1997 CarswellOnt 400, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re) 143 D.L.R. (4th) 54, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re)) 113 C.C.C. (3d) 31, 6 C.R. (5th) 137, 97 O.A.C. 59, (sub nom. Morin v. R.) 32 O.R. (3d) 265

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1997 CarswellOnt 400, (sub nom. Ontario (Commission on Proceedings involving Guy Paul **Morin**), Re) 143 D.L.R. (4th) 54, (sub nom. Ontario (Commission on Proceedings involving Guy Paul **Morin**), Re)) 113 C.C.C. (3d) 31, 6 C.R. (5th) 137, 97 O.A.C. 59, (sub nom. **Morin** v. R.) 32 O.R. (3d) 265

R. v. **Morin**

In the matter of an Application to set aside the Order of Dubin C.J.O. dated January 10, 1994 made during the appellate proceedings herein in which he ordered the continuation of the ban on the publication of the name of a witness which had been imposed at the Applicant's trial; and in the matter of the Commission on Proceedings Involving Guy Paul **Morin**; Her Majesty the Queen (respondent) and Guy Paul **Morin** (applicant / appellant) and The Honourable Fred Kaufman, Q.C., Commissioner, Commission on Proceedings Involving Guy Paul **Morin**, Toronto Star Newspapers Limited, Thomson Canada Limited carrying on business as The Globe & Mail, and Mr. X (interveners)

Ontario Court of Appeal

Robins, Moldaver and Goudge JJ.A.

Heard: January 22, 1997
Judgment: January 28, 1997
Docket: CA C13886

Counsel: *James Lockyer* and *Joanne McLean*, for applicant / appellant.

Scott C. Hutchinson, for respondent.

David M. Humphrey, for intervenor Mr. X.

Mark Sandler and *Jana Mills*, for intervenor Commissioner Fred Kaufman.

Paul Schabas, for intervenor The Toronto Star.

Peter Jacobsen, for intervenor Thomson Canada Limited.

Subject: Criminal

Criminal law --- Pre-trial practice — Public or **publication ban** order.

Criminal law — Pre-trial practice — Public or **publication ban** order — Applicant having two trials for first degree murder — Applicant's prison cellmate testifying as informant at both trials — Judge at second trial ordering **publication ban** on informant's identity because harassment of informant following testimony at first trial — Applicant

1997 CarswellOnt 400, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re) 143 D.L.R. (4th) 54, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re)) 113 C.C.C. (3d) 31, 6 C.R. (5th) 137, 97 O.A.C. 59, (sub nom. Morin v. R.) 32 O.R. (3d) 265

later being acquitted on DNA evidence — Public **inquiry** established to review proceedings against applicant — Applicant applying to revoke **publication ban** — Ban constituting promise to informant to secure testimony — Results of trial or falseness of testimony not being relevant to continuation of ban — Personal and psychiatric records of informant made public because his identity was protected — Continuation of ban required to protect informant's privacy and to ensure continued flow of information from prison informants — Public **inquiry** focusing on public policy, not on informant — **Inquiry** not undermined by ban.

The applicant was convicted on a second trial for first degree murder, but was acquitted on appeal on the basis of DNA evidence. During the second trial, a **publication ban** was issued with respect to the identity of a former prison cellmate of the applicant, who testified that the applicant had confessed to the crime. Following the applicant's acquittal, a commission was established to inquire into the criminal proceedings against the applicant. The applicant applied to the commission to lift the **publication ban** on the identity of the informant. The commissioner ruled that he was bound by the continued **publication ban**, and that the ban applied to the proceedings before the commission.

The applicant applied to set aside the **publication ban**. He argued that it should be set aside because he had been acquitted, because the informant had testified falsely against him and thus no longer deserved protection, and because the trial judge had favoured the informant's interests over those of the accused. The applicant also argued that the public **inquiry**, occasioned by the wrongful conviction of an innocent man for which the informant bore responsibility, required a full and open accounting to restore public faith in the justice system.

Held:

The application was dismissed.

