The Diocese was seeking a ban on publication of the name of Father Rene Dube.

CITATION: Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry, 2007 ONCA 20
DATE: 20070116
DOCKET: C46428

COURT OF APPEAL FOR ONTARIO

MACPHERSON, SHARPE and BLAIR JJ.A.

B E T W E E N :	)	
	)	
THE EPISCOPAL CORPORATION OF THE DIOCESE OF ALEXANDRIA-CORNWALL	)	**Bruce Carr-Harris and David Sherriff-Scott for the appellant**
	)	
Applicant (Appellant in Appeal)	)	
- and -	)	
	)	
THE HONOURABLE G. NORMAND GLAUDE, COMMISSIONER OF THE CORNWALL PUBLIC INQUIRY	)	**Brian Gover and Patricia Latimer for the respondent**
	)	
Respondent (Respondent in Appeal)	)	**Peter Wardle and Dallas Lee for Citizens for Community Renewal and the Victims Group**
	)	**John Callaghan and Mark Crane for Cornwall Community Police Service and Cornwall Police Services Board**
	)	**Colin Baxter and Daniel Henry for Canadian Broadcasting Corporation/ Radio-Canada**
	)	
	)	**Heard: January 5, 2007**

On appeal from the order of Justice Robert L. Maranger of the Superior Court of Justice dated December 11, 2006, dismissing an application for judicial review.

SHARPE J.A.:

[1] The appellant, the Episcopal Corporation of the Diocese of Alexandria-Cornwall, asks for an order banning the publication of the name of one of its employees (the "employee") in relation to evidence given at the Cornwall Public Inquiry (the "Commission"). The Commission was established to investigate the institutional

response of the justice system and other public institutions into allegations of widespread historical sexual abuse of young people in Cornwall.

[2] The employee was acquitted of historical sexual abuse charges in 2001. When it became apparent that the complainant would be asked to give evidence before the Commission of his allegations against the employee, the appellant asked the Commissioner for the publication ban. The appellant contended that as the employee's innocence had been established in the criminal proceedings, his reputational and privacy interests outweighed any deleterious effects the ban would have on the parties and the public.

[3] The Commissioner refused to order the requested ban. The Commissioner found that the allegations against the employee had already received wide publicity, that one could not presume the public would ignore reminders of the acquittal, and that in view of the nature of the Commission's mandate to clear the air, the public interest in openness outweighed any interest of the employee that would be protected by the requested ban.

[4] An application for judicial review of that decision was dismissed by a single judge of the Divisional Court who applied a reasonableness standard of review and found that the Commissioner's decision was not unreasonable. For the following reasons, I would dismiss the appeal.

The Commission

[5] The Commission was established pursuant to the *Public Inquiries Act*, R.S.O. 1990, c. P.41, s. 2. Justice G. Normand Glaude of the Ontario Court of Justice was appointed as the Commissioner. The preamble to the Commission's Terms of Reference states:

> Whereas allegations of abuse of young people have surrounded the City of Cornwall and its citizens for many years. The Police investigations and criminal prosecutions relating to these allegations have concluded. Community members have indicated that a public inquiry will encourage individual and community healing…

[6] The mandate of the Commission is set out in ss. 2 and 3 of the Terms of Reference:

> 2. The Commission shall inquire into and report on the institutional response of the justice system and other public institutions, including the interaction of that response with other public and community sectors, in relation to:
>
> a) allegations of historical abuse of young

> people in the Cornwall area, including the policies and practices then in place to respond to such allegations, and
>
> b) the creation and development of policies and practices that were designed to improve the response to allegations of abuse
>
> in order to make recommendations directed to the further improvement of the response in similar circumstances.
>
> 3. The Commission shall inquire into and report on processes, services or programs that would encourage community healing and reconciliation in Cornwall.

