INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO

In the matter of the Public Inquiries Act, R.S.O. 1990, c. P. 41

And in the matter of the Order-in-Council 826/2007 and the Commission issued effective April 25, 2007, appointing the Honourable Stephen Goudge as Commissioner

And in the matter of an Application by seven Unnamed Persons for a Publication Ban prohibiting the publication of their identities

---

FACTUM OF THE SEVEN APPLICANTS

JAMES LOCKYER
LOCKYER CAMPBELL POSNER
180 Dundas Street West, Suite 1515
Toronto, Ontario
M5G 2E9
Tel: (416) 847-2560
Fax: (416) 847-2564

Counsel for the Applicants

PART I

OVERVIEW

1. The Commission of Inquiry into Pediatric Forensic Pathology in the Province of Ontario was established by the Government of Ontario to conduct a systemic review and assess the policies, procedures and accountability mechanisms within the system as they relate to criminal investigations and prosecutions in Ontario. The seven Applicants were granted standing at the Inquiry, along with two named parties, William Mullins-Johnson and Sherry Sherret-Robinson, as members of a group of persons who have been convicted of criminal offences related to the death of a child in cases in which Dr. Charles Smith played a role. The focus of the Inquiry's mandate is systemic, and the seven as yet unnamed parties request a publication ban on their identities and anything that might tend to reveal their identities, as their identities are irrelevant to the mandate of the Inquiry, and because to subject them to further media attention and public scrutiny would result in unnecessary prejudice and suffering for them.

PART II

SUMMARY OF THE FACTS

2. In November 2005, Dr. Barry McLellan, Chief Coroner for Ontario, on advice from the *Forensic Services Advisory Committee of the Office of the Chief Coroner of Ontario*, publicly announced that a review would be conducted into 44 (later to become 45) criminally suspicious homicide cases dating back to 1991, in which Dr. Charles Smith had either performed an autopsy or provided a consulting opinion. The purpose of the review was to determine whether the conclusions reached by Dr. Smith could be supported on an independent review.

3. The Forensic Services Advisory Committee appointed a Subcommittee to conduct a review of Dr. Smith's work. The Subcommittee eventually consisted of Dr. Michael Pollanen, Chief Forensic Pathologist for Ontario, Inspector Bob Strathdee of the Toronto Police Service, Shawn Porter, Assistant Crown Attorney for Ontario, and James Lockyer, a Director of the Association in Defence of the Wrongfully Convicted (AIDWYC).

4. By November 2006, the Subcommittee had identified 35 cases which it wished to be reviewed by a panel of internationally respected experts in the field of forensic pathology. The panel included:

a. Dr. John Butt – Consultant in Forensic Medicine, specializing in expert opinion and evidence, as well as education about investigation and pathology of sudden death and serious injury. Prior to setting up an independent consulting practice, Dr. Butt was the Chief Medical Examiner for the Province of Nova Scotia and, before this, he was the Chief Medical Examiner for Alberta;

b. Professor Christopher Milroy – Professor of Forensic Pathology at the University of Sheffield, England, consultant pathologist to the British Home Office and Honorary Consultant in forensic pathology for the Sheffield Teaching Hospitals National Health Service Foundation Trust;

c. Professor Helen Whitwell – Professor of Forensic Pathology at the University of Sheffield and a consultant pathologist to the Home Office. She brought special knowledge and expertise to the panel in the area of neuropathology;

d. Professor Jack Crane – State Pathologist for Northern Ireland, a Professor of Forensic Medicine at The Queen's University of Belfast, and a consultant pathologist of the Northern Ireland Health and Social Services Boards; and

e. Professor Pekka Saukko – Professor and Head of the Department of Forensic Medicine at the University of Turku in Finland.

5. The five pathologists gathered in Toronto in December 2006 to review the 35 cases. At the conclusion of their review, they took issue with the opinions of Dr. Smith in 20 of them. Of these 20, 12 involved cases in which a person had been charged and convicted of a crime related to a child's death.

