this case.

[27] In the result, the Chambers judge decided that the Orders should be lifted, with a seven-day delay to enable members to be informed. During that seven-day period, Ms. Reddekopp, Mr. Hamilton and Mr. Hepfner were permitted to disclose the existence and nature of the proceedings to funders of Lighthouse; the staff of Lighthouse and Blue Mountain; significant donors to Lighthouse; licensors or critical vendors of Lighthouse and Blue Mountain; and the City of Saskatoon, the Saskatoon Police Service and any Ministry of the Government of Saskatchewan.

III. LAW: THE *SHERMAN* RESTATEMENT OF THE *DAGENAIS*/*MENTUCK* TEST

[28] There is no dispute between the parties as to the elements of the test to be applied in determining whether a discretionary limit should be imposed on court openness. They differ only as to its application in this case. In *Canadian Broadcasting Corp. v Manitoba*, 2021 SCC 33,

Kasirer J. summarized the current state of the *Dagenais/Mentuck* test (referring to the principles specified in the leading decisions in *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835, and refined in *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442, and *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522 [*Sierra Club*]) as follows:

> [77] … [A]ny discretionary limits on access to and publication of the contents of the court record must be understood in reference to the test from *Sierra Club* as recently recast by this Court in *Sherman*. Court proceedings are presumptively open to the public (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11). A court can order discretionary limits on openness only where (1) openness poses a serious risk to an important public interest, (2) the order sought is necessary to prevent that risk and (3) the benefits of the order outweigh its negative effects (*Sherman*, at para. 38, citing *Sierra Club*, at para. 53).

[29] Prior to the decision in *Sherman*, this test had been expressed as a two-step inquiry into the necessity and proportionality of the proposed limit: *Sierra Club* at para 53. In *Sherman*, Kasirer J. held that the two-step inquiry rested on "three core prerequisites that a person seeking such a limit must show" and explained that "[r]ecasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle" (at para 38). For convenience, I will refer to this as the *Sherman* test. As I have explained above, the Chambers judge correctly identified the *Sherman* test as the law.

[30] The *Sherman* test applies equally to all discretionary court orders that would limit freedom of expression and freedom of the press in relation to legal proceedings, including sealing orders, publication bans, orders excluding the public from a hearing, and redaction orders, subject only to valid legislative enactments: *Sherman* at para 38; *Toronto Star Newspapers Ltd. v Ontario*, 2005 SCC 41 at paras 7 and 22, [2005] 2 SCR 188.

[31] Further, the open court principle is engaged by all manner of judicial proceedings (*Sherman* at para 44). *Sherman* is an instructive example of this, relating as it did to a request for a sealing order by the Trustees of probate files of two prominent and wealthy Canadians who were the victims of an unsolved homicide – a matter that generated intense public and media interest. The Trustees argued that there was a real and substantial risk that affected individuals would suffer serious harm, including risks to their safety, if the order was not granted. They also submitted that probate proceedings are "quintessentially private" and "fundamentally administrative". Justice Kasirer disagreed, commenting as follows:

> [44] … To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis*, (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.
>
> [45] … The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

[32] In the result, the Court dismissed the Trustees' appeal of the decision of the Ontario Court of Appeal lifting the orders sealing the files for a two-year period.

IV. POSITIONS OF THE PARTIES

[33] Mr. Windels asserts that there are serious risks to two kinds of important public interests that meet the first element of the *Sherman* test. First, he submits that there is a *privacy* interest engaged in these circumstances which has strong public interest aspects, including the ability of Lighthouse to carry on its important work and to maintain the relationships with the many community workers and organizations with which it operates. He also contends that there is a public interest in enabling an inspector to conduct its investigation without the public "looking over their shoulder", as that kind of scrutiny would compromise their ability to gather useful information. He suggests that this too is a privacy interest that justifies an order restricting access.