The party seeking to restrict full media access to criminal proceedings bears a heavy onus. Any departures from full disclosure must be restricted to the most meritorious and extraordinarily compelling circumstances. The evidence of the informant on the motion for the **publication ban** was that he and his wife had been continually harassed by co-workers and neighbours after he initially testified against the applicant, and after his testimony was published. The trial judge considered that evidence as it related to the interests of justice, the risk of prejudice to the accused, the public interest in having access to information, and the interest of the informant. The judge concluded that there was an important societal interest in encouraging the flow of information from prison inmates about crimes. The judge also considered that the informant would be cross-examined on his psychiatric records, which related to sexual dysfunction and the causes underlying his crimes, and that those records would become public. Had the informant not testified, those records would have been statutorily protected from public scrutiny. The judge found that the informant had made a reasonably strong case that his safety was at risk from the publication of his identity. The trial judge was alive to the relevant factors affecting restriction of full public disclosure, and made no error in exercising his discretion to impose the ban.

As a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances present at the time the order was made materially change. To be material, the change must relate to a matter that justified the making of the order in the first place, or it must be a new circumstance that is so exceptional that it warrants a second look. That approach is consistent with the view that such an order is tantamount to a promise to the recipient. Since the second trial, there had been widespread publication of the informant's personal and psychiatric records. The invasion of the informant's privacy rights would be significantly compounded by the release of his name. Had the ban not been in place, the informant might have sought an order to keep those records confidential. The acquittal of the applicant was a neutral factor. The revocation of a ban based on the results of the trial would fail to provide the certainty of anonymity necessary for witnesses to come forward. Likewise, the protection afforded by a **publication ban** was not dependent upon the truthfulness of the witness. The trial judge recognized the interests of the accused and of the media, and recognized that those interests could be curtailed only in exceptional circumstances. The establishment of the public **inquiry** was a significant new circumstance that arose after the **publication ban**. The ban would not, however, interfere with the ability of the commission to fulfil its mandate. The commission's focus in relation to the

1997 CarswellOnt 400, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re) 143 D.L.R. (4th) 54, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re)) 113 C.C.C. (3d) 31, 6 C.R. (5th) 137, 97 O.A.C. 59, (sub nom. Morin v. R.) 32 O.R. (3d) 265

informant was with respect to policy recommendations in regard to prison informants in general. The focus was not the identity of the informant, or any liability on his part. The application was dismissed.

Cases considered:

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 94 C.C.C. (3d) 289, 25 C.R.R. (2d) 1, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 76 O.A.C. 81 — *considered*

R. v. Adams, 44 C.R. (4th) 195, 103 C.C.C. (3d) 262, 190 N.R. 161, 131 D.L.R. (4th) 1, [1995] 4 S.C.R. 707, 178 A.R. 161, 110 W.A.C. 161 — *applied*

R. v. McArthur (1984), 13 C.C.C. (3d) 152, 10 C.R.R. 220 (Ont. H.C.) — *considered*

R. v. O'Connor, [1995] 4 S.C.R. 411, [1996] 2 W.W.R. 153, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1 — *referred to*

Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46

s. 486 [am. R.S.C. 1985, c. 27 (1st Supp.), s. 203; am. R.S.C. 1985, c. 19 (3rd Supp.), s. 14; am. R.S.C. 1985, c. 23 (4th Supp.), s. 1; am. S.C. 1992, c. 21, s. 9; am. S.C. 1993, c. 45, s. 7]*referred to*

APPLICATION for revocation of **publication ban**.

***Per curiam*:**

1 This is an application to set aside a ban on the publication of the identity of a person we shall refer to as "Mr. X". The ban was imposed by the Honourable Mr. Justice Donnelly on September 27, 1991 in the course of the applicant's second trial on a charge of first degree murder. The applicant was convicted of the charge and thereupon appealed his conviction to this court. By order of Dubin C.J.O. dated January 10, 1994, the ban was continued. The appeal came on for hearing on January 23, 1995, when fresh evidence of DNA testing was admitted. This evidence exonerated the applicant of the crime. His appeal, accordingly, was allowed, his conviction was quashed and an acquittal was entered.

2 On June 26, 1996 the Lieutenant Governor, by Order in Council, established the "Commission on Proceedings Involving Guy Paul **Morin**" and appointed the Honourable Fred Kaufman, Q.C., to act as Commissioner. The Commission was mandated, among other things, to:

> inquire into the conduct of the investigation into the death of Christine Jessop, the conduct of the Centre for Forensic Sciences in relation to the maintenance, security and preservation of forensic evidence, and into the criminal proceedings involving the charge that Guy Paul **Morin** murdered Christine Jessop. The Commission shall report its findings and make such recommendations as it considers advisable relating to the administration of criminal justice in the province.