6. Shortly thereafter, James Lockyer was asked by the AIDWYC, in his capacity as a member of the subcommittee, whether any of the 12 cases might fall within AIDWYC's mandate. He determined that nine of them could. Two of these cases were already being worked on by AIDWYC, and were already a matter of public knowledge. Seven were new, and not a matter of public knowledge. These seven make up the seven Applicants.

7. Mr. Lockyer advised the Subcommittee of the remaining seven cases in which AIDWYC had an interest, and was authorized to contact each of the seven parties to advise them of the developments in their cases as a result of the external review, and to inquire as to whether or not they had any interest in attempting to set aside their criminal convictions. Each of the seven individuals personally met with Mr. Lockyer, and expressed an interest in pursuing their cases further. All seven requested the assistance of AIDWYC in this regard, and AIDWYC has agreed to review each of their cases.

8. Of the seven people concerned, six have been advised that an attempt to quash their conviction will require that an Application for an extension of time be filed with the Ontario Court of Appeal. The seventh person has exhausted all avenues of appeal, including to the Supreme Court

of Canada, and has been advised that the only remaining option is to file an Application for Ministerial Review pursuant to section 696.1 of the *Criminal Code.*

9. All seven parties requested Mr. Lockyer's representation at the Inquiry, and were granted standing by an Order of the Commissioner dated August 17, 2007, along with Mr. Mullins-Johnson and Ms. Sherret-Robinson.

10. Normally when counsel is considering and/or preparing an appeal or an application for an extension of time, there is no public knowledge of the identities or circumstances of the potential Appellant, unless the person concerned seeks to make his or her case known publicly. In an Application pursuant to s. 696.1 of the *Criminal Code,* the same holds true. It is the practice of the Minister of Justice in Ottawa to provide no information at all about any Ministerial Review Application until such time as the Minister renders a decision on it. Information gathered by the Minister's representative is provided to the parties on a strict undertaking of confidentiality. Once again, it is only if the Applicant himself or herself seeks publicity that there will be any.

11. In most, if not all, of the cases, the seven Applicants were unaware that the deaths out of which their convictions had occurred had been the subject of further review, until advised of the results of the external review by Mr. Lockyer in April and May, 2007. All seven Applicants have expressed deep concern about their identities becoming a matter of public record, and their cases becoming a matter of public knowledge and interest. Consequently, each has asked that everything be done, at the very least for the time being, to ensure that their names not be released to the media

under any circumstances. Affidavits to this effect can be obtained from each individual should there be any challenge to the proposition that they want their identities to remain unknown.

12. Pursuant to these instructions, Mr. Lockyer has consulted with Commission Counsel to explore whether the names of the seven Applicants should be provided to counsel for the other parties with standing at the Inquiry, and if so, under what terms and conditions. An agreement was reached in this regard, but it should be added that it has not been without some trepidation on the part of three of the Applicants in particular.

13. Even within AIDWYC itself, the names of the seven Applicants have only been shared with selected staff members (two persons only) and, in at least one case, the individual's identity has not been shared with any members of AIDWYC, other than counsel at the Inquiry who have signed undertakings of confidentiality.

14. The seven Applicants have all been convicted of crimes arising out of the death of a child with whom they shared an *in loco parentis* relationship. In particular, the group consists of four mothers and three fathers. Not surprisingly, all of their cases, some to a greater degree than others, received adverse media publicity from the time they were charged until the conclusion of their trials. All have had to deal with the shame, dishonour, and humiliation that inevitably accompany a conviction of this nature. Some have spent time in prison under extremely adverse conditions, due in large part to the stigma and disgrace attached to their purported crimes. Each party is genuinely, and quite understandably, frightened of further public vilification should their names be released at

this time. In some cases, if applications for an extension of time to file an appeal with the Ontario Court of Appeal are brought in the future, it is anticipated that a similar request for a publication ban will be made to the Court.

15. There can be little doubt that should the names of the Applicants be released to the media, their cases would become national headlines of considerable proportion. Several of the parties have changed their whereabouts in the intervening years whether by design or happenstance, and many have families, friends, and co-workers who have no knowledge of their previous experiences in the criminal justice system. One of the Applicants has received a pardon under section 748 of the *Criminal Code,* which in itself prohibits any publication of the circumstances of the previous conviction.

