IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Blackmore,*
2018 BCSC 1225

Date: 20180723
Docket: 31247
Registry: Cranbrook

Regina

v.

Winston Kaye Blackmore and James Marion Oler

Before: The Honourable Madam Justice Donegan

Reasons re Media Applications for Access to Sentencing Hearing Exhibits

Counsel for the Crown:	P.J. Wilson, Q.C. M.B. Rankin
Counsel for the Accused, Winston Kaye Blackmore:	B.F. Suffredine, Q.C.
The Accused, James Marion Oler appearing in person:	J.M. Oler
Counsel appearing as *amicus curiae*:	J.M. Doyle
The Applicant, Trevor Crawley of the Cranbrook Townsman, Black Press Media appearing in person:	T. Crawley
The Applicant, Daphne Bramham of the Vancouver Sun appearing in person May 15, 2018 only (via telephone May 18, 22, 30 and June 27, 2018):	D. Bramham
Counsel for the Applicant, Daphne Bramham of the Vancouver Sun (via telephone) on June 27, 2018 only:	S.A Dawson
Place and Date of Hearing:	Cranbrook, B.C. May 15, 18, 22, 30 and June 27, 2018
Place and Date of Judgment:	Cranbrook, B.C. July 23, 2018

INTRODUCTION

[1] On July 24, 2017, Winston Kaye Blackmore and James Marion Oler were each found guilty of practising a form of polygamy contrary to s. 293(1)(a) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 [*Criminal Code*]. Convictions were entered on March 9, 2018 following their unsuccessful post-trial applications for a stay of proceedings. Pre-sentence reports for each offender were ordered to assist the court in sentencing.

[2] The sentencing hearing occurred on May 15, 2018. Three exhibits were filed – the two pre-sentence reports and a collection of government birth records. I reserved judgment. Following the hearing, members of the media filed requests for unlimited access to all three exhibits. Submissions were later made and I ultimately determined the applications should be adjourned until after the imposition of sentence. The offenders were sentenced on June 26, 2018 and further submissions on the applications were made the following day.

[3] To put these applications in context, I will start with their procedural history.

HISTORY OF THESE APPLICATIONS

[4] Following the recording of convictions, the Crown sought an order requiring the preparation of a pre-sentence report by a probation officer for each offender pursuant to s. 721 of the *Criminal Code*. Unopposed, I made the orders and adjourned sentencing to allow time for their preparation.

[5] At the sentencing hearing on May 15, 2018, the pre-sentence report for Mr. Blackmore was marked as Exhibit 1 and the pre-sentence report for Mr. Oler was marked as Exhibit 2. A number of government birth record documents, tendered by the Crown, were collectively marked as Exhibit 3. No other exhibits were tendered by any party. Mr. Blackmore was the only party to call *viva voce* evidence and his friend's evidence was not contentious. Submissions by the parties and *amicus curiae* included reference to the exhibits and some of their content.

[6] At the conclusion of submissions, I received requests from members of the media seeking unlimited access to the three exhibits. As part of a new court protocol designed for the purpose of minimizing the need for accredited members of the media to make formal court applications for access to exhibits, the requests came to me through the registry in my chambers in Form 2: Media Request for Access to an Exhibit. As far as I am aware, this is the first time Form 2 and this new protocol has been used.

[7] In accordance with the new protocol, I determined that input from the parties was required through oral submissions or by completion of section B of Form 2. The parties sought to make oral submissions.

[8] I decided against requiring the media applicants to bring formal applications, with notice to all parties, in favour of oral submissions for a number of reasons unique to this case.

[9] The need for accurate and timely reporting, important to the administration of justice in every case, is particularly pressing in cases like the one at bar. Not only is this case one of first impression, it comes after decades of uncertainty about the constitutional status of the polygamy offence in this province and intense public scrutiny over decades of its non-enforcement.

[10] All hearings in this case have been held in a small community in the southeast corner of the province, where court time is limited and travel for non-local participants and members of the media can be challenging. One of the offenders, Mr. Oler, is unrepresented and resides out of province. He has chosen to remain private about his personal affairs and, although present, has effectively declined to participate in all proceedings. Service of formal notice upon him is difficult for non-parties not privy to his contact information, such as members of the media.

[11] Aware that one of the applicants had encountered significant procedural and practical difficulties on a prior application in this case (before the new protocol), I determined that oral submissions within a few days was the option that best

promoted the applicants' access to the court, balanced all of the various interests at stake and allowed for a full and fair hearing of the issues. I permitted all applicants and parties to attend by telephone at the hearing, if it assisted them.

[12] On May 18, 2018, the applicants and parties made submissions, with all participants (other than myself and Mr. Crawley for the Cranbrook Townsman) attending by telephone. To summarize, the parties did not necessarily oppose the applicants' access to the exhibits, but sought certain restrictions to that access, mainly to protect the privacy interests of some third parties who provided information to the pre-sentence report authors and the privacy interests of all children of the offenders identified in the exhibits.

[13] When we reconvened the following court day (May 22, 2018), I explained, with full reasons to follow, my decision to adjourn the applications until after the imposition of sentence and to allow for further submissions to be made at that time. A temporary publication ban, with the consent of the applicants and all parties, was subsequently imposed to prohibit the publication of submissions taken at the application hearing. I made this decision in order to ensure that the privacy and other interests at issue in these applications were protected pending the court's ultimate decision.

[14] Both offenders were sentenced on June 26, 2018 and additional submissions on the applications were made the following day. As one of the applicants, Ms. Bramham for the Vancouver Sun, was now represented by counsel, I permitted Mr. Dawson to attend by telephone and granted him leave to forward copies of the authorities to which he referred during the hearing to me through Supreme Court Scheduling. He did so. I reserved judgment on the applications and, with the consent of the applicants and parties, extended and particularized the temporary publication ban pending my decision.

[15] I turn now to describe the exhibits for which access is sought.

THE EXHIBITS

Exhibits 1 and 2: Pre-sentence reports

[16] Section 721(1) of the *Criminal Code* provides the statutory authorization for the preparation of such reports. It provides:

> 721 (1) Subject to regulations made under subsection (2), where an accused, other than an organization, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence or in determining whether the accused should be discharged under section 730.

[17] Section 721(3) governs what should be included in a pre-sentence report, including information on the offender's age, maturity, character, behaviour, attitude and willingness to make amends.

[18] The purpose of a pre-sentence report is to assist the court in the challenging and delicate task of determining a just and proportionate sentence, individualized to the circumstances of a particular offence and of a particular offender. As Charron J., writing for the majority, held in *R. v. Angelillo*, 2006 SCC 55:

> [22] … the objectives of sentencing cannot be fully achieved unless the information needed to assess the circumstances, character and reputation of the accused is before the court. The court must therefore consider facts extrinsic to the offence, and the proof of those facts often requires the admission of additional evidence.

[19] Pre-sentence reports are to provide "an accurate, independent and balanced assessment of an offender, his background and his prospects for the future": *R. v. Junkert*, 2010 ONCA 549 at para. 59. Probation officers are to be guided in their task by fairness and thoroughness, which can be accomplished by canvassing all sources of information that may provide relevant information about the offence and the offender: *Junkert* at para. 60.

Exhibit 1

[20] Exhibit 1 is the pre-sentence report prepared in respect of Mr. Blackmore. Prepared by a probation officer employed by the Corrections Branch of the British

Columbia Ministry of Public Safety and Solicitor General, it follows a very standard format, a format seen many times by this court. At the risk of over-simplifying, I will now summarize the format and content of this report.

