



SUPREME COURT OF CANADA

CITATION: Canadian Broadcasting
Corp. v. Manitoba, 2021 SCC 33

APPEAL HEARD: March 17, 2021

JUDGMENT RENDERED:

September 24, 2021

DOCKET: 38992

BETWEEN:

Canadian Broadcasting Corporation
Appellant

and

**Her Majesty The Queen, Stanley Frank Ostrowski, 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 Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

**REASONS FOR
JUDGMENT:**
(paras. 1 to 107)

Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis,
Côté, Brown, Rowe and Martin JJ. concurring)

DISSENTING REASONS: Abella J.
(paras. 108 to 131)

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Canadian Broadcasting Corporation

Appellant

v.

**Her Majesty The Queen,
Stanley Frank Ostrowski,
B.B., spouse of the late M.D., and
J.D., in his capacity as executor of the estate of the late M.D.**

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**Attorney General of Ontario,
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Centre for Free Expression,
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Ad Idem/Canadian Media Lawyers Association**

Interveners

Indexed as: Canadian Broadcasting Corp. v. Manitoba

2021 SCC 33

File No.: 38992.

2021: March 17; 2021: September 24.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin
and Kasirer JJ.

Courts — Jurisdiction — Publication bans — Variation — Criminal proceedings — Court of Appeal ordering indefinite publication ban on affidavit filed in criminal proceedings before it — Motion brought by media representative after judgment on merits of proceedings rendered asking Court of Appeal to set aside publication ban — Court of Appeal declining to hear motion on basis that jurisdiction exhausted — Whether court retains jurisdiction to reconsider publication ban orders and other such ancillary orders after merits of criminal proceedings decided.

An affidavit filed in a criminal matter before the Court of Appeal had been subject to a publication ban pending a decision as to its admissibility as new evidence. In its November 2018 reasons allowing the appeal on the merits, the Court of Appeal dismissed the motion for new evidence but ordered that the publication ban remain in effect indefinitely. In May 2019, the CBC brought a motion before the Court of Appeal to have the publication ban set aside, arguing that having access to the affidavit would shed light on the criminal matter before the Court of Appeal and the court's conclusion on the merits that a miscarriage of justice had occurred at trial.

The Court of Appeal declined to consider the CBC's motion, citing its rule of practice against rehearings and the doctrine of *functus officio*. The court reasoned that its jurisdiction was exhausted once it had decided the merits of the case and entered its formal judgment disposing of the appeal. It concluded that it had no authority to hear the motion. The CBC applied for and was granted leave to appeal to the Court

from both the Court of Appeal’s 2019 decision refusing to reconsider the publication ban (“2019 Jurisdiction Judgment”) and the Court of Appeal’s 2018 decision ordering the indefinite publication ban (“2018 Publication Ban Judgment”).

Held (Abella J. dissenting): The appeal from the 2019 Jurisdiction Judgment should be allowed and the matter remanded to the Court of Appeal. The appeal from the 2018 Publication Ban Judgment should be adjourned *sine die*.

Per Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and **Kasirer** JJ.: The Court of Appeal had jurisdiction to consider the CBC’s motion to set aside the publication ban. While the court could not rehear the appeal on the merits and while the doctrine of *functus officio* precluded it from reconsidering the substance of the appeal, the court retained the authority to supervise access to the record of its own proceeding, which allowed it to ensure compliance with the constitutionally-protected open court principle and the protection of other important public interests against which it must be weighed. The matter should be remanded to the Court of Appeal, as it is best placed to decide the CBC’s motion and the discretionary and fact-specific issues raised. It would be inappropriate for the Court to decide the CBC’s appeal from the 2018 Publication Ban Judgment before the Court of Appeal has had a chance to consider the CBC’s motion to have the publication ban set aside.

According to the rule of *functus officio*, a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that

rendered that decision. A court loses jurisdiction once the formal judgment has been entered. This rule serves goals of finality and of an orderly appellate procedure. If lower courts could continuously reconsider their own decisions, litigants would be denied a reliable basis from which to launch an appeal to a higher court.

That said, it is important to distinguish between jurisdiction over the merits lost by operation of the doctrine of *functus officio* and jurisdiction that exists to supervise the court record. Even when a court has lost jurisdiction over the merits of a matter as a result of having entered its formal judgment, it retains jurisdiction to control its court record with respect to proceedings generally understood to be an ancillary but independent matter. This power is part of a court's authority to control its own process and arises by necessary implication from the legislative grant of a court's adjudicative authority. It is anchored in the vital public policy favouring public access to the workings of the courts. Important decisions about the openness of the court record, such as rendering, varying or vacating publication bans and sealing orders, may need to be taken after the proceeding on the merits is over. Recognizing that a court's jurisdiction to control its record survives the end of the underlying proceeding is not inconsistent with the purposes of finality and stability of judgments as the doctrine of *functus officio* was never intended to restrict the ability of lower courts to control their own files.

That courts retain supervisory jurisdiction over their court records is not to say that once decisions concerning court openness have been made they are open to

reconsideration at any time or for any reason. A publication ban or sealing order is susceptible of reconsideration by the issuing court on two narrow grounds and regardless of whether formalized in an order or not.

First, a court may vary or set aside a publication ban or sealing order it has made on timely motion by an affected person, such as the media, who was not given notice of the making of that order and to whom it is appropriate to grant standing for this purpose. Regarding publication bans in criminal matters, standing should be thought of as a matter of a court's discretion. The media should generally have standing to challenge an order that threatens the open court principle where they are able to show they will make submissions that were not considered and that could have affected the result. A court does retain residual discretion to deny standing where hearing the motion would not be in the interests of justice, such as where it would unduly harm the parties or duplicate argument already before the court. As to delay, a moving party is expected to take prompt action to challenge such an order once it has become aware it exists. In the absence of legislative direction, a court must be guided by the purpose of the rule and the circumstances of each case. The task is a contextual balancing of finality and timely justice against the importance of the matter being heard on the merits. This determination is inherently tied to the facts of each particular case and the nature of the issue raised.

Second, a court may vary or set aside a publication ban or sealing order where the circumstances relating to the making of the order have materially changed.

The moving party must establish both that a change of circumstances has occurred and that the change, if known at the time of the initial order, would likely have resulted in an order on different terms. The correctness of the initial order is presumed and is not relevant to the existence of a material change of circumstances.

Instances in which a court may reconsider a publication ban or sealing order are distinct from an appeal or application for *certiorari* made to a higher court from such decisions, as the original court is not being asked to reconsider its decision because it is wrongly decided. Finally, the general principles underlying the two grounds for reconsideration can be displaced by legislation, such as applicable rules of court.

In the present case, the Court of Appeal erred in concluding that applicable legislation, such as its rules of court procedure, or the doctrine of *functus officio* deprived it of jurisdiction to consider the CBC's motion to set aside the publication ban. The Court of Appeal retained jurisdiction to oversee its record even after the certificate of decision in the underlying proceeding on the merits was entered. That the Court of Appeal had jurisdiction to consider the CBC's motion does not mean, however, that the CBC is entitled to the relief it sought. The availability of relief turns on the proper application of the law to the facts, a determination that should be made by the Court of Appeal. Since the CBC has not established a material change of circumstances, it will therefore have to rely on the Court of Appeal's power to reconsider an order on the basis that it was made without notice to an affected party.

The impugned order was made of the Court of Appeal's own accord at the oral hearing and then continued indefinitely. The court heard no submissions on point and provided no prior notice to anyone, including the media, notably the CBC who learned of the impugned ban shortly after the reasons were released. The Court of Appeal will have to determine whether the CBC has standing to challenge the relevant order and whether CBC's motion was timely. Furthermore, any discretionary limits on access to and publication of the contents of the court record must be understood in reference to the test for discretionary limits on court openness: a court can order discretionary limits on openness only where (1) openness poses a serious risk to an important public interest, (2) the order sought is necessary to prevent that risk and (3) the benefits of the order outweigh its negative effects.

Per Abella J. (dissenting): The appeals should be dismissed. The CBC is not entitled to reconsideration of the publication ban as a result of its undue and unjustified delay.

The media is a crucial voice in protecting and promoting the openness of courts, and their right to challenge publication bans is undisputed. But once the underlying proceedings are over, the doctrine of *functus officio* means as a general rule that a final decision cannot be reconsidered by the court that rendered the decision. Although the application of *functus officio* is less formalistic and more flexible in respect of ancillary orders and publication bans, and circumscribed avenues must be maintained through which the media can ask a court to reconsider a publication ban

after the underlying proceedings are over, the rationales underlying this doctrine show that it has a role to play in respect of publication ban orders.

Finality matters. The parties are entitled to move on with their lives and to be protected from the psychological and financial costs of being dragged back into the justice system when a case is over. A reconsideration of a publication ban must therefore be sought in a timely manner, and a publication ban should not generally be reconsidered after the main proceedings have ended unless there is a sound basis for believing the media's application is in the public interest and could reasonably lead to a different result. It is a balancing exercise, not a hierarchical grid, between the interests of finality and the interests in support of the open court principle. Courts issuing publication bans are expected to consider the importance of the open court principle, even in the absence of a media representative making submissions, and there is no reason to assume that did not happen in this case.

In the present case, the CBC is unable to establish a material change in circumstances. The only bases under which it could move for reconsideration of the publication ban are by showing that the ban was issued without notice, that its submissions could make a material difference to the outcome, and that it moved for reconsideration in a timely manner. None of these conditions has been met.

First, the publication ban was not issued without notice. If the media is present in the courtroom when a publication ban is issued, as was the CBC, it follows that it knows of its existence. Second, the CBC has not discharged its burden of

showing that its proposed submissions could make a material, or even any difference in the outcome.

Third, and more significantly, the CBC's failure to act in a timely manner is determinative. An unexplained six-month delay for filing a motion to have a publication ban reconsidered is inordinately long. Under no definition of "due dispatch" can this delay be justified, particularly since the CBC was fully aware of the ban from the outset of the proceedings. The delay in this case causes acute harm to the parties, who reasonably expected that their privacy and dignity interests were protected by the finality of the proceedings.

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By Kasirer J.

