IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Sipes,*
2011 BCSC 1329

Date: 20111005
Docket: 66431-2
Registry: Kelowna

2011 BCSC 1329 (CanLII)

Regina

v.

Dale Gordon Sipes, Leslie Podolski, Sheldon Richard O'Donnell Peter Manolakos and Douglas Corey Brownell

Ban on Publication pursuant to s. 486.5 of the *Criminal Code*, R.S.C. 1985, c. C-46. This edited version of the Reasons for Judgment complies with the publication ban.

Before: The Honourable Mr. Justice Smart

APPLICATIONS FOR PUBLICATION BANS

Reasons for Judgment

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Counsel for the Applicant Manolakos:	R.A. (Sandy) Ross, P. Doherty, A. Rinaldis
Counsel for the Applicant Brownell:	B. Hickford, C. Purves
Place and Date of Judgment:	Vancouver, B.C. October 5, 2011

I. INTRODUCTION

[1] I have two applications before me. One is brought by the Crown seeking an order pursuant to s. 486.5 of the *Criminal Code*, R.S.C. 1985, c. C-46, banning publication of any information that would tend to identify seven of its witnesses. The second is brought by a lawyer seeking an order pursuant to the court's common law jurisdiction banning publication of any information that directly, or by necessary implication, identifies him. The lawyer is unlikely to be a witness at this trial.

[2] Two of the seven Crown witnesses [Content Redacted]. Their evidence primarily concerns events that occurred in Vernon during 2004 and 2005. During those years they were [Content Redacted] addicted to cocaine and [Content Redacted]. These two witnesses have filed affidavits which state that they are now living stable, productive lives in communities away from Vernon where few people know about this period of their lives.

[3] The application concerning these two witnesses is not opposed by any party. I will say nothing further about it other than I agree the order should be granted in the terms agreed to by counsel.

[4] The application concerning the other five Crown witnesses is based on different considerations, and is opposed by the media and the accused. These witnesses (the "inmate witnesses") are incarcerated in federal institutions operated by the Corrections Service of Canada ("Corrections"). Four of the inmate witnesses, are serving life sentences for murder. The fifth is serving [Content Redacted] and related offences. The Crown's application concerning the fifth witness was heard some weeks after the application for the other witnesses.

[5] The lawyer's application is brought by his counsel. The lawyer, William Mastop, acted for some of the accused. His application is motivated by the fact he is awaiting trial on a charge of participating in the activities of a criminal organization. The alleged criminal organization was known as the Greeks. It is the same

2011 BCSC 1329 (CanLII)

organization the accused were members of or associated with. The media and the Crown oppose Mr. Mastop's application. The accused take no position.

[6] This trial is now in its sixteenth week. It is a jury trial. It is expected to continue for another six to eight months. I earlier imposed interim publication bans protecting the identities of Mr. Mastop and the seven Crown witnesses pending this decision. [Content Redacted] have since testified.

[7] I will first provide some background to put the applications into context. I will then consider the two applications separately. For each I will first set out the governing legal principles I must apply, summarize the evidence and the submissions of counsel, and then provide my analysis for my decision.

II. BACKGROUND

[8] The Greeks operated an illegal drug-trafficking business in the Vernon area. Members of the Greeks allegedly committed seven separate murders between July 2004 and June 2005. The accused are collectively charged with three of the seven murders.

[9] The victims of the three charged murders are David Marnuik, Thomas Bryce and Ron Thom. The Crown's theory is that each murder was committed for reasons related to the operation of the Greeks' drug business. The Crown alleges that:

(i) Mr. Marnuik was a "runner" for the Greeks who was beaten to death in July 2004 as punishment for having stolen money and a "dial-a-dope" cell phone from the Greeks;

(ii) Mr. Bryce was a rival drug dealer who was beaten to death in November 2004 because he was interfering with the Greeks' drug business; and

(iii) Mr. Thom was shot to death in May 2005 because the Greeks believed he had provided the police with information about their business.

2011 BCSC 1329 (CanLII)

[10] The accused are also charged with four criminal organization offences but those counts were severed and are not on the indictment before the jury. Notwithstanding severance, a considerable amount of evidence concerning the operation of the Greeks' drug business has been and will be led to provide the background and context necessary for the jury to assess the evidence concerning the three murders charged on the indictment.

[11] Four of the inmate witnesses were either members of or were associated with the Greeks, [Content Redacted]; they have also entered into immunity agreements with the Crown which require them to be cooperating Crown witnesses.

[12] The fifth witness's circumstances are different [Content Redacted] has not entered into an immunity agreement with the Crown.

[13] Mr. Mastop is charged with participating in the activities of a criminal organization between August 2004 and December 2005. His trial is presently scheduled to commence before a judge and jury in April 2012.

[14] Mr. Mastop's charge and the charges before me arise from the same RCMP investigation, Project E-Peccant, and the two proceedings are closely connected. For example: the disclosure provided to Mr. Mastop is essentially the same as that provided to the accused in this trial; some members of the Crown team prosecuting this trial are also prosecuting Mr. Mastop; the evidence the Crown anticipates leading against Mr. Mastop is, for the most part, some of the same evidence it intends to lead at this trial; and [Content Redacted] are expected to be key Crown witnesses at both trials.

[15] Mr. Mastop's most significant participation in the activities of the Greeks concerns the events preceding the murder of Ron Thom in May 2005.

[16] The Crown's theory is that Ron Thom was murdered because Mr. Manolakos believed he was a police informant. This belief was based on evidence contained in an information to obtain a search warrant (the "ITO") that was sworn on May 17, 2005 and used to obtain a warrant to search the residence of Jon Thom (Ron

2011 BCSC 1329 (CanLII)

Thom's brother) and Renata Shaw. Jon Thom worked for or was associated with the Greeks. When the warrant was executed on May 17 a quantity of cocaine, weigh scales, currency and packaging material were found in the residence and seized by police. As a result, Jon Thom and Ms. Shaw were arrested and charged with possession for the purpose of trafficking.

[17] Mr. Mastop was retained by Mr. Manolakos to provide legal advice and representation to members of the Greeks who needed such assistance. This was one of the benefits of being a member.

[18] Mr. Mastop acted for Jon Thom and Ms. Shaw after they were charged. As their lawyer, on May 18 he received from the Crown an edited copy of the ITO together with other disclosure.

[19] According to Crown witnesses, Mr. Mastop later attended the Manolakos residence and provided Mr. Manolakos with a copy of the edited ITO and discussed its contents with him and other members of the Greeks.

[20] The contents of the ITO included information from a confidential informant who had told the police about the presence of the drugs in the Jon Thom residence when he attended there. Other information in the ITO had been blacked out to protect the identity of the informant.

[21] The Crown's theory is that after the ITO was disclosed to the Greeks: (i) they began questioning people in an effort to find the confidential informant and eventually concluded it was Ron Thom; (ii) Mr. Manolakos ordered that Mr. Thom be killed; and (iii) [Content Redacted].

[22] The Crown also alleges that Mr. Mastop routinely provided Mr. Manolakos with other disclosure he obtained when acting for members of the Greeks who were under criminal investigation or charged with criminal offences. The Crown's theory is that this information assisted Mr. Manolakos to control and protect his drug business. Such disclosure was found by the RCMP during searches conducted at the Manolakos residence in August 2005 and May 2006.

2011 BCSC 1329 (CanLII)

[23] I earlier ruled that the Crown may lead this and other evidence to establish the "unusual" professional relationship Mr. Mastop had with Mr. Manolakos and the Greeks: *R. v. Sipes*, 2011 BCSC 640, at paras. 578-600. This includes evidence that Mr. Mastop was on a weekly cash retainer, routinely socialized with members of the Greeks and assisted in the operation of a restaurant owned by the Manolakos family. However, I cautioned that this trial was not to become a second trial concerning whether Mr. Mastop had committed a criminal offence.

2011 BCSC 1329 (CanLII)

III. THE MASTOP PUBLICATION BAN

A. Order Sought

[24] Mr. Mastop's application is for an order banning the publication of "any evidence, any statements or submissions of counsel, or any statements or rulings by the presiding judge that directly or by necessary implication identify" him.

B. Governing Legal Principles

[25] Mr. Mastop's application is brought pursuant to the court's inherent jurisdiction to order a publication ban. There is no dispute that the applicable legal analysis is as stated in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and expanded in *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; commonly referred to as the *Dagenais/Mentuck* test. The test is set out at para. 32 of *Mentuck*:

> A publication ban should only be ordered when:
>
> > (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
> >
> > (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.

[26] The *Dagenais/Mentuck* test evolved out of a series of Supreme Court of Canada decisions which recognized the fundamental importance of freedom of expression and the open court principle. In *Edmonton Journal v. Alberta (Attorney*

General), [1989] 2 S.C.R. 1326, the significance of these principles was explained by Cory J. at pp. 1339-40:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.
>
> ... It is exceedingly difficult for many, if not most, people to attend a court trial... It is only through the press that most individuals can really learn of what is transpiring in the courts. ... Discussion of court cases and constructive criticism of court proceedings is dependent upon receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.

2011 BCSC 1329 (CanLII)

[27] Consideration of these fundamental principles must be balanced against other factors, such as the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[28] The risk in question must be a "real and substantial risk", the reality of which is well-grounded in the evidence: *Mentuck*, at para. 34.