[34] Second, Mr. Windels highlights the unique nature of s. 214 applications. As in the context of his privacy argument, he asserts that there is a public interest in limiting the publication of matters relating to such an investigation, as a lack of publicity promotes the expedient and candid provision of evidence to the inspector.

[35] Mr. Windels identifies several factors that support this theme. He contends that public access to investigatory proceedings of this kind is less important than access to proceedings in which rights and obligations are determined. He submits that the purpose of s. 214 investigations is not to reach conclusions, but to generate information which may or may not result in further steps being taken – such as the s. 225 application that was made here. He notes that, as such, investigations are more likely to be incomplete and misleading than proceedings that determine rights and obligations, and that MNP LLP's recommendation that certain issues be investigated demonstrates that risk. He maintains that there are specific findings of the report – including what he says is the incorrect characterization of the key transaction relating to a house for his daughter – which illustrate these inherent limitations of s. 214 proceedings that weigh against the application of the open court principle.

[36] Further, Mr. Windels contends that the potential negative effects arising from the reflexive application of the open court principle to a s. 214 proceeding should be of particular concern where the target of the investigation is a charity, as charities have a special relationship to the public interest.

[37] Finally, Mr. Windels argues that the Chambers judge, having found that there was a serious risk to an important public interest, erred in law by failing to weigh the risks and benefits of maintaining or lifting the Orders, as required by the third step of the *Sherman* test.

[38] The Media have a very different perspective in relation to all three elements of the test. They submit that this case fails to meet the standard for a discretionary limit at all three stages.

[39] To begin, the Media agrees that the fact Lighthouse is a charity is relevant. However, they argue that this fact weighs in favour of rather than against restrictions on court access, as openness is of particular importance where legal proceedings concern a non-profit corporation such as Lighthouse; that is, one that receives funding from public and private donors for the purpose of supporting marginalized populations in the community. In particular, they contend that potential public, corporate and institutional donors have a legitimate interest in assessing whether a non-profit corporation is acting within its mandate, to enable them to decide if they should continue to provide financial support.

[40] On a more fundamental note, the Media submits that it was not open to the Chambers judge to find that the interests of Lighthouse and the population it serves as identified by Mr. Windels could constitute an important public interest within the meaning of the *Sherman* test. While the Media acknowledges that there may well be a public interest in the work done by Lighthouse – a proposition that I would have thought is beyond dispute – they say that Mr. Windels effectively and incorrectly claims that this public interest supports maintaining the confidentiality of all negative information simply because of the nature and mandate of the organization. They contend that for the purposes of the test, Lighthouse's particular operating interests are essentially of the same kind as the commercial interests of a specific business corporation, which do not engage a public interest in confidentiality.

[41] Further, the Media contends that even if the risk to Lighthouse and those it serves *could* have qualified as an important public interest, Mr. Windels has not provided sufficient evidence of that risk. They emphasize that the law requires that allegations of a serious risk to an important public interest must be well-grounded in the evidence. They argue that his evidence is nothing more than speculative and generalized assertions that court openness would result in a sufficiently serious risk to justify restrictions.

[42] As to the second element of the test, the Media submits that Mr. Windels has not demonstrated that a sealing order or publication ban were necessary to prevent serious risk to the public interest in any event. In this context, they note that the publication decision provided for notice of the nature and existence of the proceedings to funders of Lighthouse; funders and staff of Lighthouse and Blue Mountain; significant donors of Lighthouse; licensors and critical vendors of Lighthouse and Blue Mountain; and the City of Saskatoon, Saskatoon Police Service and any Ministry of the Government of Saskatchewan. Counsel was to inform all of these interested parties that the MNP LLP report had been generated and had concluded there was a commingling of finances between Mr. Windels and Lighthouse. In substance, it is the Media's position that, at this stage, restricting access would not prevent the sort of damage identified by Mr. Windels in any event.

[43] Finally, the Media do not agree that the Chambers judge failed to address the third element of the *Sherman* test. They say that he correctly concluded that the salutary effects of the restrictions

would not outweigh their deleterious effects on freedom of expression and the heightened public interest in these proceedings.

