WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.5(1), (2), (2.1), (3), (4), (5), (6), (7), (8) or (9) or 486.6(1) or (2) of the *Criminal Code* shall continue.

These sections of the *Criminal Code* provide:

> 486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.
>
> (2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is in the interest of the proper administration of justice.
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> (2.1) The offences for the purposes of subsection (2) are
>
> > (a) an offence under section 423.1, 467.11, 467.111, 467.12, or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;
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> > (b) a terrorism offence;
> >
> > (c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or
> >
> > (d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

(3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.

(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society’s interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

(e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;

(f) the salutary and deleterious effects of the proposed order;

(g) the impact of the proposed order on the freedom of expression of those affected by it; and

(h) any other factor that the judge or justice considers relevant.

(8) An order may be subject to any conditions that the judge or justice thinks fit.

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

(a) the contents of an application;

(b) any evidence taken, information given or submissions made at a hearing under subsection (6); or

(c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings. 2005, c. 32, s. 15; 2015, c. 13, s. 19

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

DATE: 20220728
DOCKET: C69884

van Rensburg, Pardu and Copeland JJ.A.

BETWEEN

B.M.D. and A.M.

Applicants (Appellants)

and

Her Majesty the Queen

Respondent (Respondent)

AND BETWEEN

College of Physicians and Surgeons of Ontario

Applicant (Respondent)

and

Her Majesty the Queen

Respondent (Respondent)

John A. Nicholson, for the appellants

Elisabeth Widner and Amy Block, for the respondent College of Physicians and Surgeons of Ontario

Peter Scrutton, for the respondent Crown

Heard: June 7, 2022

On appeal from the order of Justice Spencer Nicholson of the Superior Court of Justice, dated September 9, 2021, with reasons reported at 2021 ONSC 5938.

Pardu J.A.:

Introduction

[1] The appellants, B.M.D. and her son A.M., ask this court for a publication ban barring publication of the name of Dr. Awad Mortada, husband and father of the appellants, in connection with his convictions for assaulting and threatening his wife. A.M. witnessed the assault and called the police. B.M.D. says she has been abused and ostracized by members of her community and extended family because she revealed her husband's abuse to the police. A.M. has been distressed by the negative attention he has suffered because of the publicity surrounding his father's conduct and conviction.

[2] Dr. Awad Mortada is a physician in a small community. While the appellants concede that the College of Physicians and Surgeons of Ontario (the "College") should be permitted to publish information expressly required by its statutory mandate, they argue that any further publication by the College or by others should be prohibited to prevent further harm to them. Both also seek a publication ban barring publication of their identities as victim or witness, or of any information that would reveal their identities. They are concerned that more publicity, including publication of the physician's name and the nature of the offences, will cause them to suffer further harm. They submit that the application judge erred in failing to issue the broader publication ban they sought.

[3] The College wishes to publish both the physician's name and the nature of the convictions in order to carry out its statutory mandate of protecting the public. It says that the restrictions proposed by the appellants would undermine its ability to do so and are not in the public interest.

[4] The Crown points out that this is not simply a binary matter of weighing the duties of the College and the privacy interests of the appellants. Because of the breadth of the publication ban sought by the appellants, the broader public interest in transparency and openness of the courts is engaged. The Crown submits that while the welfare of the appellants is an important consideration, the appellants have not shown that the application judge erred in his weighing of the public interest in transparency and openness as compared to the privacy interests of the appellants, and that this appeal must therefore be dismissed.

[5] For the reasons that follow, I would dismiss the appeal, but I would amend the application judge's order to include a publication ban over the contents of the application for the publication ban pursuant to s. 486.5(9) of the *Criminal Code*, R.S.C. 1985, c. C-46.

The Charges

[6] Dr. Mortada was charged in June 2018 with 20 offences against various members of his family, alleged to have occurred in 2018 and 2001. These counts were withdrawn upon his guilty pleas on March 8, 2019 to assaulting his wife and

threatening to kill her and breach of recognizance (contact with family members he was forbidden to contact), charged on a new information.

