

The Tort of Unlawful Means, Sealing Orders, and *In Camera* Proceedings

Norm Emblem and Matthew Bradley

November 14, 2018

Speakers



Norm Emblem

Partner
Litigation

D 1 416 863 4487
E norm.emblem@dentons.com



Matthew Bradley

Associate
Litigation

D 1 416 863 4752
E matthew.bradley@dentons.com

Table of Contents

1. The Tort of Unlawful Means

- The Scenario
- Pleading Unlawful Means
- The effect of the Supreme Court's decision in *Bram Enterprises*

2. Sealing Orders and other Protective Orders

- Types of Orders that Encroach upon the Open Court Principle
- Authority for a Sealing Order
- Common Law Test for a Sealing Order

3. In Camera Hearings

- Authority to proceed *In Camera* or to obtain a Discretionary Publication Ban
- Procedure in Ontario for Obtaining an *In Camera* Order
- The necessity of *In Camera* Hearings in the Social Media Age

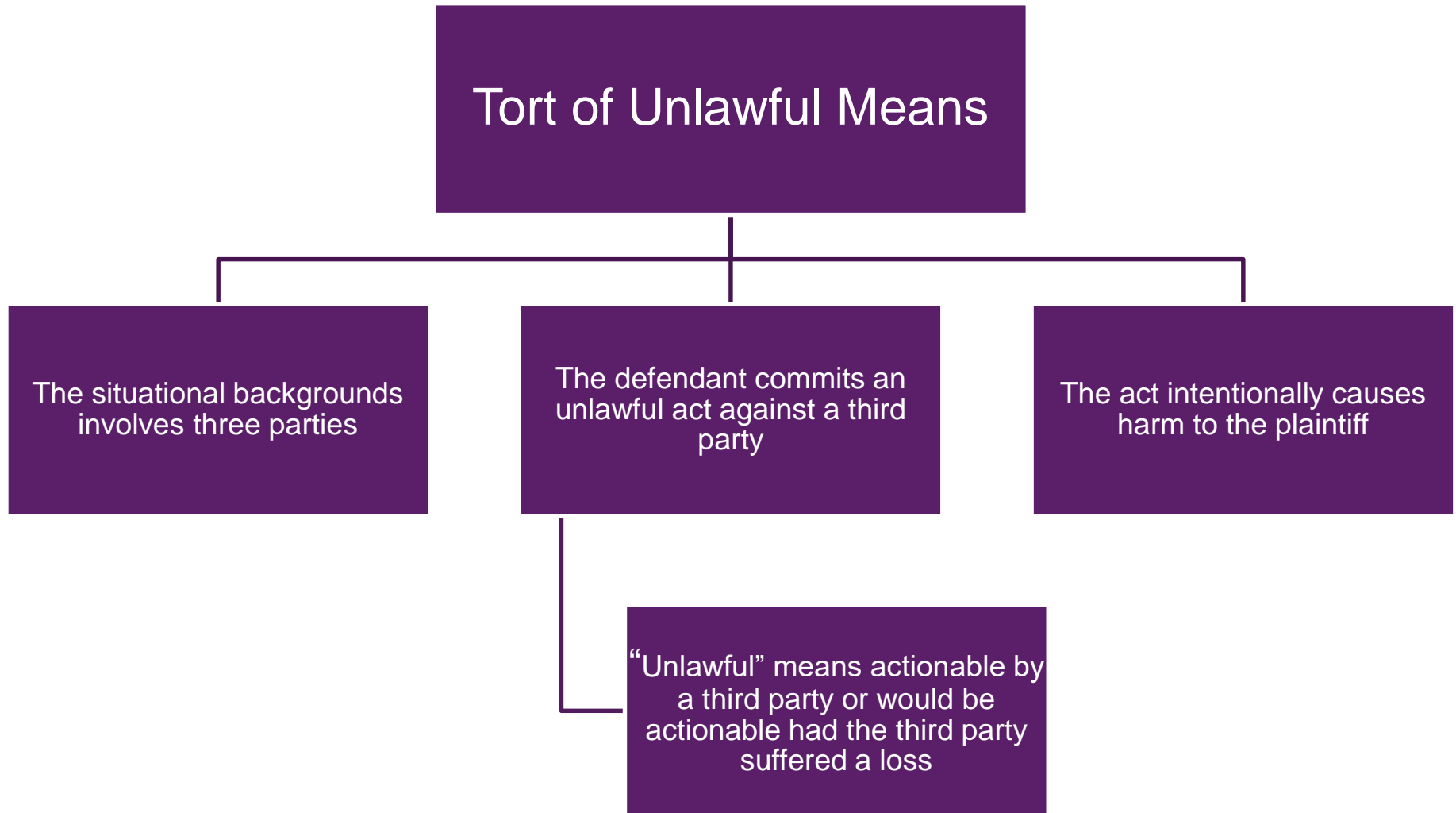
The Tort of Unlawful Means

The Scenario

- A large merchant ship, the Tarelton, is outfitted to trade with local merchants off the coast of Cameroon. The Tarelton lowers a small vessel into the water to carry goods to shore to set-up a trading post
- Another large ship, the Othello, is anchored offshore. The Othello competes with the Tarelton for trading partners
- Natives attempt to access the trading post by canoe, but the Othello fires its cannons at the canoes to prevent them from reaching the shore and completing their trades

Tarleton v. M'Gawley (1793), Peake 270, 170 E.R. 153.

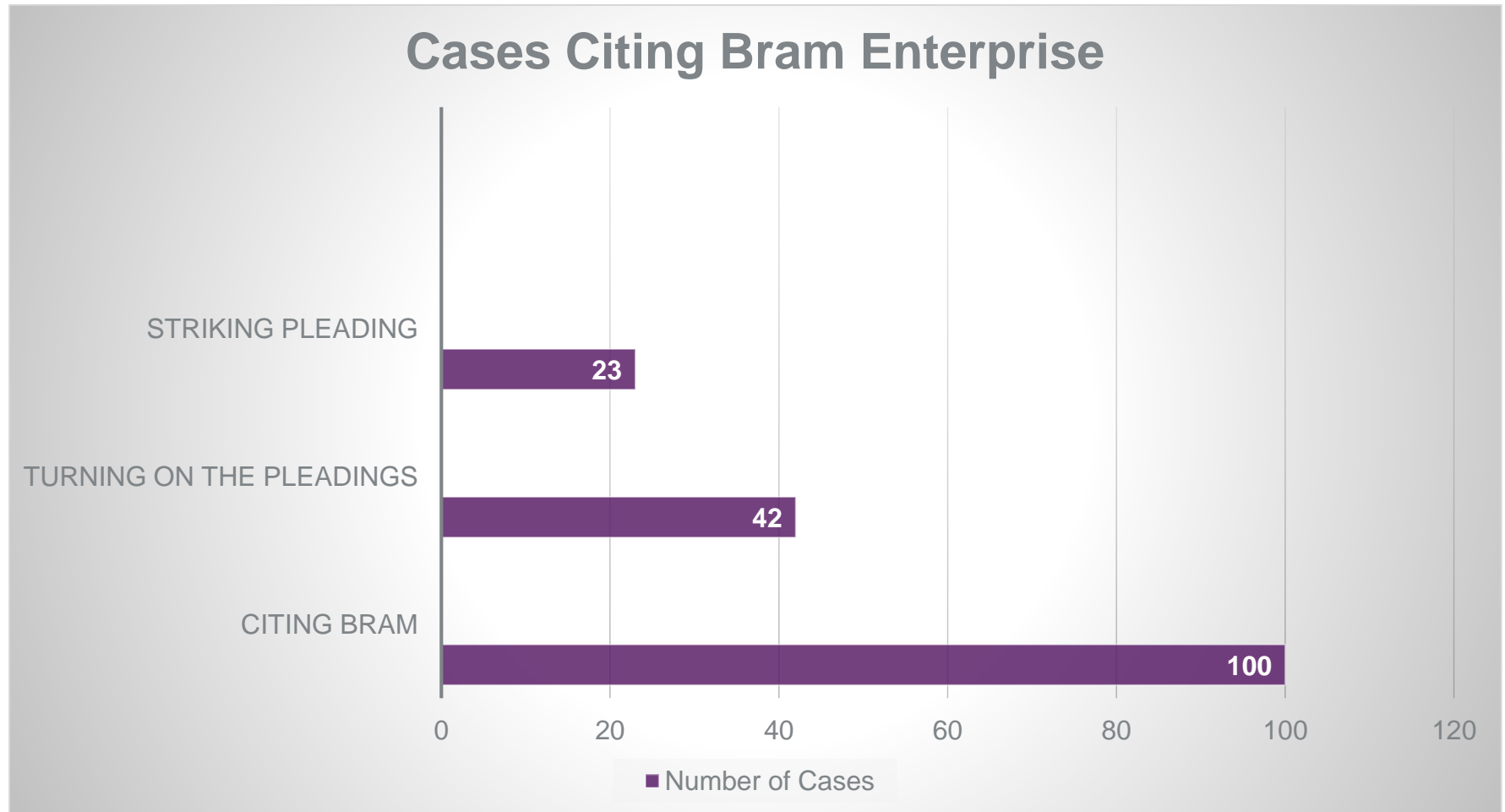
Bram Enterprises Ltd.



