COURT OF APPEAL FOR ONTARIO

CITATION: S.E.C. v. M.P., 2023 ONCA 821
DATE: 20231212
DOCKET: C70223 & COA-22-CV-0422

Trotter, Sossin and Monahan JJ.A.

BETWEEN

DOCKET: C70223

S.E.C. (also known as S.C.) by his Litigation Guardian, A.C.M., A.S.C.M., N.R.C-M., S.A.C.M. and M.B.C.

Plaintiffs (Appellants)

and

M.P. and Ontario Ltd., carrying on business as A.E. Ltd.

Defendants (Respondents)

AND IN THE MATTER OF INTACT INSURANCE COMPANY SETTLEMENT OF STATUTORY ACCIDENT BENEFITS ENTITLEMENT OF S.E.C.

AND BETWEEN

DOCKET: COA-22-CV-0422

S.T. and T.T., by their Litigation Guardian S.T.

Plaintiffs (Appellants)

and

P.K.

Defendant

Barbara Legate, D. Alexander Wolfe, and Luke Kilroy, for the appellants S.E.C., A.S.C.M., N.R.C-M., S.A.C.M., M.B.C., T.T., and S.T.

Iris Fischer and Gregory Sheppard, for the intervenor Canadian Media Lawyers Association

Sean Moreman, for the intervenor Canadian Broadcasting Corporation

Joe Dart and Judith Hull, for the intervenor Ontario Trial Lawyers Association

Heard: November 1, 2023

On appeal from the order of Justice Spencer Nicholson of the Superior Court of Justice dated March 18, 2022, with reasons reported at 2021 ONSC 8375 (C70223).

On appeal from the order of Justice Russell M. Raikes of the Superior Court of Justice dated November 15, 2022, with reasons reported at 2022 ONSC 6007 (COA-22-CV-0422).

Sossin J.A.:

OVERVIEW

[1] These appeals concern the scope and limits of the open court principle in the context of the court approval of settlements involving minor parties or parties under disability as required by r. 7.08 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. In particular, both appeals concern the denial of sealing orders over motion records for r. 7.08 settlement approvals.

[2] Rule 7.08(1) requires that no settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge. In order to obtain this approval, a notice of motion or application must be filed that

includes: an affidavit of the litigation guardian setting out the material facts, reasons supporting the settlement, and the litigation guardian's position on the settlement; an affidavit of the litigation guardian's lawyer setting out their position on the proposed settlement; the minor's consent if they are over sixteen years old; and a copy of the proposed minutes of settlement: r. 7.08(4). Under the open court principle, these materials are presumptively available to the public.

[3] Parties may seek to seal documents filed, and thereby keep them from public disclosure, using s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"), which provides that "[a] court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record." However, the *CJA* does not set out criteria to be met for a sealing or confidentiality order to be made. Instead, the relevant test was provided by the Supreme Court in *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361.

[4] The appellants urge this court to expand the use of s. 137(2) to sealing orders in settlement motions under r. 7.08 on the basis that these motions are heard in-writing and therefore not subject to the open court principle, to fulfil the court's *parens patriae* jurisdiction, in protection of solicitor-client privilege, and in the alternative, as a result of the application of the test in *Sherman*.

[5] The appellants also bring a motion to produce fresh evidence relating to how technology permits private information to be accessed after a plaintiff files a motion for approval under r. 7.08.

[6] For the reasons that follow, I would dismiss the motion to produce fresh evidence, and would dismiss the appeals from the sealing order motions below.

BACKGROUND

[7] There are two motion decisions under appeal. In each case, the motion judge approved the settlement under r. 7.08 but denied a request by the moving party to have the settlement approval motion record sealed.

(1) The Dr. C. Appeal

[8] The first appeal, styled as *S.E.C.* in the decision below, deals with the case of Dr. C., a 63-year-old pedestrian who was struck by a full-size SUV in November of 2017 (“the Dr. C. appeal”). Dr. C. suffered extensive brain injuries. He was found to be incompetent, and Guardians of the Person and Property were appointed.

[9] On June 30, 2021, Dr. C.’s litigation guardian settled a tort and accident benefit claim for $8,500,000. On September 17, 2021, the appellants moved in writing for the judicial approval of the action’s settlement under r. 7.08 and the *Contingency Fee Agreement* (“*CFA*”) under s. 24 of the *Solicitors Act*, R.S.O. 1990, c. S.15, and s. 6(b) of the *Contingency Fee Agreements Regulation*, O. Reg. 563/20 (“*CFA* Regulation”). The appellants sought to have two motions sealed:

(1) approval of the settlement under r. 7.08, and (2) approval of the contingency fees under the *Solicitors Act* and *CFA* Regulation.

[10] The sealing order was sought on three grounds: first, to protect the privacy and dignity of Dr. C.; second, to protect the confidential business records of Dr. C.'s business; and third, to protect Dr. C.'s right to solicitor-and-client privilege.

[11] The motion judge approved the settlement and contingency fee arrangement and fees but dismissed the request for a sealing order. In reasons dated December 20, 2021, the motion judge held that the test for granting a sealing order and setting aside the open court presumption was not satisfied. He applied the *Sherman* test and concluded that it was not met because the information in it was not "sufficiently sensitive" to constitute an important public interest jeopardized by the open court principle. He also emphasized that, except for an assessment of the risks involved with going to trial, the information in the motion would have been disclosed at trial had the litigation gone forward. The motion judge also noted that no sealing order was sought for similar information provided for the purposes of appointing a litigation guardian. He concluded that the information in question did not strike at Dr. C.'s biographical core and that the "affront to the plaintiff's dignity is not apparent to me."

[12] In subsequent reasons dated March 18, 2022, the motion judge added: "[I]t is my view that the Reasons for Decision ought not to be sealed even if the balance

of the motion material is sealed, as the body of case law on settlements of this magnitude is sparse. However, it would be appropriate to initialize the parties' names."

