

CANADA / JUDGMENT

R. v. B.L.

2024 BCCA 108

COURT

British Columbia Court of Appeal

DECIDED

21 March 2024

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2024 BCCA 108 R. v. B.L.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. B.L.,

2024 BCCA 108

Date: 20240321

Docket: CA49299

Between:

Rex

Respondent

And

B.L.

Applicant/Appellant

File Sealed in Part

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Abrioux

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated

April [redacted], 2005 (conviction) (R. v. B.L., [redacted docket number]).

Counsel for the Appellant:

S. Kashfi

Counsel for the Respondent:

R. Leong

Place and Date of Hearing:

Vancouver, British Columbia

February 27, 2024

Place and Date of Judgment:

Vancouver, British Columbia

March 21, 2024

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Abrioux

Summary:

This is an application for an anonymization and limited sealing order in a criminal appeal. Two questions arise: (1) does a single justice of the Court of Appeal have jurisdiction to grant the sought-after orders; and (2) has the applicant/appellant met the applicable legal test? HELD: The application is allowed and the orders are granted. A single justice sitting in chambers has implicit jurisdiction to make these types of orders. In answer to the second of the two questions, the appellant has received a pardon for the offence that underlies his appeal. In light of the pardon and the accompanying statutory protection against disclosure of his criminal record, the appellant meets the test for an anonymization and limited sealing order.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

- [1] The appellant applies for an anonymization order that allows him to use his initials rather than his full name in this appeal. He also seeks a sealing order prohibiting public access to certain material that forms part of the appeal record.

- [2] The appellant initially brought his application in chambers. The application was referred to a division (panel) of this Court after the federal Crown raised concerns about the jurisdiction of a single justice to grant the requested orders in a criminal appeal.
- [3] For the reasons that follow, I would grant the anonymization and sealing orders. As a result, I will refer to the appellant using only his initials--B.L.

Factual Background

- [4] In April 2005, B.L. pleaded guilty to a drug offence in the Provincial Court. He was sentenced to a conditional sentence under s. 742.1 of the Criminal Code, R.S.C. 1985, c. C-46, as well as a ten-year mandatory firearms prohibition.
- [5] In March 2008, he pleaded guilty to another drug offence in the Provincial Court, for which he received a \$500 fine.
- [6] In April 2019, the Parole Board of Canada granted B.L. a pardon for each of these offences. I use the term "pardon" because B.L. committed his offences before 2012. For crimes committed after that date, the term "pardon" has been replaced with "record suspension": Safe Streets and Communities Act, S.C. 2012, c. 1.
- [7] Because of the pardons, any records of B.L.'s convictions that are held by federal government departments or agencies must be kept separate from other criminal records, and are protected from disclosure under the Criminal Records Act, R.S.C., 1985, c. C-47 [CRA]. More specifically, at the time of B.L.'s convictions, s. 6(2) of the CRA stipulated that "no such record shall be disclosed to any person, nor shall the existence of the record or the fact of the conviction be disclosed to any person, without the prior approval of the [Minister of Public Safety and Emergency Preparedness]" (emphasis added). The legislation delineated a number of exceptions to the prohibition on disclosure. However, none of them applies here.
- [8] In August 2023, B.L. filed an appeal from his 2005 conviction as well as an application for leave to appeal the related sentence. He has also taken steps to appeal the 2008 conviction and sentence. However, the latter offence was prosecuted by summary conviction and that appeal must proceed in the British Columbia Supreme Court. Accordingly, it is not before us.
- [9] In the appeal from the 2005 conviction, B.L. seeks to have his guilty plea withdrawn and the conviction and sentence overturned on the basis that when he entered the plea, he was not told that a conviction would have immigration consequences if he later wanted to become a permanent resident of the United States of America ("USA").
- [10] This is something B.L. seeks to do. His common-law spouse of eight years and two children reside in the USA. He lives and works there in the finance and investment industries. B.L. is currently admissible in the USA under a work permit that must be renewed every five years. However, his convictions for drug offences preclude him from obtaining permanent resident status or citizenship in the USA. If he stops working there, and is no longer able to

rely on the five-year permit, he will be inadmissible. In his written submissions, B.L. states that he has brought this appeal to "overcome" the inadmissibility issue.

