SUPREME COURT OF NOVA SCOTIA
Citation: A.B. v. Bragg Communications Inc.,
2010 NSSC 215

Date: 20100604
Docket: Hfx. No. 329542
Registry: Halifax

Between:

A.B., C.D.

Applicants

v.

Bragg Communications Inc., Halifax Herald Limited

Respondents

Judge:	The Honourable Justice Arthur J. LeBlanc.
Heard:	May 26, 27, 28, 2010, in Halifax, Nova Scotia
Written Decision:	June 4, 2010
Counsel:	Michelle Awad, Jane O'Neill and Daniel Wallace, for the applicants Nancy Rubin, for The Chronicle Herald Alan Parish, Q.C. for Global Television No one appeared for Bragg Communications

By the Court:

[1] This decision will deal with (1) an application to abridge time, (2) an application to use pseudonyms, (3) an application for a publication ban and (4) an application under Rules 14 and 18 for the disclosure by the Respondent Bragg Communications of the identity of the owner of an IP address. More specifically, by Notice of Application in Chambers the applicant moves for an order requiring the following:

> 1. For permission to proceed by way of initials for both the Applicant and the Applicant's Litigation Guardian and for a publication ban concerning the substance of the defamatory statements made about the Applicant.
>
> 2. Abridging the Notice period required in relation to her Application for relief brought pursuant to Civil *Procedure Rule* 5.06. The abridgment is sought pursuant to *Civil Procedure Rule* 2.03(1)(c); and
>
> 3. The Applicant is applying to a Judge in Chambers for an Order, pursuant to *Civil Procedure Rules* 14.12 [and] 18.12, requiring that Eastlink [i.e. Bragg Communications] provide any and all information in its possession regarding the identity of the person or people who used IP address 24.89.213.218 at or about 6:00 p.m. (AST) on march 4, 2010, including the following information (if available): name, address, telephone number, and any other identifying information.

[2] At the outset, the court exercises its discretion to abridge the notice period pursuant to Rule 2.03(1)(c).

[3] These applications arise from the alleged creation by an unidentified perpetrator of a fake Facebook profile, which included a photograph of the applicant and other particulars which identified her. The Facebook profile also discussed the applicant's physical appearance, weight, and allegedly included scandalous sexual commentary of a private and intimate nature.

[4] I am advised by counsel for the applicant that the Facebook profile was removed by the internet provider in March 2010.

[5] In support of the application, the applicant's father and legal counsel have filed affidavits. The applicant's father, C.D., states the following:

> 4. The Applicant advises me and I do verily believe that on March 4, 2010, the Applicant became aware of a "new" Facebook profile page using the Applicant's photo and a slightly modified version of her name. At least one person saved the page and forwarded it to the Applicant. The Applicant printed the forwarded page and gave it to me....
>
> 5. I am advised by the Applicant, and do verily believe, that the Applicant was not involved in the creation of the Fake Profile.
>
> 6. I am further advised by the Applicant, and do verily believe, that the Applicant does not know who created the Fake Profile.
>
> 7. I do not know who created the Fake Profile.
>
> 8. I am advised by the Applicant and do verily believe, that at least one person saved a friend request relating to the Fake Profile and forwarded it to the Applicant. The Applicant printed the forwarded friend request and gave it to me....

> 9. The Applicant and I seek the Court's assistance in determining who authored and published the defamatory remarks about the Applicant on the Fake Profile. If we are able to determine the identity of the author(s) and publisher(s), we intend to take steps to obtain relief, including commencing legal action, if necessary.

[6] Ms. Awad, the applicant's counsel, states the following in her affidavit:

> 4. I have communicated with Facebook in relation to this matter. Facebook provided, *inter alia*, the IP address 24.89.213.218 and indicated that it is a Dartmouth, Nova Scotia address and had been used at the time the fake Facebook profile concerning the Applicant was created on March 4, 2010 and to send one of the friend requests relating to that profile....
>
> 5. I have exchanged e-mails with Kimberly Hayes, Counsel [for] the Respondent, Bragg Communications Incorporated ("Eastlink") and Eastlink has confirmed, and I do verily believe, that IP address 142.68.130.51 is allocated to Eastlink. Ms. Hayes further advised, and I do verily believe, that Eastlink consents to an abridgement of the time necessary to bring this Application and does not oppose the Application....