[29] In addition, in deciding whether to order a publication ban the court must consider whether reasonable alternatives are available and to "restrict the order as far as possible without sacrificing the prevention of the risk": *Mentuck*, at para. 36.

C. The Evidence

[30] Ms. Leduc, counsel for Mr. Mastop, filed an affidavit attaching various documents disclosed to Mr. Mastop by the Crown, including: a summary of the expected areas of evidence in this trial involving Mr. Mastop; an executive summary of the Crown's case in *R. v. Mastop* (including attachments); and various media articles concerning the investigation and prosecution of the Greeks and Mr. Mastop.

D. Submissions of Counsel

[31] Ms. Leduc provides a thorough, balanced and carefully prepared submission. She notes that the criminal organization whose activities Mr. Mastop is alleged to

have participated in is the very criminal organization of which four of the accused in this trial are alleged to have been members. She reviews common evidence which is anticipated to be led at both trials as well as common Crown witnesses.

[32] She argues there is a unique factual and evidentiary nexus between the trials and that this interconnectedness creates a very serious risk of prejudicing potential jurors against Mr. Mastop in his trial if his identity is permitted to be published alongside the details of the evidence adduced in this proceeding. She seeks the proposed order until a verdict is rendered in his trial.

[33] She focuses her argument on the *Dagenais/Mentuck* test and submits there is a serious risk to the proper administration of justice if a publication ban is not imposed. She argues at para. 20 of her written argument:

> The Applicant respectfully submits that an order prohibiting the publication of evidence and statements made in the *R. v. Sipes, et al.* proceedings that would directly or indirectly identify him, including his profession, is required to prevent a serious risk to the proper administration of justice. The Applicant submits that this serious risk arises because there is a real and substantial risk that publication of this information will undermine the fairness of his subsequent trial given the particular circumstances of this case. The particular circumstances are:
>
> (a) the unique factual nexus and evidentiary overlap between the Applicant's proceedings and the proceedings in *R. v. Sipes et al.*;
>
> (b) the risk that evidence led in *R. v. Sipes et al.* may be ruled inadmissible at the Applicant's trial;
>
> (c) the scope and nature of the media attention which the Applicant's and the *R. v. Sipes et al.* case have and will likely garner in the future; and
>
> (d) the timing of the respective trials.

[34] Ms. Leduc submits that without a publication ban, evidence led during this trial involving Mr. Mastop will likely create an indelible and prejudicial impression in the minds of members of the public who might be selected to sit on the jury in the Mastop trial.

2011 BCSC 1329 (CanLII)

[35] She points to two areas of evidence to be called in this trial that she argues create a particular risk of prejudice: (1) evidence of the relationship and activities of members of the Greeks and other evidence tending to show that the Greeks is a criminal organization; and (2) evidence directly detailing Mr. Mastop's alleged connections with and conduct regarding members and associates of the Greeks.

[36] Ms. Leduc refers me to other decisions, including *R. v. Giles*, 2008 BCSC 1900, where a publication ban was imposed by the trial judge to protect the fair trial rights of other accused yet to be tried on charges arising out of the same circumstances as those before the trial judge.

[37] She submits at paras. 33 and 46 of her argument:

> The Applicant submits that if the order sought is not granted, his identity will be linked in the public consciousness to the very evidence the Crown expects to call in his trial to make out the case against him. Further, the Applicant's identity and the specifics of his alleged conduct will be linked in the public consciousness to detailed evidence of the violent offences at issue in the *R. v. Sipes et al.* trial.
>
> …
>
> Further, the Applicant submits that there is a significant difference between the Applicant merely being linked in the media to the Greeks, and the Applicant being linked in the media to specific evidence regarding the details of the Greeks' alleged organizational structure, drug trafficking activities, and violence. This is particularly so where that same evidence will be lead again by the Crown at the Applicant's trial. [Emphasis in original.]

[38] Ms. Leduc submits that a publication ban is necessary to prevent a real and substantial risk to the fairness of Mr. Mastop's trial and there are no alternative measures that would prevent that risk, such as sequestering his jury, changing the venue of his trial, judicial instructions or challenge for cause.

[39] Mr. Anderson, on behalf of the Vancouver Sun, opposes the application. He submits there is no real and substantial risk to Mr. Mastop's fair trial rights and, even if there were, alternative measures are available. He refers to the juror's oath, challenge for cause and change of venue.

2011 BCSC 1329 (CanLII)

[40] Mr. Anderson notes that: Mr. Mastop is not scheduled to be a witness in this trial; the evidence that is anticipated to be led in which he will be referred to is relatively small; there is little chance that evidence led in this trial will be excluded in the Mastop trial; and the focus of this trial is three alleged murders, not whether the Greeks are a criminal organization.

[41] Mr. Jardine, Crown counsel in both this trial and Mr. Mastop's trial, opposes the publication ban. He submits at para. 7 of the Crown's written argument:

> The Crown position is that reasonably alternative measures will prevent any risk to the fair trial rights of the Applicant. First, the Crown asserts that the availability of the challenge for cause procedure for potential jurors will prevent any risk. Second, the Crown asserts that another measure, in effect already in place, is the fact that the trial is occurring in Vancouver whereas all the alleged offences on both indictments took place in Vernon. Further, the alleged offences took place six-seven years ago from the present. The Crown submits this change of venue is significant in negating any serious risk to the proper administration of justice as it has had the effect of reducing publicity to a trickle.

[42] Mr. Jardine acknowledges there is some overlap in the evidence being led at the two trials but submits the evidence involving Mr. Mastop being led in this trial is relatively minimal compared to the other evidence concerning the three homicides. He notes there will be no legal finding in this trial concerning whether the Greeks are a criminal organization. Mr. Jardine argues there is little risk material evidence led in this trial that could affect Mr. Mastop's fair trial rights will be ruled inadmissible in the Mastop trial. Finally, he notes that this trial has, in fact, garnered relatively little media attention in the Vancouver area - perhaps because the alleged offences occurred many miles away in Vernon.

E. Analysis

[43] I will be brief. Despite Ms. Leduc's able submissions, I generally agree with the submissions of both Mr. Anderson and Mr. Jardine.

2011 BCSC 1329 (CanLII)

[44] The critical question on this application is whether there is a real and substantial risk to Mr. Mastop's right to a fair trial if I do not order a publication ban. I am satisfied the answer to the question is no.

[45] It is important to recall that Mr. Mastop, quite properly, is not seeking a publication ban of all of the evidence led in this trial. As such, if Mr. Mastop's trial remains a jury trial, regardless of whether I impose the publication ban he seeks potential jurors may have heard or read about the Greeks, their drug business, and a great deal of discreditable conduct evidence including the three alleged murders.

[46] In addition, while the Crown is leading evidence in this trial about the operation of the Greeks' drug business, whether the Greeks were a criminal organization is not an element of any of the charges and not a question this jury will be required to answer.

[47] I am satisfied the evidence led in this trial about the Greeks' business operations will not prejudice Mr. Mastop's right to a fair trial. I am also satisfied there is little risk that material evidence relevant to the charge against Mr. Mastop admitted in this trial will not be admitted in his trial.

[48] Further, if Mr. Mastop concludes that published evidence led in this trial has prejudiced his right to a fair trial, he may apply to have potential jurors in his trial challenged for cause.

[49] I must presume that his jurors will be true to their oath, follow the instructions of the trial judge, and decide the charge against Mr. Mastop based only on the evidence received in his trial. As such, even if publication of evidence in this trial creates a real and substantial risk to his fair trial rights - a finding I am not making - there are reasonable alternative measures that can prevent that risk.

[50] The Crown knows the evidence it anticipates leading at both trials and has an undivided loyalty to the proper administration of justice. It is noteworthy that the Crown is firmly of the view that a publication ban is not necessary to prevent a serious risk to the proper administration of justice.

2011 BCSC 1329 (CanLII)

[51] In summary, I am not satisfied a publication ban is necessary to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk.

[52] As Mr. Mastop has not satisfied the first prong of the *Dagenais/Mentuck* test it is not necessary for me to consider the second prong. However, given there is no substantial risk to Mr. Mastop's fair trial rights, the balancing of the other factors, such as the right to freedom of expression and the open court principle, supports a publication ban not being imposed.

[53] For these reasons, Mr. Mastop's application is dismissed.

IV. THE CROWN'S APPLICATION

A. Orders Sought

[54] The Crown seeks orders prohibiting publication of any information that could identify the five inmate witnesses.

B. Governing Legal Principles

1. *Section 486.5 of the Criminal Code*

[55] The Crown's application is brought pursuant to s. 486.5 of the *Code*. It reads, in part, as follows:

> (1) ... [O]n application of the prosecutor, a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.
>
> ...
>
> (7) In determining whether to make an order, the judge or justice shall consider
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> (*a*) the right to a fair and public hearing;
>
> (*b*) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer significant harm if their identity were disclosed;

2011 BCSC 1329 (CanLII)

> (*c*) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;
>
> (*d*) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;
>
> (*e*) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;
>
> (*f*) the salutary and deleterious effects of the proposed order;
>
> (*g*) the impact of the proposed order on the freedom of expression of those affected by it; and
>
> (*h*) any other factor that the judge or justice considers relevant.

