



**SUPREME COURT OF CANADA**

**CITATION:** Canadian  
Broadcasting Corp. v. Manitoba,  
2023 SCC 27

**APPEAL HEARD AND JUDGMENT  
RENDERED:** October 19, 2023  
**REASONS FOR JUDGMENT:**  
November 9, 2023  
**DOCKET:** 38992

**BETWEEN:**

**Canadian Broadcasting Corporation**  
Appellant

and

**His Majesty The King, B.B., spouse of the late M.D., and J.D., in his capacity  
as executor of the estate of the late M.D.**  
Respondents

- and -

**Attorney General of Ontario, Attorney General of British Columbia, Centre  
for Free Expression, Canadian Association of Journalists, News Media  
Canada, Communications Workers of America/Canada and Ad  
Idem/Canadian Media Lawyers Association**  
Interveners

**CORAM:** Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and Jamal JJ.

**REASONS  
FOR JUDGMENT:** The Court  
(paras. 1 to 15)

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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**Canadian Broadcasting Corporation**

*Appellant*

v.

**His Majesty The King,  
B.B., spouse of the late M.D., and  
J.D., in his capacity as executor of the estate of the late M.D.**

*Respondents*

and

**Attorney General of Ontario,  
Attorney General of British Columbia,  
Centre for Free Expression,  
Canadian Association of Journalists,  
News Media Canada,  
Communications Workers of America/Canada and  
Ad Idem/Canadian Media Lawyers Association**

*Interveners*

**Indexed as: Canadian Broadcasting Corp. v. Manitoba**

**2023 SCC 27**

File No.: 38992.

2023: October 19; 2023: November 9.

Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA

*Courts — Open court principle — Publication bans — Discretionary limits on court openness — Important public interest — Privacy — Dignity — Court of Appeal ordering publication ban on affidavit filed in criminal proceedings before it — Media representative challenging publication ban — Whether Court of Appeal erred in imposing publication ban.*

During wrongful conviction proceedings before the Court of Appeal, an accused sought to introduce as new evidence an affidavit concerning the death of a witness involved in those proceedings. The Court of Appeal issued a publication ban over the affidavit and, in its reasons for judgment, ordered that the publication ban remain in effect. The CBC now calls upon the Court to set aside the publication ban.

*Held:* The appeal should be dismissed.

The Court of Appeal did not make a reversible error in issuing the publication ban or in ordering that it remain in effect. The publication ban should therefore not be rescinded or varied.

Under *Sherman Estate v. Donovan*, 2021 SCC 25, the person asking a court to exercise discretion in a way that limits the open court principle must establish that: (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

In this case, the first branch of the *Sherman* test is satisfied. There is a strong public interest in protecting the privacy of the spouse of the deceased witness, and disclosure of the affidavit would reveal highly sensitive and acutely personal information that would result in an affront to the spouse's dignity interest in her own right. The second branch of the test is also satisfied, as the publication ban is necessary to prevent a serious risk to the dignity of the witness's spouse, the publication ban was not overbroad or vague and there was no reasonable alternative to its terms. Finally, as to the third branch, the benefit of the publication ban, which is to protect the dignity of the witness's spouse, significantly outweighs its minimal deleterious effect on the right of free expression and, by extension, the principle of open and accessible court proceedings. The affidavit did not play a role in determining that a wrongful conviction had occurred.

### **Cases Cited**

**Applied:** *Sherman Estate v. Donovan*, 2021 SCC 25; **referred to:** *R. v. Ostrowski*, 2019 MBCA 122; *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33; *R. v. Ostrowski*, 2023 MBCA 6, [2023] 9 W.W.R. 210.

APPEAL from a judgment of the Manitoba Court of Appeal (Beard, Burnett and Pfuetzner JJ.A.), 2018 MBCA 125, 369 C.C.C. (3d) 139 (*sub nom. R. v. Ostrowski*), [2018] M.J. No. 306 (QL), 2018 CarswellMan 550 (WL), ordering *inter alia* that a publication ban remain in effect. Appeal dismissed.

