

**ONTARIO SUPERIOR COURT OF JUSTICE**  
(Toronto Region)

**IN THE ESTATE OF BERNARD C. SHERMAN**

BETWEEN:

TORONTO STAR NEWSPAPERS LIMITED AND KEVIN DONOVAN

Applicants

and

THE ESTATE OF BERNARD SHERMAN AND THE TRUSTEES OF THE ESTATE

Respondents

- AND -

**ONTARIO SUPERIOR COURT OF JUSTICE**  
(Toronto Region)

**IN THE ESTATE OF HONEY SHERMAN**

BETWEEN:

TORONTO STAR NEWSPAPERS LIMITED AND KEVIN DONOVAN

Applicants

and

THE ESTATE OF HONEY SHERMAN AND THE TRUSTEES OF THE ESTATE

Respondents

**FACTUM OF THE RESPONDING PARTIES,  
THE ESTATE TRUSTEES OF BERNARD SHERMAN AND HONEY SHERMAN**

July 26, 2018

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**FACTUM OF THE RESPONDING PARTIES,  
THE ESTATE TRUSTEES OF BERNARD SHERMAN AND HONEY SHERMAN**

**PART I ~ OVERVIEW**

1. The Applicants, Toronto Star Newspapers Limited and Kevin Donovan, seek disclosure from this Court of "all parts of the Estate files related to The Shermans before the court, including the text of any sealing orders or endorsements, applications,

directions, pleadings, Last Will and Testaments or other documents in possession of the court" (the "**Requested Materials**").<sup>1</sup>

2. The Estate Trustees of Bernard Sherman and Honey Sherman (the "**Estate Trustees**") respectfully submit that the Requested Materials should not be disclosed to the Applicants and should be treated as confidential, sealed, and not form part of the public record, including because: (i) there is a real and substantial risk that the Estate Trustees and the beneficiaries of the estates of Bernard and Honey Sherman (the "**Beneficiaries**"), including minor children, will suffer serious harm, detriment and/or injustice from public exposure of the materials; and (ii) the salutary effects of any orders preserving the confidentiality of the Requested Materials vastly outweigh any deleterious effects.

## PART II ~ SUMMARY OF FACTS

3. As has been widely reported, Bernard and Honey Sherman were found dead at their home in Toronto, Ontario on December 15, 2017.<sup>2</sup> The deaths of the Shermans have attracted extraordinarily intense media coverage.<sup>3</sup>

4. On January 26, 2018, the Toronto Police Service announced that they are investigating the deaths of the Shermans as targeted double homicides.<sup>4</sup> As of the date of

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<sup>1</sup> Notice of Application dated July 23, 2018 at para. (b) ("**Notice of Application**").

<sup>2</sup> Affidavit of A.B. sworn June 7, 2018 ("**A.B. Affidavit**") at para. 2, Motion Record re Motion Seeking a Confidentiality Order in respect of Court File No. 05-144/18 ("**Motion Record**"), Tab 2.

<sup>3</sup> A.B. Affidavit at para. 11(a), Motion Record, Tab 2.

<sup>4</sup> A.B. Affidavit at para. 3, Motion Record, Tab 2.



this Factum, the identity and motivation of the perpetrator(s) of the murders remain a mystery.<sup>5</sup>

5. On June 29, 2018, counsel for the Estate Trustees filed with the Court two Applications for a Certificate of Appointment of Estate Trustee relating to the estates of Bernard and Honey Sherman as well as motion materials seeking orders that these two Applications be treated as confidential by the Court. These Applications, motion materials and related documents comprise the Requested Materials now sought by the Applicants.

