CITATION: Ahmad v. Peel Regional Police Services Board, 2024 ONSC 2474
COURT FILE NO.: CV-22-00682804-0000
DATE: 20240429

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
RENA AHMAD, in her personal capacity and as Estate Trustee on behalf of the Estate of Ejaz Choudry, Deceased, NEMRAH AHMAD, HASEEB CHOUDRY, UMAR CHOUDRY, by his Litigation Guardian RENA AHMAD and MUIZZ CHOUDRY, by his Litigation Guardian RENA AHMAD Plaintiffs	*Simon Bieber* and *Robert Stellick* for the Plaintiffs
- and -	
PEEL REGIONAL POLICE SERVICES BOARD, NISHAN DURAIAPPAH, JOHN DOE OFFICER 1, JOHN DOE OFFICER 2, JOHN DOE OFFICER 3, JOHN DOE OFFICER 4 and JOHN DOE OFFICER 5 Defendants	*Ted Key*, for the Defendants
- and -	
CANADIAN BROADCASTING CORPORATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN MUSLIM LAWYERS' ASSOCIATION and POLICE ASSOCIATION OF ONTARIO Interveners	*Lawrence Gridin* for the Intervener, Police Association of Ontario *Iain A.C. MacKinnon* for the Intervener, Canadian Broadcasting Corporation *Iris Fischer, Laura Dougan,* and *Sara Bolourchian* for the Intervener, Canadian Civil Liberties Association *Zain Naqi* and *Annecy Pang* for the Intervener, Canadian Muslim Lawyers' Association **HEARD**: April 9, 2024.

PERELL, J.

Contents

A. Introduction 2
B. Factual Background 3

1. The Shooting Death of Ejaz Choudry 3
2. Special Investigations Unit 5
3. Public Reaction to the Death of Mr. Choudry 5
4. The Traumatization of Officers 1, 2, 3, 4, and 5 6
5. Policing and Public Policy: Policing and Mental Health 7
6. Detective Christine Robinson's Threat Assessment Opinion Evidence 8
C. Procedural Background 10
D. The Open Court Principle 11
E. Exceptions to the Open Court Principle 13
F. The Parties and the Interveners' Submissions 15
1. The Defendants' Submissions 15
2. The Police Association of Ontario's Submissions 16
3. The Plaintiffs' Submissions 17
4. The CBC's Submissions 17
5. The Canadian Civil Liberties Association's Submissions 18
6. The Canadian Muslim Lawyers' Association's Submissions 18
7. The Open Court Principle and the *Special Investigations Unit Act, 2019* 18
G. Discussion and Analysis 21
H. Conclusion 25

REASONS FOR DECISION

A. Introduction

[1] The Defendants John Doe Officer 1, John Doe Officer 2, John Doe Officer 3, John Doe Officer 4, and John Doe Officer 5 are police officers of the Defendant The Regional Municipality of Peel Police Services Board (misnamed as the Peel Regional Police Services Board). The five police officers were involved in the shooting death of Ejaz Choudry.

[2] The Defendants bring a motion for the following relief.

[3] First, the five officers seek a ban restricting the publication of any information that could identify the officers including but not limited to their given names, surnames, pseudonyms, physical description or likeness, vocal or speech characteristics, and visual images, until further Order of this court.

[4] Second, they seek an Order for the confidentiality and sealing of any documents in the court file that contain the name and identifying information of the Officers.

[5] Third the five officers seek an Order allowing them to continue to serve and file materials under the existing "John Doe" pseudonyms.

[6] For the reasons that follow, the motion is dismissed.

B. Factual Background

1. The Shooting Death of Ejaz Choudry

[7] **Ejaz Choudry** was born in 1958 in Pakistan. He is a Muslim. He emigrated to Canada. He married **Rena Ahmad**. Ejaz and Rena had four children, a daughter and three sons. The daughter is Nemrah Ahmad. The sons are Haseeb, Umar, and Muizz Choudry. Nemrah and Haseeb are adults. Umar and Muizz are minors with litigation guardians.

[8] On **June 20, 2020**, Ejaz Choudry was 62 years of age. He spoke English poorly. He was in poor health. He suffered from heart problems. He suffered from diabetes. He was mentally ill. He suffered from schizophrenia.

[9] In allegations, the truth of which remain to be proven, the Plaintiffs plead that Mr. Choudry died on June 20, 2020 because of the reckless manner in which the Defendants responded to a mental health call. By way of a summary of the material facts pleaded in the Statement of Claim, the Plaintiffs' account of the events leading to Mr. Choudry's death is as follows.

a. On June 20, 2020, Mr. Choudry was at home in his apartment with his wife Rena Ahmad, his daughter, and his three sons. Mr. Choudry was off his medications for schizophrenia and acting erratically. At 5:00 p.m., as she had done before, Ms. Ahmad called Peel Regional Emergency Medical Services. She requested an ambulance. She advised the dispatcher that Mr. Choudry had a small pocket knife but that he was not dangerous.

b. A 5:07 p.m., Ms. Ahmad received a phone call from a police officer. The officer told her to take the family and to leave the apartment. The family exited, leaving Mr. Choudry alone.

c. At 5:30 p.m., the paramedics and several police officers arrived at the apartment. Mr. Choudry asked the officers to leave. Then, escorted by Ms. Nemrah, two officers entered the apartment. They saw Mr. Choudry sitting on his prayer mat. He asked them to leave.

d. Speaking Punjabi, Ms. Nemrah told her father that the officers wanted to see his knife. He removed a kitchen knife from under the prayer mat. Then the officers and Ms. Nemrah left the apartment. Next, the police officers spoke to Mr. Choudry in English from outside the front door.

e. Meanwhile, an officer requested a TRU, a tactical response unit. At 6:00 p.m., more officers arrived. The family was ordered to leave the building.

f. Mr. Choudry remained alone in the apartment. At 6:45 p.m., a second TRU team arrived. A Punjabi-speaking officer asked Mr. Choudry for permission to enter the apartment. This was refused. Mr. Choudry told the officer that he was not a danger to himself and that the police should leave.

g. The police officers decided to apprehend Mr. Choudry for a psychiatric assessment pursuant to the *Mental Health Act*. The plan was that two officers would enter from the front door of the apartment and that three officers would climb to the second storey balcony and enter from the rear of the apartment.

h. At 7:42 p.m., a crisis negotiator team was summoned, but at 8:00 p.m. when Mr. Choudry stopped communicating with the Punjabi-speaking officer, a decision was made to execute the plan to enter the apartment.

i. The entry plan was executed at 8:25 p.m. The front door was broken down. Four seconds later, one officer discharged a CEW (conducted energy weapon) and simultaneously another officer discharged his ARWEN (a gun firing a less lethal munition). Two seconds later, a third officer, using a Smith & Wesson handgun, fired two shots into Mr. Choudry's chest.

j. At 8:38 p.m. Mr. Choudry was pronounced dead.

[10] By way of a summary of the material facts pleaded in the Statement of Defence, the Defendants' account of the events leading to Mr. Choudry's death is as follows.

a. At 5:07 p.m. on June 20, 2020, the police department received a call from the Peel Regional Paramedic Services. The police were asked to assist on a mental health call. The police were advised that: Mr. Choudry was diagnosed with schizophrenia; he was not taking his medication; he had left the psychiatric ward of the hospital without being discharged; he was acting confused; and he was in possession of a pocket knife.

b. Uniformed patrol officers arrived at Mr. Choudry's apartment at 5:30 p.m. The paramedics had already arrived.

c. The uniformed patrol officers went to Mr. Choudry's apartment with Nemrah Ahmad. Mr. Choudry told them to leave. The patrol officers entered the apartment. They advised him that paramedics were there for a wellness check. The patrol officers said they needed to see Mr. Choudry's knife.

d. Mr. Choudry pulled a large kitchen knife with an 8-inch blade out from under the rug. He demanded the officers leave. He screamed at them in Punjabi. The police exited. They notified their dispatcher of the situation.

e. The police officers and family members spoke to Mr. Choudry through the door. They were unsuccessful in having him leave the apartment.

f. A tactical response team arrived. They understood that Mr. Choudry required medical attention but had barricaded himself in his apartment while armed with a large kitchen knife and that he also was armed with a pocket knife.

g. A Punjabi-speaking officer attempted to have Mr. Choudry leave the apartment for medical attention. The attempt was unsuccessful.

h. Communications with Mr. Choudry continued until shortly before 8:00 p.m. when Mr. Choudry stopped responding to police. There was no noise in the apartment.

i. The police officers decided to enter the apartment. They entered at approximately 8:25 p.m. Upon the officers' entry, Mr. Choudry advanced at them with the large kitchen knife.

j. The officers attempted to stop Mr. Choudry from advancing. Non-lethal options were unsuccessful, and when Mr. Choudry was several feet from the officers still holding the kitchen knife, one of the officers used his firearm out of concern for his own safety and the safety of the other officers.

k. Mr. Choudry was shot and died.