- [11] B.L. intends to assert in his appeal that not knowing of the long-term immigration consequences of a conviction for drug offences rendered his guilty plea uninformed and invalid. Relying on *R. v. Wong*, 2018 SCC 25, he will ask that his plea be withdrawn and the conviction overturned on that basis. If he does not succeed in that argument, he will ask that the conditional sentence be varied to an absolute discharge.
- [12] Because of the time that has passed since he was sentenced (almost 19 years), B.L. requires an extension of time to proceed with his appeal. That application has not yet been heard. Nothing in these reasons is intended to express a view on the merits of the extension application or, if an extension is granted, the merits of the appeal from conviction and sentence.

Issues on Application

- [13] In this application, there are two issues to consider:
- whether a single justice of the Court of Appeal has jurisdiction to grant anonymization and sealing orders in a criminal appeal; and,
 - whether B.L. meets the test for those orders.
- [14] It is not strictly necessary to answer the first question. The parties accept that a division has jurisdiction to grant the requested orders and the application is before a division.
- [15] However, the orders sought by B.L. are not uncommon. Moreover, appellate jurisprudence on the jurisdictional point is unclear. The parties agree this is a matter of importance to litigation practice and judicial case management in criminal appeals. In the circumstances, I consider it to be in the interests of justice that the Court exercise its discretion to consider and resolve the issue, even though it is functionally moot in the circumstances of this case: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 1989 CanLII 123.

Discussion

A. Jurisdiction to grant anonymization and sealing orders

- [16] The Crown submits that a single justice has no authority to make the orders sought by B.L. in a criminal appeal. Rather, it says these orders lie within the exclusive jurisdiction of a division of three justices, sitting as the "court of appeal".
- [17] The Crown acknowledges that historically, there have been occasions in which a single justice has anonymized a style of cause or made a sealing order in a criminal appeal, including with the Crown's consent. However, it says those orders were made for expediency and the jurisdictional question raised in this application was not fully argued.

Statutory framework

- [18] In Canada, courts of appeal are statutory courts. Consequently, their jurisdiction to hear and determine appeals, as well as matters incidental to those appeals, must find support in legislation or related regulations: *R. v. Meltzer*, [1989] 1 S.C.R. 1764 at 1773, 1989 CanLII 68; *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53 at 69, 1993 CanLII 137.
- [19] Indictable criminal appeals are governed by Part XXI of the Criminal Code ("Appeals -- Indictable Offences"). The Crown submits there is a provision under Part XXI that allows for anonymization and sealing orders, namely, s. 683.
- [20] Section 683(1) lists a number of orders an appellate court can make for the purpose of hearing and determining an appeal, such as orders for the production of records, admitting fresh evidence, and amending an indictment. Anonymization and sealing orders are not included in the list. However, the Crown says an appellate court can look to s. 683(3) as statutory authority for these orders. Section 683(3) expressly incorporates the Court's civil appeal powers into criminal appeals:
- (3) A court of appeal may exercise, in relation to proceedings in the court, any powers not mentioned in subsection (1) that may be exercised by the court on appeals in civil matters, and may issue any process that is necessary to enforce the orders or sentences of the court, but no costs shall be allowed to the appellant or respondent on the hearing and determination of an appeal or on any proceedings preliminary or incidental thereto.
- [Emphasis added.]
- [21] In civil appeals, this Court may make any order the trial court could have made: Court of Appeal Act, S.B.C. 2021, c. 6, s. 24(1)(a) [Act]. In addition, it has the "power, authority and jurisdiction vested in the [trial court] for all purposes of and incidental to the hearing and determination of any matter": Act, s. 25(a)(i). The Crown submits that a trial court's "power, authority and jurisdiction" as contemplated by the Act includes the authority to anonymize a style of cause and seal court records.
- [22] Section 30 of the Act grants a single justice in a civil appeal the same authority as a division for defined purposes, including: making orders incidental to the appeal that do not involve deciding the appeal on the merits (s. 30(a)); making orders to manage the conduct of the appeal (s. 30(b)); making interim orders to prevent prejudice to any person (s. 30(c)); and exercising certain "general powers of [the] court" for matters to be decided by the judge (s. 30(d)(i)).
- [23] The Crown submits that by virtue of s. 683(3) of the Criminal Code, this Court has authority to make anonymization and sealing orders in criminal appeals. However, given the introductory language of the provision, the Crown says only a division can exercise those powers and the authority to do so does not extend to a single justice under s. 30 of the Act. Section 683(3) effectively renders s. 30 of the Act unavailable.