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[2002] 2 S.C.R. 857; *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257; *Ayangma v. French School Board*, 2011 PECA 3, 306 Nfld. & P.E.I.R. 103; *GEA Refrigeration Canada Inc. v. Chang*, 2020 BCCA 361, 43 B.C.L.R. (6th) 330; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65; *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *R. v. Wagner*, 2017 ONSC 6603; *R. v. Henry*, 2012 BCCA 374, 327 B.C.A.C. 190; *In re St. Nazaire Co.* (1879), 12 Ch. D. 88; *Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219; *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *Dickie v. Woodworth* (1883), 8 S.C.R. 192; *Hollinger Inc. v. The Ravelston Corp.*, 2008 ONCA 207, 89 O.R. (3d) 721; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; *R. v. White*, 2008 ABCA 294, 93 Alta. L.R. (4th) 239, aff'd *Toronto Star Newspaper Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *Ivandaeva Total Image Salon Inc. v. Hlembizky* (2003), 63 O.R. (3d) 769; *Canadian Transportation Accident Investigation and Safety Board v. Canadian Press* (2000), 184 N.S.R. (2d) 159; *9095-7267 Québec inc. v. Caisse populaire Ste-Thérèse-de-Blainville*, 2001 CanLII 14878; *Attorney General of Ontario v. 15 Johnswood Crescent*, 2009 CanLII 50751; *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 87 O.R. (3d) 660; *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67; *Toronto Standard Condominium Corporation No. 2058 v. Cresford Developments Inc.*, 2019 ONSC 801, 97 C.L.R. (4th) 306; *1202600 Ontario Inc. v.*

Jacob, 2012 ONSC 361; 585430 *Alberta Ltd. v. Trans Canada Leasing Inc.*, 2005 MBQB 220, 196 Man. R. (2d) 191; *Jane Doe v. Manitoba*, 2005 MBCA 57, 192 Man. R. (2d) 309; *M. (A.) v. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *R. v. Vice Media Canada Inc.*, 2018 SCC 53, [2018] 3 S.C.R. 374; *British Columbia v. BCTF*, 2015 BCCA 185, 75 B.C.L.R. (5th) 257; *Morin v. R.* (1997), 32 O.R. (3d) 265; *R. v. B. (H.)*, 2016 ONCA 953, 345 C.C.C. (3d) 206; *R. v. Le*, 2011 MBCA 83, 270 Man. R. (2d) 82; *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775; *Droit de la famille — 132380*, 2013 QCCA 1504, 37 R.F.L. (7th) 1; *R. v. Baltovitch* (2000), 47 O.R. (3d) 761; *R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385; *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331; *Lochner v. Ontario Civilian Police Commission*, 2020 ONCA 720; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. R.*, 2010 ONCA 726, 102 O.R. (3d) 673; *Aboriginal Peoples Television Network v. Alberta (Attorney General)*, 2018 ABCA 133, 70 Alta. L.R. (6th) 246; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Secure 2013 Group Inc. v. Tiger Calcium Services Inc.*, 2017 ABCA 316, 58 Alta. L.R. (6th) 209; *Canadian Planning and Design Consultants Inc. v. Libya (State)*, 2015 ONCA 661, 340 O.A.C. 98; *Gray v. Gray*, 2017 ONCA 100, 137 O.R. (3d) 65; *MK Engineering Inc. v. Assn. of Professional Engineers*

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By Abella J. (dissenting)

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APPEAL from a judgment of the Manitoba Court of Appeal (Beard, Burnett and Pfuetzner JJ.A.), 2019 MBCA 122 (*sub nom. R. v. Ostrowski*), [2019] M.J. No. 334 (QL), 2019 CarswellMan 923 (WL Can.), dismissing a motion to set aside a publication ban. Appeal allowed, Abella J. dissenting.

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 Can.), ordering

inter alia that a publication ban remain in effect. Appeal adjourned *sine die*, Abella J. dissenting.

Jonathan B. Kroft and *Sean A. Moreman*, for the appellant.

Michael Bodner and *Denis Guénette*, for the respondent Her Majesty The Queen.

Harvey T. Strosberg, Q.C., and *James Lockyer*, for the respondent Stanley Frank Ostrowski.

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 A. Ruzicka, for the intervener the Attorney General of British Columbia.

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

Tess Layton, for the intervener Ad Idem/Canadian Media Lawyers Association.

The judgment of Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ. was delivered by

KASIRER J. —

I. Overview

[1] The principal issue in these appeals concerns a court’s jurisdiction to render, vary or vacate orders — sealing orders, publication bans and the like — that limit the open court principle. The question is whether a court retains jurisdiction over these ancillary matters after it has decided the merits of the case and has entered its formal judgment. Does the doctrine of *functus officio* — the notion that once a court has performed its function, it has exhausted its authority — preclude that court from revisiting a publication ban that it had ordered or a sealing order put in place in the course of criminal proceedings?

[2] An affidavit filed in a criminal matter before the Court of Appeal of Manitoba had been held under seal and subject to a publication ban pending a decision as to its admissibility as new evidence. In its reasons allowing the appeal on the merits,

the court dismissed the motion for new evidence because it was not relevant to the issue at hand. It nevertheless ordered that the publication ban remain in place indefinitely.

[3] Relying on the open court principle and the constitutionally-protected right of freedom of the press with which it is bound up, the appellant Canadian Broadcasting Corporation (“CBC”) brought a motion in which it sought access to the affidavit and asked to have the publication ban set aside. It had been covering the proceedings as a representative of the media. Lifting the publication ban, said the CBC, would shed light on the principal matter before the Court of Appeal and its conclusion on the merits that a miscarriage of justice had occurred at trial. The Crown opposed the motion to disturb the ban, however, arguing that the affidavit was not relevant and the Court of Appeal had no continuing authority over the matter. Family members of a deceased person mentioned in the affidavit under seal also opposed lifting the ban since, they said, doing so would result in an unjustifiable violation of their privacy.

[4] The Court of Appeal declined to consider the CBC’s motion, citing its rule of practice against rehearings and the doctrine of *functus officio*. The court reasoned that its jurisdiction was exhausted once it had decided the merits of the case and entered its formal judgment disposing of the appeal. It concluded that it had no authority to hear the motion and said the CBC should turn to this Court, on appeal, to seek redress.

[5] In point of fact, this Court is seized of two appeals. In the first, leave was granted from the Court of Appeal’s refusal to hear the motion in which it was asked to reconsider its own publication ban and, in addition, to grant the CBC access to the

affidavit. This first appeal raises preliminary issues about the Court of Appeal's powers to reconsider such decisions after it had entered the formal order on the merits of the miscarriage of justice case, including consideration of the doctrine of *functus officio*. In the second appeal for which leave was also granted, the CBC challenges the publication ban directly. This second appeal is taken directly from the publication ban itself, and unlike the first appeal, it does not concern the order granting access to the affidavit also sought in the CBC's motion. It raises the sole issue of whether the Court of Appeal was correct to order the final, indefinite publication ban made in the judgment which disposed of the merits of the appeal.

[6] As to the first appeal, and so said with great respect, I do not share the Court of Appeal's view that it was without jurisdiction to consider the motion brought by the CBC. It is true that, in the exercise of its appellate authority, the Court of Appeal could not rehear the appeal on the merits and that the doctrine of *functus officio* precludes it from reconsidering the substance of the appeal. But after a court loses jurisdiction over the merits, it generally retains the authority to supervise access to the record of its own proceedings. Even after the formal judgment on the merits is filed, this ongoing authority allows the court to ensure compliance with the constitutionally-protected open court principle and the protection of other important public interests against which it must be weighed. Indeed, it is critical to upholding the responsibility all courts have to manage their records in accordance with the *Canadian Charter of Rights and Freedoms* and the proper administration of justice. As ancillary court openness issues have no bearing on the judgments on the merits, there was no

reason for the Court of Appeal to tie its own hands in service of the finality of the underlying judgment that was not at risk.

[7] Moreover, the Court of Appeal had ordered the continuing publication ban in its judgment on the merits without a hearing to determine whether the open court principle should be limited in the circumstances. The Court of Appeal ought to have considered whether it was appropriate to set aside its publication ban on motion by the CBC in these circumstances.

[8] For the reasons that follow, to dispose of the first appeal I propose that the matter should be remanded to the Court of Appeal to decide the CBC's motion. That court is best placed to decide the discretionary and fact-specific issues raised, including whether the CBC should be granted standing to challenge the publication ban, whether the motion was unreasonably delayed such that it is not in the interests of justice to hear it and whether the lifting of the publication ban is justified here taking into account this Court's decision in *Sherman Estate v. Donovan*, 2021 SCC 25.

[9] Given that I propose to dispose of the first appeal by returning the matter to the Court of Appeal to decide the CBC's motion, in my respectful view it would be inappropriate for this Court to decide the second appeal challenging the ban directly now, before the Court of Appeal has had a chance to reconsider the matter. Accordingly, I would adjourn the second appeal *sine die*.

II. Background and Proceedings Below

A. *The Miscarriage of Justice Reference*

[10] Following a jury trial in 1987, Stanley Ostrowski was convicted of first degree murder. He appealed the conviction unsuccessfully to the Court of Appeal and later this Court (*R. v. Ostrowski and Correia* (1989), 57 Man. R. (2d) 255, aff'd *R. v. Ostrowski*, [1990] 2 S.C.R. 82).

[11] In 2014, the Minister of Justice referred the matter to the Court of Appeal pursuant to ss. 696.1 and 696.3(3)(a)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46. These provisions allow matters to be referred back to the Court of Appeal in circumstances where, in the Minister's view, there is a reasonable basis to conclude that a miscarriage of justice has likely occurred.

[12] Certain new evidence relating to the conviction at trial in 1987 was proposed for consideration by the Court of Appeal upon joint motion of the Crown and Mr. Ostrowski. Unusually, this included the live testimony of 12 witnesses heard before a panel of appellate justices. The Crown conceded this evidence was admissible, that it proved a miscarriage of justice had occurred and, accordingly, that the 1987 conviction should be set aside. The concession was based on evidence pointing to the existence of a deal made between prosecutors and a witness whose testimony had linked Mr. Ostrowski to the murder. The evidence had not been disclosed to Mr. Ostrowski at trial, violating his right to make full answer and defence.

[13] The parties did not agree on the appropriate remedy for the miscarriage of justice. The Crown sought a new trial order and a judicial stay of those proceedings, while Mr. Ostrowski asked that an acquittal be entered by the Court of Appeal.

[14] Mr. Ostrowski also sought to introduce further new evidence, specifically an affidavit sworn by his lawyer, Richard Posner (“Posner affidavit”). The affidavit contained details of certain events that had occurred after one of the 12 witnesses, M.D., had testified before the Court of Appeal in this matter. Unlike the material relating to the other motion for new evidence, the Crown did not consent to the Posner affidavit being admitted into evidence.

[15] The Court of Appeal heard oral argument from the parties on May 28, 2018, including submissions regarding the admissibility of the Posner affidavit. The affidavit was sealed, pursuant to the *Court of Appeal Rules*, Man. Reg. 555/88R, relating to motions for new evidence, but the Court of Appeal nevertheless reviewed it on the consent of the parties (r. 21(4)). It also ordered a publication ban respecting this material at the outset of the May 28 hearing:

THE COURT: . . . [I]n our view, unless counsel feel otherwise, there must be a publication ban. There’s no point in having the sealed material to the extent that it’s referred to in argument without a publication ban. So there will be a publication ban as well unless counsel wish to address that?