2011 BCSC 1329 (CanLII)

[56] Section 486.5 was introduced by Parliament on June 17, 1999 pursuant to *An Act to amend the Criminal Code (victims of crime) and another Act in consequence*, S.C. 1999, c. 25, s. 2(3) ("the *Act*"). The concerns that ground the *Act* were stated in the Preamble. They include, in part:

> Whereas the Parliament of Canada recognizes that the cooperation of victims of and witnesses to offences is essential to the investigation and prosecution of offences, and wishes to encourage the reporting of offences, and to provide for the prosecution of offences within a framework of laws that are consistent with the principles of fundamental justice;
>
> ...
>
> Whereas the Parliament of Canada supports the principle that victims of and witnesses to offences should be treated with courtesy, compassion and respect by the criminal justice system, and should suffer the least amount of inconvenience necessary as a result of their involvement in the criminal justice system;
>
> ...
>
> Whereas the Parliament of Canada wishes to encourage and facilitate the participation in the criminal justice system of victims of and witnesses to offences in accordance with prevailing criminal law and procedure;
>
> ...

[57] The *Act* came into force on December 1, 1999. The wording of s. 486.5 of the *Code* has remained virtually unchanged, except that the protection afforded by the section was expanded in 2005 to include justice system participants.

[58] Section 486.5 of the *Code* requires a judge in determining whether a publication ban is necessary for the proper administration of justice to consider the factors listed in subsection (7).

2. *The Framework to be Applied*

[59] Despite the fact the Crown's application was brought pursuant to s. 486.5 of the *Code*, for the most part, counsel focused their submissions on the *Dagenais/Mentuck* test. For this reason, counsel were given an opportunity to make further submissions on the test to be applied.

[60] The Crown submits that I cannot simply apply the criteria in s. 486.5(7). It argues that in considering whether to make the order sought I must also take into account the *Dagenais/Mentuck* test.

[61] Counsel for the media, Mr. Anderson, forcefully submits that the *Dagenais/Mentuck* test governs this application. He says to apply any other test would be in error. Counsel for the accused support this position.

[62] In support of his position, Mr. Anderson refers me to several Supreme Court of Canada decisions stating that the *Dagenais/Mentuck* test applies to all discretionary decisions affecting the openness of court proceedings.

[63] In *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, a majority of the Court said, at para. 31:

> While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban (*Dagenais*, *supra*; *Mentuck*, *supra*); is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41). ...

2011 BCSC 1329 (CanLII)

[64] The Court reiterated this point in *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 7:

> ... [T]he *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the last two decades. And it would be tend to undermine the open court principle inextricably incorporated into the core values of. s. 2(*b*) of the *Charter*. [Emphasis in original.]

See also *Named Person v. Vancouver Sun*, 2007 SCC 43, [2007] 3 S.C.R. 253, at para. 35, and *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65 ("*C.B.C.*"), at para. 13.

[65] Mr. Anderson submits that to apply any lesser of a standard or, as I understand it, to apply or interpret the framework in s. 486.5 of the *Code* in any way different to the test in *Dagenais/Mentuck*, I would necessarily be interpreting it in an unconstitutional way.

[66] It is important to note that no one is challenging the constitutionality of s. 486.5. Thus, the issue I must decide is whether I am to apply the law as stated by Parliament in s. 486.5 of the *Code*, or whether I apply the law as stated by the Supreme Court of Canada in the *Dagenais/Mentuck* test. In my view, the correct approach is to apply s. 486.5 of the *Code.* Given Mr. Anderson's thorough and forceful submissions on this issue, I will explain in some detail why I have come to this conclusion.

[67] First, principles of statutory interpretation support that I should apply the law as stated by Parliament.

[68] Professor Sullivan, in her text *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008) at pp. 461-462, addresses the presumption of compliance with constitutional norms – one of the rules of statutory construction:

> ... It is presumed that legislation is enacted in compliance with the norms embodied in Canada's constitution. These obviously include the rights and freedoms protected by the Charter. ...

2011 BCSC 1329 (CanLII)

> There are two ideas underlying and according weight to this aspect of the presumption. First, constitutional values play a fundamental role in the legal and political culture of Canada and, second, they constitute an important part of the context in which legislation is made and applied. For centuries courts have interpreted legislation to comply with common law values, not because compliance was necessary for validity, but because the values themselves were considered important. This reasoning applies with even great force to entrenched constitutional values. As McLachlin J. wrote in *R. v. Zundel*, summarizing the case law to date:
>
> > These authorities confirm the following basic propositions: that the common law should develop in accordance with the values of the *Charter* ... and that where a legislative provision, on a reasonable interpretation of its history and on the plain reading of its text, is subject to two equally persuasive interpretations, the Court should adopt that interpretation which accords with the *Charter* and the values to which it gives expression ...

[69] As noted, the presumption of compliance with *Charter* values applies only where legislation is ambiguous. Professor Sullivan explains this at pp. 462-463:

> Although the Supreme Court of Canada has acknowledged this stand of the presumption of compliance, it refuses to rely on it unless it finds the text to be ambiguous after other interpretive strategies have been exhausted. In other words, it treats the presumption of compliance with Charter values as a weak presumption or a presumption of last resort. This point was established by Iacobucci J. in *Bell ExpressVu Ltd. Partnership* v. *Rex* in the following passage:
>
> > Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not" ..., it must be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.

[70] The reason for adopting this approach is explained by Charron J. in *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at paras. 18-20:

2011 BCSC 1329 (CanLII)

> [W]here a statute is not ambiguous, the court must give effect to the clearly expressed legislative intent and not use the *Charter* to achieve a different result. ...
>
> If this limit were not imposed on the use of the *Charter* as an interpretative tool, the application of *Charter* principles as an overarching rule of statutory interpretation could well frustrate the legislator's intent in the enactment of the provision. Moreover, it would deprive the *Charter* of its more powerful purpose — the determination of the constitutional validity of the legislation [citations omitted].
>
> There is no ambiguity here. ... While the Court of Appeal was correct in stating that the judge who exercises a discretion pursuant to a constitutionally valid enactment must do so in a manner which is consistent with the *Charter* principles, that is a separate question from the question of statutory interpretation. By interpreting the provision so as to accord with its view of minimal constitutional norms, the Court of Appeal effectively trumped the constitutional analysis, rewrote the legislation, and deprived the government of the means of justifying, if need be, any infringement on constitutionally guaranteed rights.

[71] As there is no ambiguity in s. 486.5, I must respect the intention of Parliament and apply that section.

[72] But what of the specific and repeated statements by the Supreme Court of Canada that the *Dagenais/Mentuck* test governs all discretionary decisions that restrict the openness of proceedings?

[73] When considering these statements it is important to recall that the Court has also said that its statements of law must not be read as if they are the words of a statute; rather, they should be read in light of the facts of the case and the issues in question: *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at paras. 52 and 57.

[74] With this in mind it is useful to consider the issues before the Supreme Court of Canada in cases where it has stated that the *Dagenais/Mentuck* test applies to all discretionary decisions. In my view, a review of the cases demonstrates that the Court intended for the *Dagenais/Mentuck* test to apply to statutory provisions where Parliament has not provided a framework for judges to use when determining whether to exercise their discretion to grant the order authorized by the section.

2011 BCSC 1329 (CanLII)

[75] For instance, in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, the Court considered s. 486(1) of the *Code*. That provision gives judges the discretion to order the exclusion of the public from the courtroom "in the interest of public morals, the maintenance of order or the proper administration of justice", but is silent as to the framework or specific criteria that judges should consider when exercising this discretion.

[76] Similarly, in *Vancouver Sun (Re)*, the Court considered the level of secrecy that should apply to judicial investigative hearings under s. 83.28(2) of the *Code*. Although the provision does not specifically provide for any part of these hearings to be held *in camera*, it gives judges a wide discretion to impose terms and conditions concerning the conduct of the hearing. The Court held that this includes the discretion to hold the hearing *in camera*. Again, the statute failed to provide a framework or specific criteria for judges to apply.

[77] The circumstances in *Toronto Star* and *C.B.C.* were somewhat different. In these cases, there was no applicable statutory authority. Thus, the *Dagenais/Mentuck* test was being applied to actions under the common law. For instance, the issue before the Court in *Toronto Star* concerned the sealing of search warrants issued under the *Provincial Offences Act* of Ontario. That Act did not provide for the sealing of the warrants. Similarly, at issue in *C.B.C.* was the broadcasting of exhibits by the media. In considering whether to prohibit broadcasting the trial judge applied the Rules of Criminal Practice. On appeal, the Court held that the Rules did not apply.

[78] In my view, to restrict the application of the *Dagenais/Mentuck* test in the context of statutory provisions to those where Parliament has not provided a framework for judges to apply is consistent with the principles of statutory interpretation discussed above. The Supreme Court of Canada has repeatedly held that, absent ambiguity or absent a challenge on constitutional grounds, courts are charged with interpreting and applying a statute in accordance with the sovereign intent of Parliament.

2011 BCSC 1329 (CanLII)

[79] For these reasons, I am confident the Supreme Court of Canada did not intend for the *Dagenais/Mentuck* test to apply where, as is the case with s. 486.5, Parliament has enacted a specific framework for analysis. The common law may supplement but not override statutory law.

[80] In response to Mr. Anderson's submission, that to apply or interpret the framework in s. 486.5 of the *Code* in any way different to the test in *Dagenais/Mentuck* would necessarily be unconstitutional, I note that it cannot be presumed that legislation is unconstitutional because it is different. The law concerning the production of third-party records provides a useful illustration.

[81] The law concerning production of such records was settled by a majority of the Supreme Court of Canada in *R. v. O'Connor,* [1995] 4 S.C.R. 411. However, Parliament later enacted a different regime with respect to third party record applications brought during the prosecution of certain sexual offences.