(2) The *S.T./T.T.* Appeal

[13] The second appeal is brought by the litigation guardian of two minor plaintiffs from another denial of a sealing order (the "*S.T./T.T.* Appeal"). The underlying case involved a medical negligence action that emerged when then 7-month-old S.T. was suffering a focal seizure, did not receive antiviral medication, and sustained catastrophic and irreparable brain damage. T.T.'s claim derives from the condition of S.T.

[14] The appellants sought judicial approval of the actions' settlement under r. 7.08 and of the *CFA*. The appellants sought to have the motion materials for the approval of the settlements and contingency fees sealed. The settlement was approved; however, the sealing request was denied.

[15] In denying the sealing order, the motion judge relied on and adopted the reasons of Corthorn J. in *Carroll et al. v. Natsis*, 2020 ONSC 3263, 151 O.R. (3d) 94 and found no basis under the open court principle for a sealing order in the circumstances of the case.

[16] The motion judge noted that the majority of the material sought to be sealed would have been revealed had the litigation gone to trial, and that the suggestion

of potential vulnerability of the minor plaintiffs to their estranged father if the amount of the settlement was disclosed was too speculative and vague to ground a sealing order. Moreover, the motion judge found that references in the motion materials to communications with S.T.'s counsel were minimal and necessary in the circumstances.

(3) The other parties in the appeal

[17] In both appeals, the respondents take no position on the outcome of the appeals with respect to the sealing orders and did not participate in the appeal.

[18] Three parties were granted intervener status as friends of the court: (1) the Ontario Trial Lawyer's Association ("OTLA"); (2) the Canadian Broadcasting Corporation ("CBC"); and the Canadian Media Lawyers Association ("CMLA"). None of the interveners takes a position on the outcome of the appeals.

THE FRESH EVIDENCE MOTION

[19] The appellants seek to introduce fresh evidence to demonstrate how private and confidential information about infant plaintiffs has been obtained and disseminated by news organizations using materials filed as part of settlement approval motions.

[20] The fresh evidence is comprised of an affidavit by one of the lawyer's representing the appellants, together with an exhibit. The affidavit asserts that ONe-Key (a free, online government service) can be used to obtain a court file

number and consequently statements of claim containing the full name of the parties despite initialization in the decision. The affidavit includes a private company's marketing of "precedents" based on information scraped from publicly available court files. The exhibit is a story from a newspaper that included details of a settlement of personal injury litigation involving an infant plaintiff and links to the underlying litigation record through CanLII.

[21] The test for the admission of fresh evidence, set out in *Palmer v. The Queen*, [1980] 1 S.C.R 759, at p. 775, is well-settled:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial…
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. [Citations omitted.]

[22] I do not accept that the proposed fresh evidence is relevant to decisive or potentially decisive issues in these appeals. The motion judges did not conclude that the settlement approval motion records could not be accessed or shared through technology. The motion judges appeared to accept that they had to deal with the sealing request on the basis that the information contained in the record

would be part of a publicly accessible record. Therefore, evidence that public court records can be accessed and shared with greater ease due to evolving technology or new digital tools was not an issue in dispute on the motions.

[23] Even if the evidence were relevant to a decisive issue, I would not accept that the evidence could have affected the result. The growing ease with which information in court files can be accessed and shared does not concretize a specific risk that information in the files at issue would be used in a manner that would meet the *Sherman* test or otherwise justify sealing the record.

[24] For these reasons I would deny the motion for the admission of fresh evidence.

[25] I turn now to an analysis of the decisions under appeal.

ANALYSIS

[26] These appeals raise three related questions:

1) Given that a settlement approval motion is brought in writing, and therefore “heard in the absence of the public” under r. 37.11(1) of the *Rules*, is the motion record subject to the open court presumption?
2) Are the court’s *parens patriae* jurisdiction and the best interests of the minor party or party under disability overriding considerations when the court is asked to consider a sealing order in r. 7.08 settlement approval motions?

3) Is the open court presumption displaced because the common law test in *Sherman* has been satisfied with respect to the public interest in the appellants' (i) right to privacy, (ii) protection as a person who requires a litigation guardian, and (iii) right to solicitor-and-client privilege?

[27] As a preliminary matter, I will deal with the submissions on the standard of review.

[28] The appellants submit that the standard of review for the motion judges' decisions is correctness, as the motion judges failed to consider applicable legal principles: r. 37(11)(1)(a) of the *Rules*, *parens patriae*, privacy, and solicitor-client privilege. Additionally, the appellants contend that the reasons in the Dr. C decision under appeal reveal an internal inconsistency, as the motion judge held that the test for a sealing order was not met, but nonetheless ordered that the Dr. C's initials, rather than full name, be used to ensure anonymity. According to the appellants, this inconsistency also means that the motion judge's decision is not entitled to deference and should be reviewed on a standard of correctness.

[29] I would reject these submissions on the standard of review. The determination of whether a sealing order is warranted under the test in *Sherman* is one of mixed fact and law. It was not inconsistent for the motion judge in the Dr. C. decision to find the sealing of the settlement approval motion record was not warranted but that anonymizing the record was nonetheless appropriate.

[30] The motion judges' findings of mixed fact and law, absent an extricable legal issue, are entitled to deference, and will be reversed only where there is a palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 10, 19, 26-37.

[31] I turn now to the issues raised on these appeals.

(1) Settlement approval motions in writing are subject to the open court principle

[32] The appellants argue that the motion judges erred in law when they failed to consider and apply r. 37.11(1)(a) to the request to seal the motion records. The appellants highlight that s. 135(2) of the *CJA* provides: "[s]ubject to section (2) and the rules of the court, all court hearings shall be open to the public...". However, r. 37.11(1)(a) states that: "A motion may be heard in the absence of the public where … the motion is to be heard and determined without oral argument". The result, it is argued, is that r. 7.08 orders, because they are heard in writing, are heard in the absence of the public and therefore are not subject to the open court principle.