[21] At page one, the author outlines basic details about the court and case information, contact information and the offence. At page two, the author lists her sources of information, organized under two headings – "Persons Contacted" and "Documents Reviewed". Under "Persons Contacted", she lists Mr. Blackmore, Constable Livingstone, three friends of Mr. Blackmore, two of Mr. Blackmore's plural wives, one of Mr. Blackmore's adult children and one of Mr. Blackmore's former wives. Under the heading "Documents Reviewed", the author identifies a Corrections file, a CPIC record and my Reasons for Judgment at Trial.

[22] Under the next heading, "Current Circumstances", the probation officer organizes the information gathered under the following headings:

1. Family relationships, living arrangements, associates;

2. Education, vocation, employment, finances;

3. Behaviour, emotional status; and

4. Substance misuse.

[23] The author then turns to report information received regarding the effects of the offence under the heading "Victim Information". Here, the probation officer summarizes information provided by two of Mr. Blackmore's current plural wives and one of his former wives.

[24] The probation officer then reports information on "Court History and Interventions" under the following headings:

1. Court history;

2. Assessment;

3. Attitude and receptiveness to previous and proposed interventions; and

4. Attitude and understanding regarding offence.

[25] Following a short section on “Sentencing Considerations for Aboriginal Offenders”, the report concludes with the author’s “Summary and Proposed Interventions”.

[26] Other than submissions pertaining to the weight to be given some information from one of his former wives, Mr. Blackmore did not contest any of the evidence contained within the pre-sentence report.

Exhibit 2

[27] Exhibit 2 is the pre-sentence report for Mr. Oler. Prepared by a probation officer for the Alberta Ministry of Justice and Solicitor General, this report follows a slightly different format than Exhibit 1, but it contains largely the same types of information. This author organized his/her report under the following headings:

1. Identifying data;

2. Present charges;

3. Previous criminal history;

4. Circumstances of the present offence;

5. Sources of information;

6. The subject as an offender;

7. Significant family and others;

8. Family circumstances;

9. Education/Employment/Financial Status;

10. Essential social, emotional and physical data; and

11. Evaluative summary.

[28] Under the heading “Sources of Information”, the probation officer identifies the persons with whom he/she spoke. Other than Mr. Oler and Constable Livingstone, only two other persons spoke to the probation officer – one member of Mr. Oler’s extended family and Mr. Oler’s employer.

[29] Under the heading “Significant Family and Others”, the probation officer lists the names and present addresses of Mr. Oler’s parents, wives, children and an extended family member.

[30] Mr. Oler participated in speaking with the pre-sentence report author, but chose to keep much of his personal life private. Mr. Oler did not take any issue with the evidence contained in the pre-sentence report.

Exhibit 3

[31] Exhibit 3 contains certified true copies of 28 documents pertaining to the births of 14 children in British Columbia between 2013 and 2017. For each child there are two documents – a Registration Document and a Declaration of Particulars.

[32] These documents are kept by the Vital Statistics Agency of British Columbia. They contain highly personal information, including the child’s full name, sex, date of birth, location of birth, time of birth, and his/her personal health number, to allow the child access to the British Columbia health care system. Much of the same personal information pertaining to each child’s parents appears as well.

[33] Each Registration Document bears an official government seal, the signature of the Registrar General of the Vital Statistics Agency, a unique certification number, a unique registration number, the registration date, and a unique “Reg. Doc. Number”. Each Declaration of Particulars bears the signature of the Registrar General, the unique registration number that appears on the corresponding

Registration Document, and another unique eight-digit number. At the top of each Declaration of Particulars, a typed warning reads:

> **"IMPORTANT DOCUMENT"**
>
> This certificate is a valuable legal document. Please keep it in a secure place.

[34] The personal information contained in each of these 28 documents derives from the reporting requirements of the *Vital Statistics Act*, R.S.B.C. 1996, c. 479 [*VSA*].

[35] The Crown tendered these documents, admissible for the proof of the truth of the information they contain pursuant to the provisions of the *VSA,* to provide further proof of an aggravating factor on sentence – that Mr. Blackmore continued to practise polygamy after 2011, when the prohibition's constitutionality was upheld. Mr. Blackmore did not contest any of the facts proven by any of the documents.

[36] I found the Crown had proven this aggravating factor beyond a reasonable doubt, on the basis of my findings at trial and in the post-trial application decision. The facts proven by Exhibit 3 – that Mr. Blackmore fathered 14 children between 2013 and 2017, with eight of his plural wives – was circumstantial evidence that his marriages to those eight wives were continuing. This evidence served to reinforce my finding.

[37] I turn now to outline the applicable general legal principles and examples of their application in contexts somewhat similar to the case at bar.

LEGAL PRINCIPLES

Dagenais/Mentuck Test and Court Exhibits Generally

[38] The analytical framework for considering applications involving access to court records was first described in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. The test was articulated by Chief Justice Lamer at page 878:

> A publication ban should only be ordered when:

> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.
>
> [Emphasis in original.]

[39] Several years later, the Supreme Court was asked to revisit the analytical framework established in *Dagenais* in *R. v. Mentuck*, [2001] 3 S.C.R. 442. The Court determined that it was necessary to broaden the *Dagenais* framework to make it more applicable to a broader set of factual circumstances. Iacobucci J. wrote at para. 32:

> 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.

[40] In *Global BC, A Division of Canwest Media Inc. v. British Columbia*, 2010 BCCA 169 [*Global BC*], our Court of Appeal confirmed the *Dagenais/Mentuck* analysis applies to applications for access to court exhibits and endorsed a summary of the applicable principles outlined by the trial judge:

> [13] …
>
> 1. There is a rebuttable presumption that judicial proceedings are open and public: *Toronto Star*, para. 14.
>
> 2. Section 2(b) of the Charter guarantees freedom of communication and freedom of expression, fundamental freedoms which depend for their vitality on public access to information of public interest including access to that which goes on in the courts: *Toronto Star,* para. 2.
>
> 3. If public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice then a temporary or permanent denial of access may be warranted: *Toronto Star*, para. 3.
>
> 4. The circumstances in which access may be denied are limited:

> Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of the justice or unduly impair its proper administration*: *Toronto Star*, para. 4

5. The *Dagenais/Mentuck* test is applicable at every stage of the judicial process but must be applied in a flexible and contextual manner: *Toronto Star*, para. 8.

6. A limitation on access should only be ordered when the salutary effects of the order outweigh its negative impact on the freedom of expression of those affected by the ban. As stated in *Dagenais* and modified in *Mentuck,* restrictions on access 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: *Toronto Star*, para. 26.

7. Finally, the *Dagenais/Mentuck* test should not be applied mechanistically:

> Regard must always be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. The test, though applicable at all stages, is a flexible and contextual one. Courts have thus tailored it to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown initiated applications for publication bans: *Toronto Star*, para. 3.

[41] More recently, the Supreme Court reaffirmed that the *Dagenais/Mentuck* approach applies to all discretionary decisions that affect the openness of proceedings in *Canadian Broadcasting Corp. v. The Queen and Dufour*, 2011 SCC 3 at para. 13 [*Dufour*]. There, the Court also confirmed that the public's ability to inspect trial exhibits is a "corollary to the open court principle": para. 12.