3 On November 29, 1996 the Commissioner dealt with a request made by the applicant and others to consider whether "the limited **publication ban** imposed by Mr. Justice Donnelly concerning Mr. X should be maintained." He ruled that he was bound by the continued **publication ban** on the use of Mr. X's name and that the ban applied to the proceedings before the Commission. In stating the reasons for the ruling, the Commissioner expressed the opinion:

1997 CarswellOnt 400, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re) 143 D.L.R. (4th) 54, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re)) 113 C.C.C. (3d) 31, 6 C.R. (5th) 137, 97 O.A.C. 59, (sub nom. Morin v. R.) 32 O.R. (3d) 265

> ... the ban has outlived its usefulness, and I would, if I could, lift it. Further, if one of the parties were inclined to bring an application to a court of competent authority to set aside the ban on publication ... I would instruct my counsel to appear on such an application and, if granted, reflect my views, as expressed above, as to the merits of the application.

4 It was in this context that the application to set aside the orders banning publication of Mr. X's name, now before us, was brought. The application is supported by the Commissioner. The Toronto Star and The Globe & Mail, each of whom has been granted intervener status. It is opposed by the respondent, the Attorney General of Ontario, and by Mr. X, who also has been granted intervener status.

5 The post-acquittal continuance of the **publication ban** was first raised at the hearing of the applicant's appeal and involves the review of an order made by a judge of this court continuing the order of a judge of the General Division. No objection is taken to the court's jurisdiction. The parties and interveners are agreed that the matter can most appropriately be dealt with by this court.

The Order of Donnelly J.

6 In the pre-trial motion phase of the second **Morin** trial, the Crown applied on behalf of Mr. X for an order banning publication of his name or information which would otherwise identify him. Mr. X, who can be described as a "gaolhouse informant," had testified at the first **Morin** trial where his evidence (which was then not subject to a **publication ban**) was to the effect that, while he was an inmate a the Whitby gaol, he overheard the applicant confess to the murder of Christine Jessop. Affidavit and *viva voce* evidence with respect to physical threats, harassment and other problems Mr. X had experienced following the publicity about his testimony was adduced on the motion. Mr. X was vigorously cross-examined on the contents of his affidavit.

7 The trial judge gave extensive and very carefully considered reasons for his decision to impose a ban on the publication of Mr. X's identity in the media. In the course of these reasons, he succinctly stated the evidence provided by Mr. X in his affidavit and testimony and reviewed the law relating to **publication bans**. Since it is essential to our considerations to appreciate the circumstances present at the time the order was made and that justified the making of the order, we think it important to refer at some length to the trial judge's reasons.

8 The trial judge summarized the evidence provided by Mr. X, in part, as follows:

> ... [X] returned to work a day after testifying at Mr. **Morin's** trial in January of 1986. On that day his assistant foreman threatened to kill [X] if [X] attempted to speak to him. This incident was reported to the construction superintendent. [X] was sent home for a week to allow things to "cool off". Upon returning to work, he was subjected to constant harassment by fellow Hydro employees, some of whom he had known while in jail, ending only with termination of his Hydro employment in May of 1988. Although [X] changed working crews at Hydro's direction, the harassment continued. Several of these incidents, and his concerns, were reported informally to Inspector Shepherd and Staff Sergeant Fitzpatrick, to the Crown Attorney's office at Whitby, and to Ontario Hydro security. He described the pressure on him at Hydro as relentless and detailed a number of incidents, as follows:
>
> 1) A fellow workman, on a higher elevation, deliberately dumped the contents of a bucket of bolts over him.
>
> 2) Paper toweling was set on fire beside him, while he was seated at a safety meeting.
>
> 3) Cigarette butts were thrown into the hood of his parka.
>
> 4) Vandalism to, and theft from, his lunch pail.

1997 CarswellOnt 400, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re) 143 D.L.R. (4th) 54, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re)) 113 C.C.C. (3d) 31, 6 C.R. (5th) 137, 97 O.A.C. 59, (sub nom. Morin v. R.) 32 O.R. (3d) 265

5) Anonymous derogatory comments about him, emerging from groups of workmen.