[33] I reject this submission. There is no basis for holding that the open court principle does not apply to written proceedings generally, or r. 7.08 motions in particular. Courts have not treated s. 37.11(1)(a) in this fashion and there is no indication that the legislature intended such a sweeping abrogation of the open

court principle, rather than a procedural effort at improving court efficiency in certain motions. Indeed, as the intervener CMLA underscored, there may actually be a greater rationale for protecting the open court principle in written motions, which would otherwise be secret and not available for public accountability.

[34] Moreover, the appellants' interpretation goes against the expansive jurisprudence on the open court principle. As Kasirer J. stated in *Sherman*, "[c]ourt proceedings are presumptively open to the public" and "the open court principle is engaged by <u>all judicial proceedings, whatever their nature</u>" (emphasis added.): at paras. 37, 44. As such, s. 37.11(1)(a) does not provide a way of avoiding the open court principle or a freestanding justification for a sealing order in the context of these appeals or r. 7.08 motions more broadly.

[35] This ground of appeal falls.

(2) The court's *parens patriae* jurisdiction is part of the r. 7.08 analysis, but does not grant a freestanding reason for a sealing order

[36] The appellants argue that it was an error in law for the motion judges to fail to consider the court's *parens patriae* jurisdiction and its goal of preventing harm to persons under a disability when determining whether to grant a sealing order. They argue that r. 7.08 leads to public, pervasive, and permanent disclosure of information that can harm the party under disability and that it was an error for the motion judges not to consider this below.

[37] However, I find that r. 7.08 and its disclosure requirements emerge from and support the *parens patriae* jurisdiction. The open court principle does not conflict with, but rather protects the parties under disability on a systemic level by ensuring that court oversight of minor parties and parties under disability is properly maintained. Where harm may result from applying the open court principle, judicial discretion ensures that the best interests of parties under disability remain protected. Whether the interests of the parties under disability were properly considered in this case is reserved for the discussion on the motion judges' application of the *Sherman* test.

[38] To begin, it is useful to assess the background and purpose of r. 7.08 motions. Rule 7.08 has been part of the *Rules of Civil Procedure* since 1990. However, r. 7.08 did not introduce court settlement approval for minor parties or parties under disability. Rather, it codified the common law rules as to the requirement of court approval of settlements involving persons under disability: see Garry Watson and Derek McKay, Holmested and Watson: *Ontario Civil Procedure* (Scarborough, Ont.: Carswell, 1984), (2023), § 22:4.

[39] The common law rules mean that, as put by Salhany J.: "For centuries, judges of the Superior Court have exercised the *parens patriae* guardianship of the sovereign to ensure that the rights of infants and others legally disabled are protected": *Ruetz v. Morscher & Morscher* (1996), 28 O.R. (3d) 545, (S.C.), at p. 549. In this older case law, settlements from "a next friend" on behalf of an infant

were "not binding on the infant or a bar to the further prosecution of the action unless the court can say that it is for the infant's benefit": *Mattei v. Vautro* (1898) 78 L.T. 682; *Rhodes v. Swithenbank* (1889) 22 Q.B.D. 577. This task was not taken lightly, but rather was understood as "an important and onerous judicial duty": *Poulin et al. v. Nadon et al.*, [1950] O.R. 219, at p. 222.

[40] The protective purpose of settlement approval for parties under disability has been repeatedly affirmed in this court's jurisprudence. Perhaps this court's most significant statement was in *Wu, Re*, 2006 CanLII 16344 (ON CA), at para. 10, where this court held:

> The requirement for court approval of settlements made on behalf of parties under disability is derived from the court's *parens patriae* jurisdiction. The *parens patriae* jurisdiction is of ancient origin and is "founded on necessity, namely the need to act for the protection of those who cannot care for themselves…to be exercised in the 'best interest' of the protected person…for his or her 'benefit or 'welfare'". The jurisdiction is "essentially protective" and "neither creates substantive rights nor changes the means by which claims are determined". The duty of the court is to examine the settlement and ensure that it is in the best interests of the party under disability. The purpose of court approval is plainly to protect the party under disability and to ensure that his or her legal rights are not compromised or surrendered without proper compensation. [Citations omitted.]

[41] Similarly, in *Krukowski v. Aviva Insurance Company of Canada*, 2020 ONCA 631, at para. 24, this court affirmed that court approval of settlements is designed to protect the interests of the party under disability. In *Tsaoussis (Litigation*

guardian of) v. Baetz, 1998 CanLII 5454 (ON CA), this court found that “[t]here can be no doubt that a court is obliged to look to and protect the best interests of minors who are parties to legal proceedings” and that these supervisory powers “are most clearly evinced by the requirement that the court approve any consent judgment to which a minor is a party and the closely aligned requirement that the court approve any settlement of a minor's claim before that settlement will bind the minor (rule 7.08)”: at pp. 14-15. While overturning the decision, this court agreed with a motion judge’s statement that “[t]he protection of parties under disability is a vital concept in our civil justice system. Insisting upon strict compliance with r. 7.08 is an important safeguard in maintaining that fundamental principle”: *Ryan v. Hebert*, 2022 ONCA 750, at para. 15.

[42] This jurisprudence makes clear that r. 7.08 is explicitly designed to protect parties under disability by providing court oversight of settlements that the parties under disability can not themselves shape and agree to. These cases demonstrate that, rather than being an unfair imposition on parties under disability, r. 7.08 motions are best characterized as remedial and protective of those parties’ interests.

[43] To achieve its protective purpose and oversight, motions under r. 7.08 must be accompanied by evidence. This includes, for example, records of medical or expert evidence underlying the settlement, as well as affidavit evidence from the litigation guardian and counsel as to the basis and justification of the settlement,

including the amount of the settlement and legal fees involved, among other disclosures.