[7] There is no evidence of the age of the applicant apart from an e-mail from counsel for the applicant and the year of birth shown in the Facebook profile. Counsel for the applicant stated that the information in the profile is hearsay and not admitted apart from the photo of the applicant. The interveners take the position that there is no evidence of the age of the applicant.

[8] An issue which arose in submissions was that the applicant's father's affidavit contained many hearsay statements. Counsel for the Chronicle Herald submits that this is impermissible under Rule 5. For the purpose of this

application, I have taken the view that the applicant is clearly under 19 years of age and therefore, could not start the application on her own. She had to act through a guardian. I would have allowed the entirety of the affidavit, on the basis of the principles of necessity and reliability. I would also permit it, with all its frailties, to allow the application to go forward.

The application for disclosure

[9] There is some dispute as to whether the application for disclosure is brought under Rule 14 or Rule 18. The Notice of Application refers to both Rules 14.12 and 18.12. Those rules provide, respectively:

> 14.12 (1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.
>
> (2) A judge may order a person to produce the original of a relevant document, or provide access to an original source of relevant electronic information, to a party or at the trial or hearing.
>
> (3) A judge who orders a person to provide access to an original source of relevant electronic information may include in the order terms under which the access is to be exercised, including terms on any of the following:
>
> (a) a requirement that a person assist the party in obtaining temporary access to the source;
>
> (b) permission for a person to take temporary control of a computer, part of a computer, or a storage medium;

(c) appointment of an independent person to exercise the access;

(d) appointment of a lawyer to advise the independent person and supervise the access;

(e) payment of the independent person and the person's lawyer;

(f) protection of privileged information that may be found when the access is exercised;

(g) protection of the privacy of irrelevant information that may be found when the access is exercised;

(h) identification and disclosure of relevant information, or information that could lead to relevant information;

(i) reporting to the other party on relevant electronic information found during the access.

(4) A judge who is satisfied that the requirement is disproportionate under Rule 14.08 may limit a requirement to produce a copy of a document, to produce exactly copied electronic information, or to provide access to electronic information.

....

18.12 (1) A judge may order a witness or a custodian of a document, electronic information, or other thing to submit to discovery.

(2) A judge may order discovery before a proceeding has started in one of the following circumstances:

(a) the party who moves for the discovery wishes to start a proceeding but is prevented from doing so immediately, and evidence needs to be preserved;

(b) a proceeding is likely to be started against the party who moves for the discovery, and evidence needs to be preserved;

(c) a court outside Nova Scotia requests assistance.

(3) A judge may order a discovery during a proceeding if both of the following apply:

> (a) the person to be discovered is in a place outside Nova Scotia, and a discovery subpoena cannot be enforced, but an order would be enforced or obeyed;
>
> (b) the proceeding cannot be determined justly without the discovery.
>
> (4) Discovery may be held after a proceeding has concluded in accordance with Rule 79 - Enforcement by Execution Order.

[10] Counsel for the applicant referred to this application as one in the nature of "pre-action discovery." Rule 14.12 permits the court to order "a person to deliver a copy of a relevant document or relevant electronic information to a party." Rule 18 expressly contemplates discovery before a proceeding has started in particular circumstances, in particular, where "the party who moves for the discovery wishes to start a proceeding but is prevented from doing so immediately, and evidence needs to be preserved." It seems to me that this is more a matter of production than of discovery. The applicant seeks documents, not a submission to oral discovery. Moreover, the grounds for the order included in the Notice of Application states that the applicant "seeks production of the requested information."

[11] In considering the application for disclosure of the information sought from the internet service provider, I have considered *Warman v. Wilkins-Fournier*, 2010 ONSC 2126, [2010] O.J. No. 1846 (Ont. S.C.J. (Div. Ct.)). In that case, the respondent had commenced an action for defamation against the named appellants

and against eight “John Doe” defendants. The alleged defamation arose from comments on internet message boards, of which the appellants were moderators. The motions judge had ordered the appellants to provide further production of documents with respect to the identities of the “John Doe” defendants, including their e-mail addresses and IP addresses. The appellants argued that production was not automatic upon establishing relevance and absence of privilege, and that the court was also required to consider the John Doe defendants’ interest in privacy and freedom of expression. There was no dispute that the IP addresses and e-mail addresses constituted documents under the relevant rule.