[7] The facts summarized by the Crown and admitted to by Dr. Mortada indicated that the parties had been married since October 2001. There had been a violent incident at the beginning of the marriage. Physical violence and threats were becoming more frequent and were escalating. During a recent incident, the physician placed a pillow over the face of the victim during an argument. During the weekend of April 14 and 15, 2018, the physician became angry while driving and threatened to kill the whole family by driving into a transport truck. Around the end of May 2018, the victim called her own family as she was fearful that her husband would kidnap the children and take them to another country. The victim's mother and her brother came to the residence and while they were there, the physician assaulted his wife by pushing her and spitting in her face.

[8] The final incident occurred on June 10, 2018. The children were at home. During an argument, the physician spat on his wife while she was in bed. The victim went downstairs with the children to remove herself from the situation. The physician followed them downstairs and threatened to kill the victim, the children and then himself. The victim called her parents for help. Her parents drove to the victim's home from Michigan. In the meantime, the physician was throwing things around the house and breaking things. When the parents arrived, the physician, the victim and her parents tried to talk over the problems. The physician became

enraged and began threatening his wife's life again. He got up and punched his wife in the face and chest. He pushed her hard, causing her to fall backwards. When the victim's father got between the victim and the physician, the physician pushed the victim's father, who then told his grandson, the appellant A.M., to call police. Police arrived, and the wife was taken for medical attention. She suffered bruising and soft tissue injuries from the assaults.

[9] In August 2018, the physician violated the non-contact terms of his release and was charged with breaching his recognizance. He was suffering from depression and was admitted to hospital involuntarily and kept there for 28 days.

[10] The physician sought treatment. He accepted full responsibility for his actions and did not blame his wife. He was remorseful and concerned for the impact of his behaviour on his wife, children and community. The parties were participating in marriage counselling and the wife had returned to working in her husband's office.

[11] The physician's sentence was suspended with two years of probation on the charges of assault and uttering threats to cause death, and three days of time served in pretrial custody was credited to the breach of recognizance. The sentencing judge was concerned about observations in a pre-sentence report that the physician's assaultive and threatening behaviour was "well and truly used to exert power and control over his wife only."

[12] Since the physician was charged the wife was living separately with the children.

[13] There was no indication of any further assault or threat to the wife and the physician expressed determination to never again engage in that kind of behaviour. Both the physician and his wife are working to reunite the family.

Publication bans made in the Ontario Court of Justice

[14] Following the husband's arrest on June 10, 2018, a Justice of the Peace issued a mandatory publication ban pursuant to s. 517 of the *Criminal Code* on any evidence or information tendered at the bail proceedings.

[15] Some two months later, when the husband was arrested again and charged with breach of recognizance, another mandatory s. 517 publication ban was made in relation to the new charges.

[16] On November 26, 2018, during a court appearance following a judicial pretrial, the Crown originally sought a broader publication ban under s. 486.5 of the *Criminal Code* to prohibit publication of any information that could identify a victim or witness, given the domestic nature of the offences and the negative effects of publicity on the family. Counsel for the husband consented to the request, and the presiding judge made the order requested. Section 486.5 provides for a discretionary publication ban and requires a written application and notice to "any other person affected by the order that the judge or justice specifies."

[17] Minutes later, the Crown, at the prompting of defence counsel, asked that the order restricting publication instead be made pursuant to s. 486.4(2.1), which provides for a mandatory order restricting publication of any information that could identify the victim, where a victim is under the age of 18. Several counts on the initial information related to minor complainants, and the presiding judge made the order requested.

[18] On March 8, 2019, a new information was placed before the court containing the charges of assault and uttering threats to cause death to which the husband ultimately pled guilty. The presiding judge granted the Crown's request to have the prior non-publication order apply to the new information, although the new information did not involve persons under 18 years of age or sexual offences.

[19] On June 20, 2019, when the physician was in court for sentencing submissions, his counsel asked the court to confirm that the existing s. 486.4(2.1) order prohibited publication of the husband's name. The presiding judge orally confirmed that it did so but did not amend the order on the information, which had been endorsed "Publication ban pursuant to 486.4 (2.1) CC". The matter was adjourned to June 24, 2019 for sentencing and all other counts were withdrawn on that date.

Publication in newspapers

[20] Newspapers operated by Postmedia published several articles about the charges laid against Dr. Mortada.

[21] On August 24, 2018, the London Free Press reported that a Chatham doctor was facing 20 charges, including two counts of assault with a weapon, but that he had not been suspended by the College. It noted that his name could not be published because of a publication ban, but that the charges became known when they were posted on the College's website.