6. As described further below, there is a real and substantial risk that the Estate Trustees and the Beneficiaries (including minor children) will suffer serious harm, detriment and/or injustice from public exposure of the Requested Materials, which contain the full names and home addresses of these individuals. Additionally, certain Estate Trustees and Beneficiaries (including minor children) referred to in the Requested Materials do not have the last name "Sherman", and the Requested Materials indicate a link between these individuals and Bernard and Honey Sherman.<sup>6</sup>

7. The substantial risks posed to the safety and security of these persons in the event the Requested Materials are made public must necessarily outweigh any potential deleterious effects of maintaining confidentiality, particularly in circumstances where the Requested Materials relate solely to the administration of individuals' estates

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<sup>5</sup> A.B. Affidavit at para. 11(c), Motion Record, Tab 2.

<sup>6</sup> A.B. Affidavit at paras. 11(c)-(d), Motion Record, Tab 2.

that does not affect the public in any significant way and for which there can be no justifiable public interest.<sup>7</sup>

### PART III ~ ISSUES AND THE LAW

8. The issue on this motion is whether the Applicants should be granted access to the Requested Materials. For the reasons set out below, the Estate Trustees respectfully submit that they have satisfied the test in *Sierra Club of Canada v. Canada (Minister of Finance)*<sup>8</sup> and the Requested Materials should be treated as confidential, sealed and not form part of the public record.

#### A. The Test for Sealing Orders

9. While the “open court” principle is a hallmark of democratic societies, Canadian courts have repeatedly affirmed that this principle is not absolute and must sometimes yield to the need for confidentiality. Among other things, Canadian courts have attempted to strike a balance between the need for public access to the court process, on the one hand, and the *bona fide* interests of parties, on the other.

10. The limited nature of the open court principle is explicitly recognized in section 137(2) of the *Courts of Justice Act*, which allows a 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” notwithstanding the public interest in open and accessible court proceedings.<sup>9</sup>

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<sup>7</sup> A.B. Affidavit at para. 11(b), Motion Record, Tab 2.

<sup>8</sup> 2002 SCC 41 [*Sierra Club*], Respondents' Book of Authorities, Tab 1.

<sup>9</sup> R.S.O. 1990. c. C.43.

11. In *Sierra Club*, in the context of litigation, the Supreme Court of Canada held that courts should exercise their discretion to grant confidentiality orders within the framework of the following two-part test:

A confidentiality order [...] should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.<sup>10</sup>

12. Our courts (including the Supreme Court of Canada) have also made it clear that this test is a contextual one that should not be rigidly applied and must instead be tailored to the specific rights and interests engaged in each particular case.<sup>11</sup>

**B. The Requested Sealing Order Is Necessary to Prevent a Serious Risk to an Important Interest**

13. It is necessary to maintain the Requested Materials as confidential in order to prevent a serious risk to an important interest, namely the personal safety, security and well-being of the Estate Trustees and the Beneficiaries.

14. As noted by Justice Brown in *C.L.B. v. J.B.*, Ontario courts may grant sealing orders “where the disclosure of the information would cause serious harm or prejudice to the person or parties involved”.<sup>12</sup>

<sup>10</sup> *Sierra Club*, *supra* at paras. 11 and 53, Respondents’ Book of Authorities, Tab 1.

<sup>11</sup> *Sierra Club*, *supra* at paras. 38, 48 and 53, Respondents’ Book of Authorities, Tab 1; *Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)*, [2005] N.S.J. No. 496 at para. 16 (N.S.C.A.), Respondents’ Book of Authorities, Tab 2. See also *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at para. 31, Applicants’ Book of Authorities, Tab 1.



15. The Requested Materials contain sensitive personal information (including full names and addresses), the disclosure of which would cause serious harm, detriment and/or injustice to the Estate Trustees and the Beneficiaries. In particular, there is a legitimate and ongoing risk to the personal safety and security of each of these individuals, including risks of violence and kidnapping, in circumstances where the identity and motivation of the perpetrator(s) of the murders remains a mystery.<sup>13</sup>