[12] The Divisional Court held that *Charter* values were engaged by the proceeding, citing *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 21 for the proposition that “freedom of expression is among the most fundamental of rights possessed by Canadians” and that “[t]he values underlying the right to free expression include individual self-fulfillment, finding the truth through the open exchange of ideas, and the political disclosure fundamental to democracy” (para. 16). As to the manner in which *Charter* values should be considered, the court said:

> In circumstances where *Charter* rights are engaged and therefore courts are required to take such interests into consideration in determining whether to order disclosure, the case law indicates that the *Charter* protected interests are balanced against the public interest in disclosure in the context of the administration of

> justice by a combination of (1) a requirement of an evidentiary threshold, (2) fulfillment of conditions establishing the necessity of the disclosure sought, and (3) an express weighing of the competing interests in the particular circumstances of the litigation. In order to prevent the abusive use of the litigation process, disclosure cannot be automatic where Charter interests are engaged. On the other hand, to prevent the abusive use of the internet, disclosure also cannot be unreasonably withheld even if Charter interests are engaged.

[13] The court reviewed the caselaw respecting "pre-action discovery" of the identity of a proposed defendant, as originally described in *Norwich Pharmacal Co. v. Comrs. of Customs and Excise*, [1974] A.C. 133 (H.L.). The court considered *BMG Canada Inc. v. John Doe*, [2005] 4 F.C.R. 81, where disclosure was sought from internet service providers of customer information in order to identify anonymous users who were sharing music files. The Federal Court of Appeal set out the following considerations (see *Warman* at para. 30):

> (1) the applicant must establish a *bona fide* claim against the unknown alleged wrongdoer;
>
> (2) the third party against whom discovery is sought must be in some way connected to or involved in the misconduct;
>
> (3) the third party must be the only practical source of the information available to the applicant;
>
> (4) the third party must be reasonably compensated for expenses and legal costs arising out of compliance with the discovery order; and
>
> (5) the public interest in favour of disclosure must outweigh the legitimate privacy interests.

[14] The court in *Warman* held that the same principles applied whether disclosure was sought from third parties or from a party defendant (para. 32), and added that disclosure was not automatic simply because the plaintiff commenced a defamation claim (para. 33). The court went on:

> 34 Given the circumstances in this action, the motions judge was therefore required to have regard to the following considerations: (1) whether the unknown alleged wrongdoer could have a reasonable expectation of anonymity in the particular circumstances; (2) whether the Respondent has established a *prima facie* case against the unknown alleged wrongdoer and is acting in good faith; (3) whether the Respondent has taken reasonable steps to identify the anonymous party and has been unable to do so; and (4) whether the public interests favouring disclosure outweigh the legitimate interests of freedom of expression and right to privacy of the persons sought to be identified if the disclosure is ordered.

[15] The court distinguished the considerations from those identified in *BMG*, noting that the second and fourth requirements of BMG were not relevant "where disclosure is sought against a co-defendant who has established and administers a website on which the allegedly defamatory statements were posted" (para. 39). More importantly, the court held, a *prima facie* case standard was more appropriate than a *bona fide* standard:

> 41 In para. 34 of *BMG*, the Federal Court of Appeal expressed the concern that, in that case, imposition of a *prima facie* case standard would effectively strip an applicant of a remedy because the plaintiff could not know the actual case it wished to assert against the defendants until it knew not only their identities but also the nature of their involvement in the file-sharing activities. Because the present proceeding is a defamation action, that concern does not arise. Unlike *BMG*, the Respondent knows the details of precisely what was done by each of the unknown alleged wrongdoers.