[44] There is no question that the information included in the record in a r. 7.08 motion could − and generally will − include sensitive and personal information about the party whose claim is being settled. Further, I accept the appellants' claim that, in light of advancing search and sharing digital technology, personal information made part of a public court record may be vulnerable to wider and more permanent circulation than ever before. This risk may give rise to specific and concerning harms for the parties involved.

[45] However, r. 7.08 addresses these potential harms by affording judges significant discretion to protect the parties' information. That discretion may be exercised to anonymize, order a publication ban, partially redact, or completely seal some or all of the record in a r. 7.08 motion. The appellants themselves have cited cases where these remedies were deployed on the basis of concern for the interests of minor parties: see, for example, the discussion below of *Mother Doe v. Havergal College*, 2020 ONSC 2227.

[46] While disclosure may, in some cases bring about the harms the appellants warn of, in my view, the appellants have failed to demonstrate why the existing discretion to address specific situations where limits to the open court principle are justified is insufficient. In exercising that discretion in the context of r. 7.08 motions,

the court's *parens patriae* jurisdiction is always engaged. The r. 7.08 motions are designed in accordance with *parens patriae* and the interests of the party under disability are taken into account.

[47] Further, the argument urged by the appellants would, in effect, render all motions under r. 7.08 presumptively confidential. This would screen an important role of the courts from public view in a sweeping fashion. In my view, this would be contrary to the *parens patriae* purpose of r. 7.08 and the rationale for the open court principle. Where the protection of judicial oversight is provided to vulnerable parties, public oversight of this vital discretionary role through the open court principle arguably becomes even more important.

[48] As the CBC emphasized in its submissions, the open court presumption advances values of particular importance in cases dealing with vulnerable parties: that judges are seen to be acting fairly and in a manner consistent with societal values; that similarly situated people can gain an understanding of how they may be treated by the judicial process; and that the public may learn more about the place of the courts in a democracy generally. For these reasons, while *parens patriae* may favour sealing orders in some circumstances, it also favours shining a light on the judicial approval settlement agreements through the open court presumption.

[49] Therefore, the argument that sealing orders generally are presumptively justified by the *parens patriae* jurisdiction must fail.

[50] The question of whether the circumstances of these cases meet the *Sherman* test for a sealing order remains to be determined. In that discussion, I will address whether the judges below adequately considered the need to protect the interests of the parties under disability in the sealing order motions.

(3) The appellants do not meet the *Sherman* test for a sealing order

[51] The appellants, in the alternative, argue that the *Sherman* test is met in the cases at issue based on the need to avoid serious risks to the important public interest in protecting the privacy of the appellants in medical records, stigmatized medical conditions, and relationships, protecting parties under disability, and affirming solicitor-client privilege.

[52] The *Sherman* test was not developed out of whole cloth by the Supreme Court. Rather, it reflected an incremental step in the Court's jurisprudence on the open court principle and its limits.

[53] In *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 SCR 835; and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 SCR 442, the Supreme Court developed a balancing test for when ordering a publication ban of a court decision would be justified. The Court stated that a publication ban should be ordered only when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice: *Mentuck*, at para. 32.

[54] In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522, the Supreme Court reformulated the test for a confidentiality order holding that it should be granted where, at para. 53:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[55] The test in *Sherman* further refined the *Sierra Club* approach as to when the open court principle can be curtailed, particularly in the context of civil proceedings. Under this test, the party seeking a sealing order or publication ban must show that, as outlined at para. 38:

> (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 outweighs its negative effects. The first prong of this test requires an applicant to show that the open court principle poses a serious risk to an important public interest in the context of the case.

[56] In my view, the appeals before the court turn primarily on the first prong of the *Sherman* test.

[57] In *Sherman*, the Supreme Court explained the two-step analysis to determine if the open court principle can be said to pose a serious risk to an important public interest, at para. 42:

> While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining 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 (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid

> important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[58] As the Supreme Court emphasized in *Sherman*, whether the interest is at "serious risk" is a fact-specific inquiry grounded in the context of the case: at para. 52. A serious risk can be established through direct evidence or through logical inferences, but these inferences must be "grounded in objective circumstantial facts that reasonably allow the finding to be made": *Sherman*, at para. 97. Both the probability of the harm and its gravity are relevant to the assessment: at para. 98.

[59] The argument that this aspect of the *Sherman* test was met was specifically rejected by the motion judge in the Dr. C Appeal. The motion judge found that the first branch of the *Sherman* test was not met because the impugned disclosure would not put an important public interest at risk − the information that was not sufficiently sensitive. In the *S.T./T.T.* Appeal, the motion judge did not have the benefit of the *Sherman* decision but incorporated the analysis of Corthorn J. in *Carroll* at para. 23, Corthorn J. applied the test in *Sierra Club v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] S.C.R. 522, on which the *Sherman* test was based: *Sherman*, at para. 38. The motion judge found that the risks raised by the appellants about the minor plaintiffs were speculative – a finding that suggests they do not meet the first branch of the *Sherman* test.

[60] The appellants argue that the motion judges erred in these conclusions. They raise three grounds on which they argue the open court principles imposes a serious risk to an important public interest in these cases: First, the law protects privacy in relation to medical records, stigmatized medical conditions (disability), relationships, and confidential business information; second, the court has a duty to protect those under a legal disability; and, third, there is a public interest in ensuring that solicitor-client privilege remains as close to absolute as possible.

[61] As stated above, the findings of the motion judges are entitled to deference. Therefore, the question is whether either motion judge committed an error of law or a palpable and overriding error in their assessment of the record.

(a) Privacy is not, by itself, an important public interest and it is not at significant risk in these appeals

[62] Turning to the first argument, it is essential to ask whether the privacy interests in these appeals constitute an important public interest based on the Supreme Court's guidance, and then whether the open court principle poses a serious risk to that important public interest in the circumstances of the appeals.