A.I. Enterprises Ltd. v. Bram Enterprises Ltd., 2014 SCC 12, 1 S.C.R. 177

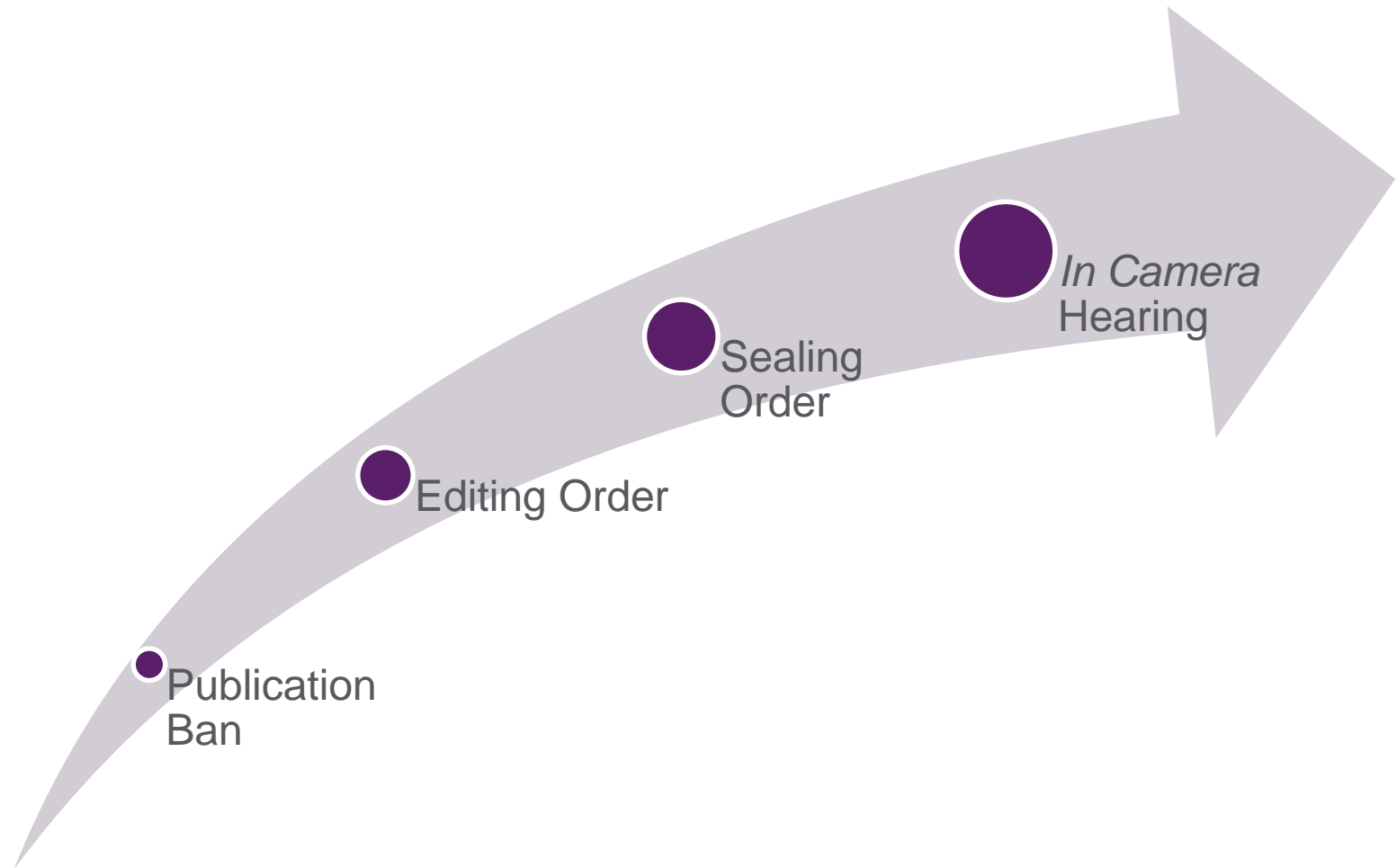
Effect of *Bram Enterprises*

Opportunity to Strike



Sealing and Other Protective Orders

Orders that Encroach Upon the Open Court Principle



Authority for Obtaining a Sealing Order

Documents public

- 137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise.

