Case Name:

R. v. Mentuck

Her Majesty The Queen, appellant;
v.
Clayton George Mentuck, respondent, and
The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of British Columbia, the Winnipeg Free Press, the Brandon Sun, and the Canadian Newspaper Association, interveners.

[2001] S.C.J. No. 73

[2001] A.C.S. no 73

2001 SCC 76

2001 CSC 76

[2001] 3 S.C.R. 442

[2001] 3 R.C.S. 442

205 D.L.R. (4th) 512

277 N.R. 160

[2002] 2 W.W.R. 409

J.E. 2001-2142

163 Man.R. (2d) 1

158 C.C.C. (3d) 449

47 C.R. (5th) 63

51 W.C.B. (2d) 349

File No.: 27738

Supreme Court of Canada

2001: June 18 / 2001: November 15.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE MANITOBA COURT OF QUEEN'S BENCH (61 paras.)

Courts -- Supreme Court of Canada -- Jurisdiction -- Publication bans -- Criminal proceedings -- Trial judge granting one-year ban as to identity of undercover police officers and refusing ban as to operational methods used in investigating accused -- Whether Supreme Court of Canada has jurisdiction to hear Crown appeal from trial judge's order -- Supreme Court Act, R.S.C. 1985, c. S-26, s. 40(1), (3).

Criminal law -- Publication bans -- Appropriate scope of publication ban -- Undercover police investigation -- Crown seeking publication ban protecting identity of police officers and operational methods used in investigating accused -- Trial judge granting one-year ban as to identity of officers and refusing ban as to operational methods -- Whether trial judge erred in ordering ban.

The accused was charged with second degree murder. At his first trial, a stay of proceedings was entered after crucial evidence was ruled inadmissible. The accused was then targeted by the RCMP in an undercover operation. The undercover operation followed a pattern commonly employed by Canadian police. As a result of evidence gathered during this operation, the indictment was reinstated. In the course of opening statements at the second trial, the Crown referred to much of the information now sought to be suppressed. Newspapers reported most of the information. During the trial the Crown moved for a publication ban to protect the identity of the officers and the operational methods employed by those officers in the investigation. The accused and two intervening newspapers opposed the motion. The trial judge granted a one-year ban as to the identity of undercover police officers, but refused a ban as to operational methods used in investigating the accused. Pending the resolution of this appeal, that order was stayed and orders granting the requested publication ban in full and sealing the affidavits filed with the trial judge were granted. Meanwhile, a mistrial was declared in the second trial due to a hung jury. At the accused's third trial, he was acquitted.

Held: The appeal should be dismissed. The order granting a one-year ban as to the identity of the undercover police officers is restored, but the one-year period commences at the date of this judgment.

As Parliament has not seen fit to amend the Criminal Code to provide for clear avenues of appeal in publication ban cases, the reasoning in Dagenais and Adams governs the appeal process. This Court has jurisdiction under s. 40(1) of the Supreme Court Act to hear a direct appeal from the trial judge's order for a publication ban. This order is ancillary to any issues relating to the guilt or innocence of the accused, and thus the appeal is not barred by s. 40(3) of the Act. No other route of appeal is open to the parties in the case, and the appeal is not explicitly barred by statute.

The ban ordered by the trial judge was properly issued and was of the appropriate scope in light of the requirements of the Charter. A publication ban should only be ordered when such an order is necessary to prevent a serious risk to the proper administration of justice, because reasonable alternative measures will not prevent the risk, and when 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. The party bringing the application has the burden of displacing the presumption of openness. That party must also establish a sufficient evidentiary basis to allow the judge to make an informed application of the test, and to allow for review.

The first branch of the analysis requires consideration of the necessity of the ban in relation to its object of protecting the proper administration of justice. The concept of "necessity" has several elements: (1) the risk in question must be well-grounded in the evidence and must pose a serious threat to the proper administration of justice; (2) "the proper administration of justice" should not be interpreted so widely as to keep secret a vast amount of enforcement information the disclosure of which would be compatible with the public interest; and(3) in order to reflect the minimal impairment branch of the Oakes test, the judge must consider whether reasonable alternatives are available, but he must also restrict the order as far as possible without sacrificing the prevention of the risk. Under the second branch of the analysis, the effect of the ban on the efficacy of police operations, the right of the public to freedom of expression, and the right of the accused to a public trial must be weighed.