[7] The Commission, in s. 7 of the Terms of Reference, is directed not to make any finding of civil or criminal liability:

> 7. The Commission shall perform its duties without expressing any conclusion or recommendation regarding the civil or criminal liability of any person or organization. The Commission, in the conduct of its inquiry, shall ensure that it does not interfere with any ongoing legal proceedings relating to these matters.

[8] The background to the establishment of the Commission included widespread rumours, innuendos, and allegations of cover-up and conspiracy that had plagued the Cornwall community for several years.

[9] The Commissioner had previously ruled that the appellant is a "public institution" for the purposes of para. 2 of the Terms of Reference and that the response of the appellant to allegations of sexual abuse could be examined. The appellant did not seek judicial review of that ruling. The Divisional Court upheld another ruling made by the Commissioner where he concluded that examining evidence of alleged victims of sexual abuse is essential to properly assess the involved public institutions' response to those allegations: see *MacDonald v. Ontario (Cornwall Public Inquiry, Commissioner)* (2006), 271 D.L.R. (4th) 436 (Ont. Div. Ct.). No appeal was taken from that decision.

Facts

[10] In 1997, Claude Marleau complained to the Ontario Provincial Police that in the 1960s he had been sexually abused by a number of people from Cornwall. One incident involved Father Lapierre (another employee of the appellant) taking Marleau to Montreal where Lapierre and another named individual assaulted Marleau. A year later, Marleau changed his story to name the employee as the other perpetrator along with Lapierre. The

employee and Lapierre were jointly charged in 1999 and tried in 2001 before a judge of the Court of Quebec, Criminal Division. Lapierre was convicted but the employee was acquitted. The trial judge expressly stated that he believed the employee's evidence denying the allegations.

[11] The employee is now 61 years old. He is from Cornwall, has worked in that community for his entire career, and continues to discharge a variety of important functions in the Diocese.

[12] Several times during the course of the inquiry the Commissioner has stressed the need for openness. In his opening remarks, he stressed that it was important that the inquiry be open in every sense of the word. In a ruling on standing and funding, he stated that openness and transparency were guiding principles of the inquiry. In an earlier ruling dealing with a request for a publication ban ("Directions on Process – Requests for Confidentiality of Victims' or Alleged Victims' Identities", October 31, 2006) the Commissioner stated, at 4: "Openness is particularly important in the context of this Inquiry, which is expected to dispel rumours and innuendoes and ascertain allegations of cover-up and conspiracy".

[13] The Commission gave the appellant written notice of Marleau's proposed evidence, and made it clear that Marleau would be asked to testify as to the allegations of sexual abuse he had asserted against the employee. The appellant moved for an order banning publication of the name and identifying information of the employee.

[14] The Commissioner applied the test mandated by the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835, and *R. v. Mentuck*, [2001] 3 S.C.R. 442, as summarized by Fish J. in *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 at para. 26:

> [D]iscretionary action to limit freedom of expression in relation to judicial proceedings encompasses a broad variety of interests and 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 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.

[15] The Commissioner ruled that the employee's name was relevant to the mandate of the Commission "when examining the interconnectedness of persons, particularly given the allegations of conspiracy that surround the facts giving rise to this Inquiry."

[16] The Commissioner found that the employee had been the subject of media attention during and after his trial when his identity had been exposed to the public. At that time, the employee enjoyed his employer's support and the support of his parish. The Commissioner also found that the employee had failed to provide medical evidence to substantiate the detrimental effect he claimed disclosure of his identity would have on his health. The Commissioner found that one could not presume that the public would ignore reminders of the employee's acquittal and jump to unfair or unfounded conclusions about him. The Commissioner indicated that the appellant could object to evidence on the ground of relevance or ask for publication bans in relation to specific allegations not germane to the examination of the institutional response to the allegations.

[17] In light of these findings, the Commissioner concluded that the appellant failed to meet either branch of the *Dagenais/Mentuck* test: (1) the order was not necessary to prevent a serious risk to the proper administration of justice as there were reasonably alternative measures to protect the employee's reputation; and (2) any salutary effects of a ban were outweighed by the public interest in an open inquiry.