*Jonathan B. Kroft, K.C., Sean Moreman and Jennifer Sokal*, for the appellant.

*Michael Bodner and Joel N. Myskiw*, for the respondent His Majesty The King.

*Robert Gosman*, for the respondents B.B., spouse of the late M.D., and J.D., in his capacity as executor of the estate of the late M.D.

*Michael Bernstein*, for the intervener the Attorney General of Ontario.

*Lesley Ruzicka, K.C., and Chantelle Rajotte*, for the intervener the Attorney General of British Columbia.

*Fredrick Schumann and Karen Bernofsky*, for the interveners the Centre for Free Expression, the Canadian Association of Journalists, News Media Canada and Communications Workers of America/Canada.

*Iain MacKinnon*, for the intervener Ad Idem/Canadian Media Lawyers Association.

The following are the reasons for judgment delivered by

THE COURT —

[1] At the hearing, the Court unanimously dismissed the appeal, without costs, with reasons to follow. These are those reasons.

[2] During wrongful conviction proceedings before the Court of Appeal of Manitoba, an accused sought to introduce as new evidence an affidavit sworn by his lawyer concerning the death of a witness involved in those proceedings. On May 28, 2018, the Court of Appeal issued a publication ban over the affidavit. In its reasons for judgment on the appeal, the court ordered that the publication ban remain in effect (2018 MBCA 125, 369 C.C.C. (3d) 139 (“2018 Publication Ban Judgment”). The appellant, the Canadian Broadcasting Corporation (“CBC”), filed a motion to set aside the publication ban. In 2019, the Court of Appeal held that it did not have jurisdiction to hear the motion to set aside the publication because it was *functus officio* (2019 MBCA 122 (“2019 Jurisdiction Judgment”). The CBC sought and obtained leave to appeal both judgments to this Court.

[3] In 2021, this Court heard the appeals from the 2018 Publication Ban Judgment and the 2019 Jurisdiction Judgment together. The Court allowed the appeal from the 2019 Jurisdiction Judgment and remanded to the Court of Appeal the motion to have the publication ban set aside. It also adjourned the appeal of the 2018 Publication Ban Judgment *sine die* (see 2021 SCC 33, which sets out the procedural background in fuller detail).

[4] On January 23, 2023, the Manitoba Court of Appeal rendered judgment on the CBC’s remanded motion to have the publication ban set aside (2023 MBCA 6,

[2023] 9 W.W.R. 210 (“Judgment on Remand”). The Court of Appeal dismissed the motion to reconsider the publication ban. First, the Court of Appeal denied the CBC standing to bring the motion as it had notice of the ban. Second, the Court of Appeal declined to hear the motion as the CBC failed to act with due dispatch in seeking to set the ban aside. In addition, the Court of Appeal wrote that in the event that it was wrong to deny standing to the CBC or to decline to hear the motion because of the delay, it would nonetheless have refused to reconsider the ban. Applying the test in *Sherman Estate v. Donovan*, 2021 SCC 25, the Court of Appeal was of the view that the ban was necessary to prevent a serious risk to privacy, and in particular to dignity, an important public interest. Moreover, the benefits of the publication ban outweigh any negative effects on court openness.

[5] While the Judgment on Remand has not been appealed to this Court, in coming to our decision we have had the benefit of the Court of Appeal’s reasons. Those reasons explain why, in light of the principles set forth in *Sherman*, the publication ban was justified notwithstanding the open court principle.

[6] The CBC now calls upon this Court to decide the appeal of the 2018 Publication Ban Judgment for which leave was granted in 2020 and which was adjourned *sine die* in 2021. The parties were invited to provide additional written submissions and a new hearing was held to address the implications of *Sherman*, which was decided after the initial hearing of the two appeals before this Court in 2021.



