

With Sherman decision, the Supreme Court sets a high bar for restrictions on court proceedings

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The Supreme Court of Canada building in Ottawa.
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In unsealing the estate files of slain billionaires Barry and Honey Sherman on Friday, the Supreme Court of Canada also clarified the type of privacy interests that could warrant restrictions on court proceedings.

“The court unanimously clarified that it is not enough to simply call out ‘privacy’ and get a sealing order or a publication ban,” said the Star’s lawyer, Iris Fischer. “That is not going to do it.”

The information in question must be sensitive enough that it would constitute an “affront to the affected person’s dignity” if disseminated, which the court said is a “narrower dimension of privacy,” according to Friday’s unanimous ruling.

Fischer called it a “high bar” to meet in order to deviate from the principle of open courts.

To prove a serious risk to the public interest in privacy, the information “must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals,” wrote Justice Nicholas Kasirer on behalf of the court.

“In other words, the more personal and confidential and highly sensitive the information is, the more likely it could justify a restriction on access, and constitute a violation of personal dignity if the information is published,” said Iain MacKinnon, president of the Canadian Media Lawyers Association.

Anyone seeking a restriction such as a sealing order in a court proceeding must show that there is a “serious risk of harm to a public interest” that cannot otherwise be addressed; then, a judge must balance whether the benefits of the restriction outweigh the benefits of openness.

In arguing last year to keep the estate files sealed, the Sherman estate trustees had argued they had a “reasonable expectation of privacy,” which their lawyers said should be enough to meet the first part of the test for a sealing order.

But the bar has to be higher than that, the top court found on Friday. “The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences,” Kasirer wrote.

The Supreme Court “has never gone to this extent before in explaining exactly what type of privacy interests are sufficient to tip the balance in favour of restricting access and limiting the open court principle,” MacKinnon said.