- [24] The Crown contends that in a criminal appeal, a single justice can exercise only those powers that the Criminal Code explicitly grants to a single justice. When Parliament has wanted to assign a particular power to a "judge", as opposed to a division, it has expressly done so.
- [25] For example, the Crown points to ss. 675(1) and 676(1) of the Criminal Code, which specify that a "judge" may grant leave to appeal a sentence in an indictable appeal. Sections 675(1.1), 676(1.1) and 839(1) allow a "judge" to grant leave to appeal in summary conviction proceedings. A "judge" can extend the time for filing a notice of appeal or application for leave to appeal under s. 678(2). A "judge" can also release someone on bail pending appeal (s. 679(1)); suspend a probation order or a conditional sentence while awaiting an appeal (s. 683(5)); or appoint legal counsel to assist an appellant (s. 684(1)).
- [26] Section 683(3) makes no mention of a "judge" exercising the authority captured there. It is the Crown's position that the absence of any such reference makes it clear that only a "court of appeal" can invoke civil appeal powers when managing and determining a criminal appeal, including the power to make anonymization and sealing orders.
- [27] The British Columbia Court of Appeal Criminal Appeal Rules, 1986, B.C. Reg. 145/86 [Rules], provide that a justice sitting in chambers has "in relation to an appeal, all of the powers that they have under the [Act] with any necessary changes as may be applicable": s. 2(4). However, the Crown submits that the Rules, including the authority to issue criminal practice directives under the Rules, must be read in light of the limiting language of s. 683(3).
- [28] The authority to enact rules for criminal appeals is found in s. 482(1) of the Criminal Code, but the provision stipulates that any such rules cannot be "inconsistent with [the Criminal Code] or any other Act of Parliament" (emphasis added). From the Crown's perspective, if the Rules are interpreted to empower a single justice to make anonymization and sealing orders, they will be "inconsistent" with s. 683(3). As such, a single justice cannot look to the Rules or a practice directive issued under those Rules for authority to grant an anonymization or sealing order in a criminal appeal.

Analysis

- [29] I agree with the Crown that if anonymization or sealing orders in criminal appeals depend on s. 683(3) of the Criminal Code, a strong argument can be made that only a division may properly exercise that authority. The opening language of s. 683(3) appears to make that clear, considered in the context of Part XXI as a whole.
- [30] However, I do not consider that s. 683(3) governs the jurisdictional point raised in this application.