[7] For the reasons that follow, we are unanimously of the view that the appeal from the 2018 Publication Ban Judgment should be dismissed. The Court of Appeal did not commit a reversible error in issuing the publication ban and ordering that it remain in effect in 2018.

[8] Under *Sherman*, “the person asking a court to exercise discretion in a way that limits the open court presumption must establish that: (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects” (para. 38). Each branch of the test is deserving of comment.

[9] We agree with the view that, under the first branch of the *Sherman* test, there is a strong public interest in protecting the privacy of the witness’s spouse with respect to the witness’s death in order to prevent an affront to the spouse’s dignity (see Judgment on Remand, at para. 77). We agree that personal information in the affidavit is a direct affront to the dignity of the spouse in her own right. In the words of the Court of Appeal, the information “goes to the core of both the witness and the spouse as human beings at their most vulnerable” (para. 77). In this case, disclosure of the affidavit would reveal highly sensitive and acutely personal information that would directly engage the spouse’s dignity interest.

[10] For the purposes of measuring the relevant dignity interest, it is sufficient to observe that the dignity of the witness's spouse is compromised. It is not necessary to decide the question of whether there is a dignity interest for the deceased witness to justify the publication ban here. The first branch of the *Sherman* test is satisfied because court openness would pose a serious risk to the spouse's dignity as an important public interest.

[11] We also agree that the publication ban is necessary to prevent a serious risk to the important public interest of protecting the dignity of the witness's spouse (see Judgment on Remand, at para. 78); that the ban was not overbroad or vague, and should be permanent (para. 80); and that there was no reasonable alternative to the terms of the publication ban (para. 83). In particular, as the Court of Appeal noted in 2023, it would be easy to identify the witness if parts of the affidavit were to be disclosed. In the circumstances, the Court of Appeal was entitled to conclude in 2018 that publishing details of the affidavit without the witness's name would risk associating the information with the witness and making the publication ban moot (see Judgment on Remand, at para. 81). The second branch of the test is therefore satisfied.

[12] Finally, as to the third branch, we agree with the Court of Appeal in the Judgment on Remand that the benefits of the 2018 publication ban significantly outweigh its minimal deleterious effect on the right of free expression and, by extension, the principle of open and accessible court proceedings. The benefit of the publication ban is to protect the dignity of the witness's spouse as already explained,

whereas the publication ban has a minimal negative effect on the right of free expression and the open court principle (paras. 92-93). The affidavit did not relate to the wrongful conviction or the legitimacy of the accused's appeal before the Court of Appeal in 2018. As the Court of Appeal observed in the Judgment on Remand, the affidavit was "capable of proving nothing" (para. 91). Here, the affidavit was not admitted as evidence in the wrongful conviction proceedings and, therefore, did not play a role in determining that a wrongful conviction had occurred.

[13] In light of the foregoing, no reversible error was made in issuing the 2018 publication ban or ordering it remain in effect and it should not be rescinded or varied in the circumstances.

[14] None of the parties sought an order for costs.

[15] For the foregoing reasons, we dismissed the appeal without costs.

*Appeal dismissed without costs.*

*Solicitors for the appellant: MLT Aikins, Winnipeg; Canadian Broadcasting Corporation, Toronto.*

*Solicitor for the respondent His Majesty The King: Department of Justice Manitoba, Constitutional Law Section, Winnipeg.*

*Solicitors for the respondents B.B., spouse of the late M.D., and J.D., in his capacity as executor of the estate of the late M.D.: Robert Gosman Law Corporation, Winnipeg.*

*Solicitor for the intervener the Attorney General of Ontario: Crown Law Office — Criminal, Ministry of the Attorney General, Toronto.*

*Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Prosecution Service, Victoria.*

*Solicitors for the interveners the Centre for Free Expression, the Canadian Association of Journalists, News Media Canada and Communications Workers of America/Canada: Stockwoods, Toronto.*

*Solicitors for the intervener Ad Idem/Canadian Media Lawyers Association: Linden & Associates, Toronto.*