2. Special Investigations Unit

[11] After Mr. Choudry's death, the Special Investigations Unit ("SIU"), a civilian law enforcement agency, investigated the death. The SIU investigates incidents involving police officers when there has been a death.

[12] The purpose of the SIU investigation was to determine whether an officer had committed a criminal offence in connection with the incident.

[13] The SIU provided a report to the Attorney General regarding the police officers' actions. The SIU reported that the Tactical and Rescue Unit's actions were justified, the police officers did not use unjustified force, and there was no criminally negligent behaviour.

[14] In the SIU's report to the Attorney General, pursuant to s. 14 of the *Freedom of Information and Protection of Privacy Act*,[1] the SIU did not identify the officers involved in the death of Mr. Choudry.

3. Public Reaction to the Death of Mr. Choudry

[15] The Choudry incident did not go unnoticed in Canada. It had occurred at a moment when across the world there was heightened public interest in the issue of police behaviour and the use of force.

[16] On May 24, 2020, one month before the death of Mr. Choudry, in Minneapolis, Minnesota, a white police officer had killed George Floyd. Mr. Floyd was a black man. He died during an arrest made after a store clerk suspected him of having used a counterfeit twenty-dollar bill to purchase goods. Mr. Floyd's death spawned anti-police demonstrations across North America and around the world. For decades, across North America, a controversial, contentious, and inflammatory issue has been the matter of the policing of racialized and marginalized communities.

[17] In Canada, the Choudry incident was reported in the conventional media. It was reported on social media. As was the case with the George Floyd incident, there were videos that captured some of the events. A witness outside the Choudry's apartment building videotaped John Doe Officers 1, 2, and 3 on the balcony. There was also a video of the police officers leaving the apartment building. The videos were broadcast on social media.

[18] A YouTube creator using the pseudonym Arnold Rightzenegger broadcast the balcony video and the exit video. He posted that he was going to post the address of one of the officers so that action could be taken against the officer. Arnold Rightzenegger was investigated, identified,

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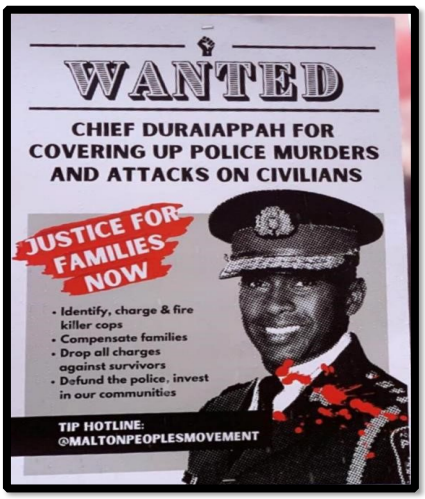
[1] R.S.O. 1990, c. F.31.

and he agreed to take down his post.

[19] After the broadcast of the videos and after reports of Mr. Choudry's death were published in the conventional media, protest groups were organized. Within weeks, a group known as "Justice4Ejaz" had organized non-violent protests at various locations, including at the Peel Regional Police headquarters.

[20] A group, which had been in existence for many years, called the "Malton People's Movement" circulated the balcony video and the exit video. It organized protests and rallies demanding justice for victims of police brutality. Speakers at the protest rallies threatened retaliatory violence. Vitriolic and sometimes threatening comments were posted online by individuals, some known and some anonymous. There were incidents where protesters attempted to bait a police response. Three protesters threw red paint on the walls of the police division station. They were charged with mischief.

[21] The activities of Malton People's Movement were not exclusively or directly connected to the fatal shooting of Mr. Choudry. Ms. Latanya Grant was a speaker at a rally; her cousin had been shot and killed by Peel Region police in an incident in 2014, six years before Mr. Choudry's death. A protester, Chantelle Krupka, had herself been shot in another incident unconnected to Mr. Choudry. The smearing of red paint was not proven to be connected to the Choudry incident.



[22] At the protest rallies, anti-police posters were displayed. The posters do not refer to the Choudry shooting in particular. One example is a WANTED poster stating that citizens were being "attacked" by "killer cops" who committed "murders". The poster included a photo with red splatter on the image of the Peel police chief. The poster of the police chief demands "identifying, charging, and firing killer cops", "compensating families", "dropping charges against survivors", and "defunding the police and investing in communities". The poster does not threaten any violence but does seek accountability for police misconduct.

[23] On January 18, 2021, on the Instagram account of a person or group named "eyesonbluelies", the exit video was posted with a comment. The comment stated: "HELP NEEDED: ID SUSPECTS IN MURDER OF EJAZ CHOUDRY […] We need help identifying the officers responsible for the murder of 62-year-old Ejaz Choudry in Malton, Ontario on June 20th 2020." The post does not threaten violence or harm to the officers. This post has not been removed from the Internet.

[24] The current status of the protest groups is unclear. The Malton People's Movement, Justice4Ejaz, and eyesonbluelies have not posted new content relating to Mr. Choudry on their respective social media platforms since the summer of 2021.

4. The Traumatization of Officers 1, 2, 3, 4, and 5

[25] Because they have not been identified to the public, Officers 1, 2, 3, 4, and 5, did not personally receive threats and no police officer has been physically harmed as a result of the media storm and protests after Mr. Choudry's death.

[26] The officers all deposed that they were traumatized by the incident and by the public's reaction to it. They deposed that they and their families have been living in anxiety and fear since June 2020.

[27] The five officers enrolled in the Provincial Address Suppression Program so that their personal home addresses are no longer available through Ministry of Transportation. John Doe Officer 3 sold his home and relocated. He became overcome by anxiety, and he is currently on medical/stress leave.

[28] None of the officers filed any medical documentation (no psychological assessments or clinical records were filed). There was no expert opinion from a medical professional to substantiate their mental health concerns.

[29] Notwithstanding that the Police Association of Ontario, which was added as an intervener to this motion, in the run-up to the motion requested and had been denied the right to file evidence, they filed evidence, and in their factum, they referred to research and reports about the mental health problems of police and other first responders.

[30] The Plaintiffs objected and submitted that these sources about the mental health of police officers were not properly part of the evidentiary record for this motion. The Plaintiffs objected because the information is hearsay, and they did not have the opportunity to cross-examine anyone about the evidence. Further, the Plaintiffs submitted that in any event, the evidence does not substantiate a serious impact on the mental health of the John Doe Officers as a result of the Choudry incident. This is true. The evidence proffered is general information about the psychiatric plight of police officers.

[31] I have decided to admit the evidence, much if not all of which comes within the realm of judicial notice or common knowledge. It is well known that law enforcement officers have chosen a public service career to serve and protect the public from crime, a job that requires enormous courage and resilience to respond to dangerous, and sometimes traumatic, and sometimes horrific events. It is well known that police officers put their mental and physical health at risk of serious harm including the ultimate sacrifice of life.

5. Policing and Public Policy: Policing and Mental Health

[32] Both the federal government and the Ontario government have made the mental health of law enforcement officers and first responders a public policy priority for research[2] and for

[2] Canada, Public Health Agency of Canada, *Federal Framework on Posttraumatic Stress Disorder: Recognition, Collaboration and Support* (Ottawa: Public Health Agency of Canada, 2020); Office of the Chief Coroner, *Staying Visible, Staying Connected, For Life: Report of The Expert Panel On Police Officer Deaths By Suicide* (Toronto: Ministry of the Solicitor General, 2019); Canada, Public Safety Canada, *Supporting Canada's Public Safety Personnel: An Action Plan on Post Traumatic Stress Injuries*, (Ottawa: Public Safety Canada, 2019); Centers for Addiction and Mental Health, *Police Mental Health: A Discussion Paper* (CAMH, 2018); Canada, Parliament, House of Commons, Standing Committee on Public Safety and National Security, *Healthy Minds, Safe Communities: Supporting Our Public Safety Officers Through a National Strategy for Operational Stress Injuries: Report of the Standing Committee on Public Safety and National Security*, 42nd Parl., 1st Sess., (October 2016); Ombudsman of Ontario, *In the Line of Duty* (Toronto: Ombudsman of Ontario, 2012); Honourable Patrick J. LeSage, *Report on the Police Complaints System in Ontario*, (2005).

legislation.[3]

[33] Policing is an inherently dangerous vocation that exposes police officers to the risk of mental illness because of the risks to their own safety and from exposure to traumatic events including homicides, suicides, and horrific victimization. Policing is a stressful activity because of the enormous responsibilities placed on police forces to serve and protect the public and to prevent criminal activity and to investigate crimes and to bring criminals to justice.