V. LIMITS ON THE APPLICATION OF THE OPEN COURT PRINCIPLE ARE NOT JUSTIFIED

A. Lack of serious risk to an important public interest

1. Privacy interest

[44] To begin, I see no basis for Mr. Windels's argument that there is a *privacy* interest at issue here that could constitute an important and competing public interest of the kind that could engage an exception to the open court principle. In *Sherman*, Kasirer J. gave clear guidance on this point, rejecting the argument that "an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness" (at para 46). He instead defined the scope of the privacy interest that might justify a discretionary limit in specific and narrow terms:

> [7] … Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

[45] As he later emphasized, the scope of this aspect of privacy must be carefully limited:

> [76] The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.
>
> [77] There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and

> 87-88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown*, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.
>
> (Emphasis added)

[46] The privacy interests identified by Mr. Windels bear no resemblance to sensitive personal information which relates to personal dignity. Indeed, Mr. Windels does not suggest otherwise.

2. Risk to Lighthouse clients

[47] I do not agree with Mr. Windels's suggestion that charities are entitled to special consideration in the context of the *Sherman* test merely because they are charities. The *Sherman* test must be applied to the facts. The first question posed by that test is whether there is a serious risk to an important public interest of the kind that would justify restrictions.

[48] Approached in this fashion, it is my view that Mr. Windels's argument – to the extent it is based on the potentially negative impact on Lighthouse – is best approached as relating not to the public interest in protecting Lighthouse itself, but to the public interest in the continued provision of essential services to the highly vulnerable clients served by Lighthouse, in order to prevent harm to those clients. Protecting people from physical or psychological harm may constitute an important public interest within the meaning of the first stage of the *Sherman* test. In *Sherman*, for example, Kasirer J. confirmed that the application judge in *Sherman* had correctly treated protection from *physical* harm as a "distinct important interest from that of the protection of privacy" (at para 96). As he also pointed out – citing *H. (M.E.) v Williams*, 2012 ONCA 35, 346 DLR (4th) 668 [*Williams*] – "where, without privacy protection, an individual would face 'a substantial risk of serious debilitating emotional ... harm', an exception to openness should be available" (at para 48).

[49] It bears emphasis that the anxiety or embarrassment that are the inevitable product of many kinds of legal proceedings – for example, prosecutions and professional misconduct proceedings – does not constitute sufficient psychological harm to justify a restriction on access. As Doherty J.A. said in *Williams*, dealing with the impact on a particular individual:

> [30] The distinction between personal emotional distress and embarrassment, which cannot justify limiting publication of or access to court proceedings and records, and serious debilitating physical or emotional harm that goes to the ability of a litigant to access the court is one of degree. Expert medical opinion firmly planted in reliable evidence of the specific circumstances and the condition of the litigant will usually be crucial in drawing that distinction: see see *P.A.B.D. #1 (Re)*, [2005] N.J. No. 394, 2005 NLTD 214 (S.C. (T.D.)), at para. 43.

[50] As to the *proof* of harm of this kind, Kasirer J. observed that both the probability and gravity of the potential for physical harm are relevant, and that while direct evidence of serious risk is not necessarily required, "inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially" (*Sherman* at para 97). This statement, read in context, is substantially to the same effect as Iacobucci J.'s observation in *Sierra Club* – which related to alleged risk to a commercial interest – that "the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question" (at para 54). All of this would, of course, apply equally to a risk of psychological harm.

[51] In *A.B. v Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 SCR 567 [*A.B.*], Abella J. commented that "while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm" despite the absence of direct evidence of harm, "by applying reason and logic" (at paras 15 and 16). Although this statement might suggest a lower standard than that specified in *Sierra Club*, it too must be understood in context. It does not mean that reason and logic alone will suffice, or that no evidence is required; rather, it reflects the fact that whether the evidence meets the "well-grounded" standard depends on the nature of the risk at issue.

