IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Reference re: Criminal Code, s. 293,*
2010 BCSC 1351

Date: 20100924
Docket: S097767
Registry: Vancouver

IN THE MATTER OF:

THE *CONSTITUTIONAL QUESTION ACT*, R.S.B.C. 1986, C. 68

AND IN THE MATTER OF:

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

AND IN THE MATTER OF:

A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL SET OUT IN ORDER IN COUNCIL NO. 533 DATED OCTOBER 22, 2009 CONCERNING THE CONSTITUTIONALITY OF S. 293 OF THE *CRIMINAL CODE OF CANADA*, R.S.C. 1985, C. C-46

Before: The Honourable Chief Justice Bauman

Reasons for Ruling

Counsel for the Applicants, James Marion Oler and Fundamentalist Church of Jesus Christ of Latter Day Saints:	Robert V. Wickett Andrew Scarth, (A/S)
Counsel for the Reference *Amicus*:	George K. Macintosh, Q.C., Timothy Dickson
Counsel for the Attorney General of British Columbia:	Craig E. Jones, Sarah A. Bevan
Counsel for the Attorney General of Canada:	Deborah J. Strachan, Keith Reimer

Counsel for the B.C. Liberties Association:	Monique Pongracic-Speier
Counsel for West Coast Legal Action Fund:	Janet Winteringham, QC, Kasari Govender
Counsel for British Columbia Teachers' Federation:	Robyn P. Trask
Counsel for Canadian Coalition for the Rights of Children & David Asper Centre for Constitutional Rights:	Stephanie L. McHugh
Place and Date of Hearing:	Vancouver, B.C. 10 September 2010
Place and Date of Judgment:	Vancouver, B.C. 24 September 2010

[1] The applicants are the Fundamentalist Church of Jesus Christ of Latter Day Saints (the "FLDS") and James Oler in his capacity as bishop of the FLDS. They are Interested Persons in this reference regarding the constitutionality of the criminal prohibition against polygamy.

[2] The applicants wish to tender the evidence of a number of current and former FLDS members to challenge the case put forth by the Attorneys General. Their proposed witnesses are currently participating in, or closely related to persons who are participating in, what might later be determined to be criminally polygamous relationships. As such, they fear legal retribution and will not give their evidence without certain protections.

[3] Accordingly, the applicants seek liberty to tender the evidence of their proposed witnesses on the following terms:

a) If a witness for the applicants tenders evidence by affidavit, then:

   i. the witness may elect not to include his or her name or other details which might identify the witness or others who may be engaging in what may later be determined to be criminally polygamous relationships; and

   ii. the witness may use a pseudonym.

b) If a witness for the applicants is cross-examined on an affidavit and/or gives *viva voce* evidence in these proceedings, then:

   i. the witness shall not be asked questions of any kind that might lead to the identification of that witness or others who may be engaging in what may later be determined to be criminally polygamous relationships;

   ii. the witness may elect to give evidence from behind a screen or by teleconference; and

iii. the witness may use a pseudonym.

[4] During oral submissions, the applicants clarified that it was their intention that the identities of their witnesses would be disclosed to the Court and that any witness who testified behind a screen would also be visible to the Court.

[5] The Attorney General of British Columbia (the "AG BC") and the Attorney General of Canada (the "AG Canada") vigorously oppose this application. They argue that the relief sought would fundamentally degrade the integrity of the proceedings and unjustifiably violate the open court principle.

BACKGROUND

[6] Bountiful is an FLDS community located near Creston, British Columbia. The FLDS is a denomination of the Mormon faith that practices plural marriage.

[7] Mr. Oler is bishop of one FLDS group in the community. Winston Blackmore is bishop of the other.

[8] In 2008, Mr. Oler and Mr. Blackmore were charged with polygamy contrary to s. 293 of the *Criminal Code*. The charges were eventually stayed following judicial review of the charge approval process.