[34] The incidence of mental illness suffered by police officers related to their work is very high. The Centres for Addiction and Mental Health reported that: (a) 37% of municipal police officers present symptoms of mental illness, compared with 10% in the general population; (b) 29% of municipal police officers were in the diagnostic range for Post-Traumatic Stress Disorder ("PTSD"), compared with 9% for the general population; and, (c) the rate of suicidal ideation is nearly twice as high amongst police officers compared to the rate for the general population.

6. Detective Christine Robinson's Threat Assessment Opinion Evidence

[35] Although Detective Robinson's qualifications to provide opinion evidence and the admissibility and the weight, if any, to be given to her testimony were vigorously challenged, Detective Robinson provided danger assessment opinion evidence.

[36] Detective Robinson has been a police officer for 28 years. Her career has included neighbourhood policing as a uniformed officer, special victims unit work, detective work in the criminal investigation bureau, work in internal affairs, work in intelligence services, and work in the offender management unit. She is now a specially trained detective in the Peel Police Forces Threat Assessment Unit. Since 2015, she has been the designated Threat Assessor for the force. She provides assessments to the Peel police, the Ministry of the Attorney General, Correctional Service Canada, and the Ministry of the Solicitor General.

[37] Notwithstanding the vigorous challenge, I am admitting Detective Robinson's evidence in its entirety, and I shall give it appropriate weight.

[38] Detective Robinson was called as an expert witness to provide an opinion. In the circumstances of the immediate case, she could have been called as an event witness because risk assessment expertise is a part of the intelligence work that police forces necessarily and normally undertake to serve and protect the public from crime and to maintain the peace. Crowd control at protests and at any public gathering and the associated risk assessment is a normal part of modern police work, and risk assessment is not a novel science.

[39] Like all science, risk assessment develops over time, but change does not make it new or novel. In the immediate case, it appears that Detective Robinson was just doing her job. Like a treating physician, a different kind of expert who can give opinion evidence without being qualified as an expert, Detective Robinson could have been presented as a fact witness about the risks, physical or mental, if any, confronted by her police colleagues after the Choudry shooting.

[40] In any event, Detective Robinson was properly qualified as an expert witness. For a witness to be qualified as an expert, his or her opinion must be relevant and necessary to assist the trier of

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[3] *Federal Framework on Post-Traumatic Stress Disorder Act*, S.C. 2018, c. 13; *Supporting Ontario's First Responders Act (Posttraumatic Stress Disorder), 2016*, S.O. 2016, c. 4.

fact and not precluded by an exclusionary rule. As established by *R. v Mohan*,[4] the four criteria for the admissibility of expert evidence are: (1) relevance, the evidence must contribute to the proof of the material facts; (2) necessity, the trier of fact needs assistance to determine the truth of the facts; (3) qualification, the witness must be qualified to express an opinion by virtue of study, training or experience; and (4) the absence of an exclusionary rule. There is a fifth factor in cases in which the expert's opinion is based on novel or contested science or science used for a novel purpose and, in these cases, the reliability of the underlying science for that purpose must be established.[5]

[41] In *White Burgess Langille Inman v. Abbott and Haliburton Co.*,[6] the Supreme Court of Canada established a two-stage test for the admission of opinion evidence. In the first step, the threshold stage, the litigant proffering expert evidence must satisfy the factors from *R. v. Mohan*. In the second stage, the gatekeeper stage, the court makes a cost-benefit discretionary decision weighing the probative value of admitting the evidence against the potential adverse impacts of admitting the evidence, including the consumption of time, prejudice and the risk of confusing the trier of fact.

[42] Detective Robinson's evidence was relevant, necessary, and she was qualified to express an opinion by many years of study, training, and experience and she was not biased. There was no exclusionary rule and a cost-benefit analysis favoured admitting the evidence.

[43] As the discussion and analysis below will elucidate, the critical fact for this motion that the police officers had to establish was that there was a serious risk that their physical and mental health would be seriously harmed should they not be granted an exemption from the open court principle. Detective Robinson's report assessing the threats to the John Doe Officers is logically relevant to the question of whether disclosure of their identities poses a serious risk to an important public interest. Detective Robinson provided special knowledge that an ordinary person would not know, and her report was necessary to assist the trier of fact.

[44] Courts routinely rely on risk assessments from police officers in criminal cases and the immediate case is a civil case in which risk assessment associated with police activity is critically relevant. In *Donovan v. Sherman Estate*,[7] now the leading case about exceptions to the open court principle, the Supreme Court stated that while it may not be necessary to engage experts to attest to the physical or psychological risk related to disclosure of a person's identity, expert evidence may be helpful to the Court in making this determination.

[45] Detective Robinson's evidence was objective, and she did not become an advocate for her colleagues. That the police officers were her colleagues as such is not a reason to disqualify Detective Robinson without some indication that she was not exercising independent professional judgment and that she was not honouring her oath of duty to the court given under affidavit. The existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible.[8]

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[4] [1994] 2 S.C.R. 9.
[5] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 23; *R. v. J. (J.-L.)*, 2000 SCC 51; *R. v. Trochym*, 2007 SCC 6.
[6] 2015 SCC 23.
[7] 2021, SCC 25, aff'g 2019 ONCA 376, which rev'd 2018 ONSC 4706.
[8] *Wright v. Detour Gold Corp.*, 2016 ONSC 6807; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

[46] Detective Robinson assessed the likelihood that the disclosure of the identities of John Doe Officers 1, 2, 3, 4, and 5 will present a risk to their safety. She employed a Threat Assessment concept known as the "Pathway to Violence." This methodology first involves the identification of a grievance that may animate a quest for justice or desire for retribution. She identified the members of Justice4Ejaz, Malton People's Movement, and eyesonbluelies as aggrieved persons and animated by the belief that the officers unlawfully and immorally caused the deaths of several innocent men, including Mr. Choudry.

[47] The second step in the methodology is the presence of "violent ideation," which occurs when an aggrieved person decides that violence is the only way to resolve the emotional burden of the perceived injustice. The methodology posits that violent ideation can manifest itself as "leakage" on social media postings, protests, and rallies and in the form of direct or indirect threats. Detective Robinson concluded that violent ideation had been manifested after the death of Mr. Choudry.

[48] Detective Robinson said that the key principle of Threat Assessment is "threat management" with the goal of "violence prevention;" i.e., the goal was to prevent violence by the grievers, protestors, and their supporters.

[49] It was Detective Robinson's opinion that in the immediate case, the members and supporters of Justice4Ejaz, Malton People's Movement, and eyesonbluelies would be prompted to violence if the identities of John Doe Officers 1, 2, 3, 4, and 5 were disclosed to the public.

C. Procedural Background

[50] On **July 5, 2022**, by Statement of Claim, (a) Rena Ahmad as Estate Trustee of Ejaz Choudry, (a) Rena Ahmad, in her personal capacity, (c) Nemrah Ahmad, (d) Haseeb Choudry (e) Umar Choudry, by his Litigation Guardian Rena Ahmad, and (f) Muizz Choudry, by his Litigation Guardian Rena Ahmad brought an action against (1) Peel Regional Police Services Board, (2) Nishan Duraiappah, who is the Police Chief, (3) John Doe Officer 1, (4) John Doe Officer 2, (5) John Doe Officer 3, (6) John Doe Officer 4, and (7) John Doe Officer 5.

[51] On **October 21, 2022**, the Defendants delivered their Statement of Defence. The Plaintiffs agreed that the Officers may use pseudonyms pending a motion in which they opposed the use of pseudonyms.