[18] The Commissioner granted a limited stay of his order pending the determination of the application for judicial review. That stay has been continued by order of this court pending the determination of this appeal. As a result, Marleau gave his evidence but the name and identifying details of the employee have not been made public.

[19] During the course of Marleau's testimony before the Commission, the Commissioner imposed a publication ban as to details of the nature of the alleged sexual abuse. The Commissioner also directed Commission counsel to formulate questions in a way that would emphasize that the witness was testifying about allegations he had made and not about the truth of those allegations. Commission counsel led evidence of the employee's acquittal. The Commissioner corrected the witness when he testified that the trial judge had a reasonable doubt and had acquitted the employee, pointing out that in his reasons the trial judge stated that he believed the employee's denial.

Application for Judicial Review

[20] The appellant brought an application for judicial review of the Commissioner's ruling refusing to grant the publication ban. Sitting as a single judge of the Divisional Court pursuant to the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, s. 6(2), the application judge ruled that the appropriate standard of review was reasonableness. The application judge found that the Commissioner applied the proper legal test and that in

view of the scope of his mandate and the nature of the Commission, the ruling was not unreasonable. The application judge concluded his decision, at para. 12, as follows:

> Given the nature of this inquiry, it seems to me that the concept of openness, and even the appearance of openness, will undoubtedly be at the forefront of the Commissioner's mind during the conduct of these proceedings. In arriving at his Ruling he had to balance a wide spectrum of interests, including but not limited to: the employee, the complainant, the Applicant, the press and the citizens of Cornwall. These Rulings are not without difficulty and this Ruling was not unreasonable. The Application is therefore dismissed.

Issues

[21] The following issues arise on this appeal:

1. Did the Divisional Court apply the appropriate standard of review?

2. Did the Divisional Court err in failing to find that the Commissioner gave insufficient weight to the employee's privacy and reputational interests?

Analysis

1. Did the Divisional Court apply the appropriate standard of review?

[22] As mandated by the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the determination of the standard of review for a decision of a body such as the Commission is to be based on a "pragmatic and functional" balancing of four factors, at paras. 29-38:

(i) the presence or absence of a right of appeal or privative clause;

(ii) the expertise of the tribunal;

(iii) the purpose of the legislation as a whole and of the particular provision; and

(iv) the nature of the question before the tribunal.

(i) The presence or absence of a right of appeal or privative clause

[23] The *Public Inquiries Act*, *supra*, contains neither a right of appeal nor a privative clause and is silent on the question of review. According to *Pushpanathan*, *supra*, at para. 30, silence on the question of review "does not imply a high standard of scrutiny, where other factors bespeak a low standard."

(ii) The expertise of the tribunal

[24] This factor is less relevant in this case than in cases dealing with specialized boards or tribunals. However, I would give some weight to it. The *Public Inquiries Act*, *supra*, s. 3 provides that the "conduct of and procedure to be followed on an inquiry is under the control and direction of the commission conducting the inquiry." In *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, Cory J. stated, at para. 175, that "the nature and the purpose of public inquiries require courts to give a generous interpretation to a commissioner's powers to control their own proceedings" and, at para. 176, that a commissioner's power to make orders such as publicity bans "should be given a reasonable and purposive interpretation in order to provide commissions of inquiry with the ability to achieve their goals." I also consider the role of the Commissioner, his familiarity with the mandate and operation of his Commission, and his familiarity with the community it is meant to serve to be relevant factors to consider. The Commissioner has been sitting in Cornwall for over one year and is familiar with the impact of the inquiry upon the community. He is familiar with the tone and quality of the media's coverage of the Commission's proceedings. He has made many rulings dealing with requests for publication bans and other similar relief. In my view, this factor supports a more deferential standard of review.