[9] The AG BC subsequently initiated these reference proceedings with respect to s. 293. The two questions to be considered are:

a) Is section 293 of the *Criminal Code of Canada* consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

b) What are the necessary elements of the offence in section 293 of the *Criminal Code of Canada*? Without limiting this question, does section 293 require that the polygamy or conjugal union in question involved a minor, or occurred in a context of dependence, exploitation, abuse of authority, a gross imbalance of power, or undue influence?

[10] The FLDS and Mr. Oler in his capacity as bishop of the FLDS were granted Interested Person status in these proceedings.

[11] Mr. Blackmore, on his own behalf and on behalf of his congregation, applied for party status and an order for advance costs. His application was denied (indexed at 2010 BCSC 517, the "Blackmore Ruling"), and he has not participated further in this reference.

[12] A schedule for the exchange of evidence between the various reference participants was set at an early case management conference. The first exchange in June 2010 related to evidence from the *Amicus* and allied Interested Persons in support of the position that s. 293 violates the *Charter*.

[13] The *Amicus* filed four affidavits. The deponents include experts in family demography and religious studies, as well as a Wiccan priest.

[14] Another of the affidavits was provided by Angela Campbell, a professor of law who has researched women in polygamous marriages, particularly in the community of Bountiful. She interviewed 22 women from the community, and her affidavit relates some of their views on issues such as choice in marriage within their FLDS community. The women are not identified.

[15] The applicants filed an affidavit of Dr. William John Walsh, a specialist and scholar in the field of Mormon studies. He describes the history, role and mechanics of fundamentalist Mormon polygamy, primarily in an American context.

[16] The only other Interested Person to file evidence at this stage was the Canadian Polyamory Advocacy Association. As has been described elsewhere, it is said that polyamory is a non-patriarchal relationship structure based on gender equality. The Association filed five affidavits from members of polyamorous households detailing their relationships and a sixth affidavit that described polyamory more generally.

[17] The Attorneys General and various allied Interested Persons filed evidence in July 2010 opposing the position that s. 293 violates *Charter* rights, and/or supporting the position that any violation is a justified infringement under s. 1. These Interested Persons were: Stop Polygamy in Canada; Christian Legal Fellowship; British Columbia Teachers Federation; Beyond Borders: Ensuring Global Justice for Children; Canadian Coalition for the Rights of Children, jointly with the David Asper Centre for Constitutional Rights; REAL Women of Canada; and, West Coast Women's Legal Education and Action Fund.

[18] The evidence filed comprises roughly 46 affidavits and voluminous Brandeis Brief materials.

[19] Nineteen of the affidavits are from individuals attesting to personal experiences within fundamentalist Mormon communities in Canada and the United States, primarily the FLDS. The AG BC explains this evidence was tendered in response to matters the *Amicus* and the applicants put squarely in issue through the affidavits of Dr. Walsh and Professor Campbell.

[20] The Brandeis Brief materials consists of:

a) 35 articles by legal academics;

b) 106 articles and book excerpts by social science academics;

c) 11 academic books;

d) 16 journalistic, historical and autobiographical accounts;

e) 7 magazine and newspaper articles;

f) 8 reports, surveys and statistics; and

g) 4 DVDs and multimedia materials.

[21] The final exchange of evidence later this month will be from the *Amicus* and allied Interested Persons opposing the position that any violation is justified under s. 1 of the *Charter*. The applicants wish to tender evidence at this last stage to address the harms described in the AG BC's affidavits.

[22] In an affidavit filed on this application, Mr. Oler describes some of the proposed witnesses and their concerns:

> 8. I am advised by Robert Wickett, and verily believe it to be true, that he has (and is continuing) to interview many members of the FLDS, both in Canada and in the United States, in anticipation of tendering their evidence in this reference. (the "Proposed Witnesses") I know all of the Proposed Witnesses. The Proposed Witnesses comprise a wide variety of members and former members of the FLDS. Some are men and some are women, both married and unmarried. The ages of the Proposed Witnesses range from age 17 through age 80.
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> 9. While the personal and family circumstances of all of the Proposed Witnesses are different they all share one characteristic. All were either raised in a polygamous household, are (or were) themselves engaged in what later may be determined to be a criminally polygamous relationship or are intimately related to or are familiar with other persons engaging in what later may be determined to be criminally polygamous relationships.
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> 10. I have spoken to some of the Proposed Witnesses about the issues raised in this application. Below I summarize what I have been told, all of which I verily believe to be true:
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> a. Proposed Witness no. 1 is a young, adult, unmarried woman. She is prepared to give evidence in this reference but is concerned that she will be asked to identify her parents, who are living in a polygamous relationship. She will not testify if her evidence could be used to identify her parents, or her brothers and sisters some of whom live in polygamous relationships.
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> b. Proposed Witness no. 2 is a woman. She is willing to give evidence in this reference. She lived in a polygamous relationship for many decades and her husband is now deceased. She has many adult children and grandchildren who live in polygamous relationships in Canada and in the United States. She also has children and grandchildren living in monogamous relationships, some as members of the FLDS and others who have chosen to leave the church. She will not give evidence if her testimony could be used to identify and prosecute her children.
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> c. Proposed Witness no. 3 is a man who lives in Texas. He is engaged in a monogamous relationship but his parents have lived in a polygamous relationship as does one of his siblings. He is prepared to give evidence in this reference but not if his testimony will require him to identify himself and those to whom he is related. He is

> concerned that US authorities will obtain his testimony and either use it to investigate or prosecute others. He is also concerned that he could be subpoenaed to give evidence in Texas.
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> d. Proposed Witness no. 4 is a woman living in a polygamous marriage. She is willing to give evidence in this reference but not if her evidence could be used to identify and thereby prosecute her husband.
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> e. Proposed Witness no. 5 is a man living in the United States and involved in the educational system for FLDS children. Although he is not involved in a polygamous marriage he has many immediate relatives who are. He is willing to give evidence in this reference but not if his testimony can be used to investigate or prosecute other members of the FLDS community.
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> 11. Proposed Witnesses no. 6-9 are women who live in Texas, in polygamous relationships. These women had their children taken from them by Texas state authorities and later returned following orders from the Texas Supreme Court. Although I have not had the opportunity to speak directly with them about this matter, I understand they have been advised that they ought not to testify in this reference if there is any risk that their evidence could be used to take their children or husbands away from them again. I would be surprised if they would volunteer to give evidence in this reference, notwithstanding its importance to them and the benefit their evidence could provide to this Court, if they believed that their evidence could be used to prosecute them or their husbands or take their children from them again.
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> 12. The foregoing are but a sampling of the Proposed Witnesses. I expect based upon my experiences as a life long member of the FLDS that all of the Proposed Witnesses will share some or all of the concerns I have expressed.

POSITIONS OF THE PARTIES

[23] The applicants say that the AG BC's proposed definition of criminal polygamy and his direct evidence respecting the harms of polygamy are entirely focussed on fundamentalist Mormonism in general and the FLDS in particular. As the only fundamentalist Mormons who have elected to participate in this reference, the evidentiary burden has fallen almost entirely upon them.

[24] Based on past experience and, in particular, the aborted prosecution of Mr. Oler, the applicants' proposed Canadian witnesses fear that if they proffer evidence in this reference, they or a family member will be targeted for future criminal prosecution in the event the Court concludes that s. 293 is constitutionally valid. The applicants say this fear is underscored by the AG BC's refusal to grant their

witnesses immunity. They further say that *Charter* protections against self-incrimination provide insufficient assurance to the witnesses that their voluntary testimony will not be used to initiate future investigations and prosecutions.