[52] The John Doe Officers have been examined for discovery, and Plaintiffs' counsel knows their true identities.

[53] On **May 19, 2023**, the Defendants brought a motion for a pseudonym order, a sealing order, and a non-publication order.

[54] Justice Centa case managed the motion, and he set a timetable. Justice Centa granted leave to the Police Association of Ontario, the Canadian Broadcasting Corporation ("CBC"), the Canadian Civil Liberties Association, and the Canadian Muslim Lawyers' Association to participate as Interveners.

[55] The Defendants' motion and a supplementary notice of motion was supported by:

a. the affidavit dated May 18, 2023 of Sarah McClure. Ms. McClure is a student-at-Law at Agro Zaffiro LLP, counsel on this motion for Blaney McMurtry LLP, counsel of

record for the Defendants.

b. the affidavit dated May 19, 2023 of Detective Christine Robinson.

c. the respective affidavits dated May 19, 2023 of John Doe Officers 1, 2, 3, and 5.

d. an affidavit dated May 19, 2023 attributed to John Doe Officer 4 but actually an affidavit from a supervising officer who mistakenly self-identified as the genuine John Doe Officer 4.

e. the affidavit dated January 20, 2024 of the genuine John Doe Officer 4.

[56] On **November 2, 2023**, the CBC, an intervener, delivered an affidavit dated November 2, 2023 from Shanifa Nasser, of the City of Toronto. Ms. Nasser is a reporter for CBC News.

[57] On **January 15, 2024**, John Doe Officer 3 was cross-examined.

[58] On **January 22, 2024**, John Doe Officer 1 was cross-examined.

[59] On **January 24, 2024**, the genuine John Doe Officer 4 and Detective Robinson were cross-examined.

[60] The parties and the interveners delivered factums.

[61] The motion was argued on **April 9, 2024**.

D. The Open Court Principle[9]

[62] The open court principle is centuries old; in the 13th century, *Magna Carta* confirmed the prohibition against selling admission tickets to trials, in favour of open public access to court proceedings.[10] Protected by the constitutional guarantee of freedom of expression and essential to the proper functioning of Canadian democracy, it is a fundamental tenet and a rule of the Canadian legal system that the administration of justice is open to be seen and that the public, including the media, are not excluded from viewing and reporting on judicial proceedings.[11]

[63] Section 135 of the *Courts of Justice Act*[12] states that "all court hearings shall be open to the public". It is a fundamental tenet and a rule of the Canadian legal system entrenched in the *Canadian Charter of Rights and Freedoms*[13] that the administration of justice is open to be seen and that the public, including the media, are not excluded from viewing and reporting on judicial proceedings.[14]

[64] In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, Justice La Forest

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[9] The analysis and discussion in this part is an updated, revised, amalgamated, and augmented version of what appears in P.M. Perell and J.W. Morden, *The Law of Civil Procedure in Ontario* 5th ed. (Toronto, Lexis Nexis, 2024).

[10] *Toronto Star Newspapers Ltd. v. Ontario (Attorney General)*, 2018 ONSC 2586 at para. 3, referring to William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John*, 2nd ed. (Glasgow: Maclehose & Sons, 1914) at 395, citing *Magna Carta* (1215), ch. 40.

[11] *Courts of Justice Act,* R.S.O. 1990, c. C.43, s. 135; *Sherman Estate v. Donovan,* 2021 SCC 25, aff'g 2019 ONCA 376, which rev'd 2018 ONSC 4706; *R. v. S. (N.)*, 2012 SCC 72; *Vancouver Sun (Re),* 2004 SCC 43 at paras. 23-26; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General),* [1996] 3 S.C.R. 480; *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175.

[12] R.S.O. 1990, c. C.43.

[13] Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.

[14] *R. v. S. (N.)*, 2012 SCC 72; *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175 at pp. 185–86.

stated:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.[15]

[65] As observed by Lord Atkin, "justice is not a cloistered virtue",[16] and the public's right to observe court proceedings, the open court principle, is regarded as fundamental to the administration of justice and is subject to few exceptions.[17] Public access to the courts aspires to maintain the independence and impartiality of the judiciary and to guarantee the legitimacy and integrity of judicial processes by demonstrating that justice is administered in a non-arbitrary manner and according to the rule of law.[18] In *Re Vancouver Sun*, the Supreme Court explained at paragraph 32.

> 32. [P]ublic access to the courts allows anyone who cares to know the opportunity to see "that justice is administered in a non-arbitrary manner, according to the rule of law" […] An open court is more likely to be an independent and impartial court. Justice seen to be done is in that way justice more likely to be done. The openness of our courts is a "principal component" of their legitimacy.

[66] The courts must be open to public scrutiny and their operation open to public criticism.[19] In *Scott v. Scott*, Lord Shaw quoted philosopher Jeremy Bentham, who described the importance of the open court principle as follows:

> In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice…. Publicity is the very soul of justice. It is the keenest spur to exertion, and surest of all guards against improbity. It keeps the judge himself while trying under trial.[20]

> That the courts should be open and accessible to the public and the media is a fundamental value of the judicial system that: (a) advances the rule of law; (b) ensures that justice is done and seen to be done; (c) informs the public and the media of what transpires in the courtroom and exposes the court to scrutiny and criticism; and (d) helps citizens to understand the laws that affect them.[21] The open court principle embraces the media's right to have access to gather information, to make copies of exhibits and publish or broadcast the information.[22]

[67] In *Edmonton Journal v. Alberta (Attorney General)*,[23] Justice Wilson recognized the public interest in open courts as rooted in four public policy concerns: (a) maintaining an effective evidentiary process; (b) ensuring the judiciary and juries behave fairly and are sensitive to the values espoused by the society; (c) promoting a shared sense that our courts operate with integrity

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[15] [1996] 3 S.C.R. 480 at para. 23.
[16] *Ambard v. Attorney-General for Trinidad and Tobago,* [1936] A.C. 322 at p. 335 (P.C.).
[17] *R. v. S. (N.)*, 2012 SCC 72; *McPherson v. McPherson*, [1936] A.C. 177 (P.C.); *Scott v. Scott*, [1913] A.C. 417 (H.L.).
[18] *Re Vancouver Sun*, [2004] 2 S.C.R. 332.
[19] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at paras. 5–9.
[20] *Scott v. Scott*, [1913] A.C. 417 at p. 477 (H.L.).
[21] *R. v. Mentuck*, 2001 SCC 76; *Canadian Broadcasting Corp. v. New Brunswick*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835.
[22] *R. v. Canadian Broadcasting Corp.,* 2010 ONCA 726 (C.A.).
[23] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.

and dispense justice; and (d) providing an ongoing opportunity for the community to learn how the justice system operates and how the law being applied daily in the courts affects them.

[68] Courts have a duty of fairness and impartiality to the parties. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. As Lord Chief Justice Hewart stated: "[I]t is not merely of some importance, but it is of fundamental importance that justice should be not only be done but should manifestly and undoubtedly be seen to be done."[24]

[69] Under rule 14.06(1), every originating process shall contain the title of the proceeding setting out the names of all the parties and the capacity in which they are made parties, if other than their personal capacity.

E. Exceptions to the Open Court Principle

[70] The right of the media and public to access to the courtroom, however, is qualified and may be restricted in the interest of justice. Section 135(2) of the *Courts of Justice Act* authorizes the court to exclude the public from a hearing "where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public". Section 137(2) of the Act authorizes the court to order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record. In *Nova Scotia (Attorney General) v. MacIntyre*, the Supreme Court stated:

> Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary proof lies upon the person who would deny exercise of the right.[25]

[71] An order restricting court openness will only be granted in exceptional circumstances where the moving party demonstrates 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) the benefits of the order outweigh its negative effects, which is to say that the salutary effects of the proposed order in promoting an important public interest outweigh the deleterious impacts on the open court principle.[26]

[72] A sealing order is an exceptional measure, and it is only granted to protect social values of superordinate importance.[27] There is a high evidentiary burden on a party seeking a sealing order or a redaction order, and the evidence required for an order to be granted will be subject to close scrutiny and must be convincing.[28]

[73] Under rule 2.03, which provides the court with jurisdiction to dispense with compliance with any rule, a party may request an order permitting the use of a pseudonym. The principles