- [31] In *R. v. Appulonappa*, 2013 BCCA 79, the Court described s. 683(3) as relating primarily to "evidentiary matters": at para. 6, citing *R. v. Geauvreau*, [1982] 1 S.C.R. 485 at 490, 1982 CanLII 44.
- [32] Anonymization and sealing orders are not "evidentiary matters". They do not authorize a party to reach into records held outside the Court's possession or control, and then pull those records forward to have them considered on appeal. That is the kind of order that was at issue in *R. v. MacKay*, 2019 BCCA 101, a decision relied upon by the Crown in support of its position that sealing orders are governed by s. 683. Rather, anonymization and sealing orders seek to place limits on publication and access in respect of this Court's own records, ones that already form part of the appeal file and are being maintained for purposes of the appeal.
- [33] In my view, anonymization and sealing orders are governed by the Court's implicit (sometimes referred to as ancillary or residual) jurisdiction to control its own process and records. This is the position advanced by B.L. in support of a single justice having the authority to make these types of orders, and I agree.
- [34] This Court has previously recognized that as a statutory court, it has implicit jurisdiction to do certain things without the necessity of an express legislative provision to that effect, including exercising supervisory jurisdiction over its own process and records. See, for example, *R. v. Holland*, 2021 BCCA 184 at para. 18; *R. v. Moazami*, 2020 BCCA 350 at paras. 49-56; and *R. v. Tallio*, 2017 BCCA 252 at paras. 26-27.
- [35] In my view, the Court's power to control its own process and records falls outside of s. 683 of the Criminal Code, is complementary to that provision, and is not circumscribed by restrictive language. Consequently, it is a power that is not confined to a division of the Court and can be exercised by a single justice in a criminal appeal.
- [36] I appreciate that this conclusion is contrary to the Ontario Court of Appeal's decision in *R. v. Church of Scientology*, (1986) 25 C.C.C. (3d) 149, 1986 CanLII 4633 (Ont. C.A.), which held that an appellate court's power to seal a record to prevent the frustration of an appeal may be exercised only by a division. However, that case is dated and not binding on us, and I consider it to have been overtaken by subsequent jurisprudential discussion about the implicit authority of statutory courts to control their own process and records.
- [37] This authority was recently affirmed and explained by the Supreme Court of Canada in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 [Manitoba]:
- [37] Supervisory authority over the court record has long been recognized as a feature of the jurisdiction of all courts. Specifically, courts must ensure compliance with the robust and constitutionally-protected principle of court openness, while also remaining responsive to "competing important public interests" that may be put at risk by that openness.

- [62] It is best to note at the outset that appellate jurisdiction, such as that being exercised by the Court of Appeal in the proceeding below, must be grounded in legislation. In addition to any explicit grant, statutory and appellate courts should be understood to have the implicit power to control their own process and exercise other powers that are practically necessary to accomplish the role the law assigns them.
- [63] the supervisory jurisdiction over the court record is a feature of all courts and this is no less true of an appellate court. As part of the court's authority to control its own process, the power over the openness of proceedings and over the court record arises here by necessary implication from the legislative grant of the appellate court's adjudicative authority. As a matter of procedural necessity -- a publication ban or a sealing order may remain in place long after the substance of the appeal has been decided -- this jurisdiction continues even after the formal judgment on the merits of a given appeal has been entered unless ousted by legislation.
- [Emphasis added; internal references omitted.]
- See also *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 at 189, 1982 CanLII 14.
- [38] The Manitoba decision did not address the specific question before us, namely, whether a justice in chambers, as opposed to a division, has authority to make an order limiting the openness of court proceedings. However, the Supreme Court of Canada's accepted rationale for a statutory court's implicit jurisdiction to control its own process and records--practical and procedural necessity--is no less compelling at the interlocutory stage of an appeal than it is at a hearing of the merits before a division.
- [39] For purposes of this application, the parties directed our attention to three chambers decisions in which orders similar in nature to the ones sought by B.L. were considered by a single justice: *R. v. Klos*, 2022 BCCA 105 (Chambers); *R. v. Dean*, 102 B.C.A.C. 81, 1997 CanLII 2926 (Chambers); and *R. v. X.Y.* (22 December 2022), Vancouver Docket [redacted] (B.C.C.A.) (Chambers).
- [40] In the first of these cases, it does not appear jurisdiction over sealing orders was disputed or fully argued, including whether s. 30 of the Act is available in light of the restrictive wording of s. 683(3). The justice determined that he had authority to make the order pursuant to s. 30. However, the order was denied because the applicant failed to meet the applicable legal test. (See also, *R. v. Klos*, 2022 BCCA 233 at para. 14 (Chambers)).
- [41] In the second case, the chambers justice assumed without deciding that she had authority under s. 683(3) of the Criminal Code to address an order for a publication ban: at paras. 70, 94-95.
- [42] In the third case, X.Y., a sealing order appears to have been made without opposition by the federal Crown. As such, no jurisdictional impediment was raised for the justice's consideration.