[25] The proposed witnesses from the United States have similar fears. The applicants have filed an affidavit of Stephen Clark, a lawyer practicing in Utah. He says this at paras. 7 - 9:

> 7. This core belief of members of the FLDS [plural marriage] has been specifically outlawed in Utah since shortly before Utah's admission to the Union in 1896, when the LDS Church was forced to disavow the practice as a condition to Utah's obtaining statehood.
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> 8. Other states in the United States, including Arizona and Texas, also have laws prohibiting polygamy or bigamy, and Texas in particular has in recent years shown a marked determination to attempt to apply its criminal bigamy statute to the FLDS practice of plural marriage. Specifically, the State of Texas has indicted twelve FLDS men for conduct related to the practice of plural marriage, including bigamy. Several of those prosecutions have resulted in pleas or convictions; others are pending; still more are threatened.
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> 9. As a consequence of these prohibitions, and particularly in light of Texas' efforts to apply its bigamy statute to the FLDS practice of plural marriage, members of the FLDS not only exhibit their historical reluctance to speak about their lifestyle and beliefs with persons not of the FLDS faith, but they also increasingly express their fear that participation in any of the numerous ongoing legal proceedings involving their faith community will make them targets of prosecution.

[26] While the applicants concede that the ability of the Attorneys General to confront the proposed witnesses will be impaired by the orders they seek, they maintain that this is of secondary concern to the importance of receiving the evidence in the unique context of these proceedings. Importantly, they say, the identities and personal details of the proposed witnesses are not essential to the reference questions before the Court which concern a particular practice as opposed to the actions of any particular person.

[27] The applicants argue that the proposed evidence is crucial to their case. Without it, they will have no evidentiary foundation to ground their submissions regarding the religious beliefs, cultural underpinnings and life experiences of FLDS members. They also say that the evidence is crucial to these proceedings, as it is

not possible for the Court to give an informed opinion in the absence of first-hand evidence to counter that of the AG BC.

[28] The applicants rely on the Court's inherent jurisdiction for the orders they seek.

[29] The *Amicus* supports the application, submitting that the protections sought are necessary in the interests of justice if this reference is to be fair and meaningful. He echoes the applicants' position that the evidence of the proposed witnesses is essential and their apprehensions real, given that they live in violation of s. 293 as it has been interpreted by the AG BC.

[30] The *Amicus* has no fact evidence to tender. He explains that members of polygamist communities are very private and guarded, and do not trust people associated with government. This includes the *Amicus*, despite assurances that he is either neutral or on their side in this matter.

[31] The affidavits filed by the Canadian Polyamory Advocacy Association provide the only other direct evidence on the *Amicus's* side. However, this evidence does not touch upon the issues on which this reference will be primarily fought. The *Amicus* says that the evidence filed by the Attorneys General makes clear that the FLDS is the primary factual focus of these proceedings.

[32] The *Amicus* submits that, as a consequence, the evidence as it presently stands leaves a one-sided picture. Without the applicants' proposed evidence, the Court will only have direct evidence from the "disenchanted" who have left fundamental Mormonism, not those who remain within the FLDS.

[33] The two Attorneys General counter that no special accommodation should be afforded the proposed witnesses over and above the rights they otherwise enjoy at law.

[34] They argue that the rationale for various witness protections available in circumstances not relevant here (both pursuant to statute and the court's inherent

jurisdiction) is to protect victims of crime, not perpetrators. The applicants, they say, are asking this Court to frustrate the administration of justice by essentially immunizing individuals who may have committed criminal offences from possible future investigation and prosecution. Such an order would be contrary to public policy and beyond the scope of the Court's inherent jurisdiction.

[35] The Attorneys General further argue that the orders sought impermissibly violate the open court principle.

[36] Characterizing this application as one for a "publication ban plus", the AG BC says it falls to be analyzed under the *Dagenais*/*Mentuck* framework (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442). The AG Canada relies on the tripartite test for an interim injunction which has been frequently applied on applications for anonymity orders in civil proceedings. The factors each canvass in their submissions are largely similar.

[37] The Attorneys General are critical of the evidentiary foundation submitted for this application. They say that the affidavits filed in support do not outline what the witnesses will say if permitted to give evidence anonymously. Further, they offer only speculative assertions of harm.