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[24] *R. v. Justices of Sussex*, [1924] 1 K.B. 256 at 259 (Div. Ct.).
[25] [1982] 1 S.C.R. 175 at p. 189.
[26] *Sherman Estate v. Donovan*, 2021 SCC 25.
[27] *Fairview Donut Inc. v. TDL Group Corp.*, [2010] O.J. No. 502 at para. 35 (S.C.J.); *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175.
[28] *Carroll v. Natsis*, 2020 ONSC 3263; *H. (M.E.) v. Williams*, 2012 ONCA 35; *R. v. Mentuck*, 2001 SCC 76 at paras. 24-29.

associated with the open court principle are used to resolve such requests.[29] The onus is on the persons seeking the order to establish on credible evidence that the interest of justice is served by permitting the use of a pseudonym.[30]

[74] In a decision affirmed by the Supreme Court of Canada in *Donovan v. Sherman Estate*,[31] the Court of Appeal set aside a sealing order that had been granted to protect the privacy of the family whose wealthy parents had been murdered in an unsolved violent crime. In *Sherman Estate*, the Supreme Court of Canada reiterated that limits on the open court principle remain the exception and not the rule and a party seeking a sealing order or a redaction order must establish that: (a) there is a serious risk to an important public interest if there is disclosure; (b) the order is necessary to prevent the risk because reasonably alternative measures will not prevent the risk; and (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[75] The first stage of the test sets a high bar and requires the person seeking a discretionary confidentiality order to demonstrate, as a threshold requirement, that there is an important public interest at stake and that court openness poses a serious risk to this interest. At the second stage of the test, the person seeking to limit court openness must show that the particular order sought is necessary to address the risk and that there is no reasonable alternative to prevent the serious risk. At the third and final stage of the test, the person seeking to limit court openness must show that the order they seek is proportionate — that is, that its benefits outweigh its harmful effects, including the negative impact on the open court principle.[32]

[76] Restricting or limiting access may be necessary to: (a) protect the innocent from unnecessary harm; (b) prevent significant physical or psychological harm to victims and witnesses; (c) protect the privacy interests of victims and witnesses; and (d) encourage the reporting of sexual offences by protecting the privacy interests of complainants.[33]

[77] Physical safety has been recognized as an important public interest that can justify a discretionary order restricting openness, however, the jurisprudence is that mere speculation of a threat to physical safety is not enough, and the applicant asking for such a discretionary order must show that the risk is real and substantial and that it is well-grounded in the evidence.[34] The evidence of risk must be real, and although speculation is insufficient to establish a risk of harm, if well-grounded in the record, the court can infer a risk of harm from objective circumstances and through the application of reason, logic, and common sense.[35]

[78] Protecting privilege, privacy and confidentiality, and protecting professional reputation have also been recognized as sufficiently important to warrant protection.[36] To qualify for a sealing order or other exception to court openness based on privacy concerns, privacy being another *Charter*-protected value to society, the claim must involve the protection of a person's dignity, and the kind of information in issue must consist of intimate or personal details about an individual

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[29] *Jane Doe v. D'Amelio*, [2009] O.J. No. 4042 (S.C.J.); *Jane Doe 1 v. Manitoba*, [2008] M.J. No. 292 (Q.B.); *B. (A.) v. Stubbs* (1999), 44 O.R. (3d) 391 (S.C.J.); *T. (S.) v. Stubbs* (1998), 38 O.R. (3d) 788 (Gen. Div.); *M. (S.) v. C. (J.R.)* (1993), 13 O.R. (3d) 148 (Gen. Div.).
[30] *Hillier v. Medallion Corp*. 2022 ONSC 6011 (Div. Ct.).
[31] 2019 ONCA 376, which rev'd 2018 ONSC 4706, aff'd 2021 SCC 25.
[32] *P1 v. XYZ School*, 2022 ONCA 571.
[33] *Canadian Broadcasting Corp. v. New Brunswick*, [1996] 3 S.C.R. 480.
[34] *Sherman Estate v. Donovan*, 2021 SCC 25; *R. v. Mentuck*, 2001 SCC 76.
[35] *Sherman Estate v. Donovan*, 2021 SCC 25; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46.
[36] *Fontaine v. Canada (Attorney General)*, 2013 BCSC 1955 at paras. 42–43.

that reveals the biographical core of the applicant, and less serious intrusions on privacy will generally be tolerated.[37]

[79] Where it is shown that there is a serious risk that the disclosure of highly sensitive personal information would be an affront to the affected person's dignity and be more than just discomfort or embarrassment, an exception to the open court principle may be justified.[38] In order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in exceptional cases and 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.[39]

[80] The open court principle yields only if the public interest in protecting privacy and confidentiality outweighs the public interest in openness.[40] Restriction on media access to and publication in respect of court proceedings cannot be justified unless it is necessary to prevent a serious risk to a public interest.[41]

[81] For the open court principle to yield, the interest jeopardized must have a public component and purely personal interests cannot justify non-publication or sealing orders; thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test.[42]

F. The Parties and the Interveners' Submissions

1. The Defendants' Submissions

[82] The John Doe Officers submitted that the factual circumstances of the immediate case warrant a publication ban and a sealing Order to protect the important public interest of "officer safety" especially after they were cleared of wrongdoing by the SIU.

[83] The Defendants submitted that "physical safety" is an important public interest that can justify a sealing order. They submitted that in the aftermath of Mr. Choudry's death, the John Doe Officers faced threats over social media, during protests, and while working in communities and they are afraid of being identified and harmed. The officers are afraid that they and their families will be harmed. Their lives have been threatened. The officers submitted that the protest groups stirred the public to anger and threats of violence with revenge and vigilante rhetoric, and that there is a high prospect of the anger being reignited if the officers' identities are disclosed. They submitted that unlike the situation in the *Sherman Estate* case, there is nothing speculative in the immediate case about the risk of serious harm and that the risk is demonstrated by the evidence

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[37] *1252663 Ontario Inc. (c.o.b. Premier Concrete Contractors Inc.) v. Lynx Environmental Solutions Inc.,* 2022 ONSC 5175 (Assoc. J.); *Turek v. College of Physicians and Surgeons of Ontario*, 2021 ONSC 8105 (Div. Ct.); *Sherman Estate v. Donovan*, 2021 SCC 25.
[38] *Sherman Estate v. Donovan,* 2021 SCC 25, aff'g 2019 ONCA 376, which rev'd 2018 ONSC 4706.
[39] *Sherman Estate v. Donovan,* 2021 SCC 25 at para. 63, aff'g 2019 ONCA 376, which rev'd 2018 ONSC 4706.
[40] *Fedeli v. Brown,* 2020 ONSC 994; *Carroll v. Natsis*, 2020 ONSC 3263 at para. 25; *F.N. (Re)*, 2000 SCC 35; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.
[41] *H. (M.E.) v. Williams*, 2012 ONCA 35 at para. 32.
[42] *M.E.H. v. Williams*, 2012 ONCA 35 at para. 25.

presented in this case.

[84] The Defendants point out that in other cases, undercover police officers and informants have been protected by sealing orders and pseudonyms, and the police officers submitted that they should receive similar protection. The Officers submitted that disclosing their identities and personal information makes them sitting ducks. Thus, they submitted that there is a manifest serious risk, and they submitted that the orders they seek are necessary to prevent this serious risk because there are no reasonable alternative measures adequate to prevent the risk. They say that expert opinion substantiates that releasing the names of the John Doe Officers will enhance the risk of violence against them, and that keeping their names confidential will reduce "target availability". The officers submitted that all of the requested measures they seek are necessary. They submitted that a publication ban alone would be insufficient because specific individuals and organized groups can requisition court documents and circulate information among themselves.

[85] Lastly, the Defendants submitted that the benefits of the relief requested outweigh the negative effects on the open court principle. The Defendants argue that the orders requested will not adversely, disproportionately, or unduly affect the purposes and policies of the open court principles associated with freedom of expression.

[86] The Defendants submitted that disclosing the names would not improve transparency in any meaningful way while keeping their names anonymous will not deprive the Plaintiffs of their day in court and their abilities to call evidence, to cross-examine the officers at trial, the ability to argue a liability position, the ability to seek damages, or to prosecute their civil claims.

[87] The moving defendants submitted that the beneficial impact of protecting the physical safety of the John Doe Officers, and their families, outweighs any deleterious effect of the anonymity, non-publication, and sealing order.