Ban on Publication

(R.R. (Crown), at p. 137)

[16] As it would later concede before the Court of Appeal, the CBC was reporting on the proceedings, and its journalists could have attended any of the hearings, including the May 28 hearing.

B. *The 2018 Publication Ban Judgment (2018 MBCA 125, 369 C.C.C. (3d) 139 — Beard, Burnett and Pfuetzner J.J.A.)*

[17] The Court of Appeal found a miscarriage of justice as a result of the non-disclosure based on material revealed by the first motion for new evidence, accepting the concession of the Crown noted above. This was sufficient to conclude the conviction should be set aside. The Court of Appeal ultimately quashed the conviction, ordered a new trial and entered a stay of any further proceedings, and continued the publication ban indefinitely (“2018 Publication Ban Judgment”).

[18] The court declined to admit the Posner affidavit as further new evidence, because it concluded that it was not relevant to the determination of the only live issue of the appropriate remedy for Mr. Ostrowski. Instead, the evidence went to “the issue of whether there was Crown misbehaviour, which was relevant to whether there had been a miscarriage of justice” (para. 82). Beard J.A. wrote the following in concluding: “I am of the view that the evidence is not relevant to the issues to be determined and the motion should be dismissed. I would order that the publication ban regarding this evidence should remain in effect” (*ibid.*).

[19] For our purposes, it bears emphasizing that the publication ban that the Court of Appeal had ordered at the hearing was, in para. 82 of the court’s reasons on the merits, ordered to “remain in effect.” This was done without either a motion to that end or particularized pleadings on the appropriateness of the continuing order in light of the open court principle. The Posner affidavit had been sealed pursuant to a rule of court during the proceedings on appeal (*Court of Appeal Rules*, r. 21(4)). That sealing order is not mentioned in the 2018 Publication Ban Judgment.

[20] A formal certificate of decision of this judgment was entered in January 2019, recording the orders on the appeal and the two new evidence motions. The certificate made no reference to a sealing order or a publication ban.

C. *The 2019 Jurisdiction Judgment (2019 MBCA 122 — Beard, Burnett and Pfuetzner JJ.A.)*

[21] Following the disposition of the appeal on the miscarriage of justice, the CBC petitioned the Court of Appeal to obtain access to the Posner affidavit and to ask the court to set aside the publication ban referred to in the 2018 Publication Ban Judgment. The CBC’s motion was brought in May 2019, following the release of reasons on the merits of Mr. Ostrowski’s appeal and the filing of the formal judgment in that matter.

[22] The CBC had contacted the Registrar at the Court of Appeal seeking access to the Posner affidavit. Evidence suggests the CBC received word from the Court of

Appeal’s media relations officer alerting it to the existence of the publication ban in the days following the release of the 2018 reasons on the merits of Mr. Ostrowski’s appeal. However, it was over five months later that the CBC filed the above-mentioned motion.

[23] The CBC relied on s. 2(b) of the *Charter* and alleged that the evidence did not support “any continued restriction on the right of the media and the public to access and report upon the full record of these [p]roceedings” (A.R., at p. 75). In its motion brief, the CBC emphasized its purpose to render transparent the circumstances that led to the miscarriage of justice, arguing that it was of the utmost importance that material in the Posner affidavit concerning M.D., one of the 12 witnesses at the miscarriage of justice proceeding, be open to public scrutiny. In an affidavit filed in support of the motion, the CBC’s Director of Investigative Journalism: Regions observed that there had been no formal motion filed requesting a publication ban of the material and there was no notice to the public or the media that a ban was being sought.

[24] M.D.’s spouse, B.B., and the executor of his estate, J.D. (collectively, “interested parties”) opposed the CBC’s motion on jurisdictional grounds, as did the Crown. Noting that the certificate of decision had already been entered, the interested parties and the Crown argued that the Court of Appeal had no authority to decide the motion by reason of the rule against rehearing in the *Court of Appeal Rules*.

[25] The Court of Appeal dismissed the motion, citing a lack of jurisdiction (“2019 Jurisdiction Judgment”). It explained that the CBC was seeking a rehearing of a publication ban order made as part of the final disposition of Mr. Ostrowski’s appeal.

“[N]o rehearing of an appeal, or any issue dealt with on an appeal, can occur once the certificate of decision has been entered”, wrote Pfuetzner J.A. for the court, relying on r. 46.2 of the *Court of Appeal Rules* and the common law doctrine of *functus officio* (para. 17 (CanLII)). The certificate had been entered well before the motion was brought. The fact that the certificate did not mention the publication ban was held not to be determinative because it was “subsidiary” to the ruling on the new evidence motion and the final disposition of the appeal. It was further barred by r. 46.2(12), which provides a motion cannot be reheard. The Court of Appeal concluded that the “proper route for a third party . . . to challenge a publication ban issued by a superior court (including one issued by an appellate court) is to seek leave to appeal to the Supreme Court of Canada” (para. 21). It dismissed the motion on this jurisdictional basis alone.

III. Issues

[26] As is plain from the CBC’s two applications seeking leave, the terms of the leave judgment and the arguments of the parties before us, this matter raises two distinct appeals. The CBC is appealing both from the 2019 Jurisdiction Judgment dismissing the motion for reconsideration, and from the 2018 Publication Ban Judgment, which made the indefinite publication ban at issue in this case.

[27] In these two appeals, the CBC seeks three orders from this Court. First, the CBC asks for an order setting aside the 2019 Jurisdiction Judgment. It argues the Court of Appeal erred in concluding it had no jurisdiction to hear its motion and should have

addressed the issues of whether to reconsider the publication ban and of whether the public and the press have the right to access the Posner affidavit. Notably, the CBC argues that neither the rule against rehearings in the *Court of Appeal Rules* nor the doctrine of *functus officio* deprived the Court of Appeal of jurisdiction to consider the motion based in constitutional principles of court openness. It says that the publication ban could be reconsidered on the basis of a change in circumstances or because, as an affected party, it did not have notice of the making of this order.

[28] The CBC also asks this Court for a second order setting aside the continuing publication ban in the 2018 Publication Ban Judgment and a third giving it access to the Posner affidavit as part of the court record. It argues the open court principle applies to material that is tendered as new evidence even if, at the end of the day, it is not admitted. In this instance, it says the publication ban fails the test for discretionary limits on this principle set forth in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442. It contends further that the public is legally entitled to access the Posner affidavit because the applicable rules do not provide for continued sealing of this material. Mr. Ostrowski adopts the CBC's position and adds that the orders of the Court of Appeal preclude the proper accountability of public officials whose actions he alleges contributed to his wrongful conviction.

[29] The Crown takes the position that the Court of Appeal was right to conclude that it had no jurisdiction to consider the CBC's motion. The Crown says,

however, that if the Court of Appeal had authority to consider these issues, this Court does not have jurisdiction with respect to the publication ban and, if it does, it should decline to exercise its authority. Should this Court proceed to consider the merits, the Crown's position is that the Court of Appeal's decision to impose a continuing publication ban was correct, even if it might have given more fulsome reasons. The material in the Posner affidavit is deeply personal and speaks to intimate details about M.D. that would re-traumatize the family, such that a discretionary limit on court openness was justified here. Similarly, the interested parties argue that the limits on court openness are necessary to protect the privacy of M.D.'s family and that the limit is justified given the inadmissible, irrelevant and unreliable nature of the proposed new evidence.

[30] The parties raise a broad series of questions before this Court bearing on jurisdiction over and the appropriateness of a publication ban or sealing order in the circumstances. It is sufficient to answer the following questions to dispose of this matter:

1. Did the Court of Appeal err in concluding it had no jurisdiction to consider the CBC's motion to reconsider the publication ban and gain access to the Posner affidavit?
2. Should the matter be remanded to the Court of Appeal to hear the merits of that motion?

[31] For the reasons that follow I am respectfully of the view, in the first appeal from the 2019 Jurisdiction Judgment, that the Court of Appeal did err on the issue of jurisdiction and that as a result the matter should be remanded to that court. This ends the analysis. The second appeal from the 2018 Publication Ban Judgment would best not proceed until the Court of Appeal decides the CBC’s motion.

IV. Analysis

A. *Jurisdiction to Make, Vary and Set Aside Orders Concerning Court Openness*

(1) Supervisory Jurisdiction Over the Court Record Survives Entering a Judgment on the Merits

[32] In concluding that it lacked jurisdiction to vary or set aside the relevant orders concerning court openness, the Court of Appeal relied, in part, on the doctrine of *functus officio*. The term *functus officio* — often rendered as “having performed his or her office” — has traditionally been understood to mean that once a judge decided a matter, they had discharged their office and did not have the ability to return to and correct their decision (A. S. P. Wong, “Doctrine of *Functus Officio*: The Changing Face of Finality’s Old Guard” (2020), 98 *Can. Bar Rev.* 543, at pp. 546-47; see A. Mayrand, *Dictionnaire de maximes et locutions latines utilisées en droit* (4th ed. 2007), at p. 193, who also uses the term *functa officio*).

[33] In its contemporary guise, *functus officio* indicates that a final decision of a court that is susceptible of appeal cannot, as a general rule, be reconsidered by the court that rendered that decision (see *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, at p. 860; *Reekie v. Messervey*, [1990] 1 S.C.R. 219, at pp. 222-23; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 77-79). A court loses jurisdiction, and is thus said to be *functus officio*, once the formal judgment has been entered (*R. v. Adams*, [1995] 4 S.C.R. 707, at para. 29; *R. v. Smithen-Davis*, 2020 ONCA 759, 68 C.R. (7th) 75, at paras. 33-34). After this point, the court is understood only to have the power to amend the judgment in very limited circumstances, such as where there is a statutory basis to do so, where necessary to correct an error in expressing its manifest intention, or where the matter has not been heard on its merits (*Chandler*, at p. 861, citing *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, [1934] S.C.R. 186; *R. v. H. (E.)* (1997), 33 O.R. (3d) 202 (C.A.), at pp. 214-15, citing *The Queen v. Jacobs*, [1971] S.C.R. 92; see also *R. v. Burke*, 2002 SCC 55, [2002] 2 S.C.R. 857, at para. 54).

[34] This rule serves goals of finality and, by stabilizing judgments subject to review, of an orderly appellate procedure (*Chandler*, at p. 861; *H. (E.)*, at p. 214). As Doherty J.A. wrote in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.), for the parties to litigation, finality meets both an economic and psychological need as well as serving as a practical necessity for the system of justice as a whole (pp. 264-65). More specifically, if lower courts could continuously reconsider their own decisions, litigants would be denied a reliable basis from which

to launch an appeal to a higher court (*Doucet-Boudreau*, at para. 79; see also *Ayangma v. French School Board*, 2011 PECA 3, 306 Nfld. & P.E.I.R. 103, at paras. 11-12). The appeal record would be written on “shifting sand”, ultimately inhibiting effective review (Wong, at p. 548).