[38] The Attorneys General contend that the proposed evidence is simply not necessary. They say this Court has already so concluded in the Blackmore Ruling at para. 39:

> [39] In my view, in light of Mr. Blackmore's lack of a direct interest in the outcome of this proceeding, it cannot be said that he ought to have been joined at the outset of the Reference; nor can it be said that his participation "is necessary to ensure that the matters in the proceeding may be effectually adjudicated upon". It is undoubtedly the case that Mr. Blackmore's participation would help in developing the record which will assist the Court in answering the questions on the Reference, but that participation is not "necessary" in the sense meant by Rule 15(5)(a)(ii) anymore than is the participation of the interested persons, including Mr. Oler and his congregation.

[39] They further argue that the ability of the applicants and the *Amicus* to argue their cases without anonymous witnesses belies their claims of necessity. They may choose to introduce expert evidence to undermine that of the Attorneys General; second-hand accounts which may be weaker with respect to weight but still admissible; social science evidence in the form of Brandeis Brief material; and, first-hand evidence of persons who do not seek to testify anonymously. They may also elicit evidence through cross-examination of the AG BC's 19 direct experience affiants.

[40] With reference to the applicants' submissions, the Attorneys Generals say the only salutary effects of the orders would be the availability to the Court of additional direct evidence regarding fundamental Mormonism, and the evasion of prosecution by the applicants and/or their witnesses.

[41] They answer that the reference questions are not directed at fundamentalist Mormonism but to polygamy in general, and that the record is already replete with evidence on fundamental Mormonism. Frustrating the otherwise valid application of the law is not a salutary effect at all.

[42] Among the deleterious effects the Attorneys General identify is the minimal value of evidence tendered anonymously and immune from investigation and effective cross-examination. Restrictions on the questions that could be asked, as the applicants seek, are a greater interference with the ability to test the proposed evidence. The violation of the open court principle itself, particularly in the context of constitutional adjudication, and the public policy implications of an order with no other purpose than the frustration of the legitimate application of the law are additional deleterious effects that must be weighed in the balance.

DISCUSSION

[43] The applicants bring this application because they consider existing legal protections to be inadequate.

[44] With respect to compelled testimony, use immunities are governed by s. 5 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, and s. 4 of the *Evidence Act*, R.S.B.C. 1996, c. 124. These provisions provide that a compelled witness cannot refuse to answer questions that might incriminate him or her but that subsequent use of that testimony in prosecutions is barred. Where evidence is offered without compulsion, the situation here, the provisions do not apply.

[45] The *Charter* provides some protection to a witness who gives evidence voluntarily. Section 13 provides:

> A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[46] Further, s. 7 has been interpreted to provide derivative use immunity.

[47] However, the applicants identify what they say are the limitations of these *Charter* protections in the present context:

a) it is not certain whether there is use immunity for evidence tendered by affidavit;

b) derivative use immunity may be unavailable to witnesses who testify voluntarily;

c) the exclusion of derivative use immunity in subsequent proceedings is, in any event, discretionary;

d) there is no protection from the direct or derivative use of the witnesses' evidence in future prosecutions in the United States; and

e) there is no protection from the direct or derivative use of the witnesses' evidence in prosecutions of spouses and others in Canada or the United States.

[48] Without deciding whether each of these propositions is necessarily correct, I do accept that the *Charter* protections provide insufficient assurances to the proposed witnesses that their evidence will not be used against them; thus, this application for broader protections.

[49] The applicants offer an English statute – the *Criminal Evidence (Witness Anonymity) Act 2008* (U.K.), c. 15 – as a template for the orders they seek. While interesting, I prefer instead to consider the application applying Canadian authorities. There is in this regard a divergence, as reflected in the Attorneys General's different analytical frameworks.

[50] As noted, the AG BC relies on the *Dagenais/Mentuck* analysis, which applies to applications which seek to restrict the openness of judicial proceedings.