Sealing documents

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

Court lists public

- (3) On payment of the prescribed fee, a person is entitled to see any list maintained by a court of civil proceedings commenced or judgments entered.

The Common Law Test for a Sealing Order

“*Sierra Club* is the law of this land. The open court principle is not a trifling obstacle to be honoured in the breach. It is a fundamental and basic principle underlying our system of justice and the rule of law itself”

- A confidentiality or sealing order should only be granted when:
 - (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
 - (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

Romspen Investment Corp. v Courtice Auto Wreckers Ltd., 2018 ONSC 1591 at para 21; *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522, 2002 SCC 41.

In Camera Hearings

Authority for Obtaining a Discretionary Publication Ban or Order for an *In Camera* Hearing

Public hearings

135 (1) Subject to subsection (2) and rules of court, all court hearings shall be open to the public.

Exception

(2) The court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.

Disclosure of information

(3) Where a proceeding is heard in the absence of the public, disclosure of information relating to the proceeding is not contempt of court unless the court expressly prohibited the disclosure of the information.

Authority Under the *Rules of Civil Procedure*


- **37.11 (1)** A motion may be heard in the absence of the public where,
 - a) the motion is to be heard and determined without oral argument;
 - b) because of urgency, it is impractical to have the motion heard in public;
 - c) the motion is to be heard by telephone conference or video conference;
 - d) the motion is made in the course of a pre-trial conference or case conference; or
 - e) the motion is before a single judge of an appellate court. R.R.O. 1990, Reg. 194, r. 37.11 (1); O. Reg. 465/93, s. 4 (1); O. Reg. 24/00, s. 7; O. Reg. 170/14, s. 9.
- **(2)** The hearing of all other motions shall be open to the public, except as provided in section 135 of the Courts of Justice Act, in which case the presiding judge or officer shall endorse on the notice of motion leave for a hearing in the absence of the public. R.R.O. 1990, Reg. 194, r. 37.11 (2).

Procedure for Obtaining a Discretionary Publication Ban or Order for an *In Camera* Hearing

- As of July 1, 2016, the following procedure applies in Ontario:
 1. File a Notice of Application or Notice of Motion pursuant to the *Rules of Civil Procedure*
 2. In addition, unless otherwise directed by a judge, the person seeking the publication ban must provide notice to the media of the motion or application by completing and submitting a **Notice of Request for Publication Ban**

Applicants/ moving parties should bind “confidential” material separately from non-confidential material in a sealed envelope, and the envelope should specify the name and number of the case and indicate what the contents relate to

Notice of Request for Publication Ban


Superior Court of Justice

Notice of Request for Publication Ban

This form is to be completed and submitted by any party requesting a publication ban in a case before the Superior Court of Justice. The information in this form will be distributed to members of the media who have subscribed with the Court's publication ban notification service. Subject to the discretion of the presiding judge, proper completion and submission of this form will be accepted by the court as notice to the media of the pending request for a publication ban. For more information, refer to Part V (F) of the Court's [Consolidated Provincial Practice Direction](#).

Fields marked with * are required.

Details of Proceeding

Case Name *

Court File No. * Courthouse *

Type of Proceeding Criminal Civil Family Divisional Court

Details of Hearing

Date *

Time * am
 pm

Nature of Publication Ban Requested *
Please provide a brief description of the nature or type of publication ban you are requesting the Court to impose, including any relevant statutory authority. This information will be distributed to members of the media who have subscribed with the Court's publication ban notification service. If the information in this notice is already subject to a publication ban, please indicate.

Details re Requesting Party

Name of Requesting Party *

Role/position of Requesting Party * Crown Plaintiff Appellant/Applicant Other Accused Defendant Respondent Victim/Complainant Witness

Lawyer of Requesting Party (if applicable)


Contact Details for Further Information The person listed here will be contacted if a member of the media wants further information about the publication ban being requested. In most cases, the contact person will be the requesting party's lawyer. However, if the requesting party is self-represented, it may be the requesting party.


Name * Tel. no.