> 42 In addition, because this proceeding engages a freedom of expression interest, as well as a privacy interest, a more robust standard is required to address the chilling effect on freedom of expression that will result from disclosure. It is also consistent with the recent pronouncements of the Supreme Court that establish the relative weight that must be accorded the interest in freedom of expression. In the circumstances of a website promoting political discussion, the possibility of a defence of fair comment reinforces the need to establish the elements of defamation on a *prima facie* basis in order to have due consideration to the interest in freedom of expression. On the other hand, there is no compelling public interest in allowing someone to libel and destroy the reputation of another, while hiding behind a cloak of anonymity. The requirement to demonstrate a *prima facie* case of defamation furthers the objective of establishing an appropriate balance between the public interest in favour of disclosure and legitimate interests of privacy and freedom of expression.
>
> 43 Finally, as Strathy J. noted in [*York University v. Bell Canada Enterprises*, [2009] O.J. No. 3689], there may be circumstances in which it is appropriate that notice of a motion for disclosure be given to a John Doe defendant. The case law suggests that any such determination is to be made on a case-by-case basis, and we agree. In a defamation action, little would generally be added by such a step, because any defences that might be raised are not relevant to a determination as to whether a *prima facie* case has been made out. For such purpose, a plaintiff is required to establish only the elements of defamation within its control. However, in other cases a John Doe defendant may have compelling reasons for wishing to remain anonymous that are not immediately obvious, such as a risk to personal safety, and such grounds could not be put before the court absent notice.

[16] In the result, the court commented that the motions judge "was alert to the need to take into consideration the privacy interests of the unknown alleged wrongdoers" but did not appear to have considered "the interest in freedom of expression" (para. 44). Further, the motions judge had erred in failing to consider whether a *prima facie* case of defamation had been established before ordering disclosure of the documents. The matter was remitted to a different motions judge for reconsideration (para. 45).

[17] Applying the analysis from *Warman*, I am satisfied that there is a *prima facie* case of defamation made out. As McLachlin, C.J.C., for the majority, put it in *Grant v. Torstar Corp.*, 2009 SCC 61, 2009 CarswellOnt 7956, at para. 28:

> A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed.... The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

[18] The statements that appear on the Facebook profile, *prima facie*, "would tend to lower the plaintiff's reputation in the eyes of a reasonable person"; they *prima facie* refer to the plaintiff; and they were published, by their public appearance on the internet.

[19] I am further satisfied that there is no means, other than by production of the documents sought on this application, by which the applicant can obtain the required information. The author of the Facebook page is anonymous. Moreover, the respondent, Bragg Communications, has raised no objection to the court making such an order. I infer that, if Bragg were aware of any other means by

which the applicant could learn the identity of the author, this would have been raised either with the applicant or before the court. The applicant (through her guardian and counsel) has approached both Bragg and Facebook in pursuit of the information, which I regard as the reasonable steps that a party would take in the circumstances.

[20] On the question of whether the author had a reasonable expectation of anonymity in the circumstances, I note the comment in *Warman*, at para. 42, that

> there is no compelling public interest in allowing someone to libel and destroy the reputation of another, while hiding behind a cloak of anonymity. The requirement to demonstrate a *prima facie* case of defamation furthers the objective of establishing an appropriate balance between the public interest in favour of disclosure and legitimate interests of privacy and freedom of expression.

[21] I agree. The reasonableness of an expectation of anonymity must be assessed on a case-by-case basis. In view of a *prima facie* case of defamation, and the absence of any suggestion of a compelling interest that would favour anonymity (such as fair comment), the expectation of anonymity in these circumstances is not a reasonable one. Anonymity is not an automatic shield for defamatory words.

[22] As to the question of whether the public interests favouring disclosure outweigh the legitimate interests of freedom of expression and right to privacy of the persons sought to be identified if the disclosure is ordered, I am mindful that *Charter* values of freedom of expression and privacy are involved here, and that "[t]he requirement to demonstrate a *prima facie* case of defamation furthers the objective of establishing an appropriate balance between the public interest in favour of disclosure and legitimate interests of privacy and freedom of expression" (*Warman* at para. 42). Defamatory speech does not lose its character as defamation simply because it is anonymous. In these circumstances, where a *prima facie* case of defamation is established, and no public interest beyond the general right of freedom of expression is offered in support of maintaining the author's anonymity, I am satisfied that the public interest favouring disclosure prevails.

The application respecting anonymity and a publication ban

[23] I am also asked to allow the applicant to use a pseudonym and to order a publicity ban on these proceedings pursuant to Rule 85.04, which governs orders for confidentiality. The Rule states, in part:

> (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the

> press and other media under section 2 of the Canadian Charter of Rights and Freedoms and the open courts principle.
>
> (2) An order that provides for any of the following is an example of an order for confidentiality:
>
> (a) sealing a court document or an exhibit in a proceeding;
>
> (b) requiring the prothonotary to block access to a recording of all or part of a proceeding;
>
> (c) banning publication of part or all of a proceeding;
>
> (d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including in a heading.