16. In summary, in a period ranging from 7 to 16 years, the Applicants' cases have for all intents and purposes disappeared from the public view, and the Applicants have moved on with their lives and families to whatever extent they have been able. Were it not for the Government of Ontario calling this Inquiry, the media would have had no cause to seek to access their identities.

PART III
THE LAW

1. The Mandate of the Inquiry

17. The mandate of this Commission is to conduct a systemic review of pediatric forensic pathology in the province of Ontario, to explore its operation within the context of criminal proceedings, and to make recommendations to restore public confidence in the system. The Order in Council creating the Commission is focused on the systemic nature of the inquiry, rather than reporting on the particular cases that may have been adversely affected by the functioning of the system. Thus, paragraph 4 of the Order in Council reads:

> 4. The Commission shall conduct a systemic review and assessment and report on:
>
> a. the policies, procedures, practices, accountability and oversight mechanisms, quality control measures and institutional arrangements of pediatric forensic pathology in Ontario from 1981 to 2001 as they relate to its practice and use in investigations and criminal proceedings
>
> b. the legislative and regulatory provisions in existence that related to, or had implications for, the practice of pediatric forensic pathology in Ontario between 1981 and 2001; and
>
> c. any changes to the items referenced in the above two paragraphs, subsequent to 2001
>
> in order to make recommendations to restore and enhance public confidence in pediatric forensic pathology in Ontario and its future use in investigations and criminal proceedings.

Order in Council 826/2007, para 4.

18. The emphasis on a systemic review means that the identities of the seven Applicants are not, as such, relevant to the carrying out of the Inquiry's mandate. As the Order in Council goes on to state:

> In fulfilling its mandate, the Commission *shall not report on any individual cases* that are, have, or may be subject to a criminal investigation or proceeding
>
> The Commission shall perform its duties without expressing any conclusion or recommendation regarding professional discipline matters involving any person or the civil or criminal liability of any person or organization. [emphasis added].

Order in Council 826/2007, paras. 5-6.

19. The facts and circumstances surrounding the forensic conclusions and criminal investigations into the Applicants' cases, and those of all others whose cases were reviewed, are relevant to the Inquiry mandate, and it will be necessary for the Commission to examine them in relation to the systemic issues, conclusions, and recommendations. In his opening statement on June 18, 2007, Commissioner Goudge emphasized the systemic nature of the Inquiry, and made clear that it would not report on individual cases. Further, the Commissioner described the private meetings that were scheduled to take place between Commission staff and affected individuals and families, which included all seven of the Applicants, and said:

> ... in order not to prejudice any ongoing legal proceedings, and in view of the intimate and personal nature of the matters that will undoubtedly be disclosed in these meetings, these meetings must take place in private. They will neither be part of the formal hearing process, nor form a basis for fact-finding. There will be no transcripts of the meetings.
>
> What is said to me by the participants will not be disclosed. This confidentiality is essential to permit individuals to feel comfortable discussing these events with me. In fact, many participants agreed to meet with me only on that basis.
>
> The Commission is not empowered to correct errors in specific cases nor provide financial compensation but the information from the meetings will be extremely useful background for my work. It will anchor my work in real human experience.

The Commissioner's statement recognized the intimate and private nature of the Applicants' concerns and anxieties, and made it abundantly clear that the details of their circumstances would be held in the utmost confidence. To now allow their identities to be publicly broadcast would undermine, and essentially nullify, the initial importance placed upon confidentiality.

Opening Statement by Commissioner Goudge, June 18, 2007, paras 20, 26-28.

20. Undoubtedly, part of the 'real human experience' faced by the Applicants is the trauma that resulted from previous media attention to their cases. The Commissioner has quite rightly recognized the sensitive and intimate nature of their situations, and in fact has been authorized by section 16 of the Order in Council to provide counseling services to the affected individuals for up to two years. It defies logic to, on one hand, subject them to further media and public scrutiny, while at the same time recognizing the traumatic nature of their situations may require extended periods of counseling for them.

Opening Statement by Commissioner Goudge, June 18, 2007, paras 20, 26-28.
Order in Council 826/2007, para 16.