6) The daily posting of signs referring to him as a "rat" and "diddler" and referring to breaking his legs, jaw and arms.

7) A washroom drawing in which he (identified by his employee number) was being hanged.

Following publication of [X's] testimony at trial, his neighbours' attitude changed from friendly to hostile. As examples, he testified that they:

(a) wrote the Workers' Compensation Board, while he was on compensation with a back injury, complaining that he was carrying on a business and was able to work.

b) wrote his wife a letter about her pregnancy and her husband being in jail.

c) complained to the police alleging that he disturbed the peace by loud stereo music.

In January of 1988, [X], because of this continuing pressure, reported to the emergency division of Oshawa Hospital. He declined hospital admission because of his wife's difficulties with a pregnancy and was referred to Dr. Khan. According to [X], Dr. Khan, who did not testify, diagnosed his condition as a nervous breakdown.

Although he presently has no real expectations of further incarceration, he expressed concerns about prison informants being at risk of bodily harm following discharge from prison. Because of a back injury, [X] is unable to perform manual work and must retrain for other employment. To this end, he is enrolled in school commencing in September 1991. He is apprehensive about a recurrence of the harassment problems and testified that, if there was a **publication ban**, he would have less pressure in giving evidence at the retrial.

9 With respect to the law relating to **publication bans**, the trial judge stated that "[i]t has long been recognized, as a fundamental principle, that the criminal process must not be secretive and that publicity is one of ... 'the surest guarantees of our liberties' ... and 'the very foundations of public and private security': *Scott v. Scott*, [1911-13] All E.R. 1 at p. 29 (H. of L.)." He went on to expressly recognize that criminal courts enjoy a "discretionary jurisdiction" to depart from the general rule where the departure is justified by special circumstances. A ban on publication would be justified, he said, where the court "reasonably believes that it is necessary in order to serve the ends of justice." The trial judge also noted, referring to authority, that such orders have been held to be appropriate in a variety of circumstances, for example, in the case of blackmail victims who may not come forward without such protection, in cases involving national security or official secrets, and in police informant cases.

10 Donnelly J. quoted with approval from *R. v. McArthur* (1984), 13 C.C.C. (3d) 152 (Ont. H.C.) (per Dupont J.), as follows:

A basic foundation rule in our administration of justice requires that our courts conduct trial proceedings in public. The principle finds its origin in the common law but is confirmed in s. 442(1) of the *Code* that I have just referred to. It has repeatedly been recognized that the ability of the public to keep abreast, remain acquainted with and to scrutinize judicial proceedings provides, undoubtedly, one of the main safeguards of the integrity of our system. It is the surest security to fair and just administration of justice. This 'open door policy' as it has been referred to, must admit a few exceptions if public respect and confidence is to be maintained. The very strength of our system is based primarily on the law *per se* but also the power of the law brought about by the trusted confidence of the general public of such system. Any deviation from full disclosure of such proceedings must be

1997 CarswellOnt 400, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re) 143 D.L.R. (4th) 54, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re)) 113 C.C.C. (3d) 31, 6 C.R. (5th) 137, 97 O.A.C. 59, (sub nom. Morin v. R.) 32 O.R. (3d) 265

restricted to the most meritorious and or extraordinary compelling circumstances.

The court is not here dealing with an application for the exclusion of the press and or the public from the court-room. This trial is to proceed in a usual public manner with one exception being that requested in the application, and which is restricted to the issue of whether the identify of certain of the witnesses to be called should be kept from the public knowledge for the reasons outlined earlier. This case must be distinguished from those where the court is asked to restrain publication of names where not to do so would create embarrassment, humiliation or even financial loss. Under most of such circumstances, the rights of complete public disclosure is paramount.

The administration of justice as a whole will benefit substantially if these witnesses are permitted to testify under conditions that will remove fear from external threats.

Failure to provide such protection is to close one's eyes to direct or indirect interference with witnesses. This would encourage threats and prevent inmates from testifying, thus militate adversely to the administration of justice and the public interest. The public interest is better served by assuring within reason and justice that such evidence is available to the courts. If this can be achieved by the court without adversely affecting the evidence as it relates to the accused or the trial, the court ought not to hesitate to provide the necessary protection to such inmate witnesses.