A publication ban as to operational methods is unnecessary. Although police operations will be compromised if suspects learn that they are targets, media publication will not seriously increase the rate of compromise. Republication of this information does not constitute a serious risk to the efficacy of police operations, and thus to that aspect of the proper administration of justice. This ground by itself is sufficient to dispose of the ban as to operational methods. However, in this case, publication of the names and identities of the officers in question would create a serious risk to the efficacy of current, similar operations. The ban as to identity is necessary and there is no reasonable alternative. The ban was properly restricted to a period of one year but, as the circumstances of the case may change, that order will be made subject to further order of the issuing court.

Even if a serious risk had been demonstrated, the deleterious effects of the ban as to operational methods on the right of the press to freedom of expression and the accused's right to a public trial would substantially outweigh the benefits to the administration of justice. The benefits this ban promises are, at best, speculative and marginal improvements in the efficacy of undercover operations and the safety of officers in the field, but the deleterious effects are substantial. Such a ban would seriously curtail the freedom of the press in respect of an issue that may merit widespread public debate. It would also have a deleterious effect on the right of the accused to a fair and public trial, which includes the right to have the media access the courtroom and report on the proceedings. Allowing public scrutiny of the trial process is to the advantage of the accused because it ensures that the trial is conducted fairly, and because it can vindicate an accused person who is acquitted, particularly when the acquittal is surprising and perhaps shocking to the public. However, the salutary effects of the ban as to identity are significant. It will reduce the potential harm to the officers currently in the field and assist in ensuring the efficacy of ongoing operations. Moreover, its deleterious effects are not as substantial. Although, in general, the names of police officers who testify against accused persons need not, and should not, be the subject of publication bans, the detrimental aspects of a time-limited ban in these circumstances is outweighed by the salutary effects of the ban.

Cases Cited

Explained: Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, rev'g (1992), 12 O.R. (3d) 239; R. v. Adams, [1995] 4 S.C.R. 707; referred to: R. v. O.N.E., [2001] 3 S.C.R. 478, 2001 SCC 77; Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480; R. v. Hinse, [1995] 4 S.C.R. 597; Michaud v. Quebec (Attorney General), [1996] 3 S.C.R. 3; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; Switzman v. Elbling, [1957] S.C.R. 285; R. v. Keegstra, [1990] 3 S.C.R. 697; Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624; Edmonton Journal v. Alberta (Attorney-General), [1989] 2 S.C.R. 1326.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 11(d).
Criminal Code, R.S.C. 1985, c. C-46, s. 676(1) [am. c. 27 (1st Supp.) , s. 139(1)].

Supreme Court Act, R.S.C. 1985, c. S-26, s. 40(1) [rep. & sub. 1990, c. 8, s. 37], (3).

APPEAL from a judgment of the Manitoba Court of Queen's Bench (2000), 143 Man. R. (2d) 275, 73 C.R.R. (2d) 52, [2000] M.J. No. 69 (QL). Appeal dismissed.

Heather Leonoff, Q.C., and Darrin R. Davis, for the appellant.
Timothy J. Killeen and Wendy A. Stewart, for the respondent.
Cheryl J. Tobias and Malcolm G. Palmer, for the intervener the Attorney General of Canada.
Written submissions only by Christopher Webb, for the intervener the Attorney General for Ontario.
John M. Gordon, for the intervener the Attorney General of British Columbia.
Jonathan B. Kroft and Brent C. Ross, for the interveners the Winnipeg Free Press and the Brandon Sun.
Paul B. Schabas and Tony S. K. Wong, for the intervener the Canadian Newspaper Association.

Solicitor for the appellant: The Attorney General of Manitoba, Winnipeg.
Solicitors for the respondent: Killeen Chapman Garreck, Winnipeg.
Solicitor for the intervener the Attorney General of Canada: The Attorney General of Canada, Vancouver.
Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto.
Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Vancouver.
Solicitors for the interveners the Winnipeg Free Press and the Brandon Sun: Aikins, MacAuley & Thorvaldson, Winnipeg.
Solicitors for the intervener the Canadian Newspaper Association: Blake, Cassels & Graydon, Toronto.

The judgment of the Court was delivered by

IACOBUCCI J.:--

I. Introduction

1 This appeal raises two questions. First, we must decide in what circumstances this Court has jurisdiction under s. 40(1) of the Supreme Court Act, R.S.C. 1985, c. S-26, to hear an appeal of an order for a publication ban directly from the court making the order. Second, we must decide whether an order prohibiting publication of the details of the police practices used in this case ought to have been issued. Along with the appeal in R. v. O.N.E., [2001] 3 S.C.R. 478, 2001 SCC 77, which was heard at the same time, this case raises important questions about publicity rights in trials. It requires us to balance the interests of the public in ensuring effective policing and society's fundamental interest in allowing the public to monitor the police, as well as the right of the accused to a "fair and public hearing".