[22] On August 24, 2018, the Windsor Star reported that a Chatham neurologist was facing 20 charges, including two counts of assault with a weapon, and that his case had been adjourned to a later date. The article named Dr. Mortada and included a picture of him. It described the offences with which he was charged, but did not name the victims or indicate that the offences involved family members.

[23] On the same date, the North Bay Nugget reported the same events. The Airdrie Echo reported the same events on August 27, 2018.

[24] On September 5, 2018 and December 19, 2018, the Chatham Daily News reported that a local neurologist facing 20 charges, including assault with a weapon, received bail and that his matter was adjourned to a later date. It said he could not be named because of a publication ban, but included a picture of him with his name noted under the picture.

[25] An article in the Sault Star dated November 6, 2018 referred to a Chatham doctor facing criminal charges, including assault with a weapon, and that a judicial pretrial was underway. It referred to a publication ban relating to evidence at the bail hearing, but described the charges, without identifying the victim or that the assaults involved family members. It named the physician in a caption under the photograph but again noted that he could not be named because of a publication ban.

[26] The Cochrane Times and the Lucknow Sentinel reported the same matters in the same fashion on December 19, 2018.

[27] None of these newspaper reports appear to have violated any order banning publication.

[28] B.M.D. relates in her affidavit that someone had posted something about the charges against her husband on Facebook.

Information posted by the College

[29] The College first learned of the charges by way of a report from the Chatham-Kent police. The College posted information about the charges and bail conditions on its public register and website. It updated the information when the physician was later charged with breach of recognizance in August 2018. Nothing in the posted material identified the victims, by name or by their relationship with

the physician. Nor did it reveal that the charges related to family members or victims under the age of 18.

[30] On March 11, 2019, after the physician pleaded guilty, his counsel notified the College of the plea and provided further details on March 13, 2019. His counsel took the position that the publication ban prohibited any identification of Dr. Mortada and asked that identifying information be removed from the public register and that the fact of his guilty plea not be published.

[31] Counsel for the College responded by letter on March 28, 2019, advising that it did not agree that its postings violated any publication ban, and that to carry out its obligations it would post the information on the register.

[32] On July 30, 2019, counsel for the physician wrote to advise of the sentencing, including a portion of the transcript in which the presiding judge indicated that the publication ban applied to Dr. Mortada's name, and again asked that his name be removed from the public register.

[33] The College responded on August 22, 2019, advising that the posting did not violate the publication ban and that the College was required to post the information about the criminal charges, release conditions and findings.

[34] In May 2020, Dr. Mortada retained new counsel, Mr. Nicholson, who wrote to the College to advise that Dr. Mortada intended to bring a court application if the College did not remove the information from the register. His unissued Notice of

Application was served on the College on June 9, 2020; the issued Notice of Application followed on July 29, 2020. The application was adjourned indefinitely and did not proceed. Both Dr. Mortada and the College agreed on a without-prejudice basis to remove reference to his convictions on the College website, pending determination of the issues in court. Disciplinary proceedings are awaiting resolution of this appeal.

Genesis of this proceeding

[35] On September 30, 2020, the College brought an application under Rule 43 of the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, S.I./2012-7, seeking the following relief:

1. A declaration that the publication bans made under s. 486.4(2.1) do not apply to information beyond information that could identify victims under the age of 18 and do not apply to information that could identify Dr. Mortada, as long as the information does not identify the minors.

2. An order in the nature of *certiorari* quashing the ban, to the extent that it applied to information beyond that which could identify the minor victims.

[36] On October 8, 2020, Mr. Nicholson commenced an application on behalf of the appellants, B.M.D. and A.M. They sought an order varying the publication ban "such that it be considered to have been issued under s. 486.5(1) of the *Criminal Code* rather than s. 486.4(2.1)", conceding that the publication ban was made under the wrong section. Alternatively, they sought a fresh publication ban under

s. 486.5(1) banning the publication of any information that would identify them, including a ban on the publication of Dr. Mortada's name in connection with the criminal charges and convictions. Notice was given to the media. Postmedia initially brought its own application but abandoned it prior to the commencement of the hearing.