[82] In *R. v. Mills*, [1999] 3 S.C.R. 668, the Court addressed the constitutionality of ss. 278.1-278.91, provisions which were seemingly inconsistent with the Court's earlier decision in *O'Connor*. Justices McLachlin (as she then was) and Iacobucci wrote for eight of the nine judges and said at para. 60:

> We cannot presume that the legislation is unconstitutional simply because it is different from the common law position. The question before us is not whether Parliament can amend the common law; it clearly can. The question before us is whether in doing so Parliament has nonetheless outlined a constitutionally acceptable procedure for the production of private records of complainants in sexual assault trials. ...

[83] For all of these reasons I have concluded that I should apply s. 486.5 of the *Code*, not the *Dagenais/Mentuck* test.

[84] This is not to say that the *Dagenais/Mentuck* test is irrelevant. Given their similarity, there is considerable guidance that can be obtained from the principles expressed in those cases when applying the criteria in s. 486.5.

2011 BCSC 1329 (CanLII)

[85] This same conclusion was reached by the court in *R. v. M. P.*, 2007 ONCJ 138. In that decision, Borenstein J. considered an application for a publication ban concerning the identities of two young complainants. He concluded that s. 486.5 governed the application, not the *Dagenais/Mentuck* test, and explained why at paras. 15 and 17:

> [15] While I find that the comments contained in *Dagenais*, *Mentuck* and the other cases provide guidance, I have determined that I am governed by the provisions of section 486 of the Criminal Code, specifically, s. 486.5.
>
> ...
>
> [17] Section 486.5 deals specifically with the Order sought before me. As a trial judge in a criminal case, I am applying the *Criminal Code*. Where a specific provision in the *Code* deals explicitly with the Order sought and directs me to the criteria that I am to apply, I should apply the *Criminal Code* and not look to the common law for my authority to make the Order sought. The criteria in the *Code* are not inconsistent with the common law test. The balancing that must occur remains.

[86] Before turning to a consideration of the evidence, I note that while s. 486.5 of the *Code* and the *Dagenais/Mentuck* test appear to be similar, there may be some differences. For example, the *Dagenais/Mentuck* test is a two-pronged test in which the proportionality component is only considered if the threshold risk component has been satisfied, while the wording of s. 486.5(7) of the *Code* suggests that all of the factors are to be considered and weighed collectively.

[87] Perhaps this is a distinction without any practical difference. However, there may be applications where the evidence will fall just short of establishing a real and substantial risk, but balancing the other factors collectively would weigh in favour of granting the order because the impact of the ban on the other interests is minimal.

[88] Given the conclusions I have reached on the evidence before me it is unnecessary for me to resolve this question. As will be explained, given that I am satisfied there is a real and substantial risk to the inmate witnesses and no reasonable and effective alternatives to a ban, the result in this case is the same whether I apply s. 486.5 of the *Code* or the *Dagenais/Mentuck* test.

2011 BCSC 1329 (CanLII)

C. The Evidence

[89] The affidavits of four of the inmate witnesses are almost identical in content except for certain individual circumstances. I reproduce most of [Content Redacted] affidavit as representative of the four:

> ...
>
> 3. I have been advised by the RCMP that I will be subpoenaed to be a witness and to give evidence in the trial of R. v. Sipes et al.
>
> 4. I believe that if I testify in these proceedings and my identity is published or disclosed in any way, my life will be put in danger.
>
> 5. If my identity is published, the inmates of whatever institution I serve the remainder of my sentence will become aware that I have testified. As a result, I believe that I will be at risk of physical retaliation and harm whether from the Accused in the trial of R. v. Sipes et al. or from other inmates as long as I remain incarcerated.
>
> 6. Should this happen, I believe my personal safety will remain in jeopardy as long as I remain in the general prison population.
>
> 7. I further believe that if my personal safety in the general population of the institution in which I am incarcerated is jeopardized, the authorities at that institution may decide to put me in protective custody.
>
> 8. I do not want to be placed in protective custody for the duration of my life sentence as a consequence of my testimony. If I am placed in protective custody I believe my mental and physical health will be severely and irreparably damaged.
>
> ...
>
> 10. I swear this affidavit in support of an application for a ban on publication of anything tending to identify me was a witness, including but not limited to the publication of my name, my image, and any physical description that could reveal my identity.

[90] These four inmate witnesses have also signed immunity agreements with the Crown which require them to cooperate and testify in court when requested to do so. Each immunity agreement also states that the Crown agrees to apply for a ban on publication of the inmate's identity.

[91] All four were former members of or associated with the Greeks and are anticipated to be key Crown witnesses at this trial. [Content Redacted].

2011 BCSC 1329 (CanLII)

[92] As mentioned, the circumstances of the fifth inmate witness differ from the other four inmate witnesses as, during the relevant time, [Content Redacted] was not a member of or associated with the Greeks in the operation of the group's drug business. [Content Redacted].

[93] The fifth witness's most significant evidence concerns [Content Redacted]. The witness was offered nothing by the Crown in return for [Content Redacted] cooperation and did not sign an immunity agreement.

[94] This witness's affidavit states, in part:

> ...
>
> 3. [Content Redacted].
>
> 4. [Content Redacted].
>
> ...
>
> 6. When I am brought to Court to testify, I believe that my life will be in danger if my identity is published in any way so that inmates in the institution in which I am serving my sentence become aware that I have given witness testimony in the R. v. Sipes et al. trial.
>
> ...
>
> 8. [Content Redacted].
>
> 9. [Content Redacted].
>
> 10. I further believe that if my personal safety in the institution in which I am incarcerated is jeopardized, the authorities at that institution may decide to put me in protective custody.
>
> 11. I do not want to be placed in protective custody for the duration of my sentence as a consequence of my compelled testimony.
>
> ...

[95] In addition to the evidence contained in the five inmate witness affidavits, the Crown filed numerous reports, statements and exhibits seized by the Project E-Peccant investigators. Counsel for the accused and media also filed affidavit evidence attaching various reports and other documents. The Crown also called two witnesses on this application: Detective Sergeant Leonard Isnor of the Ontario Provincial Police; and Luciano Bentenuto, Deputy Director of the Tactical Intelligence and Special Operations Division of the Preventative Security and Intelligence Branch for the Correctional Service of Canada.

2011 BCSC 1329 (CanLII)

[96] Mr. Bentenudo was qualified, without objection, to give expert opinion evidence in matters of security and knowledge of prison culture and criminal organizations within the federal correctional system.

[97] Det. Isnor was qualified, also without objection, to give expert opinion evidence concerning the Hells Angels motorcycle club as well as associated groups and organizations.

[98] I accept the evidence of both Mr. Bentenuto and Det. Isnor.

[99] I will review some of Mr. Bentenuto's and Det. Isnor's evidence. Det. Isnor's evidence was unchallenged. The challenge to Mr. Bentenuto's evidence was largely with respect to the consequences to an inmate of being placed in protective custody for an extended period of time.

[100] For security and safety reasons it was necessary for me to restrict counsel from questioning Mr. Bentenuto on certain subjects. I previously gave oral reasons for restricting his evidence in this regard.

1. *Evidence of Luciano Bentenuto*

[101] Mr. Bentenuto swore an affidavit prior to testifying that was filed as evidence. He said, in part:

> ...
>
> 7. If the inmate population find out that an offender has indeed testified before the courts on behalf of the Crown Counsel, usually referred to within corrections as a "justice witness", he/she is immediately labelled as a "rat.
>
> 8. A "rat" is defined within the prison culture [as] someone who has broken the code of silence among criminals. Someone who has assisted law enforcement or the justice system is considered to have "taken down" one of their own.
>
> 9. Once the identity of an offender is revealed as a justice witness or "rat", the challenges of moving him/her around for CSC [Corrections] increase extensively.
>
> ...
>
> 13. The disclosure of an inmate's identity as a justice witness or "rat", limits their ability to benefit from regular programming offered to all offenders

2011 BCSC 1329 (CanLII)

> which impacts their requirement for normal cascading towards a safe and secure community reintegration. This is due to the fact that his/her new status prohibits him/her from integrating facilities or even specific programs with the general inmate population.
>
> ...
>
> 15. In addition to protection of inmates in its custody CSC is concerned with protection of its own staff and members of the public.

[102] Mr. Bentenuto amplified his affidavit evidence during his testimony which was provided intermittently over a number of days.

[103] In particular, he explained the risks associated with an inmate being labelled a justice witness or "rat":

> Q All right. And can you just tell His Lordship that in your expert opinion what are the consequences of being labelled a rat within the correctional system?
>
> A Well obviously like I said before, prison culture dictates a very particular code of conduct within the confines of the correctional realm, and it's clear that once an individual has been identified as a rat, has been defined as somebody that's broken pretty much the code of silence within the criminals or – code of conduct, and also is – is seen as someone who's betrayed the trust of other offenders and other people that he is going to have to cohabitate.
>
> Q All right. And what are some, if any, risks associated to someone who has been labelled as a rat?
>
> A Well, it goes from simple threats to assaults to murder.
>
> Q All right. And within the correctional setting is there anything worse than being labelled as a rat?
>
> A Not to my knowledge.
>
> ...
>
> Q Mr. Bentenuto, in your expert opinion are people who testify in murders relating to criminal organizations against their former criminal organization associates, do they face an increased personal risk or even death?
>
> A Absolutely.
>
> Q And what do you base that opinion on?
>
> A Well, on the past 24 years of service where I've actually had to see situations where people would – did get assaulted, was murdered, and other serious incidents in the institutions once they – they were known and publicly disclosed as individuals who had in fact testified

2011 BCSC 1329 (CanLII)

against their organization or the people they used to be with before their incarceration.