2. The Police Association of Ontario's Submissions

[88] The Police Association of Ontario is the provincial umbrella organization for police associations in Ontario. It is comprised of 45 police associations. It advocates on behalf of 28,000 sworn and civilian police personnel. It intervened in support of the John Doe Officers' request for orders protecting their identities.

[89] The Police Association submitted that the requested orders were justified because disclosure of the officers' identities would expose the officers to physical and mental harm, and would violate the officers' constitutionally protected rights of privacy. It submitted that the safeguarding of police officer mental health is a significant public policy priority and important public interest worthy of protection.

[90] The Police Association submitted that it is particularly significant to this motion that the *Special Investigations Unit Act, 2019*,[43] stipulates that in special investigations where no charges have been laid, the public reporting of the name of, and any information identifying, a subject official, witness official, civilian witness or affected person is prohibited. The Police Association submitted that the legislature's intention would be frustrated if this protection could be nullified by filing a civil suit.

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[43] S.O. 2019, c. 1, Sched. 5. The non-disclosure provisions were modeled after section 38.121(2)-(3) of British Columbia's *Police Act*, R.S.B.C. 1996, c. 367.

[91] The Police Association submitted that in the immediate case the first branch of the *Sherman Estate* test was satisfied because there was a very serious risk to several important public interests; namely, the public interest in the health and safety of the Defendant police officers, and the public interest in protecting privacy and dignity and preventing psychological harm. In the immediate case, there was a real risk that the defendant officers who have already received threats would be further criminally victimized and protecting people from criminal activity is an important public interest.

[92] The Police Association submitted that there was a serious risk that disclosure and widespread dissemination of the officers' identities would expose them to psychological injury, not only from targeted harassment, but also from having to relive and recount a traumatic and stigmatizing event during the proceeding while under unnecessary and disproportionate stress.

[93] The Police Association submitted that the other two preconditions in *Sherman Estate* are readily satisfied because an anonymization order is necessary to prevent the serious risks with no reasonable alternatives being available, and proportionality is achieved because protecting the defendant officers' identities has minimal impact on the openness principle.

3. The Plaintiffs' Submissions

[94] The Plaintiffs submitted that the Defendants' evidence falls far short of establishing a "serious risk" to their personal safety. The Plaintiffs submitted that the evidence of the Police Officers is bald unsubstantiated concerns for personal safety based on generic threats arising from other incidents or from investigations in the immediate case that removed the threat or revealed it to be unsubstantial.

[95] The Plaintiffs submitted that Detective Robinson's report should be given no weight as it does not meet the basic requirements for the admissibility of an expert's opinion.

[96] The plaintiffs submitted that the Defendants have failed to satisfy the high burden for restrictions on the open court principle and that there is no basis to limit the media's right to report on this proceeding, and the public's right to know.

4. The CBC's Submissions

[97] The CBC submitted that there is no convincing evidence that the Defendant police officers are under any serious threat of harm from the not uncommon protests of members of the public who object to police officers shooting civilians.

[98] The CBC submitted that: (a) there is no serious risk to the physical safety of the John Doe Officers by their being identified as defendants in a civil action; (b) the requested orders are unnecessary because reasonable alternative measures would prevent the risk; and (c) the benefits of the orders requested do not outweigh the adverse effects to open court principles and the freedom of expression rights of the media and the public.

[99] The CBC submitted that there is a substantial public interest in this case about Mr. Choudry's death and the importance of the open court principle is very high in this case about state action and in particular, police accountability.

5. The Canadian Civil Liberties Association's Submissions

[100] The Canadian Civil Liberties Association ("CCLA") is a national civil liberties organization that has long been concerned with the appropriate balance between civil liberties and other competing rights and interests. Its mandate includes ensuring that the police are held accountable to the public.

[101] The CCLA submitted that the open court principle has heightened importance in the context of police activity since police officers wield state power and must be accountable for how they use it. It submitted that the need for transparency is heightened where the interaction is between the police and marginalized communities and the need for transparency is very high.

[102] The CCLA submitted that the Supreme Court of Canada has recognized that the over-policing of racialized individuals not only takes a toll on racialized communities' physical and mental health, but also encourages a loss of trust in the fairness of the Canadian criminal justice system.[44] The CCLA submitted that the appearance that courts are protecting the identities of officers in lethal force cases risks seriously undermining public confidence in the justice system.

6. The Canadian Muslim Lawyers' Association's Submissions

[103] The Canadian Muslim Lawyers' Association is a non-profit association of Muslim lawyers from all Canadian provinces and territories. It is dedicated to promoting the objectives of self-identifying Muslim members of the legal profession.

[104] The Canadian Muslim Lawyers' Association submitted that in application, the open court principle needs to take into account that the Canadian justice system exists in a multicultural society where cases of public interest may matter more to specific communities or groups.

[105] The Canadian Muslim Lawyers' Association submitted that in a multicultural society with a recognized history of systemic racism in law enforcement, a case involving the shooting death of an elderly Muslim man of South Asian descent during a wellness check, elevates the importance of the open court principle and the societal need for transparency and police accountability. The Canadian Muslim Lawyers' Association submitted that the need for transparency and accountability is heightened and particularly acute in proceedings implicating the fraught relationship between police and racialized communities.

[106] The Canadian Muslim Lawyers' Association submitted that on this application by the police officers for anonymity, granting their application would dimmish the racialized communities' confidence in the administration of justice and would exacerbate distrust by racialized groups in our public institutions and undermine the legitimacy of the judicial process.

7. The Open Court Principle and the *Special Investigations Unit Act, 2019*

[107] In making their arguments that there should be an exception to the open court principle, the Defendants and the intervener Police Association of Ontario relied on the *Special Investigations Unit Act, 2019*,[45] which adopted the recommendations of Justice Tulloch, now Chief

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[44] *R. v. Le*, 2019 SCC 34.
[45] S.O. 2019, c. 1, Sched. 5.

Justice of Ontario.

[108] In 2016, the Ontario government commissioned Justice Tulloch to conduct a review of the Special Investigation Unit ("SIU"), the independent civilian body that investigates all officer-involved shootings in Ontario.[46] Justice Tulloch was asked whether the SIU's reports to the Attorney General should continue to be kept confidential. He was asked whether subject/witness officer names and other witness names should be released publicly.

[109] In 2017, Justice Tulloch issued the *Report of the Independent Police Oversight Review*.[47] On the policy issue of whether there should be public disclosure of officer names, Justice Tulloch concluded that although officers were acting in a public capacity, they were not disqualified from anonymity. He noted the impact of traumatic events on the mental health of officers and concluded that the release of names would not improve transparency in a meaningful way, except in cases where an officer had been criminally charged because there were reasonable grounds to believe that the officer has engaged in wrongdoing. Justice Tulloch recommended that: (a) where an officer is charged, that officer's name should be released, but not the names of any other involved and uncharged officers; and (b) where no charges are laid, the identity of all involved officers (witnesses and subjects) should not be made public.

[110] In 2019, the Ontario government passed Bill 68, the *Comprehensive Ontario Police Services Act, 2019*,[48] an omnibus overhaul of policing law in Ontario that included the *Special Investigations Unit Act, 2019*,[49] which included the following provisions:

> *Definitions*
>
> 1 (1) In this Act,
>
> "subject official" means, in respect of an incident referred to in subsection 15 (1), an official whose conduct appears, in the opinion of the SIU Director, to have been a cause of the incident;
>
> "witness official" means an official who, in the opinion of the SIU Director, is involved in an incident referred to in subsection 15 (1), but is not a subject official in relation to the incident.
>
> […]
>
> *Charges*
>
> 32 If, as a result of an investigation under this Act, the SIU Director determines that there are reasonable grounds to believe that an official has committed an offence under the *Criminal Code (Canada)*, the SIU Director shall cause charges to be laid against the official.
>
> *Public notice if charges laid against official re incident*
>
> 33 (1) Subject to subsections (2) and (3), if an investigation under section 15 results in charges being laid against an official, the SIU Director shall, as soon as practicable, give public notice setting out the following, but no other, information:
>
> 1. The official's name.

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[46] Order-in-council 1530/2016.
[47] Tulloch, Michael H., *Report of the Independent Police Oversight Review* (Queen's Printer for Ontario, 2017) online: https://opcc.bc.ca/wp-content/uploads/2019/06/StreetChecks.pdf
[48] S.O. 2019, c. 1.
[49] S.O. 2019, c. 1, Sched. 5.