The role of the College of Physicians and Surgeons of Ontario

[37] The College opposed the publication ban sought by the appellants. The College is a self-governing body responsible for protecting the public by its regulation of physicians. Its duties include:

- Investigating physicians in relation to professional misconduct and incompetence. This includes monitoring active criminal matters;
- Conducting disciplinary hearings regarding allegations of professional misconduct or incompetence;
- Sharing information with other medical regulatory bodies (including issuing certificates of professional conduct verifying a physician's registration and standing with the College); and
- Maintaining a register and website, available to the public, containing specified information about Ontario's physicians, including criminal charges and convictions and the details of referrals to discipline, including hearing dates and outcomes of disciplinary hearings.

[38] Physicians are required to notify the College of criminal charges against them, bail conditions and restrictions, any changes in bail conditions and restrictions and findings of guilt.

[39] The College must maintain a public register posting this information: *Health Professions Procedural Code*, being Schedule 2 to the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18, ss. 23(1), 23(2) and 23(5).

[40] The College is also required to post information on its public register about disciplinary hearings, including:

- A notation of every matter that has been referred by the Inquiries, Complaints and Reports Committee to the Discipline Committee and that has not been finally resolved, including the date of the referral and the status of the hearing before a panel of the Discipline Committee, until the matter is resolved;
- A copy of the specified allegations against a member for every matter that has been referred by the Inquiries, Complaints and Reports Committee to the Discipline Committee and that has not been finally resolved; and
- The results of every disciplinary hearing, including the finding, the particulars of the grounds for the finding, a synopsis of the decision and the order made, the date of the finding and the date of the penalty: *Health Professions Procedural Code*, ss. 23(2), 23(14)(a); *College of Physicians and Surgeons of Ontario, General By-Law*, s. 49(1)(14).

[41] No information can be posted in violation of a publication ban: *Health Professions Procedural Code*, s. 23(3).

[42] Dr. Mortada has been referred to the Ontario Physicians and Surgeons Discipline Tribunal (the “Tribunal”) to face allegations that he had engaged in professional misconduct, in that he (a) had been found guilty of an offence relevant

to his suitability to practice; (b) had engaged in an act or omission, relevant to the practice of medicine that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional; and (c) had engaged in conduct unbecoming a physician.

[43] The College alleges that:

> [O]n the basis of the criminal convictions, Dr. Mortada has been found guilty of offences relevant to his suitability to practice medicine. In addition, the College alleges that the underlying conduct (i.e., assaulting his spouse, uttering death threats and failing to comply with his bail conditions) amount[s] to disgraceful, dishonourable or unprofessional conduct and conduct unbecoming a physician.

[44] Hearings before the Tribunal are open to the public and the Tribunal adheres to the open court principle. The outcomes of disciplinary proceedings are posted to the public register.

[45] The fact that a physician has been convicted of a domestic assault is relevant to a physician's suitability to practice and may be highly relevant to a prospective patient. As noted in *Dr. Jha v. College of Physicians and Surgeons of Ontario*, 2022 ONSC 769 (Div. Ct.), "such conduct displays 'poor judgment, lack of self-control, and capacity for violent acts which stands in stark opposition to the caring, protecting, and healing goals and values' characteristic of health professions": at para. 121.

[46] The College wishes to be able to publish the name of the physician and the fact that his convictions relate to domestic abuse.

The effects of the charges on the appellants

[47] Both B.M.D. and A.M. say that they have suffered as a result of information published about the charges.

[48] B.M.D. says she was assured by police officers that she could tell them everything that had happened, and that it would be kept confidential and would not be publicized. She says Crown prosecutors told her there would be a publication ban on the proceedings, that such an order had been made and that the presiding judge had banned publication of her husband's name. She says that contrary to the assurances made to her, the charges were "public knowledge" and had become known to her extended family in other countries through the Internet.

[49] She says that stories began to appear in newspapers and on the Internet after her husband was arrested. While her name did not appear in the articles, she says that anyone who knew about the charges knew they involved her.