[35] That said, *functus officio* is only one of several legal principles designed to promote the goal of finality. Indeed, given it is inherently tied to the entering of the formal judgment and its exceptions are relatively restrictive, this Court has described the doctrine of *functus officio* as narrow in scope (*Reekie*, at pp. 222-23; see also Wong, at pp. 555-56). So, while it is an important norm recognized in our jurisprudence to serve this necessary purpose, no one rule has a monopoly on finality.

[36] It is useful to distinguish between jurisdiction over the merits lost by operation of the doctrine of *functus officio* and jurisdiction that exists to supervise the court record. As I will endeavour to explain, even when a court has lost jurisdiction over the merits of a matter as a result of having entered its formal judgment, it retains jurisdiction to control its court record with respect to proceedings generally understood to be an ancillary but independent matter (see, e.g., *GEA Refrigeration Canada Inc. v. Chang*, 2020 BCCA 361, 43 B.C.L.R. (6th) 330, at paras. 185-86).

[37] Supervisory authority over the court record has long been recognized as a feature of the jurisdiction of all courts (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 189; see also *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65, at para. 12). As Goudge J.A. observed in *CTV*

Television Inc. v. Ontario Superior Court of Justice (Toronto Region) (2002), 59 O.R. (3d) 18 (C.A.), “it is important to remember that the court’s jurisdiction over its own records is anchored in the vital public policy favouring public access to the workings of the courts” (para. 13). 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 (*Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 26 and 28).

[38] The need to attend to the appropriate balance between these fundamental public interests does not disappear merely because the order on the merits is final and could have been appealed. Court records may be accessed even when proceedings have come to an end. Indeed, important decisions about the openness of the court record may need to be taken after the proceeding on the merits is over (see, e.g., *R. v. Wagner*, 2017 ONSC 6603; *R. v. Henry*, 2012 BCCA 374, 327 B.C.A.C. 190). If jurisdiction over court openness ceased when the formal order on the merits were entered, courts would lose control over their own record without good reason. Consider, for example, a case where no order limiting court openness is made before the formal judgment on the merits is entered, and a need to protect an important public interest is later discovered. In my respectful view, to conclude that this power is wholly lost once the formal order on the merits is entered would risk undermining the proper administration of justice in service of a reading of the doctrine of *functus officio* unconnected with its purpose.

[39] Recognizing that this jurisdiction survives the end of the underlying proceeding is not inconsistent with the purposes of finality and stability of judgments associated with the doctrine of *functus officio*. Relief granted pursuant to this power leaves the substance of the underlying proceeding and the reasons that support it undisturbed. While some interlocutory motions, such as motions relating to the admissibility of evidence, may have an impact on the final decision on the merits, deciding public access to the court record has no bearing on the underlying proceeding or its appeal. The doctrine of *functus officio* reflects the transfer of the decision-making authority in respect of final judgments from the court of first instance to the appellate court (*Chandler*, at p. 860, citing *In re St. Nazaire Co.* (1879), 12 Ch. D. 88). It was never intended to restrict the ability of those lower courts to control their own files in respect of these decisions.

[40] To be clear, this does not mean that *functus officio* never applies to publication bans or sealing orders. The point is simply that a court is not precluded from deciding a motion concerning court openness merely because it is *functus officio* with respect to the merits of the underlying proceeding.

(2) Decisions Regarding Court Openness May Be Reconsidered in Limited Circumstances

[41] That courts retain supervisory jurisdiction over their court records is not to say that once decisions concerning court openness have been made they are open to reconsideration at any time or for any reason. Where a decision concerning court

openness is formalized in an order, *functus officio* may apply, regardless of whether or not it is ancillary to some other proceeding. Even where, as here, a decision concerning court openness is not formalized in an order, finality remains an important value in the making of publication bans and sealing orders. Indeed, in this case the CBC has in fact appealed an ancillary publication ban that has never been formalized in an order. The need to provide litigants with a stable basis from which to launch an appeal — a central rationale underpinning *functus officio* (see *Doucet-Boudreau*, at para. 79) — can apply, even where *functus officio* technically does not.

[42] Therefore, regardless of whether a court is deprived of jurisdiction by the doctrine of *functus officio*, the importance of finality will mean courts will be rightly reluctant to reconsider questions of court openness. A publication ban or sealing order is, however, susceptible to reconsideration by the issuing court, albeit on narrow grounds. This will include cases where an affected party not given notice proposes to make novel submissions that could affect the result, or on the basis of a material change in circumstances. This applies to both publication bans and sealing orders that are formalized in an order and those that are not.

[43] Central to the CBC's claim that the Court of Appeal had jurisdiction to vary the 2018 publication ban is that it was made without proper notice to the press as an affected party.

[44] One basis for revisiting a publication ban or sealing order may indeed arise when an affected person who was not given notice of the making of the order later

seeks to vary it or have it set aside. Natural justice is understood to require that whenever a person is affected by a decision, they generally have the right to appropriate notice of that decision and an opportunity to be heard (*Supermarchés Jean Labrecque Inc. v. Flamand*, [1987] 2 S.C.R. 219, at pp. 233-34). When an order is made without the submissions of an affected person because that person was not given proper notice, such as an *ex parte* order, the law recognizes that the court that made that order generally has authority to review it on motion of that affected person (*Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 607, citing *Dickie v. Woodworth* (1883), 8 S.C.R. 192). This ensures that affected persons are not unfairly subjected to orders made without the benefit of their submissions (see, generally, F.-O. Barbeau, “Rétractation du jugement”, in *JurisClasseur Québec — Collection droit civil — Procédure civile I* (2nd ed. (loose-leaf)), by P.-C. Lafond, ed., fasc. 31, at No. 39). This principle also finds expression in various rules of court procedure (see, e.g., *Court of Queen’s Bench Rules*, Man. Reg. 553/88R, r. 37.11 (“*Queen’s Bench Rules*”). Similar principles apply to orders concerning court openness: I note for example that courts in Ontario have relied on the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to decide challenges to sealing orders brought by media representatives who were not given proper notice of the hearing at which the order was made (*Hollinger Inc. v. The Ravelston Corp.*, 2008 ONCA 207, 89 O.R. (3d) 721, at para. 43, per Juriensz J.A., dissenting in part but not on this point).

[45] To challenge an existing order concerning court openness, the moving party must qualify as an affected person to whom standing should be granted. Further,

where so required, that party must have acted with due dispatch in seeking to set aside the impugned order. Both of these points merit brief comment in view of arguments made here.

[46] First, it is important to recognize that applying this principle to publication bans or sealing orders requires some consideration of standing, because of the broad effects of such an order. Insofar as a publication ban or a sealing order impinges on the open court principle, such orders can, for example, affect the public's right to freedom of expression and freedom of the press under s. 2(b) of the *Charter* (*Vancouver Sun*, at para. 26). Court openness is understood as a public good, not an interest that belongs to a particular individual or entity. Further, the risks to competing important interests which justify limits on court openness must also reflect public values, even if they might be aimed at protecting particular persons (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 55). Yet, in the interest of the orderly administration of justice, it cannot be that every member of the public or media entity has standing to bring an individual motion to set publication bans aside in the absence of such notice. This would make the number of parties entitled to reconsideration potentially endless. Instead, as this Court held in *Dagenais*, with regard to publication bans in criminal matters, standing in these cases should be thought of as a matter of the court's discretion (pp. 869 and 872; see also *R. v. White*, 2008 ABCA 294, 93 Alta. L.R. (4th) 239, at para. 12, aff'd *Toronto Star Newspaper Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721).

[47] In respect of standing, an order limiting court openness engages the constitutionally-protected right of a free press to report on judicial proceedings (*Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at para. 2; *Vancouver Sun*, at para. 26). When that order has been made in the absence of notice to the media, a representative of the media should generally have standing to challenge an order that threatens the open court principle where they are able to show that they will make submissions that were not considered in its making that could affect the result (see, generally, *Hollinger*, at paras. 36-39). In practice, and properly in my view, standing is seldom refused to the media to participate in open court proceedings where it is sought (J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), s. 8.1.10). Equally, a person directly affected by an order concerning court openness because it might harm their individual interests should, as a matter of course, have standing to challenge that order (see, generally, *Ivandaeva Total Image Salon Inc. v. Hlembizky* (2003), 63 O.R. (3d) 769 (C.A.), at para. 27). Courts should nevertheless retain some residual discretion to deny standing where hearing the motion would not be in the interests of justice, as in the case, for example, that it would unduly harm the parties or merely duplicate argument that is already before the court (*Dagenais*, at p. 869; *White*, at para. 12; see, e.g., *Canadian Transportation Accident Investigation and Safety Board v. Canadian Press* (2000), 184 N.S.R. (2d) 159 (S.C.), at paras. 18-21). The requirement of standing, therefore, by limiting who may challenge a publication ban or sealing order, serves the goals of finality and mirrors the discretionary approach to standing that this Court has previously endorsed.

[48] Second, as to delay, courts may decline to hear a motion to vary or set aside an order dealing with court openness made without notice if the moving party was unreasonably slow in bringing that motion after becoming aware of the order, such that it is no longer in the interests of justice to hear it. Once the moving party has become aware the order exists, they are then expected to take prompt action to challenge the order or otherwise acquiesce to its existence (see, e.g., 9095-7267 *Québec inc. v. Caisse populaire Ste-Thérèse-de-Blainville*, 2001 CanLII 14878 (Que. C.A.), at para. 46; see also *Rules of Civil Procedure*, r. 37.14 (Ontario); *Code of Civil Procedure*, CQLR, c. C-25.01, art. 349 (Quebec); *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 9.15; *Queen’s Bench Rules*, r. 37.11 (Manitoba)). Strathy J., as he then was, explained that a timeliness requirement reflects the common sense presumption that “a party who sits on his or her rights in the face of a court order has accepted the legitimacy of the order” (*Attorney General of Ontario v. 15 Johnswood Crescent*, 2009 CanLII 50751 (Ont. S.C.), at para. 43).

[49] In some instances, the legislature will provide indications of the appropriate period of delay. In the absence of legislative direction, courts must be guided by the purpose of the rule and the circumstances of each case (see, generally, *Johnswood*, at para. 45). As in other cases where courts are asked not to hear proceedings by reason of an unacceptable delay, the task is not a mechanical calculation, but rather a contextual balancing of finality and timely justice against the importance of the matter being heard on its merits (*Marché D’Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 87 O.R. (3d) 660, at

para. 34; *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, 112 O.R. (3d) 67, at para. 19). By way of example, under the *Rules of Civil Procedure*, a period of three months to bring a motion to set aside an order dismissing the action for delay was held to be reasonable in the context of one dispute (*Toronto Standard Condominium Corporation No. 2058 v. Cresford Developments Inc.*, 2019 ONSC 801, 97 C.L.R. (4th) 306, at para. 36), but a largely unexplained ten-month delay meant in another case that the applicant had not moved forthwith (*1202600 Ontario Inc. v. Jacob*, 2012 ONSC 361, at paras. 102 and 121 (CanLII)). In one Manitoba case, a delay of five months in moving to set aside a judgment was found not to be unreasonable in the circumstances (*585430 Alberta Ltd. v. Trans Canada Leasing Inc.*, 2005 MBQB 220, 196 Man. R. (2d) 191, at para. 56). I stress, however, that this determination is inherently tied to the facts of each particular case and the nature of the issue raised. Especially where this delay has caused meaningful prejudice to the responding parties, courts may conclude it is not in the interests of justice to hear a motion. This requirement safeguards finality by circumscribing reconsideration in the temporal dimension.