[63] The Supreme Court in *Sherman*, however, clarified that privacy, in and of itself, is too open-ended to meet the criterion of an important public interest jeopardized by the open court principle: at para: 56. The court emphasized that privacy will only be a sufficient public interest if the disclosure puts the person's

dignity at risk. As the Supreme Court put it, to meet this threshold, the private information must go to the "biographical core" of the person seeking protection, such that its dissemination would result in an affront to the person's dignity. Dignity will only be at serious risk in limited circumstances, such as where the information reveals something intimate and personal about the individual, their lifestyle, or their experiences: at paras. 73, 75 and 77. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing, or distressing to certain individuals will generally on their own warrant interference with court openness: at para. 63.

[64] Turning to the r. 7.08 motion context, invariably, the choice to pursue a remedy through litigation involves giving up a measure of privacy. For example, the statement of claim in the litigation leading to the Dr. C. appeal disclosed the name of the plaintiff, the circumstances of the 2017 collision in which his accident occurred, the specific traumatic brain injuries that resulted, and the specific nature of his ongoing limitations in daily life. The statement of claim in the *S.T./T.T.* litigation similarly includes the names of the plaintiffs, the specific injuries sustained by then seven-month-old S.T., her loss of function, and the effect of her injuries on other family members.

[65] In my view, there is no question that there is a public interest in the protection of the identities of minor victims of crime and minor persons when made party to litigation (whether as a defendant in a civil action, a criminal accused, or even as

a witness). This public interest is recognized, for example, in statutory provisions providing for publication bans in the criminal and youth criminal justice contexts. As Abella J. observed in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 17: "Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people's privacy under the *Criminal Code*, R.S.C. 1985, c. C-46 (s. 486), the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (s. 110), and child welfare legislation, not to mention international protections such as the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, all based on age, not the sensitivity of the particular child." (Emphasis in original.)

[66] This inherent vulnerability of children also has been recognized for purposes of the first prong of the *Sherman* analysis. For example, in the context of minor defendants alleged to have committed sexual assaults against the plaintiff. In *P1 v. XYZ School*, 2022 ONCA 571, at para. 44, this court held that the protection of the identities of minor parties to litigation is an important public interest, and that the open court principle posed a serious risk for the minor parties involved in the litigation on the basis of psychological harm and reputational damage. The court held these circumstances met the first prong of the *Sherman* test.

[67] In these appeals, the motion judges found no such serious risk of harm. Additionally, the situation is different when dealing with a settlement of a claim

where a minor or party under disability, through their litigation guardian, brings litigation against other parties that turn on the disclosure of personal information.

[68] In such cases, in light of the pleadings – whether or not the motion records were sealed – the nature of the incident, injuries, and limitations underlying the claims are part of a public record through the statements of claim. Therefore, those aspects of the litigation can no longer truly be considered "private." Of course, there is an important difference between facts alleged in pleadings and evidence. Had the matters proceeded to trial, the evidence presented to prove the claim would also form part of the public record.

[69] However, the appellants highlight what they characterize as an unfairness in r. 7.08: that it takes away from parties under a disability the option to keep their settlement, and its underlying record, private. In other words, a settlement involving a 17-year-old is presumptively part of the public record via the r. 7.08 record, while a settlement involving the same settlement scenario, injuries, evidence, and record involving an 18-year-old would be confidential.

[70] I do not find this argument persuasive. The *parens patriae* rationale for r. 7.08 arises from a bright line drawn in law between those who are and are not minors (as well as between those who are under a disability and those who are not). While this distinction generally provides a protective benefit to those whose settlement requires judicial approval, there will also be cases where this distinction

creates the need for limits on the open court principle. Such cases are the reason for the existing discretion to anonymize, redact or seal the record in a r. 7.08 motion.

[71] In *Mother Doe v. Havergal College*, 2020 ONSC 2227, Myers J., in the context of a motion dealing with various requests to limit court openness in a case of bullying allegations between minor parties at a school, concisely set out why minors, in particular, might need protection from the open court principle:

> [32] Yet there are times when the public's "right to know" comes into conflict with other public interests. We recognize, for example, that there is a public interest in protecting the physical and mental health and well-being of children. Children are not yet fully developed adults physically, emotionally, or intellectually. They do not enjoy the same legal rights as adults under our laws. For example, children cannot sue or be sued on their own. Their interests must be represented by adult litigation guardians in a lawsuit like Mother Doe and Parent 1 in this case.
>
> [33] Children are vulnerable both developmentally and legally. They are vulnerable to abuses of their health and of their legal rights at the hands of other children and adults alike.
>
> [34] In this case, all parties agree that publication of the children's identities and information that would tend to identify them would subject them to emotional harm — whether as a result stigmatization by others or due to the very real risk of cyber-bullying by members of the public who may hear reports of the parties' unproven allegations and descend upon the minor parties and their families. The public interest requires us to protect children from the risk of emotional harm from abusive, trolling mobs of

> self-appointed morality police, juries, and executioners from cyberspace. [Emphasis added.]

[72] In *Mother Doe*, which was heard and decided prior to the release of the *Sherman* decision, the court did not order a full publication ban on the record, but rather crafted an order anonymizing the record by removing the names of minors and identifying information. Myers J. relied on the balancing approach of the *Dagenais/Mentuck* test, as elaborated in the context of the privacy of children in *A.P. v. L.K.*, 2019 ONSC 4010; *Mother Doe*, at paras. 29, 35 and 39.