[50] She relates that another physician in Chatham, who was a member of her cultural and religious community, attended at her husband's office where she also worked. She described the other physician's conduct:

> This physician had his smart phone with him, on which he had a Facebook posting open about the charges against my husband. In front of me, and other staff and

> patients in the office, he confronted my husband with the article. He criticized my husband for allowing private family matters into public. He criticized me for taking private matters out of the home. He told my husband I had brought shame on him, and he call me a whore. He said everyone knew about the charges now. He encouraged my husband to leave the marriage. My husband told him to leave, but he would not do so initially. He eventually left and repeating I was a shame and a disgrace from an Islamic perspective as a “woman”.

[51] B.M.D. began to receive anonymous calls from blocked numbers on her cell phone. The caller would often call her a whore and blame her for breaking up the family and ruining her husband’s reputation. One anonymous caller referred to a case from Alberta where a Muslim woman had been murdered for bringing shame upon her family. B.M.D. has also received multiple anonymous calls with only loud breathing on the other end.

[52] People have knocked on her door and then vanished, after tripping the alarm.

[53] B.M.D. relates:

> I believe that these callers, like the physician who came to my husband’s office, adhere to a cultural viewpoint shared by many Muslims (which is certainly not grounded in anything in the scripture of the Qur’an) that family issues, including violence against women, is always to be kept private in a Muslim family, to avoid shaming the family and the reputation of a husband. When this happens the damage to the family is the fault of the wife […] when it becomes public it is the wife’s fault for going outside of the home, and not the husband’s fault for being violent.

[54] She says she was aware of those beliefs but felt safe speaking to police because of the assurances of privacy.

[55] B.M.D. has been ostracized by a large segment of the local Muslim community and no longer attends mosque in order to avoid that derision. She has stopped wearing her hijab. Even members of her own extended family have stopped speaking to her because they think she has brought shame upon the family. She is no longer welcome to visit her sister and has been unable to attend family events such as graduations, engagements and marriage celebrations.

[56] The loss of her connection to her family and Muslim cultural identity has been painful for her. She has suffered anxiety and depression.

[57] Her three children have also suffered from the knowledge in the community that their father had been charged. She and her husband are trying to move on together but are haunted by the prospect that a Google search will reveal what happened. She questions whether calling police would be the right thing to do if she were to be assaulted again.

[58] A.M. was 17 years old and in Grade 11 at the time of the assaults. He was a witness to the events and called 911. He says he was told by police that the names of all parties would be kept anonymous, and that this gave him the comfort of speaking openly with the police. When articles were published identifying his father by name and as a neurologist, his peers soon realized that his father had

been charged. He could tell that others were talking about it. Some students made insulting comments to him, called him racial epithets, accused him of “coming here [Canada] to beat women” and told him to “get out of [their] country.”

[59] A.M. did not return to school for the rest of the year. He did not want to leave the house or play sports with friends. He went to live in Michigan with his grandmother for the summer. When he returned to school, he continued to be called names and was ostracized at school, although some of his friends were supportive. He became withdrawn, anxious and depressed. By the spring of 2019, he had to see a psychiatrist and was prescribed anti-depressants. School projects involving Google searches have led to his whole college class learning about the charges against his father. He says it is a constant source of worry and anxiety to him that Internet publicity will link him to the events that led to the charges.

The application judge’s decision

[60] The application judge ordered that the initial publication ban under s. 486.4(2.1) in relation to the minor children would remain, but the transferred publication ban and judicial commentary that the publication ban prevented disclosure of the physician’s name would be quashed.

[61] The application judge regarded s. 486.5 as irrelevant to his decision. He held that s. 486.5 contemplated a more “robust procedure” and that since the criminal

case had concluded "it would be inappropriate […] to act as if the procedures under s. 486.5 had been followed."

[62] The application judge expressed concern that although the applicants were B.M.D. and A.M., it may be the physician himself who was attacking the publication of his information by the College in the names of his family members: see paras. 44-45, 87.

[63] In considering the merits of the publication ban sought by B.M.D. and A.M., the application judge set out the principles from the leading case on balancing the open court principle with the public interest in protecting an individual's privacy rights, *Sherman Estate v. Donovan*, 2021 SCC 25, 66 C.P.C. (8th) 1. He summarized the "recast" *Dagenais/Mentuck* test, as articulated in *Sherman Estate*, as follows:

> In order to succeed, the person asking the court to exercise discretion in a way that limits the open court presumption must establish that:
>
> 1) Court openness poses a serious risk to an important public interest;
>
> 2) The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> 3) As a matter of proportionality, the benefits of the order outweigh its negative effects.