[42] In *Aboriginal Peoples Television Network v. Alberta (Attorney General)*, 2018 ABCA 133 [*APTN*], the Alberta Court of Appeal summarized the Supreme Court's jurisprudence in this area at paras. 15-16:

> [15] The public's ability to inspect trial exhibits is a "corollary to the open court principle": *CBC v The Queen and Dufour*, 2011 SCC 3 at para 12, [2011] 1 SCR 65 [*Dufour*]. Although trial judges have discretion to prohibit public access to an exhibit, or impose conditions on the public's use of an exhibit, they must apply the well-known *Dagenais*/*Mentuck* test when exercising a discretionary power that could infringe on the open court principle: *Dufour* at para 13. A trial judge considers whether:
>
> > (a) a limitation on the public's ability to access the exhibit 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 limitation on the public's ability to access the exhibit outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on freedom of expression, the accused's right to a fair and public trial, and the efficacy of the administration of justice.
> >
> > [See *Dagenais* at paras 73-74; *Mentuck* at para 32; *Vancouver Sun* at para 31]
>
> [16] As with any limit on the open court principle, the party seeking to restrict the public's access to an exhibit must displace the presumption of openness. Public access is the rule; covertness the exception: *Nova Scotia (AG) v MacIntyre*, [1982] 1 SCR 175 at 185, 26 CR (3d) 193; *CBC v New Brunswick* at para 71; *Dufour* at para 13.

Authorities Applying these Principles in Similar Contexts

[43] Mr. Justice Johnston applied these principles in *R. v. Wellwood*, 2011 BCSC 689 in respect of a media application to gain access to assessments and reports ordered under the *Youth Criminal Justice Act*, S.C. 2002, c. 1 [*YCJA*].

[44] In *Wellwood*, the offenders pleaded guilty to the first-degree murder of a teenage girl and to offering indignities to her remains. The offenders were 16 and 17 years old at the time of the offence and the Crown sought to have them sentenced as adults. After the offenders were sentenced as adults, certain media applicants applied for access to, and the right to copy, exhibits from the sentencing hearing. These exhibits included psychiatric, psychological and psychosocial assessments of the offenders and pre-sentence reports, ordered pursuant to ss. 34 and 40 of the *YCJA*. The assessments contained information obtained from the young offenders and the opinions of the psychiatrists. The pre-sentence reports contained information taken from interviews with the young offenders, their parents and their

extended families. The reports contained sections written by persons who had interviewed members of the victim's family.

[45] Both offenders objected to disclosure of these court ordered reports. The Crown did not oppose the application, but pointed to the potential chilling effect on future persons participating in the preparation of such reports if an order for access was granted. The family of the victim did not oppose release of the reports. One of the probation officers who prepared a report indicated that she was concerned that the release of the pre-sentence report could have adverse consequences upon her ability to get cooperation from information sources in the future. Counsel for the Director of Child, Family and Community Services, Ministry of Children and Family Development, indicated that the Director was not opposed to disclosure of the reports, so long as information that might identify those who had provided information to the Ministry was redacted.

[46] Johnston J. applied the *Dagenais/Mentuck* framework. In so doing, he identified a number of interests to be balanced at para. 64:

> * The presumed right to public access to the processes of the court, including the evidence on which the court has decided a question;
> * The court's interest in ensuring its continuing ability to access the best information and opinions so it may best discharge its obligations;
> * The privacy interests of those who have cooperated in the production of the reports by providing information to the authors;
> * Whether this court or the Director should weigh the expectations of confidentiality of persons who confided in workers from the Ministry of Children and Family Development;
> * The element of compulsion that flows from a court order or direction that a report be prepared, which may lead accused young persons or third parties to feel obliged to say things they would not otherwise wish publicly disclosed.

[47] Johnston J. ultimately concluded that the first branch of the *Dagenais/Mentuck* analysis had been met. He held that the infringement on the particular privacy interests at play and the chilling effect that would be incurred by the publication of the full content of the reports, represented a serious risk to the

proper administration of justice that could not be remedied by reasonably alternative measures.

[48] In respect of the second branch of the test, Johnston J. held that the right balance would be struck by allowing access to the exhibits, but with certain restrictions, including significant redactions. He concluded that while there was a legitimate interest among members of the public in accessing the reports, that interest should not be permitted to put at risk the privacy interests of individuals, the protections in place for government body records and the court's interest in protecting its ability to obtain the best quality reports and opinions needed for decisions under the *YCJA*. In order to achieve the necessary balance, the court ordered the reports be redacted to remove references to third parties and other specific redactions made on the basis of his review of the exhibits.

[49] *Wellwood* has been cited with approval by this court and others (see *R. v. Basi*, 2011 BCSC 711 at para. 10; *R. v. Sipes*, 2011 BCSC 918 at para. 7; and *Directrice des pouruites criminelles et pénales c*. *Patry*, 2015 QCCQ 11978 at para. 30). *Wellwood* is also consistent with several other decisions, pre and post-dating the decision, from other jurisdictions.

[50] In *R. v. Quintal*, 2003 ABPC 79, the offender pleaded guilty to break and enter and breaches of recognizance. The offences involved unusual aspects which made them of interest to the public. As part of the sentencing process, the Crown and defence agreed to an order that a pre-sentence report and an Alberta Mental Health Board assessment be prepared to assist the court with sentencing. Representatives of the media applied for access to, and copies of, the pre-sentence report and assessment.

[51] The offender did not object to the release of the pre-sentence report and it was made available, but he objected to the release of the assessment out of fear that the information contained within it could put him at risk of harassment.

[52] The court allowed the release of the assessment report, but with some restrictions. The offender had made statements relating to third parties that could be considered defamatory, including allegations of abuse. The court ordered that references to these innocent third parties be sealed.

[53] In *R. v. B.J.,* 2009 ABPC 248, the media applicant sought access to sentencing exhibits in a young offender proceeding, including medical reports pertaining to the victims, pre-sentence reports, a psychological assessment and a video recording played in court. The court allowed the release of the reports, but ordered them partially redacted to protect the names of (and information about) third parties. The court allowed the media to quote from the redacted reports, but prohibited their publication in their entirety. The court denied access to the video recording.

[54] In its analysis, the court cited with approval the following from *Muir v. Alberta*, 1995 CarswellAlta 1168 (Q.B.) at para. 35:

> …where disclosure of the identity of individuals who are mentioned unfavourably in the document has little or no probative value, but the disclosure of the information could be very prejudicial to those persons, the court can exercise a discretion to protect such persons.

[55] In *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27 [*Toronto Star 2012*], the media applicant sought access to pre-sentence reports and victim impact statements in three proceedings involving young offenders. The applicant had attended all three of the proceedings and had prepared a series of newspaper articles about them. The application was supported by the federal Crown, but opposed by the provincial Crown. Two of the young offenders testified and opposed the application. The third offender did not testify and did not take a position. An expert testified about potential damage that release of the reports could have on the offenders. Two probation officers testified to the same effect.

[56] In her thorough analysis of the competing interests at issue under the *Dagenais-Mentuck* approach, Cohen J. concluded that the salutary effects of denying access to the records in order to protect the privacy interests of young

people dealt with under the *YCJA* outweighed the deleterious effects on the open court principle and right of free expression. Heavy reliance was placed on protecting the privacy interests of young persons. The application was denied.

[57] In *R. v. Lisi,* 2013 ONSC 6562, the Toronto Star Newspaper sought access to exhibits filed at trial and at sentencing, including a pre-sentence report. The offender took no issue with the release of the exhibits, except the personal information contained in the pre-sentence report that could identify third parties. The Crown agreed with the offender's position.