11 On the basis of the evidence before him, the judge stated his conclusions in these terms:

Considerations bearing on whether this is a proper case to foreclose, to some extent, public scrutiny of an important criminal trial by exercise of judicial discretion are: the interests of justice, both in this case and as a continuing process: the interest of the accused and the risk of prejudice to his constitutional right to a fair and public trial: the interest of the public in having free access to information about the administration of justice, and also the interest of the witness.

There is an important societal interest in encouraging a flow of information from prison inmates about crimes. That same policy consideration applies even though the informant is no longer an inmate.

Notwithstanding that some portion of [X's] difficulty is undoubtedly attributable to the nature of his criminal record, his evidence did demonstrate, firstly, the conduct of former jail inmates toward him, after both [X] and those former inmates had been discharged from custody, and, secondly, the impact that publication of his testimony had on his life. A reasonably strong case was made out that his safety was at risk following the first trial. The attitude of his neighbours became hostile, although not violent, upon publication of his testimony and criminal record.

. . . . .

The real effect of the publication of [X's] identity following his testimony was to jeopardize his safety. His experience went far beyond embarrassment and humiliation. [X] is an important witness in a serious criminal trial. By the nature of his testimony, it will draw extensive media coverage. His actual experience supports his expressed concerns. [X] testified that he would give evidence on the retrial more comfortably if his identity was not to be published. Although the particular neighbours have moved and [X] no longer works at Ontario Hydro, there is a reasonable expectation of continuing risk if his testimony at the retrial is publicized under his name. There was no sufficient change of circumstances demonstrated to support a belief that a similar societal aversion will not recur. The issue does transcend [X's] self-interest and does affect the administration of justice, warranting departure from the established rule of full publication.

12 In addition, the trial judge made reference to the fact that Mr. X's psychiatric records had been delivered to the

1997 CarswellOnt 400, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re) 143 D.L.R. (4th) 54, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re)) 113 C.C.C. (3d) 31, 6 C.R. (5th) 137, 97 O.A.C. 59, (sub nom. Morin v. R.) 32 O.R. (3d) 265

defence pursuant to his order. In this regard, he said:

> A further consideration applying to both May [another gaolhouse informant] and [X] is the delivery of their psychiatric records to the defence pursuant to an order of this court. Currently that information is not available to the public. [X's] records do relate to sexual dysfunction and the causes underlying his crimes. A thorough credibility attack grounded in part on those psychiatric records can reasonably be anticipated. There is some significance that [X] is before the court through happenstance, as a witness and not as an accused, and as a witness for the second time on the same issue. But for coming forward with this testimony, those records would be protected from public scrutiny by the privacy interests created under the *Mental Health Act*.

Analysis

13 In our opinion, the trial judge was entitled to impose a discretionary **publication ban** on the facts as he found them, and made no error in so doing. He was alive to all of the factors to be taken into account before departing from the basic principle of full public disclosure. He recognized that a party seeking to restrict full media access bears a heavy onus: that there must be few exceptions to "the open door policy": and that "[a]ny deviation from full disclosure ... must be restricted to the most meritorious and or extraordinary compelling circumstance". No appeal was taken from this order and its validity was recognized in the 1994 order of this court continuing the ban which was consented to by the parties. The question to be determined is whether the order should now be revoked.

14 The law relevant to the revocation of an order of this nature is clearly set out by the Supreme Court of Canada in *R. v. Adams* (1995), 103 C.C.C. (3d) 262. At p. 274 Sopinka J., speaking for the Court, said:

> *As a general rule*, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed. *In order to be material the change must relate to a matter that justified the making of the order in the first place.* [Emphasis added.]

15 At p. 275. Sopinka J. went on to say:

> Where an order is required to be made by statute, the circumstances that are relevant are those whose presence makes the order mandatory. As long as these circumstances are present, there cannot be a material change of circumstances.

16 Where the order in question is a discretionary one, the circumstances that are relevant are, in like manner, those circumstances that justified the making of the order in the first place. Where those circumstances do not change, there cannot be, as a general rule, the required material change of circumstance to warrant revocation.