[51] The AG Canada proposes the tripartite test for an injunction as set forth in *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311: (1) is there a serious issue to be tried; (2) is there a likelihood of irreparable harm; and (3) does the balance of convenience favour the granting of the injunction. This test has been applied on a number of applications for anonymity orders in civil proceedings: see, for example, *A. v. C.* (1994), 89 B.C.L.R. (2d) 92, 113 D.L.R. (4th) 726 (S.C.); *A.B. v. Stubbs* (1999), 44 O.R. (3d) 391, [1999] O.J. No. 2309 (S.C.J.); *P.A.B.D. (Re)*, 2005 NLTD 214, 20 C.P.C. (6th) 306; *Jane Doe v. D'Amelio* (2009), 98 O.R. (3d) 387, 83 C.P.C. (6th) 67 (Ont. S.C.J.); and *Janet Doe v. O'Connor*, 2010 ONSC 1830. These authorities similarly stress the primacy of the open court principle.

[52] Each, in my view, leads to the same outcome.

[53] It is a foundational principle of our system of justice that all court proceedings be conducted in an open and public manner so as to maintain confidence in the administration of justice. Superlatives abound in descriptions of the importance of this principle, some of which are summarized in *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, beginning at para. 23:

> [23] This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 187; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at paras. 21-22; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. "Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly [page346] democratic societies and institutions. The vital importance of the concept cannot be over-emphasized": *Edmonton Journal, supra*, at p. 1336.
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> [24] The open court principle has long been recognized as a cornerstone of the common law: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at para. 21. The right of public access to the courts is "one of principle ... turning, not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417 (H.L.), *per* Viscount Haldane L.C., at p. 438. "Justice is not a cloistered virtue": *Ambard v. Attorney-General for Trinidad and Tobago*, [1936] A.C. 322 (P.C.), *per* Lord Atkin, at p. 335. "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity": J. H. Burton, ed., *Benthamiana: Or, Select Extracts from the Works of Jeremy Bentham* (1843), p. 115.
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> [25] Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General), supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

[54] The *Dagenais/Mentuck* analysis provides a framework for analyzing when it is legitimate to depart from the open court principle. In *Vancouver Sun (Re)*, the Court explained, at para. 29:

> [29] From *Dagenais* and *Mentuck*, this Court has stated that a publication ban should be ordered only when:
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> a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
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> b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[55] This test applies to all discretionary actions by a court to limit freedom of expression by the press during judicial proceedings: para. 30. The burden of displacing the open court principle rests with the applicant.

[56] To the extent that the orders sought restrict public access to and scrutiny of information that will be available to the Court (namely, the identities of the proposed witnesses), they infringe the open court principle so as to engage the *Dagenais/Mentuck* analysis. Indeed, they go further in that they restrict even the parties and other Interested Persons from accessing and scrutinizing the information.

[57] It is necessary that the *Dagenais/Mentuck* framework be calibrated to the specific context at hand. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, demonstrates this point.

[58] The Sierra Club sought judicial review of a federal government decision to provide financial assistance to Atomic Energy of Canada Ltd. (“AECL”) for the construction and sale of two nuclear reactors to China. The Sierra Club maintained that the authorization of financial assistance by the government triggered an environmental assessment under applicable legislation, and that failure to comply compelled cancellation of the financial arrangements.

[59] The AECL filed an affidavit in the proceedings which summarized a large volume of confidential information. It resisted the Sierra Club’s application for production of the confidential documents on the grounds, *inter alia*, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The AECL’s application for a confidentiality order was rejected by the Federal Court, a decision upheld by the Federal Court of Appeal.

[60] On further appeal, the Supreme Court of Canada considered the particular rights and interests engaged so that it could adapt the *Dagenais/Mentuck* analysis to the specific context at hand. The Court said this:

(2) The Rights and Interests of the Parties

[49] The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

[50] Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence, or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a Charter right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan,* [1997] 1 S.C.R. 157, at para. 84, per L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone [page543] demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

[51] Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

[52] In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the Charter: New Brunswick, supra, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner: New Brunswick, at para. 22.

[61] At para. 53, the Court framed the appropriate test in these terms:

> A confidentiality order under Rule 151 [of the *Federal Court Rules*, 1988, SOR/98-106] 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.