[50] On the basis of these principles, then, and in the absence of explicit legislation to the contrary, a court may vary or set aside an order concerning court openness it has made on timely motion by an affected person who was not given notice of the making of that order and to whom it is appropriate to grant standing for this purpose.

[51] To be clear, limits on court openness, such as a publication ban, can be made without prior notice to the media. Given the importance of the open court principle and the role of the media in informing the public about the activities of courts, it may generally be appropriate to give prior notice to the media, in addition to those persons who would be directly affected by the publication ban or sealing order, when seeking a limit on court openness (see *Jane Doe v. Manitoba*, 2005 MBCA 57, 192 Man. R. (2d) 309, at para. 24; *M. (A.) v. Toronto Police Service*, 2015 ONSC 5684, 127 O.R. (3d) 382 (Div. Ct.), at para. 6). But whether and when this notice should be given is ultimately a matter within the discretion of the relevant court (*Dagenais*, at p. 869; *M. (A.)*, at para. 5). I agree with the submissions of the attorneys general of British Columbia and Ontario that the circumstances in which orders limiting court openness are made vary and that courts have the requisite discretionary authority to ensure justice is served in each individual case.

[52] Indeed this Court has explicitly recognized the discretion of courts to decide when notice to the media is required in the case of search warrants and production orders. In *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, this Court held that granting a search warrant in the absence of the affected media organization was not a jurisdictional error; the issuing judge had discretion regarding the timing and modality of notice to the media (paras. 83-84). Similarly, in *R. v. Vice Media Canada Inc.*, 2018 SCC 53, [2018] 3 S.C.R. 374, Moldaver J. considered a media organization's argument that notice of an application for a production order affecting it was required (para. 59). He rejected that submission because the *Criminal Code* explicitly provided

for *ex parte* proceedings and the negative impact on the media was mitigated by the statutory right to apply to have the order varied or revoked at a later stage (paras. 61-62). It follows from these authorities that giving notice is not a pre-requisite to the issuance of a valid order in these circumstances. At the same time, this jurisprudence does not exclude the possibility of providing notice after an order has been granted or entertaining a motion to vary or set aside an order by an affected person who was not given prior notice.

[53] I also agree with the CBC that courts may exercise discretion to vary or set aside a publication ban or sealing order where the circumstances relating to the making of the order have materially changed in accordance with the principle set out by this Court in *Adams*. As Sopinka J. observed in that case, “[a]s a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed” (para. 30). This rule applies to orders involving court openness (see, e.g., *British Columbia v. BCTF*, 2015 BCCA 185, 75 B.C.L.R. (5th) 257, at paras. 15-22; *Morin v. R.* (1997), 32 O.R. (3d) 265 (C.A.), at pp. 272-73).

[54] I hasten to say, however, that I do not read *Adams* to bear the meaning the CBC attributes to it in their factum. The CBC says the case was about “whether the doctrine of *functus officio* prevented a trial judge from rescinding a publication ban it had previously issued” and suggests that it is a case about how the doctrine of *functus officio* applies to ancillary orders (A.F., at paras. 82-83). On my understanding, *Adams*

dealt simply with the question as to when a judge could reconsider a previous order made in the course of trial. The impugned order, which purported to lift a publication ban previously made, was decided as the trial judge dismissed the charges against the accused (*Adams*, at para. 5). This Court concluded that the trial judge did not have the power to revoke the order because the circumstance that made the order mandatory had not changed (para. 31). Subsequent appellate jurisprudence has interpreted the judgment to provide a general rule about varying such orders, rather than a rule about *functus officio* (see, e.g., *BCTF*, at para. 22; *R. v. B. (H.)*, 2016 ONCA 953, 345 C.C.C. (3d) 206, at para. 51; *R. v. Le*, 2011 MBCA 83, 270 Man. R. (2d) 82, at para. 123). The principles in *Adams* balance finality and flexibility even when the court is not *functus officio*, by permitting the reconsideration of such orders where there has been a material change of circumstances.

[55] In deciding whether this rule from *Adams* applies, I do agree that a first question for the court will be whether there has been a material change in circumstances since the making of the initial order (para. 30). The burden of establishing this change falls to the party seeking a variation in the order (see, by analogy, *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, at para. 31). That party must establish both that a change of circumstances has occurred and that the change, if known at the time of the initial order, would likely have resulted in an order on different terms (*L.M.P.*, at para. 32; *Droit de la famille — 132380*, 2013 QCCA 1504, 37 R.F.L. (7th) 1, at paras. 75-76; *R. v. Baltovitch* (2000), 47 O.R. (3d) 761 (C.A.), at para. 6). The correctness of the initial

order is presumed and is not relevant to the existence of a material change of circumstances (*L.M.P.*, at para. 33; *Droit de la famille — 132380*, at para. 78).

[56] Instances in which a court may reconsider a decision respecting its court record are distinct from an appeal or application for *certiorari* made to a higher court from such decisions (see, generally, *Dagenais*, at pp. 870-72). In a motion to reconsider on both grounds described above, the original court is not being asked to reconsider its decision because it is wrongly decided, but rather because it was made without relevant submissions from an affected party or on the basis of a material change in the circumstances that justified the initial decision.

[57] Finally, I note that the general principles considered here can, of course, be displaced by legislation, such as the applicable rules of court, designed to determine more exactly when it is appropriate to reconsider orders concerning court openness.

B. *Application to the Facts of This Case*

(1) The Court of Appeal Erred in Concluding It Had No Jurisdiction to Consider the CBC's Motion

[58] In answer to the preliminary question raised by the first appeal from the 2019 Jurisdiction Judgment, I turn now to whether the Court of Appeal erred in concluding it did not have jurisdiction to hear the CBC's motion to gain access to the Posner affidavit and set aside the publication ban.

[59] The CBC submits that the Court of Appeal was mistaken when it declined jurisdiction on the basis of the doctrine of *functus officio*. For the CBC, the flexible approach to *functus officio* spoken to in *Adams* requires ancillary orders, such as the publication ban here, to be treated separately from the merits of the main proceeding. Moreover, the circumstances in which the ban was ordered had changed. It was made without notice to the affected parties and no mention in a certificate of decision of the publication ban had been entered. The CBC maintains that it was not asking for a “rehearing” of the appeal or of the motion which, it recognizes, is prohibited by the *Court of Appeal Rules*. In the alternative, even if the prohibition against rehearings does apply, it must be interpreted flexibly as is the case with the doctrine of *functus officio*.

[60] The Crown answers that the Court of Appeal rightly held it was without jurisdiction given that the formal judgment had been entered. In its view, the only exception to the doctrine of *functus officio* that might conceivably apply here is that the CBC’s arguments were never heard on their merits. That exception, says the Crown, does not apply here. While the CBC did not make submissions, it was covering the case and could have challenged the ban anytime between when the initial publication ban was made in May 2018 and when the certificate of decision was entered in January 2019. The CBC provides no proper explanation for its delay in taking action to set aside the publication ban. Even if a material change of circumstances would allow the Court of Appeal to reconsider its order, there was no such change in this case. The Court of Appeal’s jurisdiction over the matter was exhausted.

[61] I agree with the CBC that the Court of Appeal did have the authority to uphold, vary or vacate the 2018 publication ban and grant or withhold access to the court record.

[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 (*R. v. Smith*, 2004 SCC 14, [2004] 1 S.C.R. 385, at para. 21). 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 (*R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at para. 19; *Lochner v. Ontario Civilian Police Commission*, 2020 ONCA 720, at para. 27 (CanLII)). I agree with the Attorney General of British Columbia that it may be unhelpful to describe this implicit authority as “inherent jurisdiction” given that appellate powers are, ultimately, rooted in statute (transcript, at pp. 100-1).

[63] The legislative foundation for the Court of Appeal’s jurisdiction over the motion on court openness is plain here. As I have said, the supervisory jurisdiction over the court record is a feature of all courts (*MacIntyre*, at p. 189) 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 (see, generally, *Cunningham*, at para. 19). 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. The Court of Appeal therefore had continuing, ancillary jurisdiction to consider the CBC’s motion regarding sealing orders and publication bans. This included implied jurisdiction to vary or vacate its orders limiting court openness in accordance with the common law principles considered above. The only remaining question is whether any applicable legislation limits this jurisdiction for the Court of Appeal in this case.

[64] The *Court of Appeal Rules* do prohibit a “rehearing of an appeal” (in French, “*appel . . . entendu de nouveau*”) after the certificate of decision has been entered, a rule on which the Court of Appeal relied in this case (r. 46.2(1) and (2), applicable by virtue of r. 45 of the *Manitoba Criminal Appeal Rules*, SI/92-106). This rule also prohibits the “rehearing” of motions (in French, “*faire l’objet d’une nouvelle audience*”) (r. 46.2(12)). Relevant portions of r. 46.2 are as follows:

46.2(1) There shall be no rehearing of an appeal except by order of the court or at the instance of the court.

46.2(2) A rehearing of an appeal may be ordered before the certificate of decision has been entered.

46.2(12) There shall be no rehearing on an application for leave or a motion.

[65] It is true that the certificate of decision referred to in r. 46.2(2) has been entered here in respect of the appeal bearing on the miscarriage of justice. Accordingly,

a rehearing of Mr. Ostrowski’s appeal on the merits is precluded in accordance with r. 46.2. Similarly, any motion that had been heard in the course of the proceeding cannot now be reheard, as this is foreclosed by r. 46.2(12).

[66] But these rules did not deprive the Court of Appeal of the ability to hear the CBC’s motion concerning court openness. This is certainly not a “rehearing of an appeal” as contemplated by r. 46.2(1) and (2). The CBC brought a motion concerning access to the court file and did not seek to reopen the miscarriage of justice proceeding itself. Interpreting the prohibition against rehearing an appeal as precluding the Court of Appeal from hearing a motion concerning court openness, distinct from the merits of the appeal, is not plain from the text. The appeal is not to be “*entendu de nouveau*”, to advert to the French text of r. 46.2(1) and (2). Nor does it accord with the purpose of rules prohibiting rehearings of the appeal that reflect the same core objectives of finality and stability of judgments associated with the doctrine of *functus officio* (see *Doucet-Boudreau*, at para. 79). There is nothing in r. 46.2 that prevents the CBC from seeking ancillary orders related to court openness after the certificate of decision has been entered on the merits.