- [43] None of these cases is binding on us as a court. In any event, jurisdiction to make the sought-after orders was neither clearly disputed, nor fully considered. In my view, the outcomes of these decisions are consistent with an exercise of implicit jurisdiction to control the Court's own process and records, and it was not necessary for the justices to rely on s. 683(3) of the Criminal Code.
- [44] To hold otherwise would leave justices in an untenable position when performing their appellate tasks under Part XXI of the Criminal Code. Restricting the Court's implicit jurisdiction to control its own process and records to a division would mean that every request for an anonymization order, a sealing order, a discretionary publication ban, or any other order that properly engages the Court's implicit authority in a criminal appeal, would have to be scheduled before a division, even at the earliest stages of the appeal proceedings, long before the appeal is ready for a review on the merits.
- [45] Furthermore, should the need for such an order arise in the midst of a chambers hearing or a case management conference (for example, to address an unanticipated claim of privilege), the chambers hearing or case management conference would need to be halted and adjourned to facilitate resolution of that issue by a division before it could proceed. Importantly, until the hearing before a division, there would be no way for the justice to protect privileged information or other competing interests that required an immediate response to prevent harm. As but one example, when an issue of informer privilege arises, every judge has a non-discretionary obligation to keep any information that might tend to identify the informer confidential: *Named Person v. Vancouver Sun*, 2007 SCC 43 at para. 26; *R. v. Basi*, 2009 SCC 52 at paras. 37-39. Taken to its logical conclusion, the Crown's position on the jurisdiction of a single justice to make a sealing order would prevent justices from meeting that obligation.
- [46] The request for an order that limits the openness of court proceedings could arise more than once within the context of a single criminal appeal, resulting in several divisions having to engage with the same appeal proceedings to determine the matter. In my view, the logistical complexities, attendant delay, and unnecessary use of judicial resources arising from this scenario would not be in the interests of the administration of justice.
- [47] In *R. v. Cunningham*, 2010 SCC 10, the Supreme Court of Canada described the implicit jurisdiction of statutory courts to control their own process and records as a practical necessity for ensuring that these courts can function as courts of law and achieve the objectives of their statutory grants of power: at paras. 18-20. Disallowing a justice in chambers to exercise this jurisdiction would arguably have the opposite effect.
- [48] Accordingly, I am of the view a single justice in a criminal appeal has the authority to make anonymization and sealing orders.
- [49] This Court has issued a practice directive entitled "Publication Bans, Sealing Orders, and Anonymization Orders" (December 2023), that applies to both civil and criminal appeals. The practice directive advises parties who seek a non-statutorily imposed publication ban,

anonymization order, or sealing order to bring that application before a chambers justice. I view the directive as consistent with the Court's implicit authority as a statutory court. The matter addressed there falls outside the scope of s. 683(3) of the Criminal Code and does not conflict, in any way, with Part XXI.

- [50] The Court also has a "Record and Courtroom Access Policy" (February 29, 2024), which directs parties who seek to have reasons for judgment initialized to apply to a chambers justice. I understand that this policy applies to both civil and criminal appeal files. The Record and Courtroom Access Policy gives meaningful effect to the Court's implicit powers to control its own process and records (see Moazami at paras. 4, 21-24, 56-59). In my view, it does not conflict, in any way, with Part XXI of the Criminal Code.

B. Whether an anonymization and sealing order is warranted

- [51] That brings me to the second of the two questions before us, namely, whether B.L. meets the test for an anonymization and sealing order.

Legal framework

- [52] Both of the orders sought by B.L. limit the openness of court proceedings. The anonymization order will prevent publication of his full name. The sealing order will prevent the public, including members of the media, from accessing affidavits (and related applications material) in the appeal record.
- [53] There is a three-pronged test that governs an application for these types of orders. The test is set out in *Sherman Estate v. Donovan*, 2021 SCC 25:
- [3] Where a discretionary court order limiting constitutionally-protected openness is sought -- for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order -- the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.
- [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order. Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, 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.