[52] In *A.B.*, for example, the issue was the potential harm which might result from the publication of the identity of a teenager who was the victim of online sexualized bullying. The point had been made by *amicus curiae* that there was no evidence that the victim was emotionally vulnerable. Justice Abella dealt with that alleged shortcoming in a variety of ways. She noted the consistent recognition of the inherent vulnerability of children by Canadian law and courts and, as a result, the frequent recognition of the importance of privacy for young persons who are participants in the justice system. She also referred to publications which confirm the potential

psychological and systemic consequences that can result not only from cyberbullying, but from the disclosure of the identity of young victims, including a chilling effect on the willingness of victims to come forward. She applied reason and logic to this evidence, concluding as follows:

> [27] If we value the right of children to protect themselves from bullying, cyber or otherwise, if common sense and the evidence persuade us that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication, and if we accept that the right to protection will disappear for most children without the further protection of anonymity, we are compellingly drawn in this case to allowing A.B.'s anonymous legal pursuit of the identity of her cyberbully.

[53] The reasoning in *Chemtrade Electrochem Inc. v Stikeman Elliott LLP*, 2020 ABCA 322, [2020] 12 WWR 295 [*Chemtrade*], also illustrates that the nature of the evidence required depends on the public interest alleged to be at risk. In *Chemtrade*, the issue was a sealing order relating to materials that were subject to solicitor-client privilege. The party that objected to the sealing order argued that there was insufficient evidence to meet the standard specified in *Sierra Club*. The Alberta Court of Appeal applied *A.B.*, finding that the Chambers judge was entitled to "objectively assess whether solicitor-client privilege was an important public interest worthy of protection" (at para 20). It found that the conclusion that it was such an interest and that disclosure would be harmful to that interest "is unassailable" (at para 20), citing the following statement in *Alberta (Information and Privacy Commissioner) v University of Calgary*, 2016 SCC 53 at para 34, [2016] 2 SCR 555, in support of that proposition:

> It is indisputable that solicitor-client privilege is fundamental to the proper functioning of our legal system and a cornerstone of access to justice … lawyers have the unique role of providing advice to clients within a complex legal system … without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive … it is therefore in the public interest to protect solicitor-client privilege.

[54] In the result, *A.B.* does not undermine the requirement specified in *Sierra Club* that the risk must be well-grounded in the evidence, in light of the nature of the risk and public interest at issue. The applicable evidentiary standard was more fully summarized by Epstein J.A. in her concurring judgment in *Out-Of-Home Marketing Association of Canada v Toronto (City)*, 2012 ONCA 212, 348 DLR (4th) 288:

> [56] If the issue relied upon to seek a confidentiality order does involve a public component, the evidence must be carefully examined. The evidence relied upon to satisfy the first branch of the test must be "convincing" and "subject to close scrutiny and meet rigorous standards": see *R. v. Canadian Broadcasting Corp.*, 2010 ONCA 726, 102 O.R. (3d) 673, at para. 40; *R. v. Toronto Star Newspapers Ltd.* (2003), 67 O.R. (3d) 577 (C.A.),

> at para. 19, aff'd 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 41; *Williams*, at para. 34; see also *Ottawa Citizen Group Inc. v. R.* (2005), 75 O.R. (3d) 590 (C.A.), at para. 54. This demanding evidentiary standard is in keeping with the well-recognized serious implications of the order.

[55] Here, Mr. Windels did not provide direct evidence that Lighthouse clients would suffer physical or emotional harm if the sealing order and publication were lifted. Rather, he deposed that there would be irreparable harm to Lighthouse, claiming that the release of what he believes to be an incomplete and flawed MNP report to the public would "mislead the public and would, unjustly, make it much more difficult for the Lighthouse to operate and to carry out its very important work in the communities it serves".