[64] Applying the *Sherman Estate* test, the application judge found that the court should not bar publication of the information that the College proposed to post. The application judge found that B.M.D. satisfied, but A.M. did not satisfy, the first inquiry into whether court openness poses a serious risk to an important public interest. The application judge found that the mere discomfort and embarrassment of a justice system participant is insufficient, and that for a privacy interest to be recognized as an important public interest, the disclosure must amount to an affront to dignity and go to the person's "biographical core". In B.M.D.'s case, the application judge found that there is an important public interest in protecting victims of intimate partner violence who are at a real risk of physical harm. He noted that B.M.D. was put at a continuing risk of physical harm, since she had received actual threats from community members, and that she suffered a real affront to her personal dignity in forsaking her religious practices to avoid such attacks. The application judge concluded that the fact that B.M.D. was a victim of domestic violence went to her biographical core. However, in A.M.'s case, the application judge found that his privacy interests could not be classified as an important public interest, noting that he was suffering not because he was a victim, but because he is a relative of the offender.

[65] On the second inquiry, which looks into whether the order sought is necessary to prevent that serious risk to the identified interest, the application judge found that an order banning the use of B.M.D.'s name in the proceedings

and on the College's website was the only appropriate measure. A blanket ban on the publication of the physician's name would be a highly intrusive order that would effectively prevent the College from fulfilling its mandate of informing the public of its members' criminal convictions. A ban on disclosing the fact that the assaults in question were committed upon the physician's spouse would not be appropriate because it may be extremely relevant to a potential patient that the victim was the physician's intimate partner.

[66] On the third inquiry, which looks into whether, as a matter of proportionality, the benefits of the order outweigh its negative effects, the application judge found that the negative effects of publication on B.M.D. and A.M. were far outweighed by the countervailing public interest in the College investigating and reporting on the criminal actions of one of its professional members, the benefit to the public of knowing whether their potential physician has committed a particular crime, and the constitutionally-enshrined principle of open court proceedings. While he accepted that B.M.D. and A.M. were assured by the police officers and the Crown that their identities would be protected, those assurances could not trump the legislative requirements of the *Criminal Code*.

[67] Accordingly, the application judge quashed the transferred publication ban and judicial commentary that the publication ban prevented disclosure of the physician's name. He ordered that the College and other media may disclose the physician's name and the specific nature of the convictions, but that B.M.D.'s name

could not be disclosed. The application judge did not order a publication ban of the physician's name as requested by both B.M.D. and A.M.

Analysis

[68] I would hold that the analysis of an application like this should be anchored in the text of s. 486.5, interpreted as required by the *Dagenais/Mentuck/Sherman Estate* test.

[69] Parliament has expressly addressed the conditions under which a discretionary publication ban may be granted at the request of a prosecutor, victim or witness. Here, s. 486.5 was engaged because the appellants sought a non-publication order under that provision, to be applicable to the physician's name and other information that could be used to inferentially identify them. The application judge was in effect stepping into the shoes of the presiding judge to determine what publication ban, if any, should be granted.

[70] An analysis of discretionary publication bans must therefore begin with the statutory provision authorizing such steps: s. 486.5 of the *Criminal Code*. Under this provision, a non-publication order may be made on application by a prosecutor, a victim or a witness. Justice system participants who are involved in proceedings in respect of certain specified offences may also apply for a non-publication order. There is no provision for an application by an accused. Section 486.5 authorizes an order "directing that any information that could identify

the victim or a witness" not be published if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice. The scope of the potential publication ban is limited.

[71] An applicant for an order must apply in writing to the presiding judge, or if that person is not yet determined, to a judge of the superior court in the district where the proceedings will take place. The applicant must give notice to the prosecutor, the accused and any other person affected by the order that the judge specifies. The judge may hold a hearing to determine if the order should be made and the hearing may be held in private.

[72] In determining whether to make the order, the judge must consider the following factors listed under s. 486.5(7):

> (a) the right to a fair and public hearing;
>
> (b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;
>
> (c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;
>
> (d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;
>
> (e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;
>
> (f) the salutary and deleterious effects of the proposed order;

> (g) the impact of the proposed order on the freedom of expression of those affected by it; and
>
> (h) any other factor that the judge or justice considers relevant.