Only where all three of these prerequisites have been met can a discretionary limit on openness -- for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order -- properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments

[Emphasis added; internal references omitted.]

[54] There is no closed category of "competing interests" that may appropriately constitute an "important public interest" for the purpose of *Sherman Estate*. However, as explained by Justice Kasirer, writing for a unanimous Court:

[42] courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests. Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

[Internal references omitted.]

[55] The party that applies for an anonymization or sealing order bears the onus of justifying the order. As explained in *Mother 1 v. Solus Trust Company Limited*, 2021 BCCA 461:

[70] The risk said to necessitate a limiting order must be a "real and substantial risk." It must also be "well-grounded" in evidence: *R. v. Mentuck*, 2001 SCC 76 at paras. 34. The party that seeks to keep information from public access bears the burden of displacing the open court principle: *Mentuck* at para. 38. In *Sherman Estate*, the Court reiterated that applicants for a restrictive order cannot rely on "unsubstantiated claim[s]" (at para. 35). Instead, they must show that a real and substantial risk exists based on the facts of the case. They must also show that the risk cannot be adequately addressed without an order.

[Emphasis added.]

See also *A Lawyer v. The Law Society of British Columbia*, 2021 BCCA 284 (Chambers) at para. 35, wherein Justice Bennett described the onus borne by the party that seeks a sealing order this way: "The applicant must demonstrate that a superordinate public interest prevails over the public's interest in open court proceedings".

Positions of the parties

- [56] B.L. says he meets the Sherman Estate pre-requisites. He was young when he committed the offence at issue in this appeal. Considerable time has passed and critically, he has received a pardon. The pardon has enabled him to leave the offence behind, including building a successful career. He currently represents private and public companies in the finance and investments industries. These companies employ more than 50 individuals and generate significant revenue. Publication of his name and access to the affidavits he has filed could risk his losing clients, or result in B.L. being asked to leave his leadership positions in publicly traded companies. He could also be refused access to banking and investments and lose his business partners and associates because of reputational threat. He is the sole income earner for his family.
- [57] B.L. submits that a fully open appeal proceeding poses a "serious risk to the important public interests of rehabilitation, reputation, and dignity of a pardoned person". Moreover, there are no alternative measures that would sufficiently ameliorate that risk. Finally, he argues that the requested orders are consistent with the underlying purpose and objectives of the CRA.
- [58] The Crown is opposed to the orders. It says the "aspect of privacy" that B.L. seeks to protect "does not rise to the level of an important public interest". He seeks to protect information "that is not sufficiently sensitive or private such that court openness strikes at the individuals' biographical core in a manner that threatens their integrity".
- [59] B.L. invokes the objectives of the CRA in support of his application. However, the Crown says this invocation reflects an erroneous presupposition that the effect of a pardon is to erase or remove a prior conviction and its surrounding circumstances. Such is not the case. The criminal record continues to exist. It is simply held separate from other (non-pardoned) records and protected from disclosure by federal departments and agencies. Moreover, from the Crown's perspective, B.L. is asking for something that is not, in fact, consistent with the CRA. He wants to engage openly with his criminal record to advance an appeal, but prevent the public from knowing of his past conduct.

Analysis

- [60] Having considered the Sherman Estate framework in the particular context of this appeal, I would grant the requested orders.