Address Email *

SUBMIT FORM

Media Subscription List


Superior Court of Justice



Superior Court of Justice Publication Ban Notification Media Subscriber List

Please complete the fields below to submit a request to be added to the Superior Court of Justice Publication Ban Notification Media Subscriber List.

Any request must be confirmed and approved before you will be added to the List. You will hear within 5 – 7 days of submitting your request whether it has been approved.

By submitting this request, you are agreeing to the following Terms and Conditions:

1. You will use the information provided through the Superior Court of Justice Publication Ban Notification Media Subscriber List (the "List") for the sole purpose of deciding whether or not you wish to attend and/or seek leave to make submissions at the hearing of the application/motion seeking a publication ban in a court proceeding.
2. You will not publish, broadcast or disseminate any of the information you receive through emails distributed through the Subscriber List in any way that could defeat the purpose of a publication ban being sought. More particularly, you will not publish, broadcast or disseminate any of the information that would be subject to the publication ban being sought, unless and until you have confirmed that the publication ban request has been determined by the Court and that publishing, broadcasting or disseminating the information would not violate the publication ban.
3. The Superior Court of Justice is not responsible for the accuracy of the content of any notices distributed through the Subscriber List. The information provided has been created and submitted by the persons who have indicated that they intend to seek a publication ban in a court proceeding. The information is being provided "as is", in the language in which it was submitted, and without warranty of any kind, express or implied, as to its accuracy, completeness, currency, or suitability for any particular purpose.
4. The list administrator can remove you from the Subscriber List at any time.
5. By submitting the request, you certify that the information provided on this form is accurate.

Email Address/Courriel

First Name/Prénom

Last Name/Nom

Criteria and Procedure for an *In Camera* Hearing

- An *in camera* hearing or exclusion order is the most intrusive measure of preserving an important commercial interest
- Due to their similar nature, the criteria and procedure to obtain an exclusion order are the same as those required to obtain a sealing order
 - “[t]here would be little point in sealing the Record while at the same time holding the exemption hearing in open court, thereby tipping off the world to the Applicant's potential bid — the very thing the sealing order would be designed to prevent.”
- The issue is whether *in camera* hearings have become a litigant’s only reasonable measure of preserving a client’s important commercial interest in the age of social media

Imperial Oil Ltd. v. Canada (Director Appointed under the Canadian Business Corporations Act), [1996] O.J. No. 2380, 6 C.P.C. (4th) 170 at para.4.

Practical Tips on a Motion to Obtain an *In Camera* Order

- The Necessity Requirement

- The risk posed by the open court room was be “well grounded in the evidence, and pose a serious threat to the commercial interest in question”
- The “**important commercial interest**” must be capable of being expressed in terms of a public interest and confidentiality”
- There must be no other reasonable alternative to the requested order

- The Proportionality Requirement

- Where the nature of the case engages the public interest, it will be harder to justify a sealing order as the public nature of the case strengthens the need for an open courtroom

An Important Commercial Interest

- Upholding confidentiality agreements if they have been negotiated prior to litigation
- Ensuring a right to a fair trial
- Protecting sensitive personal information
- Protecting the subject matter of the litigation itself
- Protecting settlement privilege

Inefficacy of Publication Bans in the Global Age

2004

Dagenais v CBC

“The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes, and shortwave radios”

2008

R v Valentine

- “The necessity of a ban is tempered by the practical reality that anyone who is inclined to do so may retrieve any aspect of the prior coverage by using an internet based search engine...foreign media, blogs, and online chat activity.”

2017

R v Globe and Mail

- “In my view, the idea that an unsealing order will keep the court open...and that a publication ban could then still have salutary effect fails to consider the sheer power of social media. All that would happen is the mainstream media would be prevented from disseminating information while versions of that same information would get into everyone's hands in any event...**[S]uch attempt to dictate the tides of internet discourse would be the administration of justice setting itself up for failure.**”

Questions?

Thank you

大成 DENTONS

Dentons Canada LLP
Toronto-Dominion Centre
77 King Street West, Suite 400
Toronto, ON, Canada M5K 0A1

Dentons is the world's largest law firm, delivering quality and value to clients around the globe. Dentons is a leader on the Acritas Global Elite Brand Index, a BTI Client Service 30 Award winner and recognized by prominent business and legal publications for its innovations in client service, including founding Nextlaw Labs and the Nextlaw Global Referral Network. Dentons' polycentric approach and world-class talent challenge the status quo to advance client interests in the communities in which we live and work.

www.dentons.com