[24] Counsel for the applicant confirms that notice of the application for the use of pseudonyms and for a publicity ban has been provided in accordance with the Rule. Counsel on behalf of the Halifax *Chronicle Herald* and Global Television intervened and opposed this application. I note for the record that representatives of other media organizations were present in court on May 26 and on May 27. It was their decision not to intervene.

[25] Although this is a civil proceeding, I am satisfied that the principles laid down by the Supreme Court of Canada in *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175, *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442. In *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522,

Iacobucci , J. set out the analysis for a publication ban as developed by the court in *Dagenais* and *Mentuck*:

> 45 [...] At para. 32 [of *Mentuck*], the Court reformulated the test as follows:
>
> > 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.
>
> 46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.
>
> 47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve Charter rights, and that the ability to invoke the Charter is not a necessary condition for a publication ban to be granted:
>
> > The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the Oakes test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added by Iacobucci J.]
>
> The Court also anticipated that, in appropriate circumstances, the Dagenais framework could be expanded even further in order to address requests for

> publication bans where interests other than the administration of justice were involved.
>
> 48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with Charter principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the Charter right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with Charter principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

[26] This type of application involves not only the parties before the court but the public in general. Such an application was considered by the Nova Scotia Court of Appeal in *Osif v. College of Physicians & Surgeons (Nova Scotia)*, 2008 NSCA 113, 271 N.S.R. (2d) 370, 2008 CarswellNS 656. In *Osif*, the application was for a sealing order and a publication ban. The College, as applicant, sought confidentiality over the names of patients and family members identified during the hearing of an appeal arising from a decision of a Hearing Committee of the College. At the hearing, which lasted over several months, charts for a number of patients were produced as exhibits. Other exhibits included references to confidential medical information of patients seen by Dr. Osif were would likely be considered at the appeal. Oland, J.A. said:

> 16 The *Dagenais*/*Mentuck* decisions arose in the context of criminal proceedings. The appeal in this case does not pertain to criminal law. In my view, the *Dagenais*/*Mentuck* test as framed in *Sierra Club* is the more appropriate approach in the circumstances before me. Iacobucci, J. for the Court stated:
>
> > A confidentiality order ... should only be granted when:
> >
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.
>
> 17 The first branch of the test requires me to determine whether disclosure of the names of third party patients and family members in the appeal book or during the hearing of the appeal would pose a serious risk to an important interest. The interest cannot be one which is merely specific to the applicant, but rather must be one which can be expressed in terms of a public interest in confidentiality: *Sierra Club* at ¶ 55. I must also consider alternative measures to the confidentiality orders that are sought, and ensure that they are not overly broad.

[27] Oland, J.A. identified "three important public interests" on the application: "(a) the confidentiality of medical records, (b) the integrity of the College and its hearing process, and (c) freedom of information" (para. 18). She noted that hospital records "concerning a patient or person, or a former patient or person, in the hospital are confidential and cannot be disclosed except with the consent or authorization of the patient or person" and that "[o]nly in the limited circumstances enumerated in the *Hospitals Act* may patient records be disclosed without patient consent" (paras. 19-20). Such confidentiality was also reflected in restrictions

imposed by the *Freedom of Information and Protection of Privacy Act* (para. 21).

Oland, J.A. continued:

> 22 Confidentiality is a hallmark of the relationship between health care professionals and their patients. There is no question that the public considers that their medical records are confidential and expects that, except in limited circumstances, they will remain confidential. The confidentiality of such records is an important public interest.
>
> 23 Also of importance is the public interest in ensuring that the College's process for regulating the practice of medicine and governing the medical profession operates efficiently. The objects of the College are directed to the service and protection of the public: Medical Act, s. 4(3). Its investigation and hearing process requires access to confidential medical records in order to function. However, the use of that information is limited to those regulatory purposes and, unless they initiated a complaint, patients and their family members are usually not involved in the investigation or hearing.
>
> 24 The third important public interest is access to information and, more particularly, the importance and role of the press in informing the public in a free and democratic society. The open court system allows the press to fulfill its responsibilities.
>
> 25 I then consider whether the confidentiality orders sought by the College are necessary to protect these important public interests. If they were granted, the confidentiality of medical records and the integrity of the College and its hearing process would be safeguarded and enhanced.
>
> 26 The important public interest that would be harmed is the public's right to information. However, neither the public nor the media would be excluded from the courtroom. The only details sought to be withheld are the names and identifying information of patients whom Dr. Osif provided with care, and their family members, which appear in the appeal book and which may be disclosed during the hearing. The names of the parties, the nature of the case, the issues on appeal, and the positions of the parties would remain in the public domain. The exclusion of those identifying particulars would not diminish the ability of the public or the media to understand the proceeding nor to communicate its import. I am of the view that if granted, the confidentiality orders would amount to a minimal intrusion of the public interest in access to information.