2. The charges laid and on what date.

3. Information respecting the official's first scheduled court appearance respecting the charges, if known.

4. Any other information that may be prescribed.

Public notice if no charges laid against official re incident

34 (1) If an investigation under section 15 does not result in charges being laid against an official, the SIU Director shall publish a report on the website of the Special Investigations Unit containing the following information:

1. The reasons why the investigation was thought to be authorized under section 15.

2. A detailed narrative of the events leading to the investigation.

3. A summary of the investigative process, including a timeline noting any delays.

4. A summary of the relevant evidence considered, subject to subsection (2).

5. Any relevant video, audio or photographic evidence, de-identified to the extent possible, subject to subsection (2).

6. The reasons for not laying a charge against the official.

7. Any other information that may be prescribed.

Omission and reasons

(2) The SIU Director may omit from the report any information required to be provided under paragraph 4 or 5 of subsection (1), if the SIU Director is of the opinion that a person's privacy interest in not having the information published clearly outweighs the public interest in having the information published, and includes in the report the reasons for the omission.

Excluded information

(3) The SIU Director shall ensure that the following information is not included in the report:

1. The name of, and any information identifying, a subject official, witness official, civilian witness or affected person.

2. Information that may result in the identity of a person who reported that he or she was sexually assaulted being revealed in connection with the sexual assault.

3. Information that, in the opinion of the SIU Director, could lead to a risk of serious harm to a person.

4. Information that discloses investigative techniques or procedures.

5. Information, the release of which is prohibited or restricted by law.

6. Any other information that may be prescribed.

[111] On this motion, the intervener Canadian Civil Liberties Association ('CCLA") argued that the fact that the Special Investigations Unit ("SIU") does not identify officers to the public is not relevant to whether sealing orders and publication bans should be placed on the names of defendant officers in a court proceeding.

[112] I disagree with the CCLA about the relevance of the *Special Investigations Unit Act, 2019.* In my opinion, the Act is relevant insofar as it identifies a public policy worthy of being balanced against the public policy of the open court principle. However, while the privacy and mental health interests of police officers are relevant, the policy of the Act is in and of itself insufficient to provide police officers with a categorical universal exemption to the open court principle. The existence of the Act is a factor among others to weigh on a case-by-case basis in accordance with the principles that govern when a court is asked to exercise its discretion to grant an exception to the open court principle.

[113] Although he was speaking in the context of criminal courts, Chief Justice Tulloch recognized that the policies and practices of the Special Investigations Unit did not preempt the open court principle. In his *Report of the Independent Police Oversight Review*, Justice Tulloch stated at pages 122 - 123:

> When police officers are charged by the SIU they formally become accused persons before the court […] The court system in Canada has always recognized the "open court principle" as a hallmark of a democratic society and the cornerstone of the common law. This means that, with limited exceptions, everything that happens in a court is public and can be published by the media. This includes the accused's name, their charges, evidence entered as exhibits, and the testimony heard in court.

[114] About the transparency and accountability of the police to the public, it is worth noting that adjudicative disciplinary hearings conducted by police services under the *Police Services Act*,[50] are presumptively open to the public, as required under section 9(1) of the *Statutory Powers Procedure Act*.[51]

[115] The Defendants' *in terrorem* argument, which is that allowing civil proceedings would circumvent the policies of the *Special Investigations Unit Act, 2019*, is without merit because there is nothing inconsistent with applying Justice Tulloch's logic to the civil courts. The open court principle fostering transparency and accountability and the pursuit of truth are not exclusive to the administration of criminal or civil proceedings; they are general principles of a democratic society.

G. Discussion and Analysis

[116] At the outset of the discussion, it needs to be kept in mind that this motion is ultimately a matter between the parties and that the interveners are not parties. This is important to keep in mind, because as between the parties, the approach was to argue the motion on essentially evidentiary grounds while in contrast, the interveners introduced and focused on public policy issues.

[117] The intervener Police Association of Ontario introduced public policy issues about the needs of its constituency, the police officers who undoubtably play a fundamental role in the rule of law and the administration of justice in society. The interveners CBC, Canadian Civil Liberties Association, and Canadian Muslim Lawyers' Association introduced public policy issues about the needs of the public generally and of racialized communities in particular to transparency and accountability in the police's engagement with their communities.

[118] While I will address some of the interveners' public policy arguments, ultimately this

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[50] R.S.O. 1990, c P.15 at s. 83(1).
[51] R.S.O. 1990, c S.22 at s. 9(1).

motion can be decided on the evidentiary grounds that the defendant police officers have not met the standard of proof to be granted what is in all events an extraordinary and rare order.

[119] The parties' competing evidentiary arguments are that from an evidentiary perspective, the police officers do or do not satisfy the satisfy the tripartite test stated by the Supreme Court of Canada in *Sherman Estate v. Donovan* that: (1) court openness would lead to a serious risk to another important public interest; (2) the order is necessary to prevent the risk because reasonably alternative measures will not prevent it, and; (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[120] The Defendants based their request for an exemption to the open court principle on two circumstances that may justify an exemption, i.e., (a) to prevent significant physical or psychological harm; and (b) to protect privacy interests.

[121] It should be immediately observed that while the prevention of significant physical or psychological harm and the prevention of privacy interests have been frequently recognized as justifications for exemptions to the open court principle - if the evidence supports the exemption - the exemptions have typically been provided to victims and witnesses and complainants in criminal cases and to plaintiffs in civil cases where the disclosure of personal information would exacerbate the injuries and harm they or their family have already suffered. The immediate case, however, is an unprecedented untypical request by police officer defendants in a civil proceeding to be granted an exemption from the open court principle.

[122] Policing is undoubtedly a matter of public interest.[52] Given that police officers in their vocation as public servants have a negligible to non-existent privacy interest and given that police officers have undertaken an inherently hazardous and traumatizing job, it might have been expected that the plaintiffs and their supporter interveners would have submitted that police officers categorically are not entitled to an exemption from the open court principle. That, however, was not the nature of the Plaintiffs' argument. Rather, the Plaintiffs argued that the evidence in the immediate case did not justify any exemption to the open court principle.

[123] Without making a universal or categorical argument, the Plaintiffs submitted that given the nature of what police officers would understand from the outset of their careers about their exposure to risk and about their exposure to scrutiny, they confronted a super-extraordinary evidentiary burden to be granted an exemption to the open court principle.

[124] A non-categorical approach was correct. While the request in the immediate case was unprecedented, there are precedents for police officers being granted exemptions to the open court principle. In *R. v. O.N.E*,[53] (a case that was argued at the same time as the leading case of *R. v. Mentuck*,[54] which also involved undercover police operations), the RCMP was granted a time-limited publication ban to protect the identity of the officers involved in the undercover operation that had led to an arrest and a conviction.

[125] However, in *R. v. O.N.E*, the Supreme Court held that the identity of police officers should not, as a matter of general practice, be shrouded in secrecy forever, absent serious and

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[52] *Robertson v. Edmonton (City) Police Service (#8)*, 2004 ABQB 242; *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 at para. 83; *R. v. Mentuck*, 2001 SCC 76 at paras. 50-51; *Re Ottawa Police Force and Lalonde* (1986) 57 OR (2d) 509 (Ont. Dist. Ct.); *Dix v. Canada (A.G.)* (2001), 301 A.R. 124 at para. 40.
[53] 2001 SCC 77.
[54] 2001 SCC 76.

individualized dangers. The time-limited ban was not based on protecting the safety of the officers, it was based on the needs of the administration of justice in other undercover operations. Justice Iacobucci stated at paragraph 14 of the Court's judgment:

> 14. However, again in accordance with the reasoning in *Mentuck*, I find that the ban on publication of information tending to identify the particular officers involved in the operation, including their names, likenesses and physical descriptions, can be regarded as necessary in order to further the proper administration of justice. Were the current targets of similar undercover operations to become aware that the names of their apparent criminal associates were in fact the names of undercover police officers, the likelihood that the operation would be compromised approaches certainty. […] But I would still restrict the term of this ban to a period of one year from the date on which this judgment is released. The identity of police officers should not be, as a matter of general practice, shrouded in secrecy forever, absent serious and individualized dangers. A force of anonymous, undercover police is not the sort of institution the courts may legitimately, in effect, create; such would be the appearance of an order restraining publication of their identities in perpetuity.