[56] Melissa Smith, a senior manager at Lighthouse, deposed that the perceived lack of trust between the Board, the Executive Director and the operations team at Lighthouse identified two key risks. She deposed that lifting the publication ban prior to the completion of the Christmas fundraising campaign would negatively impact that campaign. She also asserted that allowing the legal and internal discord relating to Lighthouse to be publicly visible "puts the organization at risk as being perceived of lacking credibility to perform its operations". It is her evidence that "if the internal conflict of the Lighthouse is publicly aired, it risks the confidence of our funders and the operations teams' ability to carry out the lifesaving services we provide on a daily basis".

[57] Based on this evidence, the Chambers judge found that there was a chance that vulnerable people may be put at risk and, as a result, that it was *possible* that the evidence demonstrated that there was a real and substantial risk to an important public interest, thereby meeting the first stage of the *Sherman* test. However, he did not – as suggested by Mr. Windels – finally decide that point. He found it was not necessary to do so. Accordingly, the question to be determined is whether the Chambers judge erred by failing to find that this aspect of the test had been met.

[58] I must respectfully disagree with the Chambers judge's statement that it was possible that the first stage of the test had been satisfied. Maintaining access to certain services provided by Lighthouse, such as emergency shelter and sustenance for impoverished and at-risk clients, could certainly constitute an important public interest for the purpose of the *Sherman* test. However, an order restricting access to court proceedings cannot be made unless the court is satisfied, based on

proof that is sufficient to meet the evidentiary standard, that there is a serious risk to that important public interest.

[59] Here, the evidence of the risk to Lighthouse was not only thin, but largely speculative. It spoke carefully and generally of possible negative impacts on *Lighthouse* as an organization which might result from lifting the Orders, with particular emphasis on the inspector's report. While it also suggested that these impacts might compromise the ability of Lighthouse to provide services, it provided no particulars as to when and to what extent clients or potential clients might lose access to those services. Evidence of that kind – such as, for example, evidence that an emergency shelter that is and would be the only reasonable option available to those clients would likely shut down or be forced to reduce capacity – would have enabled the Chambers judge to conclude that the first element of the *Sherman* test was satisfied. Indeed, the lack of concrete evidence of a real and substantial impact on the important public interest at issue was apparent even in relation to the potential effect of a poor Christmas fundraising campaign. Lighthouse was, on the evidence, an organization that was not only long established and deeply rooted in the community and with its partners, but that maintained substantial financial reserves.

[60] In my opinion, the evidence provided by Mr. Windels is insufficient to meet the evidentiary standard discussed above. There is a lack of evidence of objective circumstantial facts that would reasonably support the inference that lifting the Orders would result in a serious risk of harm to the continued provision of essential services to the highly vulnerable clients served by Lighthouse, in order to prevent harm to those clients. That is the important public interest at issue. Put differently, the evidence does not withstand close scrutiny. That being so, it was not possible, as suggested by the Chambers judge, that the first stage of the *Sherman* test had been met.

[61] For these reasons, the Chambers judge did not err by failing to find that the first stage of the *Sherman* test had been met.

3. Lack of serious risk to s. 214 investigations

[62] Mr. Windels submits that the open court principle should not apply to s. 214 proceedings due to their unique characteristics. With respect, that issue has been settled. The open court principle applies to all manner of proceedings, absent valid legislation which limits its application.

Section 214 creates a limited exception, providing that an application without notice shall be heard in private and that no person may publish anything relating to proceedings without notice except with the authorization of the court or the written consent of the corporation being investigated. As explained above, this s. 214 application was originally made without notice.

[63] However, this was a without notice *proceeding* only until the July 19 fiat of MacMillan-Brown J. After that, the usual principles applied and the question as to whether there should be restrictions on access – at least as to those aspects of the proceedings in relation to which notice had been given and no order limiting access had been made – turned on the application of the *Sherman* test to the facts. Mr. Windels did not provide cogent evidence that this proposed investigation could only be effective if access was restricted. Further, his argument that there could be a potentially chilling effect on the utility of s. 214 investigations in general was not grounded in the evidence. This was not a situation such as *Chemtrade*. There is no principle of law comparable to solicitor-client privilege that applies in relation to all manner of investigations.