[73] The order may be subject to any conditions the judge thinks fit.

[74] Under s. 486.5(9), unless the judge refuses to make the order, no person shall publish the contents of the application, the evidence taken, submissions made at a hearing under this section, or any other information that could identify the person to whom the application relates as a victim, witness or justice system participant.

[75] Section 486.5 differs from other sections in the *Criminal Code* that provide for publication bans. It is discretionary, unlike the mandatory publication bans provided for under s. 517 for bail hearings, and under s. 486.4 on applications made in respect of specified sexual offences or other offences where the victim is under the age of 18 years. Section 486.5 also contemplates an application by the prosecutor, a victim, a witness or, in respect of specified offences, a justice system participant. An application for a publication ban at a bail hearing must be brought by an accused. The application under s. 486.4 may be brought by the prosecutor, a victim or a witness, but there is no provision for an application by a justice system participant who is involved in the proceedings.

[76] It was common ground before the application judge and on appeal that s. 486.4 had no application to the issue of whether the presiding judge should

impose a publication ban in relation to the replacement information alleging that the physician assaulted and threatened his wife. She was not under the age of 18 and the specified sexual offences were not alleged. The presiding judge erred in making a publication ban pursuant to s. 486.4(2.1) and in stating that publication of the physician's name was barred under that provision.

[77] At the hearing before the application judge, the Crown disputed that the application judge had jurisdiction to make an order under s. 486.5 or at common law, but now concedes that he had jurisdiction. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, the court held that a third party, such as the media, could bring an application by way of *certiorari* in a superior court to challenge an order of a provincial judge banning publication which was tainted by error: at pp. 864-865. As the court noted, traditionally *certiorari* could only be used to quash an order, but the court expanded the remedies available to allow third parties to seek additional or alternative remedies as would be available under the *Charter*: at p. 866. Accordingly, publication bans ordered by provincial judges under their common law or legislated discretionary authority may be challenged by way of *certiorari*.

[78] *Dagenais* and *R. v. Mentuck*, 2001 SCC 76, 158 C.C.C. (3d) 449 hold that discretionary publication bans in relation to judicial proceedings should only be granted where:

> 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: *Mentuck*, at para. 32; see *Dagenais*, at p. 878.

[79] This test applies to all discretionary judicial orders limiting the openness of judicial proceedings: *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 30.

[80] The work of the courts is presumptively open to observation by the media and the public. As noted in *Sherman Estate*, at paras. 1-2:

> [The Supreme Court] has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.
>
> Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that

> the public can attend hearings and that court files can be consulted and reported upon by the free press.

[81] In *Sherman Estate*, the court held that an exception to the open court principle may be justified where dissemination of highly sensitive personal information would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity, if this narrower aspect of privacy is shown to be at serious risk: at para. 7.

[82] I would summarize the *Sherman Estate* test for whether a publication ban should be granted as follows:

1. Does court openness pose a serious risk to an important public interest?
2. Is the order sought necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk?
3. As a matter of proportionality, do the benefits of the order outweigh its negative effects?

[83] In determining whether a privacy interest justifies an exception to the open court principle, two questions are relevant:

1. Is the information in issue of a highly sensitive nature that goes beyond discomfort or embarrassment, such that its dissemination would amount to an affront to the dignity of the applicant?
2. Does society as a whole have a stake in protecting the interests in issue such that the public would not tolerate publication, even in service of open proceedings?

[84] The court observed in *Sherman Estate* that, insofar as privacy serves to protect a person from an affront to their dignity, it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. “The question is not whether the information is ‘personal’ to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting”: at para. 33. The court noted that “[d]etermining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at ‘serious risk’ is a fact-based finding” made in the context of the particular proceedings: at para. 42.

[85] That said, some intrusion on privacy related to court proceedings is tolerated despite the consequences to an individual because of the importance of the open court principle. In *Sherman Estate*, the court noted that some caution is required when weighing privacy interests in considering applications for discretionary publication bans. “It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness”: at para. 56.

[86] The application judge accepted that the fact that B.M.D. had been a victim of assault at the hands of her husband was information capable of being of a highly

sensitive nature, publication of which could cause more than discomfort and embarrassment. He cited *Sherman Estate*, at para. 77, for the proposition that "the question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences" and held that this was information that "may go to a person's biographical core", to use the language of *Sherman Estate*.