[58] Applying the *Dagenais/Mentuck* analysis, the court granted the application, but ordered the redaction of information in the pre-sentence report that could identify persons other than the offender. The court also ordered that a copy of the application, the court's reasons and the redacted pre-sentence report be provided to third parties referred to in the report in order to allow them the opportunity to respond. The issue of whether unredacted copies of the report should be produced was adjourned until after the third parties had a chance to be heard.

[59] I will now outline the positions of the applicants and parties before turning to my analysis.

POSITIONS OF THE APPLICANTS AND PARTIES

[60] The applicants emphasize the presumptive accessibility of the three exhibits and seek copies of them. Mr. Crawley does not seek copies for the purposes of actually publishing them; rather, he seeks copies to be able to report upon those portions he considers newsworthy. Ms. Bramham had not considered publication of the actual copies, but when asked, did not exclude the possibility, adding that it was not a practice common to her news organization.

[61] Both applicants fairly concede the legitimate interest in protecting the privacy of the infant children identified in Exhibit 3. Neither applicant was opposed to redactions to that exhibit in order to protect their privacy interests. Aside from those redactions, both applicants argued for full access to the exhibits. They took the

position that the party opposing access must establish, through evidence, that granting full access would bring about the risks and negative effects contemplated in *Dagenais* and *Mentuck*. They emphasize the lack of any such evidentiary basis in this case and say there is no valid reason established to support any access restriction other than the identities of the infant children in Exhibit 3.

[62] On the final day of this hearing, counsel for the Vancouver Sun, Mr. Dawson, appeared by telephone and provided further submissions supported by case authorities, in favour of unrestricted access. The authorities provided by Mr. Dawson are as follows:

1. *R. v. Mentuck*, 2001 SCC 76 at para. 39;
2. *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835 at 878;
3. *Toronto Star Newspaper Ltd. v. Ontario*
    a. Ontario Court of Appeal ~ (2003), 232 D.L.R. (4th) 217 at para. 19;
    b. Supreme Court of Canada ~ [2005] 2 S.C.R. 188;
4. *Vancouver Sun: Re*, [2004] 2 S.C.R. 332, 2004 SCC 43, at para. 31;
5. *R. v. Ottawa Citizen Group Inc*. (2005), 75 O.R. (3rd) 590 (C.A.), paras. 40-43;
6. *R. v. MacIntyre*, [1982] 1 S.C.R. 175, at 185;
7. *M.E.H. v. William*, 2012 ONCA 35 at para. 25.

[63] The Crown seeks to strike a balance between the legitimate privacy interests of some of the third parties referred to in all of the exhibits with the open court principle. Mr. Wilson does not oppose release of the exhibits, but seeks certain redactions to protect those privacy interests and to protect the court's ability to access the best information to discharge its duties.

[64] With respect to Exhibit 1, the Crown seeks to prevent release of the identities and information provided by Mr. Blackmore's adult child, his two current plural wives

and his one former wife. Alternatively, if access to the content of the information these persons provided to the probation officer is not to be restricted, the Crown seeks redaction of at least the names of these third parties and any information which would reasonably identify them.

[65] With respect to Exhibit 2, the Crown seeks to protect the identities and locations of Mr. Oler's children and extended family member through redactions.

[66] With respect to Exhibit 3, the Crown seeks to protect the identities of Mr. Blackmore's infant children through redactions.

[67] In general, the Crown submits that such restrictions to full access are necessary in order to prevent a serious risk to the administration of justice and says that the right balance is struck between the competing interests by allowing access to the exhibits with those limited restrictions. Mr. Wilson emphasizes that the pre-sentence reports are generated by court order, which introduces an element of compulsion upon those who are asked to participate in their preparation and is an element that does not generally exist in other exhibits tendered by parties. He argues that unrestricted access to these reports and birth records would infringe upon not only the privacy interests of innocent children, but upon the very few family and former family members of the offenders that actually agreed to speak to the probation officers.

[68] Mr. Wilson advises that he spoke to the former spouse of Mr. Blackmore who provided information to the probation officer. She was essentially the only person who provided information about the harmful effects of Mr. Blackmore's offence. This former wife expressed great concern over fear of reprisals should her identity become published and told Mr. Wilson she has experienced some negative repercussions already. She also told Mr. Wilson that she did not wish to provide a formal victim impact statement and that it was her understanding when she spoke with the probation officer that any information she provided was for the eyes of the court only. She further conveyed through Mr. Wilson that she would never have agreed to speak if she would have known she would be published.

[69] The Crown relies on many of the same authorities provided by the applicants for the general analytical framework relevant to this application and also relies upon *Wellwood*, where redactions of the type suggested here were imposed. The Crown also relies upon *R. v. Schoenborn*, 2010 BCSC 40, where Powers J. held that the court is, in certain circumstances, entitled to accept the submissions of counsel rather than requiring the calling of evidence to provide the necessary basis to restrict access.

[70] Mr. Blackmore adopts the position taken by the Crown and seeks to protect the privacy interests of his children, as well as his current and former family members who spoke to the probation officer to the greatest extent possible. He does not oppose access to any other information contained in his pre-sentence report.

[71] Mr. Blackmore does, however, question the necessity of access to his children's birth records, given the nature of the private information they contain and the limited probative value they had to the proceeding.

[72] Mr. Oler also adopts the positon taken by the Crown, but seeks to restrict access to Exhibit 2 further to include redaction of his personal information (his address and telephone number) and the name of his one extended family member who provided information to the probation officer. He seeks to protect his family's privacy interests to the greatest extent possible.

[73] *Amicus curiae,* who continues to provide that valuable adversarial legal context in respect of issues pertaining to Mr. Oler, echoed the concerns expressed by the Crown and Mr. Oler himself.

[74] Like Mr. Wilson, Mr. Doyle highlights the value of pre-sentence reports to the sentencing process and stresses that it is often the case that probation officers have a difficult time securing any assistance from those with relevant information to provide the court. To allow the publication of names of those who did come forward when they were unaware that such a result could occur may discourage others from providing information and deprive courts of potentially very valuable information.

PRESENT APPLICATIONS AND THE *DAGENAIS/MENTUCK* ANALYSIS

Prior to the Imposition of Sentence

[75] Following initial submissions on these applications, I concluded that to grant the applications at that time, with or without the restrictions sought, would seriously risk the proper administration of justice. To prevent that risk from materializing, I adjourned the applications until after the imposition of sentence, believing such an adjournment had value far in excess of any negative effects on the rights of free expression. I gave brief oral reasons for this decision at the time and promised full reasons later. I will now explain my reasons.

[76] In these applications, I am called upon to exercise my discretion by balancing a number of interests, some of which are competing, including the need to protect the open-court principle, the need to protect third party privacy interests, the need to protect the fair trial rights of the offenders and the need to avoid serious risk to the administration of justice. I determined that I could not meaningfully assess and weigh all of these and potentially other relevant interests at a stage of the proceedings, my deliberation stage, where I had not yet determined what evidence I would accept from the exhibits tendered. In order to be able to engage in the weighing process the applications require, I found it necessary to make those findings first. I needed that important factual context in which to properly exercise my discretion.

[77] I determined that to allow or deny access to parts or all of the exhibits before I made those findings and had that important context could seriously risk the proper administration of justice. In order to prevent that risk from materializing, I determined an adjournment of the applications until after the imposition of sentence was necessary. I will provide two examples to explain the risk I mean.