[73] In my view, a similar approach is appropriate in the cases under appeal. The motion judges in each case engaged with the request to seal the record in light of the privacy interest of the minor party or party under disability. In the context of the Dr. C. appeal, the motion judge declined to make the order and provided reasons rooted in the open court principle and the absence of a concrete risk of serious harm. The motion judge stated, "[Dr.] C.'s injuries and resulting impairments are described, but not with such specificity as to cause an affront to his dignity." While the motion judge declined to make a sealing order, he did, after consideration, order anonymizing the record. The motion judge in the decision giving rise to the *S.T./T.T.* Appeal also declined to issue a sealing order, as he saw no risk which justified departing from the open court principle, adopting the analysis set out in *Carroll*. In each case, it is clear that the motion judges were alive to the privacy concerns raised by the appellants.

[74] The appellants argue that the motion judge in each appeal failed specifically to consider the risks inherent in public access to the r. 7.08 motion record. For example, in the context of the Dr. C. Appeal, the appellants argue that Dr. C.'s medical records are entitled to privacy, and additionally that "disability is a stigmatized medical condition that Canada recognizes as worthy of legal protection." The appellants also argue the motion judge failed to appreciate the impact of Dr. C's injuries on his family relationships and the implications of disclosure of the confidential finances, operations and records involving Dr. C.'s business.

[75] I would not give effect to these arguments. Medical records may be, but are not necessarily, revealing of core aspects of a person's identity. Where they are, anonymizing those records or otherwise redacting the record may address any risk without the need for a sealing order. Similarly, the appellants have not demonstrated that information, including the motion record, in the public court file would undermine Dr. C.'s dignity by striking at his "biographical core." These issues were properly addressed by the motion judge and found to not meet the high bar of a serious risk to an important public interest.

[76] The appellants highlight that the nature of litigation guardianship means neither Dr. C. nor the plaintiffs in *S.T./T.T.* have "chosen" to disclose their personal information through the settlement approval motion. However, in my view, the very rationale of litigation guardianship concerns ensuring that decisions are made in

the best interests of the minor party or party under disability. Indeed, this is why court oversight in this area is so essential. It is inconsistent with this framework to characterize the parties as entitled to greater privacy protection as a result of their interests being protected by litigation guardians.

[77] In short, neither appeal discloses an error on the part of the motion judges in their assessment of the information in the settlement motion records. In neither case is there a basis to conclude that the open court principle jeopardizes information revealing core aspects of the private lives of the parties involved that would erode their dignity such that it would constitute an important public interest for the purposes of the test.

[78] The first prong of the *Sherman* test is not met on the basis of the privacy interests at stake constituting an important public interest put at serious risk by the open court principle.

(b) Protection of minor parties or parties under a disability is an important public interest, but it is not at serious risk in these appeals

[79] The appellants argue that the *parens patriae* jurisdiction of the court constitutes an important public interest subject to serious risk by the open court principle in the circumstances of these appeals.

[80] The appellants submit that the categories of public interest are broad, flexible, and not closed and that this court should recognize the important interests

of protecting minor parties and parties under disability. As stated before, such protection has long been a key role of courts in Canada. As a general principle, the protection of parties under disability and minor parties is an important public interest.

[81] However, there is no basis to conclude that, as a general statement, the open court principle jeopardizes the important public interest in protecting minor parties or parties under disability in r. 7.08 motions. This is so largely for the reasons set out above in relation to whether the *parens patriae* jurisdiction of the court warranted a sealing order as a free-standing concern. First, as discussed in greater detail above, the open court principle is not in conflict with the court's *parens patriae* jurisdiction, but rather a manifestation of it. Second, the open court principle is already tempered with judicial discretion to limit public access to information where specific circumstances warrant such limits in the interests of minors or parties under disability. And third, the *Sherman* test takes into account the protection of the party applying for the sealing order, considering whether disclosure poses a serious risk to them is ingrained in its analysis.

[82] Moreover, in the cases on appeal, there is no indication that the protection of minors or parties under disability is being put at serious risk in the absence of a sealing order. While the judges below did not discuss *parens patriae* in particular, they found that there was no serious risk to any of the appellants in their particular circumstances: including as parties under disability and minors. For example, the

motion judge in the Dr. C. appeal specifically addressed Dr. C.'s disability and condition and considered how revealing this information may affect Dr. C – protecting his interests from serious risk was the essential question. In *S.T./T.T.*, the protection of the minor parties was also front and centre, specifically in the motion judge's finding that the risk posed by their father gaining information on the settlement amount was too vague and unknown to ground a sealing order. I see no palpable and overriding error in these findings.

[83] For these reasons, this ground of appeal falls.

(c) Solicitor-client privilege is an important public interest, but it is not at risk in these appeals

[84] Third and finally, the appellants argue that the public interest prong of the *Sherman* test is met by the intrusion of r. 7.08 motion records on solicitor-client privilege. The appellants argue that solicitor-client privilege is a principle of fundamental justice and a substantive right that warrants public protection, even where it interferes with the open court principle. They cite, for example, the decision in *Law Society of Ontario v. Gupta*, 2022 ONLSTH 14, where the Law Society Hearing Division Panel held that the "confidentiality of client information, and client identity, in the context of lawyer-client relationship" constituted an important public interest. The Panel added: "Notably, the *Rules of Professional Conduct* require maintenance of client confidentiality. Client

confidentiality yields to professional regulation but must still be protected in regulatory proceedings in the public interest. Clients should not unnecessarily suffer loss of confidentiality in aid of professional accountability": at para. 112.

[85] Neither motion judge in these appeals directly addressed the argument that a sealing order was warranted on the basis of solicitor-client privilege. It is unclear if that argument was put to either motion judge, but I note that neither factum on appeal addresses specific, privileged information disclosed as a result of the r. 7.08 motion records. Rather, the argument appears to be a general one with respect to the requirement that an affidavit from plaintiff's counsel form part of the r. 7.08 motion materials.

[86] There is no question that solicitor-client privilege represents a fundamental right that is in the public interest to protect: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at para. 34. Because of this, it is clear that as a general principle, solicitor-client privilege constitutes an important public interest under the *Sherman* test.

