



EVIDENCE

Joint motion by respondents for orders to: prohibit publication of evidence, submissions to be presented during public part of underlying *Canada Evidence Act*, R.S.C., 1985, c. C-5, s. 38 application; prohibit public access to documents Public Prosecution Service of Canada (PPSC) intending to file in connection with public hearing — Respondent Cameron Jay Otis arrested, charged in relation to his alleged conduct while Director General of RCMP's National Intelligence Coordination Center — Publication ban ordered pursuant to Criminal Code, R.S.C., 1985, c. C-46, s. 517(1) — Crown electing to proceed by way of direct indictment — S. 38 application in this case to proceed initially in public hearing with submissions on application of *Canada (Attorney General) v. Ribic*, 2003 FCA 246, [2005] 1 F.C.R. 33 test by PPSC, followed by private hearings — Present motion relating only to public hearing — Moving parties accepting that public permitted to attend, observe public hearing but seeking time-limited ban on publication of submissions made by PPSC, any information or evidence presented in that hearing — Also seeking order prohibiting public access to any documents filed by PPSC in connection with that hearing in order to ensure that those documents do not enter into public circulation prior to conclusion of Mr. Ortis's trial — What is source of Court's authority to make orders requested? — Distinct sources existing for authority to make orders in relation to public proceeding under s. 38 — Publication ban over otherwise public information not sort of protective order contemplated by s. 38.12(1) — Ban on publication of Court's proceedings can be ordered in exercise of Court's power to control its own process, to function as court of law — *Federal Courts Rules*, SOR/98-106, r. 151 providing authority to make confidentiality order with respect to Court records — Order under this provision meeting needs demonstrated by moving parties — What test should Court apply in determining whether orders should be made? — Test that must be met by party asking court to exercise discretion in way that limits open court principle recast in *Sherman Estate v. Donovan*, 2021 SCC 25 — In order to succeed, person must establish that: (1) court openness posing serious risk to important public interest; (2) order sought necessary to prevent serious risk to identified interest because reasonably alternative measures will not prevent this risk; (3) as matter of proportionality, benefits of order outweighing its negative effects — Moving parties establishing all three elements of *Sherman Estate* test — Fairness of Mr. Ortis's trial important public interest — Publication of information, evidence presented in public part of s. 38 application before conclusion of Mr. Ortis's trial would pose serious risk to fairness of that trial — Critical question at second stage of test whether reasonably alternative measures will prevent risks identified in preceding section — Measures used to protect fairness, integrity of criminal trial from adverse effects of pre-trial publicity, including change of venue, challenges for cause not capable of preventing risks — Finally, benefits of orders sought outweighing their negative effects — Benefits of open court principle in present case not frustrated entirely but only deferred — Orders requested would make significant contributions to protecting Mr. Ortis's right to fair trial — Important similarities between present case, *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721 — Motion allowed.

CANADA (ATTORNEY GENERAL) V. ORTIS (DES-5-20, 2021 FC 737, Norris J., reasons for order dated July 13, 2021, 22 pp.)