Q And why is that? Why is testifying against people who were in the organization, why is that a concern?

A Well, it's a code of conduct, it's a code of conduct within the prison culture that you don't do that. It's as simple as that.

Q When you say "don't do that", what are you specifically referring to?

A Do not go and testify and assist the Crown or assist the justice system in convicting one of your own.

[Transcript, April 1, 2011, p. 16, l. 44 to p. 17, l. 18; and p. 19 ll. 19-44.]

[104] In cross-examination he agreed that Corrections has a duty to keep federal inmates safe regardless of their status within an institution:

Q And it is part of the duties of Corrections Canada to keep inmates or persons incarcerated safe?

A Absolutely, yes sir.

Q Regardless of their status or how people view them in a certain culture, subculture, anything of the sort, everybody needs to get kept safe, correct?

A That's correct, sir.

Q And lots of inmates, people who are incarcerated, testify for the Crown in open courtrooms across this country, correct?

A That's correct.

Q And there are provisions and procedures in place that Corrections uses to protect the safety of those individuals, correct?

A Again, yes. Yes.

Q In fact there's protocols, right?

A That's correct, yes.

Q One of those protocols involves someone potentially getting put in protective custody, correct?

A That is usually our last resort, yeah.

[Transcript, April 1, 2011, p. 37, l. 42 to p. 38, l. 15.]

[105] While Mr. Bentenuto agreed that protective custody is an option available to Corrections to protect inmates who are cooperating Crown witnesses, he explained in cross-examination that it may have significant adverse consequences for an inmate who has been "outed" as a witness:

2011 BCSC 1329 (CanLII)

Q You do get access to some programming when you're in protective custody?

A Once you're outed out and it's made public, it becomes very limited, and I won't go into the details of that, because of the pragmatic of who you're going to be going to the program with, which teacher is going to see you, which teacher is not going to see you. Once you become outed out as a witness, Crown witness or justice witness, and that you collaborate in a very high profile type of environment, unfortunately it eliminates all those – those options. And that's why we're – I mean, when you – you're referring to my affidavit, that's why I state – I made the statements I made, yes.

Q Yes.

A Once they're outed out, it's over.

Q Well, it's not over, sir, you continue to do your time. You may not be able to participate in all of the other activities the general population –

A The majority. The majority of the activities, sir.

Q Yes, but you don't, for example, suggest for a moment that someone who is in protective custody that they're locked by themselves, they have no interaction with other inmates, they have no access to books or materials or written courses or correspondence or anything like that, isn't that right?

A Not really, I have protective custody individuals who have been identified as high profile witnesses for the Crowns who unfortunately right now at the present time can't benefit of 99 percent of the stuff you just mentioned.

[Transcript, April 1, 2011, p. 49, l. 31 to p. 50, l. 16.]

[106] Mr. Bentenuto also gave evidence in cross-examination concerning the rapid flow of information within Corrections institutions. He testified that, while there is no internet service available to inmates, once information is broadcast in the media it may quickly become known within the institutions:

Q All right. In any event you said that if there was something from the outside, it's somebody – something that somebody wanted to get spread within the institution, by collateral conduct it was widely distributed and that's –

A Once a third party would be – have access to the institution, bring in the information through a visit or phone call.

Q Then I think you said it would be distributed within the institution within hours?

A If, example, if I could give you one specific example, sir, to respond to your question. In one situation, the person was identified in the media. Within a couple of hours, we had information that – because

2011 BCSC 1329 (CanLII)

people phone at certain hours at night in institutions and as soon as they start making phone calls, they would check in. "Anything new?" "Yeah, Joe's here. Joe did this, Joe did that." Next thing you know it's – it doesn't take long to spread.

Q Well, if any member of the Hells Angels knew that somebody was a rat and communicated that to anybody in, it would distributed within hours?

A Oh, maybe even quicker.

Q Maybe even quicker?

A Yes, sir.

Q So if some member of the Hells Angels outside of the institution was aware that four individuals in this case were rats and wanted to communicate that information within the institution, where a member of the Big House Crew or someone else was located, it would be disseminated probably quicker than within hours?

A They have their own mechanisms that are less legitimate than what we know, with regards to making sure the information gets to the right people. As a fact, when you're a member of the Big House Crew, they actually have what they call a Big House Crew letter that they send, newsletter. They actually put in there, so and so ratted so and so. They'll actually put certain information in there and that's – they actually print it. I mean, it's not only just said, they actually print it. And they actually have movements that tells you which Hells Angel is going where, make sure you know he's really a Hells Angel, so that you don't get fooled.

[Transcript, May 2, 2011, p. 10, l. 7 to p. 11, l. 6.]

2. *Evidence of Detective Sergeant Isnor*

[107] Det. Isnor testified that there are approximately 450 members of the Hells Angels in Canada. Each member has his own franchise or geographical area for conducting criminal business and controls the criminal activity in that area. Det. Isnor said the most successful Hells Angels members totally isolate themselves from the groups or individuals - “crime cells” - that conduct crime on their behalf in their area. The member operates these crime cells at arm’s length “... through fear, loyalty, and the fact of sharing the profits” (Transcript, May 5, 2011 at p. 11, ll. 9-10).

[108] He said that one of the “rules” of the Hells Angels is that members or associates must not assist the police or Crown with information about the organization, its members or the crime cells. If they do they will be considered to be

2011 BCSC 1329 (CanLII)

"rats" and "probably would be met with grievous bodily harm or possibly death, depending on the situation of providing information" (Transcript, May 5, 2011 at p. 14, ll. 29-31).

[109] Det. Isnor was shown rings, shirts and other items seized from the accused and identified as "support gear". He said the gear reveals that the Greeks support the Calgary chapter of the Hells Angels and are a crime cell or an associate organization to that chapter. He also explained that the consequences of being labelled a "rat" and testifying against a member of the Hells Angels - death or grievous bodily harm - may also apply to testifying against a crime cell member, depending on the impact on the profits flowing from the crime cell to the Hells Angels.

[110] He explained that members of the Hells Angels serving prison terms become members of the "Big House Crew" while they are in jail. The Big House Crew is the equivalent of a chapter of the Hells Angels and its members are kept informed about the activities of the organization. They are also expected to carry out certain responsibilities while they are serving time. For instance, Big House Crew members may cause harm to be inflicted upon inmates who are labelled as "rats" because they have or will testify against members of the Hells Angels or members of associated crime cells. Det. Isnor explained further:

> Q Is there – in terms of individuals – persons who have testified against Hells Angels members or crime cell members that are in custody, is there a risk to them from the Hells Angels while they're incarcerated?
>
> A Absolutely.
>
> Q And what is that?
>
> A Because they've informed on – on the organization. They've caused them to not – to – to jeopardize part of their organization in making money, et cetera.
>
> Q How long are such witnesses at risk for?
>
> A Forever, until they're dealt with.
>
> [Transcript, May 2, 2011, p. 29, ll. 21 - 33.]

2011 BCSC 1329 (CanLII)

[111] Det. Isnor testified that in addition to a "newsletter" the Hells Angels distribute to members of the Big House Crew, information can reach members in jail other ways:

> Q Okay, why don't I – is there any other form of – are you aware of any other form of means by which information is transmitted into the jails where witnesses are who have testified against crime cell members, other than by the H.A. newsletter?
>
> A Yeah. Well, they can get anything they want into the jails. I mean, if – if you – if you need physical proof of something, they can get anything they want in the jails. I mean, there's drugs getting into our jails every day, there's contraband, cigarettes. They can get whatever they want into the jail. ...
>
> [Transcript, May 2, 2011, p. 30, l. 42 to p. 31, l. 6.]

[112] Mr. Bentenuto's evidence was similar to Det. Isnor's with respect to the Big House Crew with some minor qualifications. Mr. Bentenuto also said that Big House Crew members were not housed in all Corrections institutions.

[113] Defence counsel applied to cross-examine the inmate witnesses on their affidavits. I gave oral reasons denying this request. For the purpose of this application, I repeat that I am relying on the affidavits only for the basis of each inmates' subjective belief in the need for and support of the ban sought by the Crown.

D. Submissions of Counsel

[114] Mr. Favell, on behalf of the Crown, submits there is a real and substantial risk the inmate witnesses will suffer significant harm if their identity, or information which could reveal their identity, is published by the media. He argues that a ban on publication is required for the witnesses' safety and security, and to protect them from intimidation and retaliation from other inmates while they remain incarcerated.

[115] Mr. Favell reviews the *Dagenais/Mentuck* test and s. 486.5 of the *Code*, and submits there can be no doubt that ordering a publication ban in order to protect incarcerated witnesses who testify for the Crown from harm is an appropriate means by which to prevent a serious risk to the proper administration of justice. He urges

2011 BCSC 1329 (CanLII)

the court to look at the evidence as a whole in the context of the allegations in this case, which includes the allegation that Mr. Thom was murdered because he was believed to be a police informant, and the connection between the Greeks and the Hells Angels.