[67] Similarly, the prohibition on the rehearing of motions in r. 46.2(12) cannot be interpreted to prohibit the CBC from moving to set aside the publication ban made without notice and which affects the open court principle. The impugned order was made of the Court of Appeal’s own accord, with the consent of the parties, at the oral hearing and then continued indefinitely in para. 82 of the 2018 Publication Ban

Judgment. The court heard no submissions on point and provided no prior notice to anyone, including the media, notably the CBC who learned of the impugned ban shortly after the reasons were released. The CBC was not asking the Court of Appeal for a “rehearing” of a motion. The idea of a “rehearing” spoken to in r. 46.2 necessarily implies there was an original hearing and that the court would be hearing the same motion again, as the French (“*nouvelle audience*”) in r. 46.2 makes plain.

[68] Instead, the CBC brought an altogether new motion to set aside the 2018 publication ban made in its absence. This may engage, as the CBC suggests, a fundamental principle of the administration of justice that parties affected by orders be given the opportunity to be heard. There is nothing in the text of r. 46(12) that modifies the generally applicable rule allowing the Court of Appeal to vary or rescind its publication ban or sealing order on motion from an affected person not given notice of the making of the order.

[69] The CBC also argued that the Court of Appeal should have taken up its rightful jurisdiction to vary the publication ban covering the Posner affidavit because there had been a material change of circumstances.

[70] I disagree. I think it should be recorded that the CBC did not, in the proceedings below, establish a material change of circumstances.

[71] While it may be the case that the finding of a miscarriage of justice by the Court of Appeal increased the public interest in the materials, that conclusion was made

in the 2018 Publication Ban Judgment in which the continuation of the publication ban was ordered. It cannot, therefore, be a change of circumstances that has occurred *since* the impugned order was made, as is required (*Adams*, at para. 30; *L.M.P.*, at para. 31).

[72] Equally, the subsequent appearance of the CBC in the proceedings as a party did not constitute, in itself, a material change in circumstances. Assuming the initial order was correctly made, as one must at this stage (*L.M.P.*, at para. 33), and recognizing that the CBC did not make submissions on the initial order, in my view the CBC's mere presence would not likely have resulted in a different outcome for the purposes of the applicable test. This is not to exclude the possibility that, had the CBC made submissions, the result might have been different. But acknowledging this possibility requires one to consider whether the Court of Appeal may have erred in applying the relevant test without the benefit of the CBC's argument. This is contrary to the well-established principle that one must not consider the possibility that the original court erred when determining whether a material change has occurred (*L.M.P.*, at para. 33). The Court of Appeal is therefore presumed at this stage to have balanced the interest of the media in open court proceedings with competing public interests even in the absence of a representative of the press, as is required (*Mentuck*, at para. 38). The CBC's absence at the making of the initial order is more properly considered in reference to the principles relating to orders made without notice to an affected party, since it is a lost opportunity to make submissions, and not in reference to a change in the circumstances relied on by the Court of Appeal.

[73] In sum, the Court of Appeal erred in concluding that r. 46.2 or the doctrine of *functus officio* deprived it of jurisdiction to hear the CBC's motion. Said respectfully, the Court of Appeal's interpretation of these principles was unnecessary to protect the values of finality and orderly appellate review. It had an adverse impact on the opportunity of the media to make representations in respect of this order limiting the open court principle. The better view is that the Court of Appeal retained jurisdiction to oversee its record even after the certificate of decision in the underlying proceeding on the merits was entered.

(2) The Matter Should Be Remanded to the Court of Appeal

[74] That the Court of Appeal had jurisdiction to consider the CBC's motion and its request for access to the Posner affidavit, does not mean, of course, that the CBC is entitled to the relief it sought. The availability of relief turns on the proper application of the law to the facts here, a determination that would be best made at first instance by the Court of Appeal.

[75] In respect of the publication ban, the CBC will rely on the Court of Appeal's power to rescind an order on the basis that it was made without notice to an affected party. As a preliminary matter, the Court of Appeal must determine, in keeping with the principles sketched above, whether the CBC has standing to challenge the relevant order. This initial hurdle, which the CBC must clear, serves to restrict the scope of those who are able to challenge an order made without notice to the media to those

representatives who were deprived of the ability to make useful submissions that may have affected the result.

[76] The CBC will also be required to show that the delay from the time it became aware of the impugned order to the time it filed its motion in May 2019 was not unreasonable. I note that the Crown argues the CBC ought to have brought its motion earlier. In response to questions from my colleagues at the oral hearing, the CBC rightly conceded it knew of the publication ban shortly after the 2018 Publication Ban Judgment was released. Its delay in bringing the motion was in the order of six months. While the matter was not advanced by the Crown as a basis for dismissing the appeal, at the hearing before this Court the CBC did say the delay was justified in the circumstances, pointing to initial confusion as to the nature of the order, and asserted the public interest in deciding this open court issue that affects the rights of all Canadians.

[77] Turning to the substance of the CBC's motion, any discretionary limits on access to and publication of the contents of the court record must be understood in reference to the test from *Sierra Club* as recently recast by this Court in *Sherman*. Court proceedings are presumptively open to the public (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11). A court can order discretionary limits on openness only where (1) openness poses a serious risk to an important public interest, (2) the order sought is necessary to prevent that risk and (3) the benefits of the

order outweigh its negative effects (*Sherman*, at para. 38, citing *Sierra Club*, at para. 53).

[78] Before this Court, both the Crown and M.D.’s family invoke the privacy and dignity of the interested parties as an important public interest that would be threatened if the publication ban was lifted. The CBC answers that the interests raised are merely personal, without the public component required to displace the open court principle. Much like in *Sherman*, the parties’ disagreement is rooted in the inherent tension between the open court principle and what Dickson J., as he then was, once described as competing “superordinate” values (*MacIntyre*, at pp. 186-87). Both privacy and court openness have been recognized in law as pillars of a free and democratic society (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25). If open courts are to remain the rule rather than the exception, some degree of privacy loss for those whose lives are the subject of litigation is inevitable. But circumstances do exist where openness poses a serious risk to an aspect of privacy that evinces an important public interest.

[79] The Court of Appeal did not have the advantage of considering the judgment of this Court in *Sherman* where it was held that there is an important public interest in a narrower dimension of privacy concerning the protection of individual dignity. In order to show a serious risk to this interest, an individual must establish that

the information about them that would be disseminated as a result of court openness is sufficiently sensitive such that it strikes at their biographical core, revealing something “intimate and personal about the individual, their lifestyle or their experiences” (*Sherman*, at paras. 73-77, 79 and 85). If they succeed, the question becomes whether, in light of the totality of the circumstances, court openness poses a risk to individual dignity that strikes meaningfully at this important public interest. A serious risk need not be supported by direct evidence but may be reasonably inferred on the basis of available circumstantial facts (*Bragg*, at paras. 15-16). If the party succeeds in establishing this serious risk, they must then show that the order they seek is necessary to prevent the risk and that the benefits of the order outweigh its negative effects, including the effects on constitutionally-protected court openness (*Sierra Club*, at para. 53).

[80] The parties disagree about the extent to which the test for discretionary limits on court openness applies to determine access to and publication of the Posner affidavit. The CBC argued that the sealing order that applied to the affidavit by operation of the *Court of Appeal Rules* ended once the new evidence motion was dismissed. The Crown took the position that the relevant rule is silent on what happens to material under seal after a new evidence motion is dismissed such that the Court of Appeal was entitled not to enter the proposed evidence into the public record. As for the publication ban covering the details of this evidence, the CBC argued that it fails the test for discretionary limits on court openness, which it says applies even though the Posner affidavit was ultimately not admitted into evidence. The Crown and the

interested parties stressed instead the Posner affidavit's alleged irrelevance as a factor in this analysis.

[81] For two reasons, I conclude that any limits on access to or publication of the Posner affidavit in this case must meet the generally applicable test for discretionary limits on court openness. First, I agree with the CBC that r. 21(4) of the *Court of Appeal Rules* does not provide for a permanent sealing order over the Posner affidavit. Rule 21(4), which specifies that the new evidence remains sealed “until the motion is decided”, explicitly anticipates that the sealing prescribed by this rule will cease once there is a decision. This decision occurred when the new evidence motion was dismissed. There is nothing in the rule to indicate that the seal is to protect the information from public dissemination and that this is meant to extend indefinitely after the motion is decided. In my view, r. 21 does not continue to seal the Posner affidavit.

[82] Second, the fact that the Posner affidavit was not admitted as new evidence for the purposes of the miscarriage of justice proceeding should not shield the publication ban from review. The Crown submits that the Court of Appeal's “practice” not to admit such evidence into the court registry fills the silence in r. 21(4). But an administrative practice cannot have the effect of taking this matter outside the scope of the test for discretionary limits on the open court principle. Court openness serves to maintain the legitimacy of the exercise of judicial power — including the decision to dismiss the motion for new evidence — by allowing the public to scrutinize this exercise in service of ensuring that justice is being dispensed fairly (*Vancouver Sun*, at

para. 25). Public access to the court record facilitates this scrutiny (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1339, per Cory J.).

[83] Consistent with this purpose, all materials that are made available to the court for the purposes of deciding the case — in other words, for the purposes of exercising its judicial power — are subject to the open court principle (see *Canadian Broadcasting Corp. v. R.*, 2010 ONCA 726, 102 O.R. (3d) 673, at paras. 42-44; see also *Aboriginal Peoples Television Network v. Alberta (Attorney General)*, 2018 ABCA 133, 70 Alta. L.R. (6th) 246, at para. 48). In this case, the Court of Appeal had before it a motion to admit the Posner affidavit as new evidence. With the consent of the parties, the court reviewed that affidavit in considering the motion. While the court ultimately declined to admit it, the affidavit was considered in deciding the new evidence motion. It follows that any discretionary limit on access to or publication of the Posner affidavit must meet the requirements affirmed in *Sierra Club* and *Sherman*.

[84] In sum, to the extent the requested relief required it to reconsider its publication ban, the Court of Appeal should have asked whether it was appropriate to vary or set aside that decision on motion by the CBC given it was made without notice. On the substance of the motion, the Court of Appeal should have considered whether any discretionary limits it imposed on publication of the court record, which includes the Posner affidavit, complied with the test for discretionary limits on court openness.

[85] The remaining question is which court should decide these issues raised in the context of the first appeal from the 2019 Jurisdiction Judgment. I recall that the

Crown suggests that if the Court of Appeal had jurisdiction to hear the motion for reconsideration, it follows that this Court does not. It argues that in this scenario the publication ban is not a “final or other judgment of . . . the highest court of final resort” for the purposes of s. 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, under which leave to appeal in this matter was granted.