(iii) The purpose of the legislation as a whole and of the particular provision

[25] The statutory purpose of the *Public Inquiries Act* and the purpose of this Commission both engage policy issues that involve balancing multiple sets of interests and considerations. At para. 5 of his reasons, the application judge referred to a passage from *Pushpanathan*, *supra*, at para. 36, where the Supreme Court distinguished a court-like dispute between two parties involving a specific issue from a "polycentric" issue "which involves a large number of interlocking and interacting interests and considerations" (referring to Peter Cane, *An Introduction to Administrative Law*, 3d ed. (New York: Oxford University Press, 1996) at 35). The Supreme Court indicated that if "legal principles are vague, open-textured, or involve a 'multi-factored balancing test'", requiring "the consideration of numerous interests simultaneously, and the promulgation of solutions which concurrently balance benefits and costs for many different parties", a lower standard of review than correctness is called for.

[26] This Commission is not asked to resolve a bi-polar dispute over a specific legal or factual issue. The Commissioner is not entitled to make findings of criminal or civil liability. He is faced, rather, with a broad issue of policy affecting the public at large. His mandate concerns, in the words adopted in *Pushpanathan*, *supra*, a "polycentric issue" involving "a large number of interlocking and interacting interests and considerations." In formulating his recommendations, the Commissioner will be required to take into account a wide variety of factors and considerations of a kind not ordinarily

encountered by a court of law. I agree with the application judge that this factor points to a deferential standard of review.

[27] I now turn to the particular provisions at issue here. Section 4 of the *Public Inquiries Act, supra,* provides that with certain exceptions, all hearings on an inquiry are to be open to the public:

> 4. All hearings on an inquiry are open to the public except where the commission conducting the inquiry is of the opinion that,
>
> (a) matters involving public security may be disclosed at the hearing; or
>
> (b) intimate financial or personal matters or other matters may be disclosed at the hearing that are of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interest of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,
>
> in which case the commission may hold the hearing concerning any such matters in the absence of the public.

[28] I have already set out the relevant extracts from the Commission's Terms of Reference. I add here s. 6:

> The Commission shall ensure that the disclosure of evidence and other materials balances the public interest, the principle of open hearings, and the privacy interests of the person(s) affected, taking into account any legal requirements.

[29] Pursuant to its statutory power to regulate its own procedures, the Commission issued the "Rules of Practice and Procedure" (the "Rules"). Rule 39 provides as follows:

> 39. Without limiting the application of s. 4 of the *Public Inquiries Act*, the Commissioner may, in his discretion and in appropriate circumstances, conduct hearings in private, and/or issue orders prohibiting the disclosure, publication, broadcast or communication of any testimony, document or evidence, when he is of the opinion that intimate medical or personal matters, or other matters, are of such a nature, having regard to the circumstances, that the desirability of avoiding

> disclosure outweighs the desirability of adhering to the general principle that the hearings should be open to the public. …

[30] These provisions require that the Commission's hearings be open to the public but confer a discretion on the Commissioner to hear evidence in camera or impose appropriate bans where the Commissioner considers other interests, including the privacy of affected persons, to outweigh the public interest in openness. I will return to this issue under the fourth heading, but observe here that that a discretionary balancing exercise of this kind attracts a deferential standard of review.

(iv) The nature of the question before the tribunal

[31] I turn to the nature of the specific question at issue: namely, whether to order the publication ban in the context of this inquiry. Unlike *MacDonald*, *supra*, where it was agreed that a standard of correctness applied, the issue here is not jurisdictional in nature. The appellant submits that the Commissioner was faced with a pure question of law, emphasizing the argument that the need to protect the innocent trumped other considerations and required a publication ban as a matter of law, and that accordingly a standard of correctness applies. The Cornwall Community Police Service and the Cornwall Police Services Board (the "Cornwall Police") also submit that the publication ban issue raised a question of law which attracts a standard of correctness. I am unable to accept that submission for the following reasons.