[28] In *Dagenais* and *Mentuck*, the first part of the analysis was characterized as requiring the order to be granted in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk. Rule 85.04 encompasses the spirit of these principles.

[29] I refer to the decision of Wachowich, C.J.Q.B. in *Doe (Next friend of) v. Church of Jesus Christ of Latter-Day Saints in Canada*, 2003 ABQB 794, [2003] A.J. No. 1165 (Alta. Q.B.). The plaintiff had been sexually assaulted by a church leader. A civil proceeding was started for recovery of damages. The minor, her parents and the church argued that it was necessary to seal the court file to protect the minor's emotional health. The Chief Justice stated: [24-29]

> 24 An appropriate order would, in my view, allow for unfettered public access to the file, subject to a condition that:
>
> > No identifying feature of the minor be published or disseminated in any way, including
> >
> > a) the minor's name,
> >
> > b) the names of the minor's family members,
> >
> > c) the minor's age or birthday,
> >
> > d) the minor's grade in school, or
> >
> > e) any other information that would tend to identify the minor.
>
> 25 Such a restriction makes good policy sense. In criminal proceedings with similar facts, the identity of the complainant is protected, while the balance of the

> file remains open: see *Criminal Code*, R.S.C. 1985, s. 486(3). The protection of a complainant/victim's identity is a concern that, in these circumstances, displaces the presumption of open justice.
>
> 26 It is necessary, however, to examine whether such an order would comport with the two-part Supreme Court test. First, as stated above, I find that there is a real and substantial risk to the administration of justice if the minor is identified in these circumstances. The evidence before me clearly establishes that a serious risk to the minor exists. I am satisfied that justice cannot be done without restricting the public's access to the identity of the minor.
>
> 27 An order restricting the dissemination of any identifying features will allow the media to report about the nature of the order, and to effectively report to their audiences what kinds of events are occurring in their communities and in the judicial system. The public has a legitimate interest in events leading up to the settlement, except the identity of the minor. This type of order is minimally restrictive.
>
> 28 The second branch of the test requires that the order's salutary effects not be outweighed by its deleterious effects. The salutary effects of a partial publication ban are tangible: the minor's identity will be protected, and the risk to her emotional health would be severely reduced. A partial ban would also ensure that the maximum amount of information is available to the public and the media. Pressing public policy concerns about sexual abuse in religious institutions can be addressed, instead of ignored.
>
> 29 The deleterious effects of a partial publication ban are not, in my view, compelling. There is the danger that the minor will be identified indirectly, by naming, for example, the tortfeasor or Church. That danger, in my view, is not great. The incident occurred almost a decade ago in a fair-sized city. It is unlikely that the facts of the case - absent the identifying features set out above - would point to a specific individual or family. In the balance, therefore, I find that the salutary effects of a partial publication ban outweigh its deleterious effects.

[30] In assessing the application it is important to remember that the press plays a fundamental and important role in an open and democratic society. With a publication ban, it would still be possible for people to attend court and observe the proceedings. However, it must be remembered that people rely on media

coverage to learn what transpires in the courtroom. For most people, the publication ban would have the same effect as a sealing order, meaning that the public would never learn of the details of the litigation.

[31] The applicant maintains that if a publication ban is not ordered, people who downloaded the profile and retained it will be prompted to revisit the profile if the press reports the details of the profile. I do not find this a compelling basis to grant a publication ban. I am advised that the profile no longer appears on the internet. Moreover, it seems implausible that people who downloaded and saved the profile who be unaware of the details or of the applicant's identity. I am not convinced that granting a publication ban would have any beneficial effect for the applicant. Counsel for the applicant claims that someone could republish the Facebook page, however the level of risk of this has not been established by evidence.