[87] There is a question, however, as to whether the protection of that privilege is at serious risk because of the open court principle in the context of r. 7.08 motions. I would conclude that it is not.

[88] Pursuant to the *Solicitors Act*, in a motion under r. 7.08, the court must be satisfied that the *CFA* is fair and reasonable: s. 24. The fairness requirement "is

concerned with the circumstances surrounding the making of the agreement and whether the client fully understands and appreciates the nature of the agreement that he or she executed": *Henricks-Hunter v. 814888 Ontario Inc. (Phoenix Concert Theatre)*, 2012 ONCA 496, 294 O.A.C. 333, at para. 20, quoting *Raphael Partners v. Lam* (2002), 61 O.R. (3d) 417 (C.A.), at para. 30. Reasonableness is determined by assessing: the time expended by the solicitor; the legal complexity of the matter at issue; the results achieved; and the risk assumed by the solicitor: *Henricks-Hunter*, at para. 22. Confirming reasonableness and fairness does not require infringing solicitor-client privilege such that public access to the r. 7.08 motion record always jeopardizes an important public interest.

[89] In *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 875, the Supreme Court established the following principles that are applicable when determining whether there is an attempt to interfere with solicitor client privilege:

> 1. The confidentiality of communications between solicitor and client may be raised in any circumstances where such communications are likely to be disclosed without the client's consent.
>
> 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with another person's right to have his communications with his lawyer kept confidential, the resulting conflict should be resolved in favour of protecting the confidentially.
>
> 3. When the law gives someone the authority to do something which, in the circumstances of the case, might

> interfere with that confidentiality, the decision to do so and the choice of means of exercising that authority should be determined with a view to not interfering with it except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
>
> 4. Acts providing otherwise in situations under paragraph 2 and enabling legislation referred to in paragraph 3 must be interpreted restrictively.

[90] In *Burns Estate v. Falloon*, 2007 CanLII 38558 (Ont. S.C.), Pierce J. commented on the tension between r. 7.08 and solicitor-client privilege:

> [19] The court relies on counsel to adequately describe an infant settlement. It may refuse to approve a settlement because of insufficient evidence. While local practice has developed such that defence counsel is not usually concerned with the particulars of the infant settlement, nonetheless the clear wording of the rule requires service of the entire motion record on opposing counsel.
>
> [20] <u>An infant settlement represents a unique incursion on solicitor-client privilege</u>.…
>
> [21] In this case there is limited encroachment on the solicitor and client privilege in order to meet the policy concern of protection of infants. Interference with that privilege is circumscribed and occurs when the case has been settled. It does not form part of the discovery process and does not, at the end of the case, prejudice the prosecution or defence of an action. Disclosure is limited to the extent necessary to approve the settlement and does not open to view the rest of the client's communications with her solicitor. Thus, service of documents required by Rule 7.08(4) must be a true copy. [Emphasis added.]

[91] It is worth noting that in *Burns Estate*, Pierce J. found a sealing order was not warranted. While Pierce J. characterized r. 7.08 as an “incursion” into solicitor-client privilege, I would adopt the caveat on this statement offered by Corthorn J. in *Boone v. Kyeremanteng*, 2020 ONSC 198.

[92] In *Boone*, at para. 21, Corthorn J. stated, “I find that the disclosure of privileged information is neither mandated nor inevitable on a motion or an application for court approval of a settlement.” Corthorn J. came to this conclusion in dismissing a constitutional challenge to r. 7.08 on the basis that it lacked a factual foundation. Reflecting specifically on Pierce J.’s comment in *Burns Estate*, she clarified that r. 7.08 may require an incursion into solicitor-client privilege, but there is nothing in the rule itself requiring it: at paras. 55-64. Rather, what the rule requires is full and frank disclosure of the merits of a settlement. I agree.

[93] In her decision in *Rivera v. Leblond*, (2007), 44 C.P.C. (6th) 180 (Ont. S.C.), Thorburn J. (as she then was) discussed the type of evidence required to meet the requirement of full and frank disclosure:

> [23] Rule 7.08(4) and the obligations of the court pursuant to its *parens patriae* jurisdiction require a party seeking approval to submit sufficient evidence to make a meaningful assessment of the reasonability of the proposed settlement of the claims of a person under a disability.
>
> [24] This is a serious and substantial requirement which cannot be satisfied by the provision of conclusory statements. It requires full disclosure of evidence

> regarding the material issues. Where there is a conflict in the evidence the conflicting evidence must be disclosed to the court.

[94] The evidence required depends on the facts of the case but generally, the moving party must show on the evidence in the record that:

> a) An appropriate investigation with respect to both liability and damages has been completed;
>
> b) An appropriate assessment of liability issues has been made;
>
> c) An appropriate assessment of damages issues has been made; and
>
> d) The fees and disbursements which the plaintiff's lawyers propose to charge are reasonable in all the circumstances (*Rivera*, at paras. 26-28).

[95] The OTLA points out *MacDonald v. OSPCA*, 2023 ONSC 2445, at para. 32, where Broad J. found that legal advice was an important public interest worth of protection under the *Sherman* test. There, the court accepted that a temporary sealing order was required over pleadings where there was a dispute as to whether the pleadings disclosed communications covered by solicitor-client privilege. The temporary sealing order was justified to preserve the ability of the affected client to make the argument that the solicitor-client privilege had not been waived and would be infringed by including the pleadings in the court record of the action. That serious risk scenario is distinct from the settlement approval context of this appeal.