17 This approach is consistent with the view that such a court order is tantamount to a promise or an undertaking to the recipient. Absent exceptional circumstances, the integrity of the judicial process requires that a commitment of this nature be revoked only where the factors motivating the order change in a material way.

18 As we have indicated, Donnelly J. considered a number of matters in making his order: the interests of justice, both in the case before him and as a continuing process: the interest of the accused and the risk of prejudice to his constitutional right to a fair and public trial; the interest of the public in having free access to information about the administration of justice: the interest of the witness, in particular the significant risk to his safety: and the societal interest in encouraging a flow of information from prison inmates about crimes.

19 Moreover, as we noted earlier. Donnelly J. also considered the fact that the witness' psychiatric records had been delivered to the defence pursuant to a court order. We agree with counsel for the Attorney General and Mr. X that this has led to a material change which argues in favour of continuing the existing order. Since the second trial, there

1997 CarswellOnt 400, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re) 143 D.L.R. (4th) 54, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re)) 113 C.C.C. (3d) 31, 6 C.R. (5th) 137, 97 O.A.C. 59, (sub nom. Morin v. R.) 32 O.R. (3d) 265

has been widespread publication of the witness' personal and psychiatric records. This invasion of the witness' privacy rights (the importance of which was recognized by the Supreme Court of Canada in *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.), would be significantly compounded by the release of his name. Moreover, had the ban not been in place the witness might well have sought assistance from the court to keep confidential his personal records. That confidentiality cannot now be recaptured.

20 The Applicant, the Commissioner, and the interveners who support the application have advanced a number of reasons which they contend provide the basis for revoking the ban effected by the order of Donnelly J.

21 Firstly, it was argued that the trial having taken place and an acquittal having been entered on appeal, the order should be revoked. In our view, this is a neutral factor in this application. Were it otherwise, non-publication orders of this nature would, in every case, potentially have little more than temporary effect in ensuring a witness' anonymity despite the continuation of the circumstances warranting the order in the first place. In *Adams*, the Supreme Court of Canada made clear that, in the case of mandatory **publication bans** under s. 486 of the *Criminal Code*, the making or reconsideration of such orders is not to be influenced by the results of the trial because (p. 273):

> A revocable **publication ban**, like a discretionary ban, would fail to provide the certainty that is necessary to encourage victims to come forward. If the trial judge were given the power by the legislation to revoke the ban, the complainant would never be certain that her anonymity would be protected. The ban would serve as little more than a temporary guarantee of anonymity.

22 In our opinion, this reasoning applies with equal force to discretionary bans of the type in issue.

23 Secondly, we were urged to draw the inference that the witness protected by the order testified falsely at Mr. **Morin's** second trial and, hence, is no longer deserving of protection. On the record before us we are unable to embark on such an analysis or make the findings of credibility necessary to support the inference on which the submission is based. Indeed, it would be improper to do so. In any event, the protection afforded by a non-publication order is no more dependent upon the truthfulness of the witness than it is on the results of the trial.

24 Thirdly, it was urged upon us that the law as it existed at the time the order was made has been altered by the decision in *Dagenais v. Canadian Broadcasting Corp.* (1994), 94 C.C.C. (3d) 289 (S.C.C.). Without drawing the distinctions that can be made between the circumstances of that case and this, we are of the opinion that the approach adopted by the trial judge is in accord with the principles enunciated in *Dagenais*. He cannot be said to have dealt with the application on the basis that the interests of the witness Mr. X enjoyed greater protection than the right of the accused. Mr. **Morin**, to a fair and open trial or the right of the media to fully report on the proceedings. As is apparent from the trial judge's reasons, he recognized that the interests of the accused and the media were so highly valued that they could be curtailed only in exceptional circumstances and then only to the extent reasonably necessary to protect the witness' legitimate interests.

25 Finally, the applicant takes the position, as does the Commissioner, that the calling of the public **inquiry** is of such singular importance that it renders the case exceptional and manifestly warrants the revocation of the **publication ban**. They point out that the public **inquiry** has been convened in the wake of public shock and disillusionment occasioned by the wrongful prosecution and conviction of an innocent man for first degree murder; and that, rightly or wrongly, it is alleged that Mr. X bears no small responsibility for this injustice in that he falsely claimed the applicant confessed to a crime that he did not commit, in circumstances which raise the spectre of misconduct on the part of the authorities. In order to restore public faith and confidence in the administration of justice. it is argued, there must be a full and open accounting of these and other factors which may have contributed to this grave miscarriage of justice.