[32] A publication ban would prevent the media from reporting on the proceedings, including documents and affidavits. It is true that a publication ban is contemplated in criminal proceedings by s. 486.4 of the *Criminal Code*, by which the media is prevented from disclosing the name of the victim and any evidence that would identify the victim. Otherwise, the media is permitted to report on the

events in the court room. It appears to me that a total publication ban is not the least restrictive means available to deal with the applicant's request. It appears to me that the balance of whether to grant a publication ban weighs in favour of the public having access. I believe it is important for people to understand the positive and the negative aspects of chat rooms, social networking, and other such internet resources. A total publication ban would mean that the public would not be aware of how social networking programs work and how they can be destructive to the public and particularly to young persons.

[33] I believe that bullying and this type of pernicious conduct should be exposed and condemned by society. Only if the public know the extent of such conduct and its likely result, will society speak up for better control of such conduct arising from free and unlimited ability to publish such material on internet sites. However, it is clear from the cases that it is imperative that the scope of any order of the kind requested should be tied to the legitimate objective of the restriction.

[34] I am satisfied that a publication ban would not be justified in the circumstances. In the matter before Chief Justice Wachowich there was evidence of danger to the emotional health to the minor. In the case before me there is no

such evidence. The affidavit filed by the guardian and by counsel on behalf of the applicant does not make any reference to the effect, whether physical, psychological, emotional or mental that this Facebook profile has had on the applicant.

[35] In *Re: John Doe P.A.B.D. #1*, 2005 NLTD 214, Faour, J. denied an application to anonymize the name of the plaintiff and in denying so stated that the embarrassment without additional evidence of harm was insufficient to displace the need to have open courts. He followed decisions from New Brunswick and Ontario, including *Doe v. Brown* (1998), 205 N.B.R. (2d) 123 and *B.(A.) v. Stubbs* (1999), 175 D.L.R. (4th) 370. Faour, J. left the possibility that the applicant could refile the application at a later date.

[36] In *B.G. v. British Columbia*, 2004 BCCA 345, [2004] B.C.J. No. 1235, the British Columbia Court of Appeal overturned a trial judge's decision to rescind a publication ban after judgment. The plaintiff had been an inmate at a school for boys. A number of former inmates sued the school for sexual and physical assault. A publication ban covered the names of the plaintiffs during the trial, but after trial, the trial judge set aside the publication ban and published the names of the

witnesses and the plaintiffs. The Court of Appeal overturned that decision, relying not on specific issues dealing directly with the plaintiffs, but in more general terms stated that:

> 25 Although *Dagenais*, *supra* and *Mentuck*, *supra* both deal with principles that govern the making of discretionary publication bans in the specific context of criminal proceedings, I consider the general approach and some of the factors mentioned in those cases to be relevant to civil actions involving claims of historical sexual abuse. In the particular circumstances of the present case, the judge should have considered the effects that ending the ban would have on the plaintiffs, their witnesses and other former inmates of Brannan Lake School. Perhaps of equal importance, the judge also should have considered the chilling effect the prospect of termination might have on those pursuing similar civil claims for historic sexual abuse (which are notoriously difficult to prove) and hence on the administration of justice.
>
> 26 The judge also should have considered that courts have frequently recognized that replacing the names of certain parties with initials relates only to "a sliver of information" and minimally impairs the openness of judicial proceedings....

[37] I am not convinced that *B.G.* provides an adequate basis upon which to grant a confidentiality order without an evidentiary basis of harm to one of the parties (or, as in the case of *Osif*, to patients and witnesses). I repeat that there is no evidence before the court of the harm that counsel for the applicant says will occur. While counsel suggests that no evidence of potential harm is necessary, I cannot agree. This conclusion does not depend entirely on the lack of evidence respecting future harm. The Facebook profile was published in March and this application

was heard in late May, yet there was no evidence offered respecting any effects the publication had in the interim. I appreciate the contention by the applicant's counsel that if she were to proceed with a defamation suit and succeeded, she would be entitled to a presumption of damages that would follow from the finding of defamation. However, it is my view that this is not sufficient to establish the harm, actual or potential, required to grant for this type of order. I therefore, deny the application for a publication ban and the use of pseudonyms.

[38] If the parties wish to make representations on costs, they can do so before June 25, 2010.

J.