16. In *X. v. Y.*, the British Columbia Supreme Court granted a sealing order in circumstances where the plaintiff had real and substantial concerns about risks to his and his family's safety if the order sought was not granted. The plaintiff in *X. v. Y.* was an RCMP officer who commenced a personal injury action. At the conclusion of the trial, the plaintiff sought an order sealing the court file on the basis that, among other things, the inclusion in the court file of the plaintiff's personal information (including the names of the plaintiff, his wife and his daughter, as well as their home address) would place him and his family at risk of personal harm, given his involvement in investigating criminal gang activity.<sup>14</sup> In granting the order, the Court emphasized the "unique circumstances" of the case where the release of the personal information sought to be protected "would create a security and personal protection risk" for the plaintiff and his family.<sup>15</sup>

17. Further, it is important that the Requested Materials remain confidential for the emotional well-being of the Sherman family. The deaths of Bernard and Honey Sherman have attracted an enormous amount of publicity and speculation. It is

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<sup>12</sup> (2009), 97 O.R. (3d) 544 (S.C.) [*C.L.B. v. J.B.*], Respondents' Book of Authorities, Tab 3.

<sup>13</sup> A.B. Affidavit at paras. 11(c)-(d), Motion Record, Tab 2.

<sup>14</sup> *X. v. Y.*, [2011] B.C.J. No. 1377 at para. 4 and 6 (B.C.S.C.), Respondents' Book of Authorities, Tab 4.

<sup>15</sup> *X. v. Y.*, *supra* at para. 24, Respondents' Book of Authorities, Tab 4.



completely unnecessary to subject the Sherman family to additional publicity and speculation relating to the disposition of their estates.

18. In addition to the significant personal interests at stake for the Estate Trustees and the Beneficiaries, there is a superordinate public interest in protecting persons from incurring violence or harm, as well as in the right to privacy, as reflected in section 7 of the *Charter of Rights and Freedoms* which provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>16</sup> As noted by the Supreme Court in *Sierra Club*, although the present matter is a civil proceeding and *Charter* rights are not directly engaged, those rights should inform the exercise of this Court’s discretion in determining exceptions to the principle of openness.<sup>17</sup>

19. There are no reasonable alternatives to maintaining the confidentiality of the Requested Documents in the present case.

### **C. The Salutary Effects of the Requested Sealing Order Outweigh Its Deleterious Effects**

20. In order to succeed at the second stage of the *Sierra Club* test, the party seeking a sealing order must establish that the salutary effects of the order sought outweigh any possible deleterious effects, including the public interest in open and accessible court proceedings.<sup>18</sup> For the reasons set out below, the Estate Trustees

<sup>16</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.) 1982*, c. 11, s. 7. See also *X. v. Y.*, *supra* at para. 16, Respondents’ Book of Authorities, Tab 4.

<sup>17</sup> *Sierra Club*, *supra* at paras. 37-38, Respondents’ Book of Authorities, Tab 1; *X. v. Y.*, *supra* at para. 20, Respondents’ Book of Authorities, Tab 4.

<sup>18</sup> *Sierra Club*, *supra* at para. 53, Respondents’ Book of Authorities, Tab 1.

submit that in the unique circumstances of this case, the salutary effects of the requested order vastly outweigh any deleterious effects.

21. In *Sierra Club*, the Supreme Court held that the consideration of the deleterious effects of a sealing order should include an assessment of the effects of such an order on the three "core values" underlying freedom of expression, namely: (i) seeking the truth and the common good; (ii) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (iii) ensuring that participation in the political process is open to all persons.<sup>19</sup> The Supreme Court stated:

The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.<sup>20</sup>

22. The case law is clear that at the second stage of the *Sierra Club* test, the Court should consider the nature of the information at issue and whether there is a *bona fide* public interest in having access to that information. The fact that the information in question is not information which attracts a legitimate public interest weighs heavily in favour of granting the requested sealing order. This is because the order would not undermine any of the three "core values" underlying the right to freedom of expression.

23. It is clear that the deleterious effects of a sealing order in the present case would be minimal, and are far outweighed by the salutary effects of preserving the safety and privacy of the affected individuals.