[126] For another example, the case at bar is not like *X v. Y*,[55] where the court granted a pseudonym order to the plaintiff, who was a police officer. The plaintiff was suing the defendant in a civil action for damages for personal injuries suffered in a motor vehicle accident that had occurred while the plaintiff was operating his motorcycle in the line of duty. In *X v. Y,* the plaintiff was an investigator of criminal gang activity and there was evidence that he and his family would be at serious risk of harm if his identify was disclosed. There was evidence that gang members were engaged in counter-surveillance to obtain personal information about officers and their families in an effort to intimidate the officers. An exemption to the open court principle was justified because the public would have no particular interest in a motor vehicle accident case and a pseudonym order protecting the identity of the plaintiff was a modest intrusion on the open court principle.

[127] For present purposes, I need not decide whether police officers confront a higher evidentiary burden than other requestors for an exemption to the open court principle. For present purposes, based on the evidentiary record including Detective Robinson's evidence and what I can infer by common sense and common knowledge, I am not persuaded that the court should exercise its discretion to grant the orders requested.

[128] The public policy interests identified by the police officers are certainly worthy of protection, and there may be a civil case where it would be appropriate to grant a police officer or police officers exemptions from the open court principle; the immediate case, however, is not that case.

[129] Although I accept the Defendants' argument that the police officers have not suffered harm to date possibly because they have not been identified to date, the evidence that there is a risk of harm is weak and insufficient to justify an exemption to the open court principle.

[130] The police officers would not as a norm have the expectation of the anonymity that has occurred in the immediate case. It is obvious that there is more risk of harm if a person comes out of hiding, but the appropriate risk assessment is what is the risk of harm should the officers be identified, which was always possible, and which remains possible even with a continuation of the court order. It needs to be recalled that the officers have already been exposed to the balcony video and to the exit video and they continue to work for the Peel police force. Detective Robinson does not opine whether the risk of harm in the immediate case is normal or abnormal for the event of

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[55] 2011 BCSC 943.

the officers being identified. Such evidence as there is does not support a conclusion that the officers are exposed to any serious risk beyond the serious risks that they were normally confront having undertaken an inherently notorious, risky, and potentially traumatizing public service.

[131] The evidence of "threats" filed by the John Doe Officers in support of their motion is primarily anonymous and generalized criticisms of police shootings of civilians and not directed at the Choudry death in particular. The comments and implicit threats do not relate to the shooting of Mr. Choudry but are about other police shootings and officers. There is no evidence that any police officer in Canada has been physically harmed as a result of any type of vigilante justice that the John Doe Officers fear. The only evidence of violence against police filed by the John Doe Officers relates to officers who were harmed in the course of performing their duties as officers.

[132] The risk to police officers is real and inherent, but in the immediate case the realization or actualization of that risk based on the evidence is speculative and remote and does not rise to the level for an erosion or encroachment on the open court principle. As Justice Iacobucci noted in *R. v. Mentuck*,[56] the claimant for an exemption to the open court principle must meet the burden of proving a "real and substantial risk" to the administration of justice that is "well-grounded in the evidence" before an order is issued. That burden has not been overcome in the immediate case.

[133] I have no doubt that the officers genuinely are stressed and that inside and outside of their role as public servants they have genuine privacy interests that are worthy of protection. However, their personal dignity is not offended by disclosing their names, which would normally occur.

[134] To preserve the integrity of the open court principle, an important public interest concerned with the protection of privacy and personal dignity should be understood to be seriously at risk only in exceptional cases and neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to the individuals will generally on its own warrant interference with court openness. Distressing as it may be for a public official to have his or her conduct scrutinized, it is his or her conduct. The public official has a name and is not just a pronoun or a title or office holder.

[135] In the immediate case, a publication ban would have significant negative effects on freedom of expression and the public's ability to understand the circumstances surrounding Mr. Choudry's death and to evaluate the conduct of the John Doe Officers in connection with Mr. Choudry's death.

[136] The whole of civil society has an interest in scrutinizing the administration of justice in a civil action that involves how that society is being policed in what was a civil matter of a wellness check, which is a civil service that police officers, along with paramedics, and other first responders are called upon to do from time to time.

[137] Without knowing the names of the John Doe Officers, journalists and the public have no way of knowing whether any of them may have been involved in previous incidents, and whether there may be a systemic problem or an isolated incident. The public will be unable to probe the connection among police training, the police department's policies and procedures, including disciplinary action, and the relationship with the community and various groups in it to avoid similar unfortunate outcomes for the citizens that the police are sworn to serve and protect.

[138] The above is sufficient to decide the motion, but it is worth briefly addressing the

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[56] 2001 SCC 76.

arguments that insofar as the policing of society and particularly the policing of racialized communities is concerned making an order exempting a court proceeding from the open court principle would be super-extraordinary; i.e., such an order would theoretically be possible but, practically speaking, would be virtually impossible to achieve.

[139] Based on the intervener's arguments, there is some support for the proposition that in the context of the role of the police in society exceptions to the open court principle would be super-extraordinary. In this regard, courts[57] and governments and public authorities[58] have acknowledged the realities of racism in Canadian society and of the history of systemic racism perpetrated by public institutions including courts in the administration of justice. Courts have also recognized that public trust in the police is and must be a paramount concern. In *Wood v. Schaeffer*,[59] where a majority of the Supreme Court of Canada held that police officers were not entitled to consult legal counsel before delivering their notes to the Special Investigations Unit after a fatal shooting, the majority stated at paragraph 48:

> 48. The SIU was born out of a crisis in public confidence. Whether or not police investigations conducted into fatal police shootings in the 1980s were actually biased, the public did not perceive them to be impartial (see, e.g., Task Force Report). This history teaches us that appearances matter. Indeed, it is an oft-repeated but jealously guarded precept of our legal system that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*R. v. Sussex Justices, Ex parte McCarthy*, [1924] 1 K.B. 256, at p. 259, *per* Lord Hewart C.J.). And that is especially so in this context, where the community's confidence in the police hangs in the balance.

H. Conclusion

[140] For the above reasons, the motion is dismissed.

[141] There shall be no order as to costs to or for the interveners.

[142] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the submissions of the Plaintiffs within twenty days of the release of these Reasons for Decision followed by the Defendants' submissions within a further twenty days.

Perell, J.

Released: April 29, 2024

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[57] *R. v. Morris,* 2021 ONCA 680; *R. v. Le,* 2019 SCC 34; *R. v. Grant,* 2009 SCC 32; *R v. Spence*, 2005 SCC 71; *R. v. S. (R.D.),* [1997] 3 S.C.R. 484; *R. v. Parks* (1993), 15 O.R. (3d) 324.

[58] Senate Standing Committee on Human Rights, *Combatting Hate: Islamophobia and its Impact on Muslims in Canada* (November 2023); House of Commons Standing Committee on Public Safety and National Security, *Systemic Racism in Policing in Canada* (June 2021); Ontario Human Rights Commission, *A Disparate Impact: Second interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (August 2020); The Honourable Gloria J. Epstein, *Missing and Missed: Report of the Independent Civilian Review into Missing Person Investigations* (2021), The Honourable Michael H. Tulloch, *Independent Street Checks Review* (2018).

[59] 2013 SCC 71 (McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis and Wagner JJ; LeBel, Fish, and Cromwell, JJ dissenting).

CITATION: Ahmad v. Peel Regional Police Services Board, 2024 ONSC 2474
COURT FILE NO.: CV-22-00682804-0000
DATE: 20240429

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

RENA AHMAD, in her personal capacity and as Estate Trustee on behalf of the Estate of Ejaz Choudry, Deceased, NEMRAH AHMAD, HASEEB CHOUDRY, UMAR CHOUDRY, by his Litigation Guardian RENA AHMAD and MUIZZ CHOUDRY, by his Litigation Guardian RENA AHMAD

Plaintiffs

- and -

PEEL REGIONAL POLICE SERVICES BOARD, NISHAN DURAIAPPAH, JOHN DOE OFFICER 1, JOHN DOE OFFICER 2, JOHN DOE OFFICER 3, JOHN DOE OFFICER 4 and JOHN DOE OFFICER 5

Defendants

- and -

CANADIAN BROADCASTING CORPORATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN MUSLIM LAWYERS' ASSOCIATION and POLICE ASSOCIATION OF ONTARIO

Interveners

REASONS FOR DECISION

PERELL J.

Released: April 29, 2024