26 The applicant and the Conmissioner further submit that the perpetuation of Mr. X's anonymity in this context would not enhance the public's respect for the administration of justice or reinforce public faith and confidence in the

1997 CarswellOnt 400, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re) 143 D.L.R. (4th) 54, (sub nom. Ontario (Commission on Proceedings involving Guy Paul Morin), Re)) 113 C.C.C. (3d) 31, 6 C.R. (5th) 137, 97 O.A.C. 59, (sub nom. Morin v. R.) 32 O.R. (3d) 265

courts and the **inquiry** itself. To the contrary, they contend that any further shielding of Mr. X from public scrutiny would disentitle the public to its right to know his identity and to form its own opinion about his conduct and its relationship to the applicant's wrongful conviction.

27 The fact that an **inquiry** has been established in this matter is obviously a significant new circumstance arising subsequent to the order of Donnelly J. The respondent Crown and intervener Mr. X recognize this. However, contrary to the position of the applicant and the interveners who support the application, they argue that this fact does not constitute a material change in the circumstances which justified Donnelly J.'s order in the first place. Hence, they contend, it fails to meet the test enunciated in *Adams*.

28 We agree that the calling of the **inquiry** cannot amount to a material change in the circumstances which justified the making of the original order. Plainly, the trial judge could not have anticipated that the case before him would lead to the establishment of a commission of **inquiry**. Nonetheless, we do not consider this to be dispositive of the issue. To give effect to this submission would necessitate an unduly restrictive interpretation of the *Adams* test.

29 In framing the test. Sopinka J. indicated that it was intended "as a general rule." At p. 274, he stated:

> The ease with which such an order may be varied or set aside will depend on the importance of the order and the nature of the rule of law pursuant to which the order is made. For instance, if the order is a discretionary order pursuant to a common law rule, the precondition to its variation or revocation will be less formal. On the other hand, an order made under the authority of statute will attract more stringent conditions before it can be varied or revoked. This will apply with greater force when the initial making of the order is mandatory.

30 This statement leaves open the possibility that new circumstances may arise subsequent to the making of a discretionary order which, although not related to a matter justifying the order in the first place, are so exceptional as to warrant a second look.

31 We are of the opinion that the public **inquiry** is an exceptional circumstance. As such, it warrants consideration in the review of Donnelly J.'s order. The question then is what effect should be given to this circumstance in our determination of the issue at hand. This, in turn, requires us to consider the impact, if any, the continuation of the order will have on the ability of the Commissioner to properly carry out and fulfil his important mandate.

32 As noted earlier, the Commissioner takes the position, for the reasons already stated, that the ban should be removed. At the same time, he fairly acknowledges that the continuance of the ban will not interfere with the ability of the Commission to carry on its work and fulfil its mandate.

33 The Attorney General, who, it is to be noted, acted to constitute the Commission, takes a contrary position. It is his view as chief law enforcement officer charged with ensuring the due and proper administration of justice in the province that the Commission can satisfactorily discharge its mandate while, at the same time, leaving the **publication ban** intact. The Attorney General's position is succinctly stated in his factum, as follows:

> The Attorney General has acted to constitute The Commission on Proceedings Involving Guy Paul **Morin**. The Commission will begin holding hearings and it appears that [X] may become a witness at that proceeding. The press will be free to report [X's] evidence and virtually every circumstance related to it. The only limit on their function is the publication of information tending to identify [X]. pursuant to the existing narrow **publication ban**. This order does not, it is respectfully submitted, impair the functioning of the Commission, nor does it in any significant way, lessen the public scrutiny quite properly focused on the administration of criminal justice by the Commission.

34 After weighing and balancing the interests and concerns of all the parties, we are of the view that the Com-

mission'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 prohibit 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. This, together with the importance of maintaining the integrity of the judicial process, persuades us that the calling of a public **inquiry** in this case does not represent a sufficient reason to revoke the order in question.

Conclusion

35 For these reasons, we would not interfere with the order of Donnelly J. The application must therefore be dismissed.

Application dismissed.

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