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<sup>19</sup> *Sierra Club*, *supra* at para. 75, Respondents' Book of Authorities, Tab 1.

<sup>20</sup> *Sierra Club*, *supra* at para. 75, Respondents' Book of Authorities, Tab 1.



24. The Requested Materials relate to two Applications for a Certificate of Appointment of Estate Trustees in respect of the estates of Bernard and Honey Sherman. Although the normal rule in Ontario is that materials filed in court in the process of applying for a Certificate of Appointment (including a will in respect of which a Certificate of Appointment is sought) are accessible by the public, there will be circumstances (such as those in the present case) where this general presumption of openness is outweighed by the need to protect from harm those who are estate trustees, beneficiaries or who are otherwise interested in the relevant estate, or who may for other reasons be adversely affected if such materials are open for public inspection.
25. Importantly, absent probate, there is no general requirement that a will be made available for public inspection, which is unsurprising given that there is no legitimate public interest in the content of a will. Indeed, as a practical matter, individuals often seek to avoid probating a will if possible in order to minimize the payment of the Estate Administration Tax and to maintain privacy, which is an entirely acceptable practice. In particular, it is common practice in Ontario to have “dual wills” with the result that only one of these two wills is probated, and accordingly there is no right afforded to members of the public to access the will that has not been probated. This practice has been repeatedly “blessed” by the courts and is reflected in the *Rules of Civil Procedure* and the applicable prescribed forms.<sup>21</sup>
26. In granting a confidentiality order over a probate file involving a beneficiary suffering from a mental disability in *Doe Estate*, former Chief Justice Wachowich of the

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<sup>21</sup> Ian M. Hull and Suzana Popovic-Montag, *Macdonell, Sheard and Hull on Probate Practice*, 5th ed. (Toronto, Canada: Thomson Reuters Canada Limited, 2016) at 378-379, Respondents' Book of Authorities, Tab 6.



Alberta Court of Queen's Bench considered the balance between the salutary and deleterious effects of the order sought, and held as follows:

"The salutary effects of the proposed order are obvious and tangible. The sensitive information will be protected, thereby allowing the mentally-handicapped person to benefit from the bequest without outside interference. The deleterious effects of a sealing order, on the other hand, are not compelling. First, this is not an order that will have effects on other parties. The public does not have any interest, and in particular any legitimate interest, in the nature of the bequest, nor in the personal affairs of Mr. Doe. Second, the proposed order does not remove a substantial amount of information from the public sphere. Any information about this case in which the public can claim any interest, for example the circumstances of the death of the testator, has already been reported. Accordingly, I find that the deleterious effects of the proposed order are substantially outweighed by the salutary effects on the rights and interests of the parties involved. This probate matter is quintessentially a private law matter that does not affect the public in any tangible way, whereas the salutary benefits of a sealing order for Mr. Doe are significant."<sup>22</sup> [emphasis added]

27. Former Chief Justice Wachowich's reasoning in *Doe Estate* is directly applicable in the present case. The public does not have any legitimate interest in the Requested Materials. This is a private matter "that does not affect the public in any tangible way". In contrast and as explained in detail above, the salutary effects of the order sought are substantial, and outweigh any minimal impairment to the public interest in accessing the Requested Materials.

28. The facts before the Court on this Application can be readily distinguished from those in the 2009 decision of Justice Brown in *C.L.B. v. J.B.* cited by the Applicants. In that case (which did not involve applications for Certificates of Appointment), Justice Brown refused to seal the court file for trust proceedings in respect of two minor children whose father died in the September 11 attacks. The applicant (the children's mother)

<sup>22</sup> *Doe Estate*, [2003] A.J. No. 1174 (A.B.Q.B.), Respondents' Book of Authorities, Tab 5.