[78] On the one hand, if I were to release the full contents of the pre-sentence reports before my reasons for sentence, I would risk putting evidence before the public that I may have ultimately decided was inadmissible or for which I may have decided to give very little weight. On the other hand, if I were to restrict access by

redacting certain content from the reports as sought by the parties, and this evidence proved later to be evidence upon which I relied in deciding the question before me, this could risk depriving the public of evidence important to my decision.

[79] In either case, to decide the applications prior to the imposition of sentence could potentially subject Mr. Blackmore and Mr. Oler to a parallel process of judgment in the news and social media while I was deliberating, based perhaps on evidence I would ultimately decide not to accept (or give little weight to) or without vital evidence that I would give weight. Either scenario posed a real and substantial risk to their fair trial process and risked undermining the efficacy of the administration of justice. In the end, I determined that the benefits of adjourning the applications until after sentencing had value far in excess of any negative effects on the rights of free expression. This was particularly true in light of the fact that the submissions of counsel at the sentencing hearing, and some of the contents of exhibits, were already available to be reported and had been already.

[80] In addition, given the number of third-party interests potentially at stake, adjourning the applications would allow those third parties an opportunity to be heard. Counsel for the parties made submissions with respect to most of the third parties in the short time given, but not with respect to all. I determined it necessary to allow the parties an opportunity to contact the authors of the pre-sentence reports and other third parties.

[81] In the end, once my findings had been made, my reasons for sentence delivered, all potentially affected third parties given the opportunity to be heard and further submissions made, I concluded that I would then be able to engage in the analysis required.

[82] My decision to adjourn the applications until after sentences were imposed is consistent with the Court's Record Access Policy (the "Policy"). The Policy is introduced by the following general principles:

> **1.1 Introduction**
>
> British Columbia's court system is based on fundamental principles of openness and accessibility. These principles reflect society's interest in providing for public scrutiny of its key institutions, including the court, so that there can be confidence that these institutions are functioning as they should.
>
> Public access to the courts is achieved mainly through the public's ability to attend and view and listen to court proceedings. Members of the public may attend any court proceedings, subject to some limited exceptions where a statutory rule or safety or other significant concerns require a closed courtroom.
>
> Access to the court's record involves additional considerations. This is partly because the court record (which is described below) consists of many different types of documents and other items, created at different stages of the proceedings by different people for different purposes. Statutory restrictions and constitutional and other rights and interests of parties to the proceedings or third parties may require some limitations on public access to certain parts of the court record.

[83] The specific policy with respect to access to court documents in criminal proceedings can be found in s. 2.1 of the Policy and the specific policy with respect to access to pre-sentence reports can be found in s. 2.1.17, which provides:

> **2.1.17 *Pre-Sentence Reports***
>
> In some criminal cases, the judge who finds an accused person guilty will ask that a pre-sentence report be prepared before the sentencing hearing is held. A pre-sentence report provides details about the accused person's background and circumstances and describes the sentencing facilities and programs that may be appropriate.
>
> Pre-sentence reports are not available to the public before a judge has imposed sentence.
>
> After the judge has imposed sentence, a person seeking access to a pre-sentence report may apply to the judge, or the Chief Justice or Associate Chief Justice.
>
> [My emphasis.]

[84] Section 2.1.17 of the Policy allows for an application to be made for access to pre-sentence reports only after the judge has imposed sentence. This is consistent with my view that prior to the imposition of sentence a court cannot meaningfully assess and balance all of the potentially competing interests required in order to properly exercise its discretion under the *Dagenais/Mentuck* analysis for access to exhibits tendered at a sentencing hearing.

After the Imposition of Sentence

The Pre-Sentence Reports (Exhibits 1 and 2)

[85] Now that the offenders have been sentenced, reasons given and further submissions made, I have that critically important factual context and full submissions upon which to exercise my discretion under the *Dagenais/Mentuck* framework.

[86] This analytical framework requires me to determine whether restricting access to Exhibits 1 and 2 is necessary to prevent serious harm to the administration of justice because reasonably alternative measures will not prevent the risk and to consider whether the positive benefits of restricting access outweigh the negative effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of an accused to a fair and public trial and the efficacy of the administration of justice.

[87] The first step in applying the *Dagenais/Mentuck* analysis is to determine which societal values, rights and interests are in conflict: *Toronto Star 2012* at para. 22. In these applications, society's interests in protecting the open court principle and freedom of the press appear to be in conflict with society's interest in protecting the privacy interests of innocent third parties, including children, and its interest in protecting the court's continuing ability to access the best information so that it may most effectively discharge its obligations.

[88] The first of these – the open court principle and freedom of the press – are central to our system of justice. The Alberta Court of Appeal very recently summarized the jurisprudence and reiterated their importance in *APTN*:

> [13] The open court principle is a central tenet of our justice system. Open courts are a hallmark of a democratic society: *Re Vancouver Sun*, 2004 SCC 43 at para 4, [2004] 2 SCR 332. The administration of justice "thrives on exposure to light and withers under a cloud of secrecy": *Toronto Star Newspaper Ltd v Ontario*, 2005 SCC 41 at para 1, [2005] 2 SCR 188. The open court principle is "multifaceted," and is best understood as an "ensemble of practices" that reflect the importance of transparent and accountable justice: *CBC v New Brunswick (AG)*, [1996] 3 SCR 480 at para 22, 139 DLR (4th) 385; *CBC v Canada (AG)*, 2011 SCC 2 at paras 1-2,

> [2011] 1 SCR 19; *Endean v British Columbia*, 2016 SCC 42 at para 83, [2016] 2 SCR 162. These transparency-enhancing practices help educate the public about the administration of justice, help enable informed criticism of the actors within the justice system, and help guarantee the integrity of the courts: *Edmonton Journal v Alberta (AG)*, [1989] 2 SCR 1326 at pp 1360-1361, 64 DLR (4th) 577; *CBC v Canada* at para 29. Few have expressed the importance of open courts as eloquently as Toulson L.J. in *Guardian News and Media Ltd. v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 at para 1, [2012] 3 All ER 551:
>
> > Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. *Quis custodiet ipsos custodes* - who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse. Jeremy Bentham said in a well-known passage quoted by Lord Shaw of Dunfermline in *Scott v Scott*, [1913] AC 417 [at p 477]:
> >
> > > Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.
>
> [14] APTN is a media organization. Members of the media serve an important role in maintaining public access to the courts and the justice system. Journalists act as surrogates for the public. Reporters are the conduits through which members of the public learn about the justice system: *Edmonton Journal* at pp 1340, 1360. Canadian courts do not merely *permit* journalists in the courtroom, reporters are an essential feature within Canadian courts: *CBC v Canada* at para 96; *Endean* at para 85. At the heart of nearly every significant public debate about our justice system are journalists who report on the proceedings and help inform these debates.

[89] In this case, evidence relating to the circumstances of the offenders and the effects of their offences (particularly Mr. Blackmore), came primarily from the information gathered by the probation officers. I accepted most of that evidence and relied upon it in deciding the question before me. As such, accessibility to that evidence is very important to the public's understanding of the sentences imposed. Public accessibility is an important aspect of judicial accountability as well.