[116] He argues that it is no answer that the inmate witnesses can be placed in protective custody for the duration of their sentences because to do so would be an undue personal hardship. He refers me to the evidence of Mr. Bentenuto in that regard.

[117] With respect to the impact of the proposed orders on the accuseds' right to a fair trial, Mr. Favell submits that any impact is minimal. He argues it is pure speculation that anyone would come forward with evidence of assistance to the defence if the names of the inmate witnesses are published together with their evidence. He refers me to the reasoning of Heeney J. in *R. v. Sandham*, [2009] O.J. No. 4549, at paras. 16-17:

> As to whether the order sought will impact on the fairness of the trial, the defence will be deprived of the opportunity outlined above, where anyone reading about the case and who had negative evidence about M.H., would be able to come forward. However, the weight to be attributed to this factor is not great, due to the fact that it is pure speculation that any such witness exists. Furthermore, M.H. was an associate of several of the accused, and they would have personal information about him and his past and the people he associated with. They are well positioned to have an investigator seek out any potential witnesses who might have the information that is sought to be discovered.
>
> Finally, additional negative character evidence about M.H. is not likely to carry any particular significance at trial, given the admitted fact that he is such an unsavoury character that a Vetrovec warning will be required. Aside from his participation in these homicides, he has a past history of criminal activity and association with other motorcycle clubs that will be brought out in evidence. It is difficult to imagine what additional information this hypothetical witness might be able to offer that would amount to anything more than overkill.

[118] Mr. Favell points out that the inmate witnesses (with the exception of [Content Redacted]) have pleaded guilty to murder charges themselves. He submits they are

2011 BCSC 1329 (CanLII)

clearly unsavoury witnesses concerning whom the accused already have an abundance of bad character evidence. [Content Redacted].

[119] Mr. Favell further argues the circumstances of these alleged offences are such that it is highly unlikely that someone in custody will come forward and say they were present at one of the alleged offences and what the inmate witness say occurred is wrong. In addition, the possibility that the inmate witnesses may have said something to another inmate about the offences is highly unlikely given the risk to them if other inmates find out they are cooperating Crown witnesses.

[120] With respect to the effect on the right to free expression, Mr. Favell submits the proposed orders will not prohibit publication of the inmate witnesses' evidence. He argues that the media will be free to report on the substance of their testimony; therefore, allowing the public to be well informed as to what is occurring in this trial. He refers me to what Josephson J. said in *R. v. Malik and Bagri*, 2004 BCSC 520, at para. 8, with respect to a similar application:

> Weighed against the risk of harm to the Witness should her identity be published is the very minimal impairment of the right to freedom of expression. The publication ban is limited to the Witness's identity, leaving the media free to continue publishing the nature and content of her evidence....

[121] Concerning the risk to the inmates, Mr. Favell notes they are testifying against accused persons who are members of a gang with undeniable connections to the Hells Angels, and their evidence is critical testimony that could result in first-degree murder convictions. As such, the motivation to suppress the inmate witnesses' evidence or seek revenge is very high.

[122] In response to evidence that information concerning the inmate witnesses' identities and status as cooperating Crown witnesses may make its way into Correctional institutions notwithstanding a publication ban, Mr. Favell argues that this Court should not decline to do all that it can to protect the inmate witnesses, despite any practical limitations.

2011 BCSC 1329 (CanLII)

[123] Finally, he submits the deleterious effects on freedom of expression that would arise from the orders sought do not outweigh the salutary effects of the publication ban which is necessary for the protection, safety and continuing security of the inmates.

[124] Mr. Nathanson, on behalf of the accused, stresses that the onus is on the Crown to provide clear and convincing evidence that a publication ban is necessary.

[125] He argues that imposing a ban would violate the fair trial rights of the accused because it would prevent the very real possibility of witnesses coming forward with information that could assist the defence after hearing or reading about the inmates' testimony in the media. To support this submission, he points to the affidavit of Peter Wilson, Q.C., filed by the accused. In his affidavit, Mr. Wilson describes his involvement in a criminal trial where an inmate witness came forward with information because of what he had heard or read in the media.

[126] Mr. Nathanson refers me to various passages from *Mentuck* that stress the importance of the open court principle and the impact of a publication ban on an accused's fair trial rights. The twofold impact on an accused's fair trial rights was explained by the Court at paras. 53- 54:

> This public scrutiny is to the advantage of the accused in two senses. First, it ensures that the judicial system remains in the business of conducting fair trials, not mere show trials or proceedings in which conviction is a foregone conclusion. The supervision of the public ensures that the state does not abuse the public's right to be presumed innocent, and does not institute unfair procedures. See *Dagenais*, *supra*, at p. 883.
>
> Second, it can vindicate an accused person who is acquitted, particularly when the acquittal is surprising and perhaps shocking to the public. In many cases, it is not clear to the public, without the advantage of a full explanation, why an accused person is acquitted despite what a reasonable person might consider compelling evidence. Where a publication ban is in place, the accused has little public answer. ... [Emphasis in original.]

[127] Mr. Nathanson argues that the proposed publication bans are unnecessary as there is a reasonably available alternative; namely, the inmate witnesses can be placed in protective custody. He also submits the orders will have no salutary effect

2011 BCSC 1329 (CanLII)

as information concerning the identities of the inmate witnesses as cooperating Crown witnesses will get into the institutions once they testify regardless whether a publication ban is imposed.

[128] Mr. Nathanson stresses that the inmate witnesses [Content Redacted] are the most untrustworthy of witnesses who have committed murders, engaged in other unsavoury acts and specifically bargained with the Crown to obtain lesser consequences. He submits this application is about the inmate witnesses' comfort - not their safety - because they can be placed in protective custody if necessary.

[129] He also cautions me that I should be reluctant to grant the Crown's application because to do so may create a perception of bias by making it appear that the Court has been drawn into the negotiations between the Crown and the inmate witnesses for a publication ban.

[130] Mr. Anderson, on behalf of the media, commences his written submissions by highlighting, from the evidence:

(i) the widespread public concern about gang violence;

(ii) that the accused have known for many years that the inmate witnesses are cooperating Crown witnesses and what they are expected to say;

(iii) that there has already been significant publicity in the media [Content Redacted]; and

(iv) the contents of the immunity agreements between the Crown and the inmate witnesses.

[131] Mr. Anderson stresses the importance of permitting an informed public discussion of the immunity agreements which have allowed some of the inmate witnesses to negotiate resolutions with the Crown that some members of the public may find outrageous.

2011 BCSC 1329 (CanLII)

[132] He reviews the law concerning the vital importance of the open court principle, the role of the media, and the right to freedom of expression.

[133] Mr. Anderson then addresses whether, in this case, there is a real and substantial risk. He submits that there is no evidence of a real and substantial risk to the inmate witnesses given the ability of Corrections to protect them. He, like Mr. Nathanson, submits the risk in question is to their custodial status, not their lives. He explains this at paras. 81-84 of his written submissions:

> There is no evidence before the court that the lives of any of the Inmate Witnesses are in jeopardy. All of the evidence of the Inmate Witnesses and the evidence of Mr. Bentenuto is to the effect that if it becomes known within the institution in which the Inmate Witnesses are located their custodial status will be changed and they will be safe. All of the evidence is to the effect that Corrections is more than capable of protecting a "rat". They do it daily.
>
> Further, the evidence of Mr. Bentenuto is to [the] effect that if the Inmate Witnesses become known as rats that Corrections has a number of options available to it to protect them. Two of the options include a change of identity and protective custody. For security reasons Mr. Bentenuto was not prepared to elaborate on the various other options available.
>
> Whatever option Corrections were to employ, the evidence is to the effect that even in the worst case scenario, and the Inmate Witnesses are put into protective custody, they will still have some programs available to them and they will be imprisoned in "safe and humane" conditions.
>
> Accordingly, even if it can be said that, but for the publicising of the Inmate Witnesses' names, their identity as rats within the institutions in which they are located will not become public, there is no evidence of a real and substantial risk to their lives. The issue is not to their lives but to their custodial status.

[134] Mr. Anderson's central submissions were focussed on the notion of "incremental risk" and the existence of reasonable alternatives to a ban. He submits the court must consider whether publication will result in any increased or incremental risk. Mr. Anderson says that, given the circumstances of this case, the status of the inmate witnesses will become known within the institutions irrespective of a publication ban. He explains this at paras. 85-87 of his argument:

> The overwhelming weight of the evidence is that if the Inmate Witnesses testify the fact that they are "rats" will become public knowledge in whatever institution they are located whether or not their identities are published. The testimony of each of the Inmate Witnesses will take weeks. There is virtually

2011 BCSC 1329 (CanLII)

> no doubt that given who the Greeks are and their connection to the Hells Angels the fact of their testimony will become public knowledge within their institutions whether or not there is any publication of their names.
>
> Accordingly, to the extent that their custodial status constitutes a "risk" the publication of the names of the Inmate Witnesses will not result in any increased or "incremental" risk of that occurring.
>
> The carefully drafted Affidavits of the Inmate Witnesses readily acknowledge this reality: "If I testify in this proceeding and my identity is published or disclosed in any way, my life will be put in danger." [Emphasis in original.]

2011 BCSC 1329 (CanLII)

[135] He further argues that if the court finds there is an increased risk, the publication bans sought are unnecessary in light of reasonably available alternative measures that could be taken to protect the inmate witnesses. Like Mr. Nathanson, he submits the evidence shows that protective custody is a reasonable alternative measure.