[32] The appellant, the respondent Commissioner, and all intervenors except the Cornwall Police, take the position that the *Dagenais/Mentuck* test applies. The Cornwall Police submit that the Commissioner's authority to issue a publication ban is conferred by statute and not by the common law, but concede that the *Public Inquiries Act*, *supra*, and the order-in-council require the Commissioner to engage in a balancing exercise very similar, if not identical, to that mandated by the *Dagenais/Mentuck* test.

[33] In *Toronto Star*, *supra*, at para. 31, Fish J. observed that the *Dagenais/Mentuck* test is a flexible and contextual one that must be tailored to fit the character of the interests at stake and the nature of the process in which the request for a publication ban arises:

> It hardly follows, however, that the *Dagenais/Mentuck* test should 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. [Emphasis in original.]

[34] In my view, the nature of this discretionary balancing exercise, particularly when done in connection with a policy-oriented public inquiry, is a factor that strongly militates against a standard of correctness and in favour of a more deferential standard.

[35] I do not agree with the appellant's submission that the following passage from *Dagenais, supra,* at 878, requires us to apply a standard of correctness to the *Dagenais/Mentuck* balancing exercise:

> 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.
>
> If the ban fails to meet this standard (which clearly reflects the substance of the *Oakes* test applicable when assessing legislation under s. 1 of the *Charter*), then, in making the order, the judge committed an error of law and the challenge to the order on this basis should be successful. [Emphasis in original.]

[36] In my view, the characterization of the failure to meet the standard as an "error of law" must be read in the context of the issue before the court in *Dagenais, supra,* and in light of later cases, especially *Toronto Star, supra*. *Dagenais* involved the review of an order made under a different test. *Dagenais* established a new test not available to the judge who made the order under appeal. As I read the quoted passage, Lamer C.J.C. stated that as the judge did not apply the new test, failure to arrive at a result that could be supported under the new test would amount to an error of law. That, in my view, cannot mean that where the Commissioner does apply the *Dagenais* test, he is be held to a standard of correctness or that that it is open to a reviewing court to substitute its view because it disagrees with the way the Commissioner balanced the competing interests.

Standard of review: conclusion

[37] Of the four factors, one is neutral and three point to a deferential standard of review. Accordingly, I conclude that the application judge did not err in finding that the appropriate standard of review was reasonableness *simpliciter*. The issue, therefore, is whether the Commissioner's ruling refusing the requested ban can stand up to the test

described in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 55, that judicial review should succeed "only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" and that if "the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere".

2. Did the Divisional Court err in failing to find that the Commissioner gave insufficient weight to the employee's privacy and reputational interests?

[38] The Commissioner cited and applied the *Dagenais/Mentuck* test. The appellant does not suggest that the Commissioner applied the wrong legal test but argues that he failed to give adequate weight to the employee's privacy and reputational interests when applying that test.

[39] The appellant's case rests on two related submissions. First, the appellant says that the Commissioner failed to give adequate weight to the employee's innocence, conclusively determined by the acquittal in the criminal proceedings. Second, the appellant argues that a ban on publication of the name or identifying features of the employee would not interfere with or impede the Commission's work and that there was no justifiable reason not to make the requested ban in order to protect the reputation of an innocent person.

[40] On the first point, the Commissioner expressly adverted to the need to consider the protection of the employee's reputation as an innocent person. He stated that "the presumption of innocence and the protection of the innocent are important interests that should be taken into consideration in the first branch of the *Dagenais/Mentuck* test." The Commissioner added, however, that the presumption of innocence and the protection of the innocent do not "supersede the principle of an open hearing in all cases." That determination "will depend on the circumstances and each case should be assessed on a case-by-case basis."

[41] I see no error in the Commissioner's statement of the applicable legal principles. The appellant relies on the majority judgment of Dickson J. in *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, a case dealing with the public's right to inspect a search warrant and the information upon which it was obtained. Dickson J. held, at 186-87, that "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent." Where a search warrant was issued but nothing was found, Dickson J. concluded that protection of the innocent is an overriding social value and is sufficiently important to justify curtailment of public accessibility.