[90] Furthermore, it is fundamental to our system of justice that courts remain independent and impartial. As in every proceeding, in sentencing an offender the

court must rely only upon the admissible evidence tendered within the four walls of the courtroom and disregard what may be heard or read outside them. As Holmes J., as she then was, wrote in *R. v. Panghali*, 2011 BCSC 422:

> [45] …Judges presiding over judge-alone trials are well-accustomed to disregarding, in reaching their verdicts, both inadmissible evidence and information or opinions expressed in news media or elsewhere. Our system of justice depends heavily on trial judges' responsibility and well-recognized ability to do so.

[91] The community of Bountiful has been the subject of reporting for decades, so there is naturally a great deal of information in the public realm that was not before the court. This makes public accessibility to the evidence that was properly before the court all the more crucial in this case.

[92] However, as Cohen J. observed in *Toronto Star 2012*:

> [31] …notwithstanding the paramount and constitutional importance of the open court principle and freedom of the press, it is also the case that the public's right of access to the courts has never been unfettered. Bans on publication are made at preliminary inquiries and bail hearings. The identity of undercover officers and their methods of operation are protected. Publication bans may be found necessary to protect vulnerable individuals (*Dagenais*, para. 83; "*CBC 2011*", para. 19)[16]. Subject to some exceptions, child protection proceedings are closed and the privacy of litigants protected. National security hearings are closed.

[93] The second interest is society's need to protect the privacy interests of innocent third parties, particularly children, and those family and former family members who spoke to the probation officers.

[94] Cohen J. summarized the jurisprudence on the concept of privacy, particularly in the context of young persons, in the following way:

> [41] Privacy is recognized in Canadian constitutional jurisprudence as implicating liberty and security interests. In *Dyment*, the court stated that privacy is worthy of constitutional protection because it is "grounded in man's physical and moral autonomy," is "essential for the well-being of the individual," and is "at the heart of liberty in a modern state" (para. 17). These considerations apply equally if not more strongly in the case of young persons.[26]. Furthermore, the constitutional protection of privacy embraces the privacy of young persons, not only as an aspect of their rights under section 7 and 8 of the Charter, but by virtue of the presumption of their diminished

> moral culpability, which has been found to be a principle of fundamental justice under the *Charter*.

[95] Some of the evidence in the pre-sentence reports, particularly information about the effects of the offence in relation to Mr. Blackmore and the current circumstances of Mr. Oler and his family, derives from innocent third parties whose privacy interests would be negatively affected by disclosure. These third parties had no notice they may be subject to publication, as far as I am aware.

[96] The Crown communicated the harms Mr. Blackmore's former wife expressed she would suffer upon the infringement of her reasonable expectation of privacy. Mr. Blackmore communicated that his two current plural wives who spoke to the probation officer hold similar views and Mr. Oler seeks to have his extended family member that spoke, as well as all of his children, similarly protected for similar reasons. In the context of all of the evidence I have heard in this case about this particular community, I accept these submissions.

[97] Third, society has an interest in the court continuing to access the best evidence available so that it may best discharge its obligations in sentencing an offender. This interest was recognized by Johnston J. in *Wellwood*. It was also recognized by Cohen J. in *Toronto Star 2012* in the context of a young offender proceeding. She described the interest this way:

> [82] …The probation officer obtains information exclusively for the purposes of assisting the court with sentencing. The information should be as ample and as accurate as possible to enable the court to impose a sentence which addresses proportionate accountability, and rehabilitation, and which is informed by an understanding of the underlying causes of the offending. A more complete report enables the court to make a fairer decision on sentencing. It is reasonable to suppose that that the information in the presentence report may be more complete because the participants will be less fearful of the consequences of publicity[31]. This is a salutary effect on the fair trial right.

[98] Exhibits 1 and 2 contained relevant evidence. Without the information provided to the probation officers by the offenders, their family and former family members and a few other third parties, the court would have had very little evidence

about the current circumstances of the offenders, their attitudes toward their offences and the effects of these offences upon those directly affected.

[99] Those very few family and former family members who chose to speak to the probation officers belong to the group most affected by these offences. They come from a very tight-knit community of persons, some of whom are very vulnerable and have historically been very reluctant to speak to authorities.

[100] I recognize that information contained in a pre-sentence report is "in a sense volunteered, and in a sense compelled by the state": *Toronto Star 2012* at para. 47. In these circumstances, I accept what those family and former family members say about not having spoken to the probation officers had they been aware they could be published and their identities revealed. I accept the legitimacy of their fears of reprisal and the chilling effect that would occur by unrestricted access to the pre-sentence reports. This would negatively affect the court's interest in ensuring its continuing ability to access the best information so it may best discharge its obligations.

[101] In identifying these second and third interests to be balanced in the analysis, I will address the applicants' submissions regarding the need for an evidentiary basis to support a restriction to access.

[102] Other courts have considered this argument and concluded that the authorities holding that an evidentiary basis is required to support a restriction to access should not be taken to mean that a court may never make an assessment of the interests at play without an evidentiary foundation presented by a party. To hold that in all cases an evidentiary basis is mandatory would be "inconsistent with the court's responsibilities both to control its process and to protect the interests of vulnerable persons affected [by] its proceedings": *Panghali* at para. 34.

[103] Johnston J. considered whether evidence about the impact of full disclosure of court ordered reports upon the court's ability to obtain the best information was required in *Wellwood* and concluded it was not. The court held:

> [61] The potential impact of full disclosure of the court ordered reports, it seems to me, invokes consideration of general human nature or prediction about the manner in which sources of much needed information would probably act or be influenced by the knowledge that what they say to persons conducting examinations under ss. 34 or 40 could be published or broadcast. Those are matters that the court can and must consider based on the experience and judgment of the trial judge.
>
> [62] To do otherwise would be an abdication of the court's function to protect its processes and prevent avoidable harm to third parties whose interests may be affected by court actions, and who have not had an opportunity to speak.
>
> [My emphasis.]

[104] Holmes J. reasoned similarly in *Panghali*:

> [33] Nor am I persuaded that the *Dagenais/Mentuck* approach can take no heed of judicial determinations made without evidence tendered or filed by a party.
>
> [34] Sharpe J.A. concluded that the personal opinion of the application judge in *R. v. Canadian Broadcasting Corp.* that the public did not need to see the "gruesome image" did not satisfy the *Dagenais/Mentuck* test for restriction. In the context of that conclusion, Sharpe J.A. spoke of the responsibility of a party seeking to restrict access to "demonstrate through convincing evidence" that the *Dagenais/Mentuck* approach justifies the restriction (para. 40). However, I do not take these remarks as indicating that never may a presiding judge make an assessment of the interests at play without an evidentiary foundation presented by a party. As I discuss below, such a conclusion would be inconsistent with the court's responsibilities both to control its process and to protect the interests of vulnerable persons affected its proceedings. The court bears a responsibility to exercise supervisory and protecting power over exhibits surrendered into its care independent of the positions of the parties in the instant case.
>
> [35] The Supreme Court of Canada discussed this responsibility in *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671. After noting at 680 the central principle of "public accessibility as an important ingredient of judicial accountability", Stevenson J., for the majority of the Court, identified at 681 four significant factors concerning access and the ability to copy and disseminate exhibits:
>
> 1) The nature of exhibits as part of the court "record".
>
> 2) The right of the court to inquire into the use to be made of access, and to regulate it.
>
> 3) The fact that the exhibits were produced at trial and open to public scrutiny and discussion so that the open justice requirement had been met.
>
> 4) That those subjected to judicial proceedings must undergo public scrutiny of what is said at trial or on

> appeal and contemporaneous discussion is protected, but different considerations may govern when the process is at an end and the discussion removed from the hearing context.