sought to have the court file sealed in order to protect the children “from publicity and financial or other harm in light of the notoriety of the events of September 11, 2001 and taking into account the sizeable amounts awarded to them”.<sup>23</sup> In declining to grant the order sought, Justice Brown found that there was insufficient evidence supporting the existence of the alleged risks, and further that the use of the children’s initials was a “reasonably alternative measure” to protect against the risk of publicity.<sup>24</sup>

29. The risks identified by the Estate Trustees in the present case are not merely financial or relating to unwanted publicity. Instead, if the sealing order sought is not granted, there is a real and substantial risk that the Estate Trustees and the Beneficiaries may suffer serious physical harm, detriment and/or injustice at the hands of the perpetrator(s) of the murders, in circumstances where the identity and motivation of the perpetrator(s) remains a mystery. With regard to certain of the Estate Trustees and Beneficiaries in particular, it is not public knowledge that these individuals are connected to the Shermans. The Requested Materials, however, name these individuals and indicate a link between them and the Shermans. If the Orders sought are not granted, this information would be available to the public resulting in a real and substantial risk to their personal safety. In addition, the privacy of the Estate Trustees and Beneficiaries will be further invaded by making public materials relating to the disposition of the estate of Bernard and Honey Sherman. These concerns are supported by the affidavit evidence tendered by the Estate Trustees.<sup>25</sup>

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<sup>23</sup> *C.L.B. v. J.B.*, *supra* at para. 6, Respondents’ Book of Authorities, Tab 3.

<sup>24</sup> *C.L.B. v. J.B.*, *supra* at paras. 14-18, Respondents’ Book of Authorities, Tab 3.

<sup>25</sup> A.B. Affidavit, para. 11, Motion Record, Tab 2.

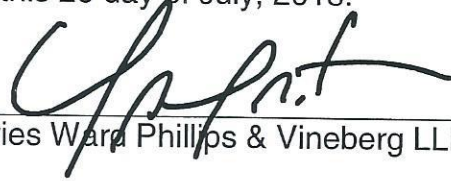


**PART IV ~ ORDER REQUESTED**

30. The Trustees respectfully request that this Court dismiss the Application and grant an Order that the following documents filed with the Court be treated as confidential, sealed and not form part of the public record:

- (i) the Motion Records in support of the Confidentiality Orders sought dated June 25, 2018 in respect of Court File Nos. 05-143/18 and 05-144/18, and related materials;
- (ii) the Application for a Certificate of Appointment of Estate Trustee Without a Will in the estate of Bernard Sherman, and related materials; and
- (iii) the Application for a Certificate of Appointment of Estate Trustee Without a Will in the estate of Honey Sherman, and related materials.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 26 day of July, 2018.



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## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41
2. *Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)*, [2005] N.S.J. No. 496 (N.S.C.A.)
3. *C.L.B. v. J.B.*, (2009), 97 O.R. (d) 544 (S.C.)
4. *X. v. Y.*, [2011] B.C.J. No. 1377 (B.C.S.C.)
5. *Doe Estate*, [2003] A.J. No. 1174 (A.B.Q.B.)

#### **Secondary Source**

6. Ian M. Hull and Suzana Popovic-Montag, *Macdonell, Sheard and Hull on Probate Practice*, 5th ed. (Toronto, Canada: Thomson Reuters Canada Limited, 2016)

**SCHEDULE "B"**

**TEXT OF STATUTES, REGULATIONS & BY - LAWS**

**Courts of Justice Act**

R.S.O. 1990, CHAPTER C.43

**Consolidation Period:** From July 1, 2018 to the e-Laws currency date.

Last amendment: 2018, c. 8, Sched. 15, s. 8.

**Sealing documents**

(2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

CONSTITUTION ACT, 1982

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

GUARANTEE OF RIGHTS AND FREEDOMS

LEGAL RIGHTS

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.



**IN THE ESTATE OF BERNARD C. SHERMAN  
IN THE ESTATE OF HONEY SHERMAN**

JUL 30 18

Court File No. 012564-18

Court File No. 012565-18

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

(Toronto Region)

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