21. The mandate of the Commission will not be assisted in its truth seeking, restorative or analytical functions by a public announcement of the names of affected individuals. To maintain the level of trust and confidentiality that has been imposed to date will properly respect the privacy interests of the Applicants, and will ensure that the Inquiry preserves its systemic focus.

2. The *Dagenais/Mentuck* Test

22. In *Dagenais v. C.B.C.,* the Supreme Court of Canada set out the principles to be considered in granting a common-law publication ban. The case involved an application to prevent the C.B.C. from broadcasting a documentary on the sexual abuse of boys at a religious institution, prior to the sexual assault trial of several teachers at a religious school. The analysis centered on the conflict between the accused's right to a fair trial and the media's freedom of expression. Lamer, C.J.C. rejected the so-called "*clash*" model pitting one party against the other, and adopted a richer analysis of the competing interests, including the privacy interests of the accused. A court ordering a ban may seek, *inter alia,* to

> -preserve the privacy of individuals involved in the criminal process (for example, the accused and his or her family as well as the victims and the witnesses and their families)
>
> . . . . .
>
> - save the financial *and/or emotional costs* to the state, the *accused,* the victims and witnesses of the alternative to publication bands (for example, delaying trials, changing venues, and challenging jurors for cause)

Significantly, the Court noted that these considerations should be borne in mind at *each step* of the analysis – they are relevant to both the necessity of the ban, to the question of whether reasonable alternatives are available, and to the balance between a ban's salutary and deleterious effects.

Dagenais v. C.B.C. (1994), 94 C.C.C. (3d) 289 (S.C.C.) at 87 and 89.

23. In *R. v. Mentuck*, Iacobucci J., for the Court, held that the common-law rules permit orders to be made in the interests of the administration of justice which encompass more than fair trial rights. He reformulated and broadened the rules accordingly, saying that:

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 of the right to free expression, the right of an accused to a fair and public trial, and the efficacy of the administration of justice.

R. v. Mentuck (2001), 158 C.C.C. (3d) 449 at 466

3. Necessity

24. The privacy interests of each of the seven Applicants are easily identifiable. Each went through the agony of losing a child, and was then convicted of a crime for the child's death. To varying degrees, they lost their families, friends, jobs, livelihoods and freedoms, and have had to spend years re-building their lives anew, often hiding their pasts from even those closest to them. They have been enveloped in personal shame and grief since they were charged, and have experienced the consequences of media coverage and publication of their cases. The media interest and attention would certainly be resurrected, likely to a much greater degree, if their names are now made public as part of this Inquiry. The harm that would be caused to them is obvious and, it is submitted, does not require proof.[1] For most, if not all, of the Applicants, it has been a long and uphill battle to rebuild their lives, and a public reopening of their cases, at least for now, could cause

1 See *Re CBC and an Application by an Unnamed Person for an Order Barring the Publication of his Name* (2005), 205 C.C.C. (3d) 435 (Nfld. S.C.) at 445.

them to lose everything and have to start all over again. [2]

25. In *Re CBC and an Application by an Unnamed Person for an Order Barring the Publication of his Name,* Adams J. imposed a publication ban on the name of a doctor who had been charged with five historical offences dating back between 20 and 30 years. His charges had either been subsequently stayed or withdrawn. Adams J. said:

> In my view, the flexible approach mandated by the Supreme Court of Canada in *Mentuck* supports a finding on the facts of this case that the loss of the unnamed person's privacy rights presents a serious risk to the proper administration of justice if the ban on publication of his name is not continued. It is not necessarily an inevitable consequence of being charged with a criminal offence that a person's name is published in the media. Nor is it a core function of the criminal justice system that no exceptions to full disclosure of all details of criminal charges and those charges must be made public in order to maintain a transparent justice system.
>
> The purpose of a transparent justice system is to ensure that it is administered in a fair and impartial way, free from improper influences, and that the general public maintains faith in its decisions and make responsible judgments based on those decisions and procedures. If the case against a person charged is as apparently weak as it is in this case it is contrary to the proper administration of justice for that person and his family to be exposed to the public stigma of having his name published in the media as the person charged with a sexual offence if it can be reasonably avoided.
>
> . . . . .
>
> The ban on the publication of the name of the unnamed person is necessary to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk.