- [61] First, I agree with B.L. that a fully open court proceeding would pose a serious risk to an important public interest, namely, the rehabilitative objectives underlying the CRA as supported by the legislation's non-disclosure provisions. This is the basis on which an anonymization and sealing order has been shown to be justified by B.L. But for the existence of the pardon and the mandated non-disclosure protection that accompanies a pardon, I would have reached a different conclusion.
- [62] It is plain from the preamble to the CRA in effect at the time B.L. was granted his pardon, that the pardon was intended to provide him with relief as an offender on the basis that he had "subsequently rehabilitated" himself. Unless B.L.'s pardon for the 2005 offence is revoked under the CRA or otherwise rendered inoperative, he is entitled to claim the benefit of that relief. The fact that he has initiated appeal proceedings does not change his status as someone who has received a pardon. No one has suggested that the mere fact of an appeal deprives him of the non-disclosure protection provided under s. 6 of the CRA.
- [63] As explained by Justice MacNaughton in *Chu v. Canada (Attorney General)*, 2017 BCSC 630 at para. 2, a pardon helps an "offender rehabilitate and reintegrate into society by reducing the social barriers and stigma caused by the existence of a criminal record". Non-disclosure of the criminal record logically plays an integral role in achieving those objectives.
- [64] Presumably, this is why law enforcement and other non-federal agencies that are not subject to the provisions of the CRA nonetheless take steps to respect the non-disclosure prohibition. This fact was specifically noted in *Chu*:
- [34] The CRA applies only to records kept within federal departments and agencies. However, once a record suspension has been ordered, it is the practice of the RCMP to notify all agencies who have contributed information to the subject's file and all federal government agencies who have received a copy of the subject's criminal file. Many provincial and municipal law enforcement agencies cooperate by restricting access to their records once they receive notification from the RCMP. For example, it is the policy of the B.C. Ministry of Justice to remove a record suspension file from the public record when the criminal registry receives notice of a suspension from federal authorities.
- [36] In summary, when individuals obtain a record suspension, they can expect that their prior convictions will not be disclosed or held against them except in very limited circumstances.
- [Emphasis added.]
- [65] When the Parole Board of Canada advised B.L. of his pardon, it told him that "many provincial, territorial and municipal agencies, when notified, choose to conform to the [CRA] by restricting the disclosure of the criminal record". Consistent with this statement, it is common ground that the records of B.L.'s convictions in the Provincial Court have been sealed or otherwise closed off to public access because of the pardon. Consequently, B.L. must apply to the Provincial Court and have the records of the 2005 and 2008 convictions "unsealed" before he can produce those records (or whatever remains of them), for use in

his appeals.

- [66] In my view, the fact that provincial and municipal agencies take steps to conform with the non-disclosure provisions of the CRA even though not statutorily mandated to do so, reflects a collective recognition of rehabilitation as an important public interest and the need to ensure that the rehabilitative objectives of the CRA, achieved in part through its non-disclosure provisions, receive meaningful effect. Indeed, in *R. v. Bissonnette*, 2022 SCC 23, the Court reaffirmed that the rehabilitation of convicted offenders is "one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world": at para. 48, quoting from *R. v. Lacasse*, 2015 SCC 64 at para. 4.
- [67] The Crown argues that the information B.L. seeks to protect does not go to his "biographical core", is neither intimate nor intensely personal, and if disclosed, will not unduly compromise his privacy, integrity, or dignity. The fact of a conviction, the nature of the conviction, and the surrounding circumstances, are pieces of information that are routinely disclosed in criminal courts and made known to the larger community, including on appeal. The Crown contends that in light of this contextual reality, the "aspect of [B.L.'s] privacy" that he wants kept from public view does not "rise to the level of an important public interest".
- [68] Respectfully, the Crown's position on whether B.L. is able to demonstrate an important public interest fails to account for the unique feature of a pardon and the non-disclosure protection afforded by the CRA. In my view, the existence of the pardon distinguishes B.L. from other appellants and properly informs the analysis under the first prong of the *Sherman Estate* test. This application is not about the protection of privacy, per se. It is about protecting a particular aspect of B.L.'s privacy that already finds protection elsewhere and importantly, is prohibited from disclosure for the specific purpose of supporting his ongoing rehabilitation and reintegration into society.
- [69] The Crown argues that in applying for an anonymization and sealing order, B.L. is asking for something "beyond what would otherwise flow from a pardon", and is "seek[ing] to erase his past and, to some degree, be able to deny that he was found guilty of committing a criminal offence".
- [70] I disagree. That may be his ultimate goal in seeking to have the 2005 conviction set aside or the sentence varied, but for present purposes, the application for an anonymization and sealing order is not inconsistent with the protection already afforded to B.L. under the CRA. He is asking that he not be publicly identified as someone with a criminal record, and that the details surrounding that record, his application for a pardon, and his rehabilitative efforts before and after the pardon, be sealed. I do not see any substantive inconsistency between the non-disclosure provided by the CRA and the orders sought by B.L. The information contained in his affidavits certainly extends beyond the mere fact of a criminal record. However, the affidavits focus on the existence of the criminal record, the existence of the pardon, the role the pardon has played and continues to play in B.L.'s personal circumstances, and the harms he says will arise in the event he loses the benefit of the