[86] I disagree. The Court of Appeal’s reconsideration of its publication ban is not, as we have seen, an appeal of the publication ban order. The only route of appeal from either the Court of Appeal’s 2018 Publication Ban Judgment or the 2019 Jurisdiction Judgment was to this Court with leave pursuant to s. 40(1) of the *Supreme Court Act* (see, generally, *Dagenais*, at p. 872). Accordingly, I have no difficulty concluding that both were “final or other judgment[s] of . . . the highest court of final resort” from which this Court has jurisdiction to hear an appeal with leave (see, generally, *Mentuck*, at paras. 20-21).

[87] That said, I am of the view that fairness to all the parties requires that we remand the motion that resulted in the 2019 Jurisdiction Judgment to the Court of Appeal. The remaining issues raised are best decided by the Court of Appeal. The Court of Appeal ended its analysis after concluding it was *functus officio* and we do not have the benefit of any reasons below on these issues. As I have noted above, the motion required the Court of Appeal to make several discretionary decisions: whether to grant the CBC standing, whether to hear the motion given the delay, and ultimately whether to uphold a discretionary limit on the openness of its own record. These are decisions

the Court of Appeal is best placed to make given they are intimately connected to the facts and procedural history of this case, in which that court effectively acted as a court of first instance.

[88] In my view, it is not in the interests of justice for this Court to step into the Court of Appeal's shoes and decide these matters at first instance. This is quite different from considering such issues on appeal through the deferential lens this Court would take in reviewing the exercise of discretion below (see *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117). Other appellate courts have been rightly cautious to dictate to lower courts in this way (see, e.g., *GEA Refrigeration*, at para. 184).

[89] I note as well that the issue of delay was not fully argued before this Court and we are therefore not well placed to come to the appropriate balance in this case in any event. This Court has remanded matters to the Court of Appeal where a question was not addressed below and the record and arguments are “too sparse to . . . resolve the matter confidently” (see, e.g., *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at para. 46). The CBC did not raise the issue in its factum because it considered the issue to have been resolved when we granted its motions for extensions of time to seek leave to appeal. While the Crown pointed to the delay in passing, it never argued the appeal bearing on the motion for reconsideration could be dismissed on that basis alone. This further militates towards remanding the matter.

[90] Even if this Court were to exercise its jurisdiction to decide these issues, it does not have the benefit of submissions from the parties on how the principles from

Sherman outlined above apply to these facts. That decision was released only after this matter had been heard and, in my view, fairness would require further submissions from the parties with respect to its impact on the issue at hand. This Court had previously considered privacy in the context of this test in *Bragg*, but was clear that it was not a question of privacy without more but was combined with “the relentlessly intrusive humiliation of sexualized online bullying” (para. 14).

[91] *Sherman* provided an opportunity for this Court to confront this issue directly from a distinct perspective. The Court of Appeal had identified privacy interests as mere personal concerns that could not “without more” justify a limit on court openness (*Sherman*, at para. 18). This Court concluded on appeal that it was “inappropriate . . . to dismiss the public interest in protecting privacy as merely a personal concern” (para. 52), and went on to recognize that “privacy understood in relation to dignity is an important public interest for the purposes of the test” (para. 86).

[92] Of course, it is not uncommon that this Court clarifies the law in an appeal, or series of appeals heard together, and then applies that clarified law to those appeals. But the situation here is different because these parties were not heard in settling the approach taken in *Sherman*. That they would also not be heard on how this approach applies on the facts of their case would be fundamentally unfair to them, not to mention a disadvantage to this Court in deciding the matter. The need for these further submissions on *Sherman* attenuates any judicial economy that would be gained by deciding the matter here rather than remanding it below.

[93] I recognize, as the Crown argued at the hearing, that remanding the matter will prolong the period of uncertainty for the interested parties as to whether the publication ban will ultimately be set aside. It is important to remember, however, that the interested parties will continue to benefit from the publication ban they say is necessary to protect their privacy in the interim.

[94] This is a completely different situation from cases such as *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, and *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, where it had been approximately a decade since the impugned conduct that was the subject of the litigation and this Court had the benefit of a reasonable decision supported by the record and made by the appropriate first instance decision-maker (*Saadati*, at para. 45; *Wells*, at para. 68). In this case, the publication ban that is the subject of these proceedings was made less than three years ago and we have no decision from a first instance decision-maker on the motion, let alone a reasonable one.

[95] In the circumstances, the value of shortening this period of uncertainty does not outweigh the importance of fairness to all parties, served by ensuring the matter is decided by the appropriate first instance decision-maker and with the benefit of appropriate submissions.

[96] I would therefore allow the appeal from the 2019 Jurisdiction Judgment and remand the matter to the Court of Appeal to decide the CBC's motion in accordance with these reasons (*Supreme Court Act*, s. 46.1).

[97] The second appeal from the 2018 Publication Ban Judgment itself presents a procedural complication. As I mentioned above, the CBC sought and was granted leave not only from the dismissal of its motion for reconsideration, but also directly from the publication ban. This is plain from the leave judgment and the parties specifically argued both appeals before this Court. That appeal raises a single remaining issue concerning the legality of the publication ban as an exception to the open court principle.

[98] In light of my conclusion that the Court of Appeal did have jurisdiction to hear the CBC's motion, I would not decide the issues raised in the appeal from the 2018 Publication Ban Judgment before the Court of Appeal has decided the motion for reconsideration. I note that appellate courts in similar circumstances have generally insisted that recourse be sought at the original court before hearing an appeal (see, e.g., *Secure 2013 Group Inc. v. Tiger Calcium Services Inc.*, 2017 ABCA 316, 58 Alta. L.R. (6th) 209, at paras. 54-55; *GEA Refrigeration*, at para. 184). Similarly, in this case, it is not in the interests of justice to consider the appeal from the 2018 Publication Ban Judgment before the CBC's motion is decided, given this appeal could be rendered moot as a consequence of that proceeding. We are accordingly not in a useful or informed position to dismiss or allow the second appeal.

[99] Nor would it be appropriate to remand this appeal in whole to the Court of Appeal. Unlike remanding the 2019 Jurisdiction Judgment to the Court of Appeal to reconsider the publication ban following submissions from an affected party not given

notice, which as I noted earlier is distinct from an appeal, returning the 2018 Publication Ban Judgment to the Court of Appeal would require it to sit in appeal of its own publication ban.

[100] It follows, in the unusual circumstances of this case, that the appeal from the 2018 Publication Ban Judgment should be adjourned *sine die* pending determination of the motion for reconsideration at the Court of Appeal (see, e.g., *Canadian Planning and Design Consultants Inc. v. Libya (State)*, 2015 ONCA 661, 340 O.A.C. 98, at para. 61). I note that if the Court of Appeal engages with the merits of the publication ban and the 2018 Publication Ban Judgment appeal is then reopened, then those reasons will be before this Court and it will benefit from them as it decides this appeal.

[101] This Court heard appeals thus both directly from a judgment and, simultaneously, from the denial of reconsideration of that same judgment. Leave was granted from both judgments here, a fact that has created the procedural difficulty, but this difficulty is not insurmountable. Appellate courts have used the *sine die* adjournment to deal with appeals identified as premature due to ongoing proceedings below which ought to be completed before the appeal is heard (*Libya*, at para. 83; *Gray v. Gray*, 2017 ONCA 100, 137 O.R. (3d) 65, at para. 33; *MK Engineering Inc. v. Assn. of Professional Engineers and Geoscientists of Alberta Appeal Board*, 2014 ABCA 58, 68 Admin. L.R. (5th) 135, at para. 22; *Aleong v. Aleong*, 2013 BCCA 299, 340 B.C.A.C. 44, at para. 47). This is more than a procedural concern here: we cannot, in

my respectful view, dismiss the second appeal now without conflating the issues at stake on reconsideration of the 2019 Jurisdiction Judgment and those at play in a direct appeal of the 2018 Publication Ban Judgment.

[102] Finally, even if it were appropriate for this Court to decide the reasonableness of the CBC’s delay in bringing its motion, and even if its view was that the motion should have been dismissed on this basis, that conclusion alone would be insufficient to dismiss the appeal directly from the 2018 Publication Ban Judgment. This Court granted leave to appeal, and an extension of time to seek leave to appeal, directly from this separate judgment. I am of the respectful view that it would be inappropriate to effectively reverse these decisions or retroactively limit their scope. If this Court sought only to dispose of the reconsideration issues raised in the appeal from the 2019 Jurisdiction Judgment, it could have granted leave from that judgment alone. But it granted leave from both judgments.

[103] The CBC has not acquiesced in the 2018 Publication Ban Judgment from which it appeals directly to this Court and, with respect for other views, this second appeal has not “lost its *raison d’être*” (*Canadian Cablesystems (Ontario) Ltd. v. Consumers’ Association of Canada*, [1977] 2 S.C.R. 740, at pp. 744 and 747). The question it raises is whether the publication ban should be set aside, which is an ongoing issue of live controversy between the parties, and which is distinct from the appropriateness of the reconsideration raised in the appeal from the 2019 Jurisdiction Judgment. There is no basis to say this second appeal has become moot.

[104] Unlike in the first appeal bearing on the reconsideration motion, in the direct appeal from the 2018 Publication Ban Judgment there is no preliminary issue about the delay in bringing the motion, a motion that was not even filed before this judgment was rendered. The only issue in this second appeal is the validity of the final and indefinite publication ban imposed in the 2018 Publication Ban Judgment, which requires the application of the test for discretionary limits on court openness. To resolve this issue now, this Court would have to advert to and apply this test, including, with proper submissions, the recent judgment of this Court in *Sherman*. In my respectful view, that task should not be undertaken until the motion for reconsideration is resolved by the Court of Appeal.

V. Conclusion

[105] I would allow the appeal from the 2019 Jurisdiction Judgment of the Court of Appeal, set aside that judgment, and remand the matter to that court to decide the CBC's motion in accordance with these reasons.

[106] I would adjourn the appeal from the 2018 Publication Ban Judgment of the Court of Appeal *sine die*. I would order that if no motion for directions is filed in this Court within 30 days after the date of the judgment of the Court of Appeal deciding the matter remanded to it in accordance with these reasons, the appeal will be dismissed as abandoned.

[107] The CBC does not request costs of these appeals and I would make no order as to costs.

The following are the reasons delivered by

ABELLA J. —

[108] These appeals involve a request by a member of the media to reconsider a publication ban after the underlying proceedings have ended. While I generally agree with Justice Kasirer’s analysis of the “notice” issues, I do not share his view that the appeal should be remanded to the Manitoba Court of Appeal for disposition.