[36] Discussing the first and second factors, Stevenson J. noted at 681-683 that many exhibits are not the property of the court:

> An exhibit is not a court record of the same order as records produced by the court, or pleadings and affidavits prepared and filed to comply with court requirements. Exhibits are frequently the property of non-parties and there is, ordinarily, a proprietary interest in them. When they have served the purpose for their filing they are ordinarily at the disposition of the person who produced them. While they remain in its custody, the court has a duty to pass upon any request for access. That function is ordinarily exercised by its officers, such as the prothonotary here, but the court having custody of the exhibits has supervision over their use. The chambers judge here noted the Nova Scotia rule which directs that exhibits be turned over to the party producing them (Rule 30.11(6), *supra*). She observed that the reason for the rule was to relieve the court of the task of storing unwanted exhibits. The rule, however, reflects the fact that exhibits are not the property of the court.
>
> ...
>
> Once exhibits have served their purpose in the court process, the argument based on unfettered access as part of the open process lying at the heart of the administration of justice loses some of its pre-eminence.
>
> It follows that the court, as the custodian of the exhibits, is bound to inquire into the use that is to be made of them and, in my view, is fully entitled to regulate that use by securing appropriate undertakings and assurances if those be advisable to protect competing interests. ...

[37] In the hearing on December 14, 2010, which preceded the Supreme Court's two recent decisions, Mr. Burnett submitted that the developing jurisprudence concerning the *Dagenais/Mentuck* test has superseded the reasoning in *Vickery*. However, *CBC v. Canada*, 2011 SCC 3, which then followed, indicates that this is not so: Deschamps J. there held that the *Vickery* factors remain relevant, but must be considered in light of the *Dagenais/Mentuck* framework (para. 14).

[38] For these and other reasons, the legally-protected interests at play in the application of the *Dagenais/Mentuck* test where, as here, copies are sought to be released "to the infinity of the internet" may therefore require the court to consider factors outside the scope of the filed or tendered evidence in a parties-driven process.

[105] Similar reasoning was employed by Powers J. in *Schoenborn* where a member of the media applied for access to audio recordings of the accused's wife speaking with him in jail after he killed their three young children. The applicant sought to broadcast the recordings. The Crown, supported by the accused, opposed the request. The Crown did not tender any evidence from the mother of the children and instead communicated the mother's concerns about the harms that release of the exhibit would cause to her privacy interests.

[106] The court agreed that in the circumstances of that case, no evidence was required to be called by the Crown. The submissions of counsel, having spoken to the mother directly, were sufficient and reasonable. Powers J. held:

> [50] This is a particularly tragic case which has attracted the attention of the public. The children's mother agreed to assist the RCMP in their investigation by allowing her conversations with the children's father on the telephone and at KRCC to be recorded. This was extremely difficult for her to do, and it is obvious from the exhibits themselves, stressful at the time. The audiotapes reveal her pain and her distress. Her privacy would be significantly impacted if these materials were reproduced. They could well be published on the Internet. Many media outlets, in particular the Canadian press, provide information over the Internet. The recording of her voice would be accessible for an indefinite period of time by anybody doing a simple search on the Internet. She would know that her pain and anguish could be exposed indiscriminately over and over again to anybody with access to the Internet. I am told by Crown counsel that after discussions with her, it is her position that this would be extremely damaging to her and prolong her already significant suffering.
>
> [51] The applicants argue that no evidence has been presented in opposition to their application; that is no affidavits have been provided. However, I am entitled in this case to accept the submissions of counsel, including Crown counsel who have dealt with the children's mother in the preparation of this case and in her giving evidence. As Ms. Mark, one of the Crown counsel, pointed out, she has spoken directly to the children's mother and submits it would be extremely difficult or impossible for her to provide an affidavit. It was also Ms. Mark's position that it would not be reasonable to put the children's mother in the position of having to provide such an affidavit in this case. I agree.
>
> [52] I am satisfied that the children's mother's concerns and privacy interests go much beyond mere embarrassment. To allow her suffering, in her own voice to be available to the entire world indiscriminately would pose a serious risk to the proper administration of justice in the sense that it would impact negatively on the reputation of the administration of justice if the court simply allowed the re-victimization of the children's mother in this case.

> [53] I am also satisfied that the salutary effects of the publication restriction or the denial of the right to copy the exhibits outweighs any deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression. The media, including the applicants, already have access to the transcripts of these conversations. Accredited members of the media may listen to the audio without reproducing it or recording it themselves if they wish to make arrangements with the court registry to do so.
>
> [My emphasis.]

[107] I agree with the reasoning and conclusions of all of these courts. As they have held, the court bears a responsibility to exercise supervisory and protecting powers over its exhibits, not only exhibits surrendered into its care, but exhibits generated by its orders. This responsibility exists independent of the positions of the parties in a given case. Where appropriate, a court is entitled to consider matters of general human nature and prediction and is also entitled to accept the submissions of counsel or factors outside the scope of tendered evidence in considering the legally protected interests at play in its application of the *Dagenais/Mentuck* test. This is a case where all of these types of considerations come into play.

[108] To require these identified vulnerable and innocent third parties to provide affidavits or attend court to testify about their fears of reprisal, lack of awareness they could be published if they spoke to the probation officer and/or the effects an infringement on their reasonable expectations of privacy if published, in the circumstances of this case would only further aggravate their personal fears and concerns and would only further deepen the chilling effect on those upon whom courts rely to provide valuable information in the future. These concerns and interests go well beyond mere embarrassment. To require their attendance at court or the provision of affidavits in the circumstances of this case would be to abdicate the court's function to protect its process and to prevent avoidable harms to innocent third parties whose interests are negatively affected by that process.

[109] Having identified the values and interests to be balanced, I turn now to the analytical framework to be applied.

[110] The first branch of the *Dagenais/Mentuck* analysis requires that I consider whether restriction on access to Exhibits 1 and 2 is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk.

[111] To assess the necessity of a restriction, I must consider the objectives of the restriction. Here, as I have outlined, the objectives of restriction are twofold: protection of privacy interests of innocent third parties and children and protection of the court's ability to continue gaining access to the best available information to best discharge its obligations, which in this case are its obligations in determining the appropriate sentences for the offenders.

[112] I find the proper administration of justice embraces the protection of both of these interests and that unrestricted access to Exhibits 1 and 2 represent a serious risk to the proper administration of justice.

[113] Having been satisfied that these serious risks to the proper administration of justice exist, I must now turn to the question of reasonably alternative measures. When examining this question, I am to consider all rights at issue in order to ensure that any alternative measures that impair free expression to a lesser degree than denial of access also reasonably protects the other interests engaged: *Toronto Star 2012* at para. 78.

[114] Having considered this question, I am satisfied that the serious risks to the proper administration of justice can only be addressed through some form of restricted access to these exhibits. I am satisfied a restriction on access is necessary to protect the identified third party privacy interests and to protect the court's ability to gain access to the best evidence available in order to best discharge its obligations. Restriction is needed in order to prevent these risks from materializing because there are no other reasonably alternative measures to do so.