[87] There can be no doubt that important public interests are at stake. Society as a whole has an interest in encouraging abused domestic partners to report assaults, and to encourage victims to come forward. Too many times, domestic assaults culminate in homicides. Further, society as a whole has an interest in protecting victims of domestic violence from further harassment or reprisals.

[88] Second, the application judge found as a fact that the evidence established that there was a real possibility that B.M.D. would be "further victimized in the absence of a publication ban", and that there was a basis to believe she may suffer physical harm. He recognized that the previous disclosures had already resulted in the serious risk he was then asked to prevent.

[89] In contrast, the application judge did not conclude that the privacy interests claimed by A.M. raised important public interests worthy of protection. His suffering was caused by the fact that he was related to the offender, not because he was a victim.

[90] Despite these observations, the application judge ultimately concluded that the blanket ban requested over publication of the physician's name could hardly be considered to be tailored to minimally intrude upon the open court principle. He concluded that it would be a "highly intrusive order that would effectively prevent the College from fulfilling its mandate of informing the public of its members' criminal convictions".

[91] He observed, at paras. 83-84 of his reasons:

> Physicians play a unique role in society and hold positions of significant trust. This, in my opinion, requires that members of the public have confidence that if there is any reason known to the College that a physician may be unworthy of that trust that the College will disclose it. As described in the College's factum, physicians hold an enormous degree of power over a patient's physical, psychological and emotional well-being.
>
> Violence towards an intimate partner, is, in my opinion, a fundamental breach of the trust built up in that relationship. It can be viewed as more egregious than an assault upon a stranger because of the mutual dependence that life partners have upon each other. Accordingly, I view it as especially important that the public is aware that a physician has committed an act of violence towards their intimate partner.

[92] In the end, the application judge prohibited publication of B.M.D.'s name only.

[93] While this matter took on a binary aspect because of the involvement of the College on the one side, and the applicants on the other, the application judge also had to consider the interests of the press and the public at large. Even where no

member of the media comes forward to press for that right, the judge must still consider the "demands of that fundamental right": *Mentuck*, at para. 38.

[94] As noted in *Mentuck*, at paras. 38-39:

> The absence of evidence opposed to the granting of a ban, that is, should not be taken as mitigating the importance of the right to free expression in applying the test.
>
> 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.

[95] There is a substantial public interest in the reporting of criminal convictions and the identity of the offender. The public should know that criminal courts function transparently. This serves an educational purpose, both to deter similar conduct and to encourage victims to come forward.

[96] Ultimately, the intervention of the criminal justice system in this matter stopped the escalating violence to which the victim had been subjected and forced the offender to get help for his spiraling depression.

[97] The strong general public interest in transparency in criminal proceedings supports the exercise of the application judge's discretion.

[98] The balancing undertaken by the application judge was a discretionary decision to which deference is owed, and I see no basis to interfere with the result. His analysis of the factors relevant to the application largely tracked those listed in s. 486.5(7).

[99] However, the effect of the application judge's conclusion that s. 486.5 was not engaged was that he did not consider s. 486.5(9), which bars publication of the content of the application for the publication ban:

> **486.5 (9)** Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way
>
> > **(a)** the contents of an application;
> >
> > **(b)** any evidence taken, information given or submissions made at a hearing under subsection (6); or
> >
> > **(c)** any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

[100] That provision is relevant, as the application judge did not refuse to make an order but made a limited order banning publication of B.M.D.'s name.

[101] Thus, the application judge should have made a non-publication order in the terms of s. 486.5(9) in relation to his reasons, and the order made by him is amended to add that mandatory publication ban. The same mandatory order will

attach to these reasons, prohibiting publication of the contents of the application, including the proceedings on appeal, any evidence taken, information given or submissions made at the hearings in relation to the application for a non-publication order below or on appeal, except insofar as those documents are otherwise part of the public record, and any other information that could identify the person to whom this matter relates as a victim, witness or justice system participant.

[102] I would otherwise dismiss the appeal.

Released: July 28, 2022 KMvR

G. Pardu J.A.

I agree. K. van Rensburg J.A.

I agree. Copil J.A.