[62] It is similarly necessary to calibrate the *Dagenais/Mentuck* framework to the present circumstances by considering what rights and interests are engaged on this application. These rights and interests are, in turn, informed by the nature of these proceedings.

[63] Of singular importance to this application is the fact that it is brought in the context of a reference. I referred to the characteristics of a reference in an earlier ruling indexed at 2009 BCSC 1668, at para. 45:

> [45] A reference is a process by which a government is able to receive an advisory opinion from the court on a question of law outside the framework of adversarial litigation. As the Supreme Court of Canada explained in *Reference re Secession of Quebec*, at para. 25, a court hearing a reference performs a function that differs from its usual adjudicative role:
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> > In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise it would never entertain in the context of litigation. No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

[64] This is not a criminal proceeding in which the rights of an accused are paramount. Nor is it a civil proceeding engaging the Court in a disposition of rights. It is a reference in which the Court has been called upon to provide an advisory opinion on the two questions referred.

[65] More unusual still is the fact that the AG BC has initiated this reference in a trial court, as opposed to an appellate court where virtually every other reference in this country has been brought. Presumably, this is to enable the introduction of a sufficient evidentiary foundation to ground a meaningful analysis of the reference questions.

[66] With this mind, I turn to the rights and interests engaged on this application.

[67] Briefly, this application is grounded on the apprehensions of the applicants' proposed witnesses that their evidence may give rise to criminal investigation and prosecution. If the anonymity orders are not granted, they will not give their evidence.

[68] Without this evidence, the applicants contend that they will be unable to fully present their position on the constitutionality of a *Criminal Code* provision they allege contravenes their *Charter* rights. They will have no evidentiary foundation upon which to base their submissions regarding the religious beliefs, cultural underpinnings and life experiences of FLDS members, or upon which to challenge the harms of polygamy alleged by the Attorneys General.

[69] The *Amicus*, who was appointed to advance arguments in opposition to those of the Attorneys General, is similarly constrained in his ability to advance those arguments without the evidence in question, given the paucity of direct evidence on his side.

[70] There is, as well, a general public interest in a reference opinion informed by a complete record and full argument on all sides.

[71] Thus, the interests promoted by the anonymity orders are those of the applicants and the *Amicus* to a fair reference proceeding. Further, there are the public and judicial interests in a reference opinion informed by a complete record and argument.

[72] On the other side of the scale lies the impact of anonymity orders on the principle of open and accessible court proceedings, as already discussed. Additionally, there is the impact of the proposed orders on the fair trial interests of the Attorneys General whose ability to investigate and cross-examine on the proposed evidence will be curtailed.

[73] With these factors in mind, I will approach the *Dagenais/Mentuck* analysis as follows:

a) Are the anonymity orders necessary in order to prevent a serious risk to an important interest in the context of a reference proceeding because reasonably alternative measures will not prevent the risk?; and

b) Do the salutary effects of the anonymity orders, including their effects on the interests of the reference participants to a fair proceeding, outweigh their 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?

[74] In my view, the necessity criterion is met.

[75] The risk of harm is not the possibility of prosecution for criminal conduct if the witnesses testify without the benefit of an anonymity order. The Attorneys General appear to have so characterized the risk and then submit that the Court should not be a party to shielding potentially criminal conduct. That concern is quite beside the mark. The fact is that in all likelihood if the order does not go, the proposed witnesses will not testify. No shield is necessary. The order is needed so as to ensure that the evidence of these witnesses is before the Court. And that evidence is necessary for the Court to conclude the reference. I add, parenthetically, that the reality of the applicants' concern that existing protections will not necessarily assist them in future proceedings is relevant, but it is relevant to their *bona fides* in advancing this application. If I were to conclude that the applicants' fears were groundless that would certainly affect the analysis in which I am engaged.

[76] The risk of losing the evidence of the proposed witnesses gives rise to at least two distinct harms: that to the public and the Court who will be denied a complete record upon which to have these important social and legal issues tried properly; and that to these Interested Persons who will be denied the full entitlement to be heard assured them under s. 5 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68.