[42] In my view, *MacIntyre*, *supra*, dealt with the specific situation of search warrants and does not stand for the proposition that protection of the innocent *always* prevails over the public's right to know, particularly when read in the light of the post-*Charter* cases: see *Dagenais*, *supra*, *Mentuck*, *supra*, and *Toronto Star*, *supra*. These cases reinforce the presumption of openness upon which *MacIntyre* rests and posit a flexible and contextual balancing test that is to be applied in a non-mechanistic fashion with reference to the particular interests at stake. While protection of the reputation of innocent persons is a highly significant factor to be weighed in that balance, it does not automatically trump the public interest in an open hearing and the right to freedom expression, just as the public interest in an open hearing and the right to freedom of expression do not automatically trump the protection of innocence. As the Commissioner properly found, all the pertinent rights and interests must be weighed on the balance.

[43] The appellant also relies upon *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671, where immediately after a conviction was overturned on appeal a journalist sought access to an illegally obtained confession that had been excluded by the appeal court. Another case in the same line is *Re Canadian Broadcasting Corporation* (2005), 205 C.C.C. (3d) 435 (Nfld. Sup. Ct.) where, after two charges were stayed and the other withdrawn, the media moved unsuccessfully to set aside a ban on the publication of the name of the accused. In both cases, the ban was justified as being necessary to protect an innocent person. Again, I do not read these cases as standing for the proposition that the protection of the innocent must inevitably prevail over openness and freedom of expression. One must always have regard to the particular context in which the request for a publication ban arises. In *Vickery* and *Re Canadian Broadcasting Corporation*, all proceedings had come to an end and the publication bans had no impact upon the openness or successful operation of an ongoing proceeding. In the present case we are dealing with a public inquiry called to clear the air of allegations of conspiracy and cover-up and to "encourage community healing and reconciliation". Openness is a factor relevant to the Commission's success in accomplishing that mandate, a factor not present in the cases upon which the appellant relies.

[44] The appellant also relies on *Gagnon v. Southam*, [1989] R.J.Q. 1145, where the Quebec Court of Appeal upheld a publication ban imposed by a commission of inquiry. That case may be readily distinguished on the ground that the court was upholding the discretion of the commissioner to grant a publication ban in relation to very different terms of reference. In any event, the decision pre-dates the establishment of the *Dagenais/Mentuck* test and therefore did not turn on the law that now applies to this issue.

[45] The Commissioner considered several factors that mitigated the risk to the employee's reputation. He pointed out that the Commission would not and could not try

or re-try the allegations of sexual abuse. He observed that the employee's counsel "will most certainly ensure that the evidence of the Moving Party's acquittal comes out" and, as I have mentioned, he took steps to correct the witness who testified that the employee had been acquitted because of a reasonable doubt on the evidence. The Commissioner found that in view of the acquittal establishing the employee's innocence, "one cannot presume that the public, equipped with the reminders of the Moving Party's acquittal, will jump to any unfair or unfounded allegations about the Moving Party." The Commissioner also indicated that the employee could object to evidence of the specifics of the allegations and indeed later made rulings and redacted certain documents to that end. The Commissioner also noted that the employee had been subjected to a considerable amount of publicity at the time of his trial and acquittal so that he was not being exposed for the first time as a result of the Commission. These findings are essentially factual in nature and unassailable before the application judge and before this court. They demonstrate that the Commissioner gave serious consideration to the protection of the employee's innocence. I cannot say that his consideration of these factors was unreasonable.