[115] However, neither complete restriction nor restriction to the content of the information provided by the identified third parties is necessary. Protection of their

identities is needed. In sentencing the offenders, I relied heavily on the evidence they provided as it was largely the only evidence in certain areas. To deprive the public of that critical information, information necessary to inform their understanding of the sentences imposed, would risk undermining the administration of justice. Public disclosure of the identities of those third parties who came forward is, however, unnecessary to the public's understanding and would unnecessarily expose those innocent persons and ultimately the administration of justice to the harms I have outlined. I am satisfied the infringement upon third party privacy interests and the chilling effect that would be incurred by publication of the identities of those third parties would cause serious harm to the proper administration of justice that cannot be remedied by reasonably alternative measures.

[116] With respect to the second part of the *Dagenais/Mentuck* analysis, I am satisfied that the concern to avoid the risk of identifying those innocent third parties outweighs the negative effects on the right to free expression. In my view, the right balance is struck between all of the competing interests by permitting access to the reports with limited redactions to protect the identities of all of the offenders' children, along with a publication ban in respect of the identities of the former and current family members of both offenders who spoke to the report authors and limiting the use to which these reports can be put. I think these limited restrictions will lessen any impairment to free expression while still protecting the other interests that are engaged.

[117] The names of the offenders' children and their current addresses are unnecessary to the public's understanding of the sentences imposed in this case. The positive effects of protecting their privacy far outweigh the negative effects on free expression in these circumstances. The identities of those former and current family members who spoke to the probation officers are known to the applicants, so redaction of their identifying information from Exhibits 1 and 2 would serve no purpose other than to make the content of their information very difficult to read. Rather, a ban on publication with respect to their identities, but not the content of the information they provided, has the effect of protecting the proper administration of

justice while minimizing any negative effects on free expression. The restrictions I have identified will protect the privacy interests at issue while impairing the freedom of expression as minimally as possible.

[118] With respect to Mr. Oler's personal contact information, he did not agree to the release of this information. This information is unnecessary to the public's understanding of his sentence and should be redacted from Exhibit 2 as well.

[119] The applicants will receive copies of the redacted reports, but will not be permitted to publish the actual documents or disseminate them in any way.

The Birth Records (Exhibit 3)

[120] The values, rights and interests in conflict here are society's interest in the open court principle and freedom of the press and the privacy rights of third parties, particularly infant children.

[121] I have already discussed the fundamental importance of protecting society's interest in the open court principle and freedom of the press.

[122] The highly personal information about the infant children in Exhibit 3 derives from the reporting requirements of the *VSA*. Recognizing the need to protect this compelled private information, the legislature built certain protections into the *VSA*. For example, the Vital Statistics Agency cannot release a birth certificate to a member of the public unless the requestor falls within a narrow class of persons entitled to make the request, such as the person who is the subject of the birth certificate: s. 36(1) of the *VSA*.

[123] Confidentiality of the information is also protected through operation of s. 46 of the *VSA*. It provides:

> **Confidential information**
>
> **46** (1) A vital statistics registrar or a person employed in the service of the government must not
>
> > (a) communicate or allow to be communicated to any person not entitled to it any information obtained under this Act, or

> (b) allow the person to inspect or have access to records containing information obtained under this Act.
>
> (2) Nothing in subsection (1) prohibits the completion, furnishing or publication of statistical data that does not disclose specific information with respect to a particular person.

[124] These provisions reflect a legislative intention to protect the privacy interests of those persons providing their personal information and the child to whom each record pertains. In my view, release of such private information, including names, sexes, dates and places of birth, personal health numbers, registration numbers and the like would undermine the reasonable and legitimate expectations of privacy persons hold in such information in this context. It would also risk exposing their personal information to the "infinity of the internet" and the potential for misuse of such information, including identity theft.

[125] The need to protect the privacy of our most innocent and vulnerable members of society, our children, is a value deeply rooted in our legal system. It is a value articulated in many statutes (see for example the enhanced protection to privacy rights of young persons found in the *YCJA*), in *Charter* jurisprudence and in various international instruments: *Toronto Star 2012* at paras. 48 and 77.

[126] Having identified the interests and values to be balanced, I move to the analytical framework to be applied.

[127] The first branch of the *Dagenais/Mentuck* analysis requires that I consider whether a restriction on access to these documents is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk.

[128] Here, the restrictions sought by the Crown (redaction of some of the private information of the children) and the restriction suggested by Mr. Blackmore (no access at all) find their objective in the protection of the privacy of Mr. Blackmore's 14 children, all of whom are under the age of six. These children cannot speak for themselves. It falls upon not only their parents and the Crown as quasi-judicial officers, but to this court pursuant to its *parens patriae* role to protect their welfare.

The proper administration of justice in this case embraces the protection of the privacy interests of these children.

[129] I am satisfied that a serious risk to the proper administration of justice exists by the public's access to these records and restrictions on access are necessary to prevent that risk. I turn then to examine alternative measures that might impair free expression to a lesser degree, but also reasonably protect these privacy interests.

[130] I find there are no reasonably alternative measures available that would address the risk. In my reasons for sentence, I summarized these records and relied upon them as a piece of circumstantial evidence that served to support a finding already made – that Mr. Blackmore has continued to engage in the practice of polygamy after the *Polygamy Reference*. The redactions that would be required to protect the privacy interests of these young children would remove most of the information on the documents. Because of the scope of the redactions that would be required in this case (essentially redacting all information), I do not find this to be a "reasonable" alternative measure. Accordingly, refusing access to the exhibits is necessary in order to prevent a serious risk to the proper administration of justice because I find there are no reasonably alternative measures that would prevent the risk.

[131] Turning to the second part of the *Dagenais/Mentuck* analysis, which requires that salutary effects of restrictions to access outweigh the deleterious effects on the rights and interests of the parties, including the effects on the right to free expression, the right of the offenders to a fair and public trial, and the efficacy of the administration of justice.

[132] I conclude that the public benefit in having these birth records published is low. Their publication would provide little or no substantive information that would further the public's understanding of the sentence imposed in this case. As I indicated, I summarized the relevant conclusions derived from the facts contained within these documents in my reasons for sentence. Access to the documents themselves would not assist the public in understanding the issue that was decided.

In contrast, public access to these birth records and disclosure of them, even redacted in the manner suggested, would have a significant negative impact on the privacy interests of innocent infant children and expose them and the administration of justice to a real risk of harm. In this case, the negative effects on free expression freedom of the press are outweighed by these salutary effects of restriction. Accordingly, the application with respect to Exhibit 3 is dismissed.

SUMMARY

[133] The applicants are granted access to, and copies of, Exhibit 1 at the sentencing hearing, with the following restrictions:

1. The name, and any information that would reasonable identify, Mr. Blackmore's adult child who provided information to the probation officer shall be redacted;

2. Exhibit 1 shall not be published or disseminated;

3. There shall be a ban on publication of the names, and on any information that would reasonably identify, Mr. Blackmore's two current wives and one former wife who provided information to the author of Exhibit 1. This publication ban applies only in respect of the sentencing proceedings.

[134] The applicants are granted access to, and copies of, Exhibit 2 at the sentencing hearing, with the following restrictions:

1. The names of Mr. Oler's children, including adult children, and Mr. Oler's telephone number and address shall be redacted;

2. Exhibit 2 shall not be published or disseminated;

3. There shall be a ban on publication of the name, and on any information that would reasonably identify, Mr. Oler's extended family member who provided information to the author of Exhibit 2. This publication ban applies only in respect of the sentencing proceedings.

[135] The applicants' request for access to Exhibit 3 is denied.

[136] All that remains is to thank the applicants, counsel and Mr. Oler for their helpful and thoughtful submissions.

"S.A. Donegan J."

DONEGAN J.