[77] I further conclude that alternative measures will not prevent the risk. Indeed no realistic measures were suggested in argument. It bears repeating that this a reference before a trial court. To the extent this venue was chosen to facilitate the creation of a full evidentiary record, alternatives identified by the AG BC in his submissions on necessity - expert evidence, second hand accounts, social science evidence, and cross-examination of the AG BC's personal experience deponents, for instance - are poor substitutes.

[78] I interject to note that the AG BC also submits that the participation of the applicants is not necessary, as this Court has already found in the Blackmore Ruling. That ruling, however, concerned Mr. Blackmore's application for party status under Rule 15(5) of the *Supreme Court Rules*. "Necessity" in that context has a specific and more stringent meaning that does not apply to this application or in the measurement of the need of the evidence of the proposed witnesses.

[79] I further conclude that the salutary effects of the anonymity orders, which I have just identified - ensuring a full record and facilitating the applicants' right to be heard - outweigh their deleterious effects. Those effects include the compromise of the open court principle, the effects on the right to free expression and the limitation on the ability of persons who are adverse in interest to fully cross-examine the anonymous witnesses.

[80] These deleterious effects are, in my view, muted by the nature of these proceedings. I am not adjudicating rights, so the concern with the inability to fully confront a witness (by knowing his or her identity) loses much of its force. The *Amicus* said that in the circumstances of this proceeding, the right to cross-examine

is fairly minimally impaired by the requested orders. I agree. I note, as the *Amicus* underlines, that there is a wealth of material before the Court, particularly in the Brandeis Brief, which will never be tested in cross-examination in the traditional way.

[81] That consideration mutes, as well, the impact of the proposed orders on the open court principle and the right to free expression. We will hear and see the evidence of these witnesses; it will be reported. The consideration to be paid for the evidence is anonymity to the witnesses. The evidence is worth the price and I can say that without knowing, as the Attorneys General urge, the "chapter and verse" of what the witnesses will say. It is their lifestyle evidence. Its worth is self-evident.

[82] In conclusion on this test, in balancing the rights and interests engaged in the specific context of these reference proceedings, the salutary effects of the proposed anonymity orders outweigh their deleterious effects.

[83] The same result would pertain under the test for injunctive relief put forth by the AG Canada.

[84] The points I have made above, placed in the context of the test for injunctive relief, make the case for the order going.

[85] The applicants seek the order set out in para. 3 of this ruling. The first part pertains to evidence tendered by affidavit, and is acceptable as proposed.

[86] The second part concerns *viva voce* evidence. The first aspect of this part is that a "witness shall not be asked questions of any kind that might lead to the identification of that witness or others who may be engaging in what may later be determined to be criminally polygamous relationships". I frankly find this to be somewhat troubling part of the order, as it may in some circumstances be difficult for a questioner to know whether a particular question will lead to identifying information in contravention of the order. Nevertheless, in the event questions in this grey zone arise, the Court can rule on them accordingly.

[87] The second aspect of this part of the order purports to give a right to the witness to elect to give evidence by teleconference. While I am not precluding the giving of evidence by teleconference on application, I am not prepared to allow the witnesses to so dictate. This part of the order will not go.

[88] The order will go as follows:

a) If a witness for the applicants tenders evidence by affidavit, then:

   i. the witness may elect not to include his or her name or other details which might identify the witness or others who may be engaging in what may later be determined to be criminally polygamous relationships; and

   ii. the witness may use a pseudonym.

b) If a witness for the applicants is cross-examined on an affidavit and/or gives *viva voce* evidence in these proceedings, then:

   i. the witness shall not be asked questions of any kind that might lead to the identification of that witness or others who may be engaging in what may later be determined to be criminally polygamous relationships;

   ii. the witness may elect to give evidence from behind a screen; and

   iii. the witness may use a pseudonym.

[89] I should add, since submissions were made on this point, that this order falls squarely within this Court's inherent jurisdiction.

"The Honourable Chief Justice Bauman"