Re CBC and an Application by an Unnamed Person for an Order Barring the Publication of his Name, supra note 1, at 445-446.

---

2 It may be that, if and when AIDWYC elects to adopt one or more of the Applicants' cases, *some* of those Applicants may decide that they will then want media coverage so that they can publicly clear their names. Thus, Mr. Mullins-Johnson and Ms. Sherret-Robinson both decided to go public once they knew that AIDWYC had adopted their cases. In the case of those Applicants, if any, whom AIDWYC decides it will not adopt, it is highly unlikely that they will ever want their names back in the media.

26. The Applicants, in the context of the Commission, do not hold the position of an accused, but rather as witnesses and, it remains to be seen, as victims. In that sense, particularly in the context of a systemic inquiry rather than a case-specific analysis, their privacy interests should be held in as great if not a greater regard than the Unnamed Person in *Re CBC*. A conviction for a crime related to the death of a child is no less harsh than one for sexual assault, and the associated stigma are no less grim. Whatever the ultimate effect of the Inquiry on the criminal convictions of the Applicants (which could conceivably assist in many, if not all, cases in the eventual overturning of a conviction), as Adams J. astutely noted:

> It cannot be presumed that every person who heard of the initial charges would hear of the later exoneration. And despite the constitutional right to the presumption of innocence, in my respectful view it is human nature for some people to believe that there must be some element of truth to such allegations or they would not have been made. The damage to one's reputation is incalculable. One cannot unscramble an egg.

Re CBC and an Application by an Unnamed Person for an Order Barring the Publication of his Name, supra, at para 31.

27. It is in the interests of the administration of justice that those who have been personally affected by the breakdown and malfunction of public institutions not be deterred from assisting with inquiries into what went wrong, for fear that in doing so they may face negative media attention and irreparable harm to their rebuilt lives. It should also be noted that the publication of the identities of these individuals would affect not only them personally, but their families and those around them, many of whom have also spent years coping with the realities of the past, and others who may not even be aware of the tragic histories of the Applicants.

28. The Supreme Court of Canada in both *Dagenais* and *Mentuck* has established that the preservation of the privacy of individuals involved in the criminal justice system as well as that of their families are values which can legitimately be protected by a publication ban. Short of a ban on the publication of the identities of the Applicants, there is no reasonable means of effectively protecting their privacy interests or those of their families. While in *Mentuck* a publication ban as to operational methods of the police was struck down as unnecessary, a ban on the publication of the names and identities of police officers was upheld, as in the Court's opinion there was no reasonable alternative.

Dagenais, supra, at 75.
Mentuck, supra, at 46 and 57.

29. In *Dagenais,* in considering the scope of the requested ban, the majority found:

> The publication ban in the case at bar would have passed the first stage of analysis [necessity] under the common law rule if: (1) the ban was as narrowly circumscribed as possible (while still serving the objectives); and (2) there were no other effective means available to achieve the objectives.

It is submitted that a ban on the publication of the Applicants' identities and any evidence that might tend to identify them is necessary to secure the proper administration of justice, as there is no other remedy that could reasonably secure their obvious privacy interests.

Dagenais, supra, at 83.

4. Balance

30. As Lamer C.J.C. noted in *Dagenais,* the imposition of a publication ban "*requires a balance to be achieved that fully respects the importance of both sets of rights*". A ban on the publication

of the identities of the Applicants, constitutes a suitable compromise when balancing the rights of the media, the public, and the Applicants. A relatively minimal restriction, such as that being sought by the Applicants, is therefore an appropriate balance, as was recognized in *Re CBC*. In that case, Adams J. imposed a publication ban on the name and any identifying factors of the Unnamed Person, and considered the second prong of the *Dagenais/Mentuck* test as follows:

> Restrictions on the publication of a person's name are seen by the Court as being considerably less restrictive on freedom of the press than an outright ban on publication of evidence.
>
> . . . . .
>
> The banning of the publication of the name of the unnamed person or evidence by which he could be identified while allowing all other evidence to be published is a reasonable compromise to full disclosure in this case. The unnamed person would be at risk of suffering substantial damages and loss of professional and personal reputation if his name were to be published.
>
> . . . . .
>
> In this case, I am satisfied that the second part of the test has also been met in that the salutary effects of the limited publication ban outweighs the deleterious effects on the right to freedom of the media and the efficacy of the administration of justice.
>
> On the facts of this case, the values of an open court have not been and are not compromised by banning the publication of the unnamed person's name or information by which he could be identified. The media and the public have had full access to the Court. The decisions of the Court and the considerations leading to them have been open to the media and have been reported on. The only information withheld from publication is the identity of the unnamed person.

n this case, some of the evidence would also need to be restricted because it could quickly and easily lead to identification of the individuals concerned., especially in the locales in which the deaths occurred where they were charged and convicted.

Re CBC and an Application by an Unnamed Person for an Order Barring the Publication of his Name, supra, at paras 40-46.

31. In the context of a Public Inquiry, an appropriate balance can be struck between the public's right to know and an individual's rights to privacy. During the *Morin Inquiry*, Guy Paul Morin applied to set aside a publication ban, originally imposed by the trial judge, on a Crown witness's identity. Mr. Morin's position was supported by the Commissioner. The Ontario Court of Appeal, however, upheld the ban, finding that the Commissioner could effectively perform his task without the identity of the witness being revealed to the public.

Re Morin and the Queen; Kaufman et al., Interveners (1997) 113 C.C.C. (3d) Ont. C.A.)

32. In *Re Morin,* an issue of particular concern to the unnamed witness was that his psychiatric and medical records had been widely publicized. The Court found that the invasion of his privacy rights "*would be significantly compounded by the release of his name*". Like *Re CBC,* the Court found a balance by banning publication of the witness's identity, rather than the evidence as a whole. The Court considered the impact, if any, that the limited publication ban would have on the ability of the Commission to fulfill its mandate, and concluded:

> ··· the Commission's ability to perform the task assigned to it will not be impaired in any significant way if this narrow publication ban is allowed to stand. The right of the public to be fully informed about the criminal prosecution of Mr. Morin and the ongoing proceedings of the Commission is full and complete, save only for the identity of Mr. X. It must be remembered that the focus of the Commission, at least insofar as the subject matter relevant to this application is concerned, relates to the role of gaolhouse informants in the administration of justice and the policy recommendations that might be made in this regard. *The focus is not on the identity of Mr. X, nor on any civil or criminal responsibility on his part. Indeed, the terms of reference prohibited the Commissioner from expressing any conclusion or recommendation regarding civil or criminal responsibility. In short, we find that the continued publication ban represents at most a minimal impairment to the Commission.* [emphasis added].

Re Morin and the Queen, supra, at 38 and 42

33. As in the *Morin Inquiry*, the mandate of this Commission includes, as it must, an instruction precluding the Commission from making findings of criminal or civil liability concerning any individual's conduct. In addition, however, this Commission is further precluded from reporting on any individual cases that have been the subject of criminal proceedings. Consequently, banning the publication of their identities is of little, if any, significance to the mandate. In *Dagenais,* Lamer C.J.C., provided some general guidelines regarding publication bans, and noted that the public's right to know is not absolute, but rather must be considered based on the circumstances and particular facts at issue:

> ··· the judge must weigh the importance of the objectives of *the particular ban* and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate.

Similarly, in upholding a publication ban of the identities of certain police officers in *Mentuck*, Iacobucci J. noted that the names of the officers in question were irrelevant to the issues at hand:

> The deleterious effects of this ban are, on the other hand, not as substantial. The informed public debate about the propriety of the police tactics used in this and similar cases can proceed largely unhindered without the need for knowledge of which police officers, precisely, were involved. It is largely irrelevant to the accused's desire for public vindication whether the names of the officers are immediately known.

Dagenais, supra, at 102
Mentuck, supra, at 57.