[46] I turn to the appellant's second contention, namely, that the Commission could accomplish its task even if the requested publication ban were granted. To consider this argument, one must have close regard to the nature of the Commissioner's mandate. The Commission was appointed to respond to allegations of a pedophile ring and of conspiracy, collusion, and cover-up by various institutions and individuals. The central question for the Commissioner is whether the justice system and other public institutions responded adequately to allegations of historical sexual abuse against young people. The Commission is specifically directed to encourage community healing and reconciliation. The Commissioner is required to consider whether the allegations made by Marleau against Lapierre and the employee were properly investigated and whether the appellant responded appropriately to those allegations. It was in this context that the Commissioner found that the employee's "name is relevant when considering the interconnectedness of persons, particularly given the allegations of conspiracy that surround the facts giving rise to this Inquiry." I am not persuaded that this finding was unreasonable.

[47] Even if it were possible for the Commission to conduct certain fact-finding investigations by using a moniker to identify the employee, one must have regard to the fact that this is a public inquiry called to clear the air in a community long troubled by rumours, innuendoes, and allegations of secrecy and cover-up. The employee's prosecution and acquittal were widely reported in the local media and he is well-known in the community. His identity cannot be viewed as a mere detail that is not germane to the inquiry. A central purpose of this Commission is to facilitate the public's understanding of the institutional response to the allegations made against well-known

individuals, including the employee, prominent in the community and whose names have already been in the public eye in relation to this very controversy.

[48] The "open court" principle takes on particular importance in relation to this type of public inquiry, the purpose of which is to educate the public about the events leading up to a tragedy or worrisome community problem. In *Phillips, supra*, at para. 62 (a passage adopted in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440 at para. 30), Cory J. described the purpose of public inquiries:

> One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". … In times of public questioning, stress and concern they provide the means for Canadians to be apprised of the conditions pertaining to a worrisome community problem and to be a part of the recommendations that are aimed at resolving the problem. Both the status and high public respect for the commissioner and the open and public nature of the hearing help to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole.
>
> They are an excellent means of informing and educating concerned members of the public.

[49] The public's special interest and right to know take on added significance as the Commission's mandate is not restricted to fact-finding but also includes community healing. As Cory J. stated in *Phillips, supra*, at para. 117, open hearings "function as a means of restoring the public confidence" and act as a "type of healing therapy for a community shocked and angered by a tragedy." In my view, these observations are apposite to this case.

Conclusion

[50] The Commissioner applied the appropriate legal test in assessing the request for a publication ban. He gave careful consideration to the protection of innocence and to the employee's particular situation. He found that the employee's name was relevant to his mandate given the interconnectedness of those caught up in the controversy. As the allegations against the employee had already been publicized in the community, the Commissioner concluded that with appropriate emphasis upon the acquittal and by expunging reference to the details of the allegations, the impact of disclosure of the

employee's name could be minimized. He concluded that the appellant had not satisfied the burden of demonstrating that there was a serious risk to the administration of justice or that the salutary effects of a publication ban outweighed the deleterious effects on the public interest in openness.

[51] I recognize that the employee's innocence has been judicially determined and that there may be an element of unfairness in permitting publication of his identity as Marleau's evidence regrettably does pose a risk that the employee's reputation may be damaged. I am not persuaded, however, that the Commissioner's conclusion in favour of openness was unreasonable on the particular facts before him, particularly in view of his core mandate to help heal a community long-troubled by allegations of conspiracy, secrecy, and cover-up. In the language of *Ryan*, *supra*, at para. 55, the Commissioner's consideration of the issue before him stands up to "a somewhat probing examination" and I see no error on the part of the application judge in finding that the Commissioner's ruling was a reasonable one.

[52] For these reasons, I would dismiss the appeal with costs to the respondent Commissioner fixed in the amount agreed to by the parties, namely $10,000 inclusive of disbursements and GST. All parties agreed that the decision of this court should be stayed for ten days from the date of its release and I would so order.

"Robert J. Sharpe J.A."
"I agree J.C. MacPherson J.A."
"I agree R.A. Blair J.A."

RELEASED: January 16, 2007