protection afforded by the CRA. The content of the affidavits is inextricably linked to the fact and purposes of the pardon and if disclosed, will expose his identity and circumstances as a pardoned offender.

- [71] Specific to the second prong of the Sherman Estate test, I also agree with B.L. that the orders sought by him are necessary to prevent a serious risk. I consider it self-evident that if B.L.'s full name is published and the details in the affidavits are made accessible to members of the public, including the media, the rehabilitative objectives of the CRA as facilitated through its non-disclosure provisions will be substantially impaired. B.L.'s affidavits provide a solid evidentiary basis for the serious risk he has identified. This is not an "unsubstantiated claim": Mother 1 at para. 70.
- [72] Finally, I appreciate that the open court principle "is part of the bedrock founding our judicial institutions and the rule of law": Moazami at para. 2. It is well-accepted that public access to the courts allows "public scrutiny of judicial processes and enhances public confidence in the justice system and an understanding of how justice is administered in Canada": Moazami at para. 2. This is why the test for interference with the open court principle is a stringent one and applicants for limiting orders must show a real and substantial risk to an important public interest that cannot be adequately addressed without an order: Mother 1 at para. 70; Sherman Estate at paras. 2-3.
- [73] However, in the exceptional circumstances of this case, I am satisfied that as a matter of proportionality, the benefits of the orders sought outweigh their negative effects.
- [74] B.L. is not asking for his appeal to be heard in camera, or for the whole of the appeal file to be sealed. Rather, he seeks anonymization of his name to protect his identity as a pardoned offender, and a sealing order limited to two affidavits and related application materials that contain detailed information directly relevant to his status and circumstances as a pardoned offender. The remainder of the information contained in the appeal file and all other developments in the case will be accessible and open to public view. Critically, the essence of the information B.L. seeks to protect is already protected from disclosure elsewhere. He appropriately seeks tailored orders that are intended to preserve and give meaningful effect to the non-disclosure provisions of the CRA, without unduly compromising the open court principle.
- [75] On balance, and as long as the pardon and non-disclosure protection under the CRA remain applicable to B.L., I consider the orders sought by him to be a proportionate limit in light of the demonstrated risk to an important public interest.

Disposition

- [76] For these reasons, I would hold that a single justice of this Court has implicit jurisdiction to grant anonymization and sealing orders in exercise of the justice's control over the Court's process and records.

- [77] I would grant B.L.'s application for an anonymization and sealing order for as long as his pardon remains in effect and the non-disclosure provisions of the CRA are properly available to him.
- [78] To give effect to the orders, I would direct that, subject to a further order of this Court:
- a) the style of cause in these proceedings be amended to "Rex v. B.L.";
 - b) the appellant be identified as "B.L." in all documents filed in these proceedings;
 - c) B.L.'s affidavits affirmed on August 14, 2023 and November 13, 2023 be sealed, as well as all application materials filed for purposes of deciding the entitlement to an anonymization and sealing order; and,
 - d) B.L. has leave to replace the notice of appeal from conviction, application for leave to appeal against sentence, and application for an extension of time with redacted versions, consistent with the terms of the anonymization and sealing orders.
- [79] I express no opinion on the merits of the application for an extension of time to proceed with the appeal or, if an extension is granted, the merits of the appeal from conviction and sentence.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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