34. At the ongoing Public Inquiry into allegations of the abuse of young people in the Cornwall area, a publication ban was sought into the victims' or alleged victims' identities. Commissioner Gladue granted the confidentiality requests in respect of several witnesses, finding that "*the salutary effects of the confidentiality orders to protect the privacy interests of [the witnesses] would clearly outweigh any deleterious effects*". The Commissioner found that the relevance of the details in

outweigh any deleterious effects". The Commissioner found that the relevance of the details in question is a factor that may be taken into account in the second branch of the *Dagenais/Mentuck* test, noting:

> If information is not relevant or is only marginally relevant to the mandate of the Inquiry, the deleterious effects of a confidentiality measure applicable to such information should be limited. In my view, the 'open court principle' should apply to information that is relevant to the proceedings of that court.

Public Ruling on Confidentiality Measures for Exhibits Marked as "C" on an Interim Basis, The Cornwall Public Inquiry, Dated November 16, 2006.

35. Commissioner Gladue refused a publication ban on the identity of an employee of the Episcopal Corporation who was acquitted of the historical sexual abuse charges and of "*allegations of a pedophile ring and of conspiracy, collusion, and cover-up by various institutions and individuals*" that were the subject of the Inquiry. The circumstances in that Inquiry and its mandate, however, are quite different from the circumstances of this Inquiry and its mandate. In the Court of Appeal's decision upholding the Commissioner's ruling, the Court adopted the Commissioner's view that "*openness is particularly important in the context of this inquiry, which is expected to dispel rumors and innuendoes and ascertain allegations of a cover up and conspiracy*". The mandate of the Cornwall inquiry was, in part, to "*clear the air of allegations of conspiracy and cover-up*", thus rendering the identity of the employee and his relationship with other parties a necessary detail for consideration. This Commission, conversely, is specifically mandated to consider systemic concerns, rather than individual cases. Most significantly, and distinct from the mandate of this Inquiry, was the Court's finding in *Episcopal* that "*the employee's name was relevant to the mandate of the Commission, when examining the interconnectedness of person, particularly given the*

allegations of conspiracy that surround the facts giving rise to this inquiry". In the context of this Inquiry, however, there are no allegations of conspiracy, cover-up, or association between the Applicants or any other party that would make their identities relevant to the Commission's mandate.

Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall (Public Inquiry) [2007] O.J. No. 100 at 12, 15, 43 and 46.

36. While the circumstances surrounding the Applicants' cases and the associated forensic investigations are relevant to the mandate of the Commission and should be open to public scrutiny, the Applicants' names and identifying features are not. Pursuant to *Dagenais,* it is the nature of the specific information that must be considered, as opposed to any sweeping or blanket analysis. As Fish J. noted in *Toronto Star Newspapers v. Ontario,* the freedoms of communication and expression "*are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice.*"

Toronto Star Newspapers Ltd. v. Ontario Her Majesty the Queen (2005) 197 C.C.C. (3d) 1 at para 3.

Conclusion

37. While each of the seven Applicants has an obvious interest in the Inquiry, they should not be forced to relinquish their anonymity when to do so would add nothing to the systemic focus and mandate of the Inquiry. The imposition of a publication ban on the Applicants' identities would not

interfere with or impair the ability of the Commission to carry out its mandate, as their identities are irrelevant to the systemic focus of the Inquiry. A ban will not lessen the level of media coverage and public scrutiny into the functioning of the system of pediatric forensic pathology in Ontario. It is the underlying facts, circumstances and collective functioning of the pediatric pathology system as a whole that is of importance, not the identities of those individuals who were likely adversely affected by its malfunction.

PART IV

ORDER REQUESTED

38. It is respectfully submitted that the Application should be allowed and an Order made prohibiting the publication of the identities of the seven Applicants and any information that may tend to identify them.

ALL OF WHICH Is respectfully submitted this 11th day of October, 2007.

JAMES LOCKYER
LOCKYER CAMPBELL POSNER
180 Dundas Street West, Suite 1515
Toronto, Ontario
M5G 2E9
Tel: (416) 847-2560
Fax: (416) 847-2564

Authorities

Dagenais v. C.B.C. (1994), 94 C.C.C. (3d) 289 (S.C.C.)

R. v. Mentuck (2001), 158 C.C.C. (3d) 449 at 466