[96] As Corthorn J. stated in *Dickson v. Kellett*, 2018 ONSC 4920, at para. 34, in the settlement approval motion context, a statement in counsel's supporting affidavit that disclosure of the supporting materials would infringe on solicitor-client privilege is generally insufficient to support a sealing order being made. She added that for the majority of settlement approval motions, counsel are in a position to provide the court with the requisite evidence without an unwarranted incursion into either solicitor-client or litigation privilege (para. 42). In part, this is because the issues in a case, and the relative strengths and weaknesses of each party's case, are typically well understood by the parties and their respective counsel by the time a settlement is reached. Corthorn J. concluded that, "Something more than the potential incursion into solicitor-client or some other form of privilege is required to support a request for an order dispensing with service of the relevant documents on the opposing party." (para. 43).

[97] OTLA urges this court to recognize that, while r. 7.08 may not technically require the infringement of solicitor-client privilege, as a matter of practice counsel on a r. 7.08 motion will need to share their appraisal of the strengths and weaknesses of the case, and in so doing, disclose privileged communications with the client. OTLA also observes that at the time the r. 7.08 motion record is filed, and thereby made subject to public access, the litigation has not yet settled. As a result, the potential for prejudice against the plaintiff in disclosing such privileged assessments could be very real.

[98] While this concern strikes me as well-founded, it does not lead to the conclusion that motion records under r. 7.08 should be presumptively sealed. Rather, it speaks to the need for counsel to be guided by this concern in how they prepare affidavits for r. 7.08 motions, so as to minimize the disclosure of privileged information, and the basis on which they may seek specific redactions in the context of specific cases where such disclosure is viewed as necessary to obtain judicial approval. Further, where there is a basis for a concern that a settlement may not be finalized in the circumstances of a particular case, a motion judge has the option of ordering a temporary sealing order, which would end once the settlement is finalized.

[99] The appellants also highlight the privileged nature of lawyer's fees, which also must be disclosed and approved in the context of r. 7.08 motions. The amount and breakdown of legal fees are presumptively privileged: *Kaiser (Re)*, 2012 ONCA 838, 113 O.R. (3d) 308, at paras. 21-30. However, that presumption does not operate in the context of settlement approval motions, where the privilege may be waived by the party to permit judicial oversight and approval of the reasonableness of the fees charged. Where necessary to meet the requirements of judicial approval, litigation guardians may instruct counsel, on behalf of the parties, that they waive the privilege or seek to redact privileged information. In either scenario, neither the rule nor the open court principle leads inevitably to reducing a party's right to solicitor-client privilege.

[100] Even if solicitor-client privilege were not waived in this context, the rationale for the presumption of privilege (that by knowing the amount and breakdown of fees, the party seeking the information could infer or discover privileged communications between the lawyer and their client) generally does not arise once a settlement has been reached. Consequently, I would not accept that the disclosure of legal fees in the r. 7.08 context, in and of itself, constitutes an infringement of solicitor-client privilege that would justify sealing the record.

[101] Here again, the appellants emphasize the alleged unfairness of the requirement to disclose legal advice and legal fees in the r. 7.08 context, as parties who are not minors or under disability are not compelled to waive solicitor-client privilege to settle their litigation. In the Dr. C appeal, for example, the appellants argue that the court should recognize that Dr. C. should not enjoy a "lesser form of privilege" because he must bring a motion under r. 7.08, instead "[h]e has a substantive right not to be compelled to waive his privilege in favour of public disclosure."

[102] Again, I would reject this characterization of the effect of the open court principle in the context of r. 7.08 motions. First, no party is compelled to bring a r. 7.08 motion. Plaintiffs (or, in this context, litigation guardians) choose to initiate litigation, and may choose to settle. Rule 7.08 is a protective provision to ensure settlements are in the interests of the minors or parties under disability. Rule 7.08,

properly construed, is a benefit to the parties to the litigation, not a burden on litigation guardians and counsel.

[103] Solicitor-client privilege is raised by the appellants both as an aspect of the *Sherman* test, and as a separate basis for a sealing order. For the same reasons that solicitor-client privilege does not meet the *Sherman* test's serious risk to an important public interest threshold, it also does not constitute a separate basis for a presumptive sealing order in the r. 7.08 context. In short, fulfilling the requirements of settlement approval under r. 7.08 and the *Solicitors Act* generally does not compel the infringement of solicitor-client privilege, and where the specific circumstances of a settlement do necessitate the sharing of otherwise privileged communications, this may be resolved either through the waiver of the privilege by the client, or by the partial redaction of the record as a discretionary remedy by the judge hearing the motion.

CONCLUSION

[104] For these reasons, in my view, the first prong of the *Sherman* test that the open court principle be shown to pose a serious risk to a matter of important public interest is not met.

[105] As I conclude the first prong of the *Sherman* test is not met in these appeals, I do not need to turn to the second step in the *Sherman* analysis, which considers

whether a sealing order is necessary, and if so, the third step, which considers whether the benefits of a sealing order outweigh its negative effects.

[106] If it were necessary to conduct the second step of the *Sherman* analysis, I would conclude that a sealing order is not necessary. In *P1 v. XYZ School*, 2022 ONCA 571, at para. 46, this court confirmed that the focus of the analysis at this stage is on “minimal impairment” of the open court principle: the court must consider whether reasonably alternative measures are available and restrict the order as far as possible without sacrificing the prevention of the risk. The less restrictive options of anonymization (adopted in the Dr. C. motion) or a publication ban can deal with the protection of the important public interest at stake in these appeals, if such an interest were found to be at serious risk through the operation of the open court principle.

[107] Finally, if it were necessary to conduct the third step of the *Sherman* analysis, I would place the value of public accountability in the court discharging its *parens patriae* jurisdiction through the operation of r. 7.08 motions as a more fundamental value in the justice system than the protection of the privacy of litigants or their lawyers. Therefore, in my view, the benefits of a sealing order would be outweighed by the negative outcomes.

DISPOSITION

[108] For these reasons, I would deny the motion for fresh evidence and dismiss the appeals.

[109] Costs are not sought on these appeals and none are ordered.

Released: December 12, 2023

L. SOSSIN J.A.

I agree. P.J. Monahan J.A.