[136] Finally, Mr. Anderson submits that even if the Crown satisfied the first prong of the *Dagenais/Mentuck* test, it has not demonstrated that the salutary effects of the proposed orders would outweigh any deleterious effects on freedom of expression and the accused's right to a fair trial.

[137] He argues that permitting public scrutiny of these court proceedings is particularly important given the significant public issues at stake, including gang violence and the nature of the immunity agreements.

[138] Mr. Anderson cautions that a publication ban of any information that could identify the inmate witnesses goes beyond just banning publication of their names. He says, in reality, to ensure compliance with such an order the media would be able to report little of the inmate witnesses' testimony. In particular, he submits the media would not be able to report on: the narrative of the trial; the central issue of the Crown's case - the credibility of the inmate witnesses; and the details of the immunity agreements.

[139] Finally, he submits at paras. 95-96 of his argument:

> Gang violence is a major issue in British Columbia. Immunity Agreements with cold blooded murders is highly controversial. Reporting on the narrative

> in all its aspects of this trial is of fundamental importance to the public's right and need to know. All aspects of the criminal justice system [are] under scrutiny in this case.
>
> If the publication bans sought by the Crown is granted the deleterious effects on both on freedom of expression and on the accused's fair trial rights is overwhelming.

2011 BCSC 1329 (CanLII)

E. Analysis

[140] I begin by stating some of my findings of fact. Many of them are not in dispute.

[141] Based on the evidence presented on this application I find that: the Hells Angels is a dangerous and violent criminal group that operates throughout Canada; its members use associated criminal groups or crime cells to commit much of the crime from which they profit; these crime cells pay a tax or percentage of their profits to the Hells Angels in return for their protection and support; and the Greeks were an associated group or crime cell of the Calgary chapter of the Hells Angels.

[142] I stress that these findings are based on the evidence heard on this application, most of which was unchallenged. The import of these findings should be restricted to this application.

[143] In addition, I find that:

(i) the inmate witnesses are key Crown witnesses whose evidence could result in the accused being convicted of first-degree murder;

(ii) the accused have been incarcerated for between four and five years and have known for most of that time the inmate witnesses are cooperating Crown witnesses;

(iii) it is likely that persons connected to the accused, other former members of the Greeks and some members of the Hells Angels have known for years that the inmate witnesses are cooperating Crown witnesses;

(iv) the inmate witnesses face a substantial risk of death or serious bodily harm while incarcerated in general population if their fellow inmates learn they are cooperating Crown witnesses or if certain individuals learn where they are incarcerated;

(v) Corrections has, over the last number of years, been able to keep four of the inmate witnesses [Content Redacted] relatively safe in general population, by keeping their status as cooperating Crown witnesses hidden from their fellow inmates and restricting knowledge of where they are incarcerated;

(vi) information may be communicated from outside prison to inmates inside prison within hours;

(vii) members of the Big House Crew receive a newsletter which includes information about inmates who are "rats"; and

(viii) information published in the media can be disseminated through collateral contacts into Correctional institutions within hours.

[144] I return to the legal principles I discussed earlier.

[145] Section 486.5 of the *Code* governs this application. The overriding question is whether a publication ban is necessary for the proper administration of justice. To answer this question I must consider the factors set out in subsection (7). As discussed, given the similarity between these factors and the principles considered in *Dagenais/Mentuck*, the Court's interpretation and analysis of these principles is of assistance when considering them in the context of s. 486.5 of the *Code.*

[146] With these considerations in mind I turn to the factors set out in s. 486.5.

2011 BCSC 1329 (CanLII)

Whether There is a Real and Substantial Risk that the ...Witness ...Would Suffer Significant Harm if Their Identity Were Disclosed (para. b)

Whether the ...Witness...Needs the Order for Their Security or to Protect Them from Intimidation or Retaliation (para. c)

[147] These two factors can be conveniently considered together in the circumstances of this trial because the need for the proposed orders to protect against retaliation and intimidation are intertwined with the question as to whether there is a real and substantial risk of significant harm.

[148] The risk in question must be well-grounded in the evidence and must be one that poses a serious threat to the proper administration of justice: *Mentuck*, at para. 34.

[149] The evidence demonstrates the inmate witnesses are perceived in the criminal world as "rats" - as individuals who have broken the code of conduct expected from criminals in and out of prison; namely, you do not inform on or testify against other criminals. The code is reflected in the words printed on a T-shirt found by the RCMP during a search of the residence of one of the accused, "*Be Silent or Be Silenced"*. These words and the code they reflect take on added meaning in this case where the alleged motive for one of the murders is that the victim was believed to be a police informant.

[150] The evidence further establishes that if the inmate witnesses' identities as cooperating Crown witnesses become known within the institutions where they are presently incarcerated, they face a real and substantial risk of harm - including death or serious bodily harm. The inmate witnesses face the same risk if their location of incarceration is disclosed to those who wish to cause them harm.

[151] As discussed, this evidence was not seriously challenged. While Mr. Anderson argues there is no risk as Corrections would be able to keep the inmate witnesses safe in any event, the central issue in this case concerns the "incremental risk" and necessity of the ban.

2011 BCSC 1329 (CanLII)

[152] The accused and media argue that the inmate witnesses' status as cooperating Crown witnesses as well as where they are incarcerated (the "protected information") will be disclosed once the inmate witnesses testify regardless whether a publication ban is ordered. In other words, publication will result in no additional risk; therefore a ban is of no purpose or necessity as it will do nothing to avoid the risk to their safety.

[153] With respect, I do not accept this submission. The protected information has apparently not been disclosed within the institutions where the inmate witnesses are presently located or to those who wish to cause them harm despite the many years the accused and others have known the inmate witnesses are cooperating with the Crown. This fact goes against the argument that the proposed orders will have little or no effect on the disclosure of the protected information.

[154] In my view, risk of disclosure of the protected information will materially increase if the inmate witnesses testify without a publication ban; as such, so will the risk they will suffer significant harm and intimidation.

[155] Their testimony will likely attract considerable media attention and public interest because it will provide a window into the world of organized crime, drug trafficking and murder. Given the wide circulation of mass media, without a publication ban, many thousands of persons, both in and out of prison, would learn the identities of the inmate witnesses and the fact they are cooperating with the Crown.

[156] Publication of this information is likely to generate interest and discussion amongst criminals in and out of prison. It is also more likely to be a topic of conversation between inmates and those communicating with them in person, or by phone or letter.

[157] Most significantly, broadcasting photographs or other images of the inmate witnesses would greatly increase the risk that former, present and future inmates,

2011 BCSC 1329 (CanLII)

who have knowledge of their locations, will be able to identify them as cooperating Crown witnesses.

[158] For all of these reasons, a publication ban is necessary to protect the inmate witnesses from a real and substantial risk of harm. I acknowledge there exists the possibility that the protected information may be disclosed even where a publication ban is in place. However, I do not see the test as requiring perfection. In my view, it is sufficient that the absence of the proposed orders will materially increase the risk.

[159] These factors weigh in favour of the proposed orders.

Whether Effective Alternatives Are Available to Protect the Identity of the... Witness (para. e)

[160] This factor requires the court to consider whether the objective can be achieved "by a reasonably available and effective alternative measure": *Dagenais*, at p. 840.

[161] The inmate witnesses are in general population. The accused and media argue that the inmate witnesses can simply be transferred from general population to protective custody.

[162] Even assuming that protective custody is an effective alternative, I do not consider it a reasonable one. I reject the defence submission that this application is merely about the inmate witnesses' comfort, and protective custody for between five and 20 years is a reasonable alternative.

[163] In my view, to serve most, if not all, of their remaining sentences in protective custody as publicly recognized cooperating Crown witnesses would impose an unreasonable hardship on the inmate witnesses. In addition, as will be discussed, it is hardly an alternative that would encourage other gang members who are or will be incarcerated to cooperate with the Crown in the future.

2011 BCSC 1329 (CanLII)

[164] The fact the inmate witnesses are not presently in protective custody despite the ongoing risk to them is consistent with the opinion expressed by both the inmate witnesses and Corrections that long-term protective custody is a last resort.

[165] Given that I reject the notion that protective custody is a reasonable alternative, and no other alternatives were raised, this factor weighs in favour of the proposed orders.

2011 BCSC 1329 (CanLII)

Society's Interest in Encouraging the Reporting of Offences and the Participation of... Witnesses... in the Criminal Justice Process (para. d)

[166] The violence associated with gangs has been become a matter of increasing public concern and discussion. Politicians at all levels of government have and are expressing the public's frustration that gang wars have invaded our communities and spilled onto public streets. Enormous police resources and public funds are being expended in an effort to curb such violence.

[167] The extraordinary difficulties associated with investigating and prosecuting criminal organizations, i.e. gangs, is recognized in various provisions in the *Criminal Code*, including: s. 186(1.1) [no requirement to demonstrate investigative necessity for a Part VI authorization]; s. 515(6) [reverse onus on bail]; s. 486.2(5) [testimonial accommodation for witnesses]; and s. 467.1-467.2 [the offences and special provisions relating to criminal organizations].

[168] The code of silence and the serious consequences of breaching that code increase the challenge of investigating and prosecuting offences committed by members of criminal organizations. Encouraging former members of and persons associated with gangs to cooperate can greatly assist the investigation and prosecution of gang activity and violence. Comparison can be made to the role police informants play in the criminal justice system.