[64] Mr. Windels also contends that it is less important to apply the open court principle to s. 214 proceedings, as they do not determine rights and obligations, and are more likely to be incomplete and misleading than proceedings that result in a final adjudication. These considerations do not trump the open court principle or change the *Sherman* test. Considerations of this kind may, depending as always on the facts, be relevant in determining whether the benefits of a proposed order outweigh its negative effects at the third stage of the *Sherman* test. In this case, there is no need to consider that issue, as the proposed limits on publication and access fail at the first and second elements of the test.

4. Conclusion

[65] For these reasons, I conclude that there is no serious risk to an important public interest. I would dismiss Mr. Windels's appeal on this ground, as an order restricting access cannot be made absent a serious risk to such an interest.

B. Lack of proof of serious risk and lack of necessity: the effect of prior publication

[66] The Chambers judge ordered that notice of these proceedings be provided to a large number of interested parties, both inside and outside Lighthouse. The Media contends that this means that it has not been demonstrated that continuing restrictions are necessary – necessity being the second element of the *Sherman* test – and that, as a result, this appeal should also fail for that reason.

[67] I agree with the Media on this point. The Chambers judge authorized notice to staff, funders, licensors and critical vendors, as well as to the Saskatoon Police Service, the City and any Ministry of the Government of Saskatchewan, that a s. 214 proceeding seeking an investigation had been commenced; that MNP LLP had been appointed and had reported; that MNP LLP concluded that there has been a commingling of finances between Mr. Windels and both Lighthouse and Blue Mountain; and that the applicant Board members have sought more relief, including the removal of Mr. Windels as Executive Director. Thus, the very kind of information – albeit admittedly only to a very limited extent – that Mr. Windels submits might damage the credibility of Lighthouse and its ability to effectively carry on is already in the hands of what would appear to be the important players from both a funding and operational perspective.

[68] In my view, the fact that publication of this kind has already occurred is important in relation to all three elements of the *Sherman* test. As to the first element, the fact that damage of the kind of concern to Mr. Windels may already have been done would further undermine the argument – which I have rejected in any event – that lifting the Orders would create a serious risk to an important public interest. As noted above, that is sufficient to dispose of the appeal.

[69] As to the second element – which was not considered by the Chambers judge – the fact that notice has already been given means that continuing restrictions on access may not only lack efficacy but exacerbate the potential damage. As it is, members, funders, and others can only speculate as to the nature of the alleged commingling identified in the inspector's report, where the battle lines are drawn, and what may occur to right the ship. An open process would enable interested players to understand the facts, rather than potentially assuming matters are worse than they are. As such, an order would not be necessary to protect any important public interest that might have been found to exist. Given that the onus rests on those who would restrict publication,

I would accordingly also dismiss Mr. Windels's appeal on the ground that it has not been demonstrated that the second prerequisite to an order restricting access exists.

[70] Finally, although it is not necessary to further address the third element of the *Sherman* test, the fact that the significant information specified by the Chambers judge has already been circulated would weigh in favour of open access in the balancing that occurs at the last stage of the test.

VI. CONCLUSION

[71] For the reasons explained above, I have found that the Chambers judge erred in certain respects. However, I have nonetheless concluded that the first two prerequisites to the continuation of the sealing order and publication ban specified by the *Sherman* test have not been demonstrated to exist. That being so, I need not consider whether the Chambers judge failed to undertake the proportionality analysis required by the third element of the test.

[72] In the result, I would dismiss Mr. Windels's appeal of the publication decision, with one set of costs to be assessed in the usual way.

"Barrington-Foote J.A."

Barrington-Foote J.A.

I concur. "Whitmore J.A."

Whitmore J.A.

I concur. "Leurer J.A."

Leurer J.A.