[109] As this Court has repeatedly stressed, the media is a crucial voice in protecting and promoting the openness of courts. That is why the media’s right to challenge orders like publication bans is undisputed and why the courts have the discretion to give them notice of publication ban hearings. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, this Court clearly stated that members of the media are “third parties” and that notice remains “in the discretion of the judge to be exercised in accordance with the provincial rules of criminal procedure and the relevant case law” (p. 869).

[110] But once the underlying proceedings are over, the doctrine of *functus officio* means as a general rule that a final decision cannot be reconsidered by the court

that rendered the decision. In *R. v. Adams*, [1995] 4 S.C.R. 707, Sopinka J. recognized that the application of *functus officio* is “less formalistic and more flexible” in respect of ancillary orders including publication bans (para. 29). It is therefore imperative to maintain circumscribed avenues through which the media can ask a court to reconsider a publication ban after the underlying proceedings are over.

[111] The rationales underlying the doctrine of *functus officio* show that it has a role to play in respect of publication ban orders, even when those orders are ancillary to the underlying proceedings. *Functus officio* is “commonly described as a ‘rule about finality’” (A. S. P. Wong, “Doctrine of *Functus Officio*: The Changing Face of Finality’s Old Guard” (2020), 98 *Can. Bar Rev.* 543, at p. 549, citing *Nova Scotia Government and General Employees Union v. Capital District Health Authority* (2006), 246 N.S.R. (2d) 104 (C.A.), at para. 36). As Doherty J.A. observed in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 41 O.R. (3d) 257 (C.A.):

Finality is an important feature of our justice system, both to the parties involved in any specific litigation and on an institutional level to the community at large. For the parties, it is an economic and psychological necessity. For the community, it places some limitation on the economic burden each legal dispute imposes on the system and it gives decisions produced by the system an authority which they could not hope to have if they were subject to constant reassessment and variation

The parties and the community require that there be a definite and discernible end to legal disputes. There must be a point at which the parties can proceed on the basis that the matter has been decided and their respective rights and obligations have been finally determined. Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of

indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. [pp. 264-65]

[112] Finality is important, in part, because it provides a stable basis for an appeal (*Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, at para. 79). But finality is also important because it provides economic and psychological security to parties who are dragged into the justice system, including those impacted by publication ban decisions.

[113] It has been settled since *Adams* that publication ban orders, which are ancillary to the underlying proceedings, “can be varied or revoked if the circumstances that were present at the time the order was made have materially changed” (para. 30; *R. v. Henry* (2012), 327 B.C.A.C. 190, at para. 11; *British Columbia v. BCTF* (2015), 75 B.C.L.R. (5th) 257 (C.A.), at para. 22). The change must “relate to a matter that justified the making of the order in the first place” and the moving party must act “at the earliest opportunity” after the change in circumstances occurs (*Adams*, at para. 30, citing *R. v. Khela*, [1995] 4 S.C.R. 201, at pp. 210-11). I agree with the majority that a material change in circumstances cannot be established in this case.

[114] In the absence of a material change, trial and appellate courts have recognized that the media are “affected by” orders relating to court openness, meaning that they can generally apply for reconsideration when such an order is issued without notice (see e.g. *Hollinger Inc. v. The Ravelston Corp.* (2008), 89 O.R. (3d) 721 (C.A.), at para. 43, and cases cited therein). As Justice Kasirer confirms, this approach applies

if the media can show that their submissions are made with “due dispatch” and “prompt action”, could make a material difference to the outcome and that the nature of those submissions was not originally considered by the court that issued the ban. The courts have discretion to decide whether it is in the interests of justice to reopen a publication ban under such circumstances.

[115] These two avenues for after-the-fact media challenges to publication bans reflect the fact that the media is indispensable to court openness. But the applicable tests also take the concept of finality seriously. At a certain point, the parties are entitled to move on with their lives and to be protected from the psychological and financial costs of being dragged back into the justice system when a case is over.

[116] That is why reconsideration of a publication ban must be sought in a timely manner, and why a publication ban should not generally be reconsidered after the main proceedings have ended unless there is a sound basis for believing the media’s application is in the public interest and could reasonably lead to a different result. It is a balancing exercise, not a hierarchical grid, between the interests underlying finality and the interests in support of the open court principle.

[117] In balancing these principles, and with great respect, I come to a different conclusion from the majority on whether to remand the matter to the Manitoba Court of Appeal.

[118] As noted, the CBC is unable to establish a material change in circumstances under *Adams*. As a result, the only basis on which it could move for reconsideration once the proceedings are over is by showing that the publication ban was issued without notice, that its submissions could make a material difference to the outcome, and that it moved for reconsideration in a timely manner. None of these conditions has been met in this case.

[119] To start, the CBC’s argument that the publication ban was issued without notice is difficult to accept in the circumstances. At the hearing before the Manitoba Court of Appeal, counsel for the CBC candidly admitted that the CBC was reporting on the Ostrowski case throughout the course of the proceedings. And before this Court, counsel confirmed that the CBC had a representative in the courtroom when the publication ban was originally ordered on May 28, 2018. At no point in the intervening period between the original publication ban order and its continuation in the Court of Appeal’s reasons of November 27, 2018 did the CBC attempt to assert its interests.

[120] In any event, it is not clear to me what further “notice” would be required in such circumstances. Courts do not issue formal invitations to their hearings — the courtroom is, and should be, open to all, including and especially the media. If the media is present in the courtroom when a publication ban is issued, it follows that it knows of its existence. That is what notice is supposed to be for.

[121] Nor has the CBC discharged its burden of showing that its proposed submissions could make a material difference in the outcome. It is well-established that

courts issuing publication bans are expected to consider the importance of the open court principle, even in the absence of a media representative making submissions (*R. v. Mentuck*, [2001] 3 S.C.R. 442, at para. 38). There is no reason to assume that did not happen in this case. The CBC does not propose to advance a new or unique position or to introduce evidence of which the Court of Appeal was unaware. It simply wishes to argue that the open court principle outweighs the interests supporting the ban, a foundational submission that the Court of Appeal is presumed to have already considered. Furthermore, having heard the CBC's complete argument on the propriety of the publication ban in this Court, I find it difficult to see how its submissions could make a difference in the result.

[122] More significantly, and relatedly, the CBC's failure to act in a timely manner is, in my respectful view, determinative. The publication ban was originally ordered on May 28, 2018 and was continued by the Court of Appeal in its reasons for judgment on November 27, 2018. But the CBC did not file its motion for reconsideration until May 10, 2019, over five months later. And it did not file its application to this Court for leave to appeal the original publication ban until January 27, 2020, nearly two years after the ban was first imposed and well over a year after it was continued in the November 2018 reasons for judgment.

[123] The CBC has suggested that its delay can be explained in part by its confusion as to the nature and scope of the publication ban, resulting in communications with the Court of Appeal to determine precisely what was prohibited.

[124] The correspondence between the CBC and the Manitoba Court of Appeal following the November 27, 2018 reasons demonstrates clearly that this is hardly a robust explanation. On November 30, 2018, the Executive Assistant to the Chief Justices and the Chief Judge informed the CBC that the media was entitled to review the material “protected by the ban on publication”, but that the actual fresh evidence affidavit was not available for review because the fresh evidence was not filed with the court after the motion was dismissed. After some further clarifying correspondence, by January 21, 2019, the Registrar had spelled out in unmistakable terms that “at the outset of proceedings on May 28, 2018, the [c]ourt imposed a publication ban preventing the publication of any of the details of the proposed fresh evidence. In paragraph 82 of the reasons, the [c]ourt ordered that the publication ban would remain in effect”. Yet it took the CBC another four months to file a motion for reconsideration.

[125] It is useful to put this delay in perspective by reference to some timelines provided for by Manitoba’s *Court of Appeal Rules*, Man. Reg. 555/88R. If a party to an appeal before the court of appeal wants a rehearing before the certificate of decision has been entered, they presumptively have 30 days to file a motion after reasons for judgment are delivered (r. 46.2(4)). If the appellant fails to file its factum in accordance with the timelines set out in the rules, its appeal will be deemed to be abandoned 30 days after the appellant receives notice from the registrar (r. 33(4)). These timelines are a legislated acknowledgement of the importance of timeliness in the resolution of court cases.

[126] An unexplained six month delay for filing a motion to have a publication ban reconsidered — even a four month delay, on a charitable interpretation of when the CBC had full and complete notice of the nature of the publication ban — is inordinate. Under no definition of “due dispatch” or “prompt action” can this delay be justified, particularly since the CBC was fully aware — and present — from the outset of the proceedings, the ban, and the ban’s continuation. On the other hand, the delay in this case causes acute harm to the family, who reasonably expected that their privacy and dignity interests were protected by the finality of the proceedings and that they would not be brought back to court. I see no reason to prolong their distress further.

[127] While it is true that the CBC’s appeal directly from the publication ban technically came to this Court on a separate application for leave to appeal from that of its appeal from the Court of Appeal’s refusal to reconsider that ban, both appeals ultimately seek the same relief: that the publication ban be set aside. In the unique context of this case, it makes sense that leave was granted concurrently in both appeals since the ultimate relief sought in both was the same. Moreover, the legal question of when the media can reopen a publication ban order after the case is over raised an issue of “public importance” requiring this Court’s guidance (*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1)).

[128] Since, in my respectful view, the CBC was not entitled to reconsideration of the publication ban as a result of its undue and unjustified delay, it would be incongruous to conclude that the impact of the CBC’s delay is different for its appeal

from the ban itself and for the appeal from the reconsideration motion. The reconsideration appeal is an appeal of that same ban. It would be the triumph of procedural formalism over substantive reality to pretend that these are two different and unrelated legal issues requiring separate conceptual consideration. An undue delay in one is an undue delay in the other.

[129] As for how to deal with this Court's recently released decision in *Sherman Estate v. Donovan*, 2021 SCC 25, it was open to the majority to seek further submissions based on the *Sherman* reasons. This would have been more consistent with this Court's usual practice in dealing with appeals of publication bans, namely, deciding them in our Court rather than remanding them back to the issuing court. It would also have curtailed the prolongation of these proceedings. In any event, with respect, I do not see anything in the *Sherman* decision of such determinative relevance to the CBC's interests that it justified ignoring the unjustified delay.

[130] This Court retains a narrow discretion to refuse to entertain the merits of an appeal even after leave has been granted. As Laskin C.J. wrote for the Court in *Canadian Cablesystems (Ontario) Ltd. v. Consumers' Association of Canada*, [1977] 2 S.C.R. 740,

Although it will be rarely that this Court, leave having been granted, will thereafter refuse to entertain the appeal on the merits, its power to do so is undoubted [p. 742]

This is one of those rare cases where the interests of justice warrant a refusal to entertain the appeal on the merits.

[131] I would dismiss the appeals.

Appeal from motion to set aside publication ban allowed. Appeal from publication ban adjourned sine die. ABELLA J. dissenting.

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