[169] Justice McLachlin (as she then was) recognized the important role informants play in *R. v. Leipert*, [1997] 1 S.C.R. 281, at para. 10, when she explained the rationale for the informer privilege rule:

> The rule is of fundamental importance to the workings of a criminal justice system. ...
>
> In *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 994, Cory J. stressed the heightened importance of the rule in the context of drug investigations:
>
> > The value of informers to police investigations has long been recognized. As long as crimes have been committed, certainly as long as they have been prosecuted, informers have played an important role in their investigation. It may well be true that some informers act for compensation or for self-serving purposes. Whatever their motives, the position of informers is always precarious and their role is fraught with danger.
> >
> > The role of informers in drug-related cases is particularly important and dangerous. Informers often provide the only means for the police to gain some knowledge of the workings of drug trafficking operations and networks. . . . The investigation often will be based upon a relationship of trust between the police officer and the informer, something that may take a long time to establish. The safety, indeed the lives, not only of informers but also of the undercover police officers will depend on that relationship of trust.

2011 BCSC 1329 (CanLII)

[170] In my view, members of and persons associated with gangs who cooperate with the Crown can fulfil a similar role and significantly enhance the effective investigation and prosecution of criminal organizations.

[171] However, being a cooperating Crown witness can be extremely dangerous for the same reasons it can be extremely dangerous for informants. Both groups need to be protected if their cooperation is to be expected now and in the future. While the identity of cooperating gang members cannot be protected in the same way as the identity of police informants because they usually will be required to testify in court, a publication ban is one means of providing some protection.

[172] Here, the inmate witnesses face an increased risk of serious harm, including death, if their identities as cooperating Crown witnesses are disclosed. In the absence of a publication ban the risk of disclosure is significantly greater. In my view, this may affect how forthcoming they will be in the witness stand. Breaching an immunity agreement or the threat of being held in contempt of court may mean little when weighed against the risk that they could be killed, particularly to someone serving a life sentence.

[173] The potential for intimidation and retaliation in this trial has been highlighted by two individuals who were recently charged with obstruction of justice in relation to this trial.

[174] The two individuals are alleged to have attempted to threaten or intimidate a Crown witness, a former employee of the Greeks. One of the individuals sent threatening messages to the witness and then attended court when the witness testified. The other individual also attended court while the witness testified, although at a different time. While sitting in the courtroom, he made a throat slashing motion by drawing his hand across his throat. Both of the individuals have a connection to one or more of the accused and have criminal records for violence.

[175] I have been provided transcripts of phone calls intercepted at North Fraser Pretrial Centre between the first individual and one of the accused. These phone calls suggest that pressure and intimidation may be exerted on other Crown witnesses. Such conduct goes to the heart of the proper administration of justice and provides a disturbing example of the need to protect vulnerable witnesses if the truth seeking function of a fair trial is to be effective.

[176] Given the circumstances of this case, this factor weighs in favour of the proposed orders.

The Impact of the Proposed Order on the Freedom of Expression of Those Affected by It (para. g)

[177] As discussed, freedom of expression and the open court principle are of fundamental importance to our justice system. This is particularly so given that it is only through the media that most members of the public will be able to learn about the evidence and the conduct of this trial.

[178] I agree with Mr. Anderson that this trial raises matters of significant public importance. The evidence will disclose the commission of multiple murders and how gangs involved in the drug business operate, including the routine use of violence and intimidation. It will also disclose some of the effects gangs and drugs have on

2011 BCSC 1329 (CanLII)

our communities and those involved in the business, as well as the efforts and methods used to investigate and prosecute this case, including negotiating immunity agreements.

[179] The public also has a significant interest in this case given that its investigation and prosecution has involved an enormous expenditure of public resources.

[180] I do not, however, agree that a publication ban will entirely prevent the media from reporting on the narrative of the trial, the credibility of the inmate witnesses and the immunity agreements. While the proposed orders would undoubtedly restrict the media's ability to report on this case, I do not accept that the impact would be as significant and far-reaching as suggested.

[181] For instance, concerning the credibility of the inmate witnesses (not including [Content Redacted]), the media could report on the fact they are convicted murderers and former members or associates of the gang, or were vigorously cross-examined on numerous inconsistencies in their evidence and, in some cases, repeatedly admitted to lying to police.

[182] In addition, they could report on some aspects of the immunity agreements; namely, that former members or associates of the gang received arguably favourable sentences for murder in exchange for their cooperation. In my view, this would allow public debate and scrutiny concerning the existence and use of such agreements.

[183] Although I have found that the effect of the proposed orders on the right to free expression is not as far-reaching as the media suggests, there is no doubt they would have a significant effect. This is particularly so given the likely duration of the proposed bans. As I have found that the inmate witnesses face a significant risk for the duration of their incarceration, which is in the range of five to [Content Redacted] years, any bans ordered would, by necessity, be lengthy in duration.

2011 BCSC 1329 (CanLII)

[184] For all of these reasons, this factor militates against granting the orders sought.

The Right to a Fair and Public Hearing (para. a)

[185] There is no question that a publication ban concerning the identities of witnesses will usually adversely affect an accused's right to a fair and public hearing. The extent to which a ban will do so will vary with the circumstances of the case and the particular witness for whom the ban is sought. In my view, in this case, the effect will not be significant. I reach this conclusion for a number of reasons.

[186] First, as discussed, notwithstanding the proposed orders, the media will be able to report on much of the evidence given in this trial.

[187] Second, it is unlikely that six or seven years after the alleged offences a material witness will come forward with evidence to assist the defence because the inmate witnesses are identified in the media. If any witnesses to the alleged offences or related events have not yet been identified or come forward after years of investigation, hundreds of thousands of pages of disclosure, or as a result of media coverage of the police investigation, the laying of charges and the progress of the trial to date, it is unlikely that they would now as a result of publication of the identities of the inmate witnesses.

[188] I also agree with the Crown that given the potential consequences to the inmate witnesses of being labelled a "rat" it is unlikely they would have discussed their evidence with other inmates. For this reason, the likelihood that another inmate will come forward with potentially reliable evidence that the inmate witnesses made statements to them inconsistent with their evidence is speculative.

[189] In addition, given the voluminous disclosure, including third-party records ordered produced concerning the inmate witnesses, the accused have an abundance of evidence with which to attack the credibility and character of these witnesses.

2011 BCSC 1329 (CanLII)

[190] The right of an accused to a fair trial is an important consideration for the reasons expressed in *Dagenais* and *Mentuck*. However, the impact of the accuseds' fair trial rights in this case is minimal given it is unlikely that material witnesses helpful to the defence will emerge at this time, and the fact the order will still allow the public to be informed about many aspects of the proceedings - including the strength of the Crown's case and the credibility of witnesses.

[191] Although I have found the impact of the proposed orders on the accuseds' fair trial rights is minimal, this factor weighs against granting the orders.

Any Other Factor that the Judge Considers Relevant (para. h)

[192] I reject Mr. Nathanson's submission that granting the Crown's application would create a reasonable apprehension that the court is biased in the Crown's favour because it ordered what the Crown agreed to seek in the immunity agreements – a publication ban.

[193] I have given no weight to the fact the Crown has agreed to seek the proposed bans concerning the four inmate witnesses as it is not a relevant consideration. It is not necessary to say anything more in response to this submission.

The Salutary and Deleterious Effects of the Proposed Order (para. f)

[194] This factor requires the court to weigh the salutary or beneficial effects of the proposed order against the deleterious or negative impacts.

[195] Here, the deleterious effects of a publication ban include its impact on the fair trial rights of the accused, and freedom of expression and the open court principle. As discussed, in this case, the impact on the accuseds' fair trial rights is minimal. However, the proposed orders will have a significant impact on the media's right to freedom of expression.

[196] The salutary effects of the proposed orders include reducing the risk of serious harm to the inmate witnesses, including the risk that they will be intimidated

2011 BCSC 1329 (CanLII)

or threatened and dissuaded from testifying, and encouraging cooperation from similar individuals in similar investigations and prosecutions in the future.

[197] Weighing these factors, I am satisfied that the negative impacts of the proposed publication bans are outweighed by their beneficial effects.

[198] In reaching this conclusion, I am mindful of the importance of attempting to balance competing rights and interests, and not simply deciding which right trumps the others: *Dagenais*, at p. 839. However, in this case the most compelling factor is the risk to the inmate witnesses if the protected information is disclosed. There is a real and substantial risk that they will suffer serious physical harm, potentially even death. It is also important that the potential for intimidation and retaliation be reduced.

[199] The proper administration of justice requires that witnesses be protected from serious harm and intimidation, and that the truth seeking function of the trial be protected. These factors are particularly important here given the context in which the offences were allegedly committed and the intimidation that has already occurred in this trial.

[200] I am satisfied that, pursuant to s. 486.5 of the *Code*, a ban on publication concerning the identity of the inmate witnesses is necessary for the proper administration of justice.

V. CONCLUSION

[201] Mr. Mastop's application is dismissed.

[202] I am making an order directing that any information that could identify [the two non-inmate witness] including: names; initials; ages or dates of birth; photographs, drawings or other images; and [Content Redacted], shall not be published in any document or broadcast or transmitted in any way, unless and until further order of this Court.

2011 BCSC 1329 (CanLII)

[203] I am making an order directing that any information that could identify [the five inmate witnesses] shall not be published in any document or broadcast or transmitted in any way, unless and until further order of this Court.

"SMART J."

2011 BCSC 1329 (CanLII)