2 I conclude that this Court does have jurisdiction to hear this appeal and other direct appeals from orders for publication bans, but only in a limited set of circumstances where no other route of appeal lies. I also find that the full publication ban in this case should not have been issued. A ban that conceals the nature of police practices was rightly not ordered by the trial judge. The improved efficacy of police undercover operations would not be substantial, and in any event, is outweighed by the deleterious effects on the rights protected by ss. 2(b) and 11(d) of the Canadian Charter of Rights and Freedoms. However, the more limited ban on the publication of the involved officers' names and identities for a one-year period, was properly ordered. Accordingly, the order of the Manitoba Court of Queen's Bench is affirmed and this appeal is dismissed.

II. Background

3 On July 13, 1996, 14-year-old Amanda Cook disappeared from the Rossburn Harvest Fair. Her body was discovered on July 17, 1996, in the bush near the fairground. The body was partially clothed and an examination disclosed that she had been killed by a series of blows to her head with a rock. On March 11, 1997, the respondent was charged with second degree murder for the death of Amanda Cook. At his first trial in March 1998, a stay of proceedings was entered after crucial evidence was ruled inadmissible.

4 Following the first trial, the respondent was targeted by the Royal Canadian Mounted Police in an undercover operation code-named Operation Decisive. The undercover operation followed a pattern commonly employed by Canadian police. The respondent was invited by undercover officers to join a fictitious criminal organization. He was then asked to undertake certain tasks, the claimed importance of which was increased over time. The tasks included counting large sums of money and delivering parcels. The respondent was then told to be honest about his involvement in the murder of Amanda Cook. When he denied involvement, he was told that the "Boss" of the organization was angry with the person who had recruited the respondent as the respondent was a liar. The respondent was again encouraged to discuss the murder honestly. He was told that the criminal organization would arrange for a person dying of cancer to confess to the crime, and thereafter would provide assistance to the respondent in suing the government for wrongful imprisonment.

5 As a result of evidence gathered during this undercover operation, the indictment was reinstated on January 28, 1999. The second trial commenced on January 24, 2000, before a judge and

jury. In the course of opening statements, Crown counsel referred to much of the information now sought to be suppressed, and the interveners the Winnipeg Free Press and the Brandon Sun reported most of it.

6 During the trial the Crown brought a motion before the trial judge to prohibit the publication of certain facts that were to be tendered in evidence. The motion sought a ban on the publication of:

> (a) the names and identities of the undercover police officers [involved] in the investigation of the accused, including any likeness of the officers, appearance of their attire and physical descriptions;
> (b) the conversations of the undercover operators in the investigation of the accused to the extent that they disclose the matters in paragraphs (a) and (c);
> (c) the specific undercover operation scenarios used in investigation... .

In these reasons, the ban set out in paragraph (a) will be referred to as "the ban as to identity"; the ban set out in paragraphs (b) and (c) will be referred to as "the ban as to operational methods".

7 The respondent opposed the application for a publication ban. The interveners, the Winnipeg Free Press and the Brandon Sun, were granted leave to intervene in the original motion. On February 2, 2000, the trial judge refused to order the ban as to operational methods. He did grant a ban as to identity limited to a period of one year. Pending the resolution of this appeal, I ordered a stay of the trial judge's decision on February 7, 2000, and made an order granting the requested publication ban in full, and an order sealing the affidavits filed with the trial judge. I also ordered that the application for leave to appeal be expedited, and leave was granted on May 25, 2000. On February 18, 2000, the trial judge ordered a mistrial as a result of a hung jury. On September 11, 2000, a third trial was commenced before a judge alone. On September 29, 2000 the respondent was acquitted of the murder of Amanda Cook.

III. Relevant Statutory and Constitutional Provisions

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

> 676. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
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> (a) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;
> (b) against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails to exercise jurisdiction on an indictment;
> (c) against an order of a trial court that stays proceedings on an indictment or quashes an indictment; or
> (d) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.

Supreme Court Act, R.S.C. 1985, c. S-26

> 40. (1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal Court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.
>
> ...
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> (3) No appeal to the Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

Canadian Charter of Rights and Freedoms

> 2. Everyone has the following fundamental freedoms:
>
> ...
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> 11. Any person charged with an offence has the right
>
> ...
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

IV. Judgment Below

Manitoba Court of Queen's Bench (2000), 143 Man. R. (2d) 275

9 Menzies J. refused the greater part of the Crown's application for a publication ban. He reviewed the decision in Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, and rejected the Crown's argument that the test for a publication ban set out in Dagenais was only applicable to motions by the accused to protect his or her right to a fair trial (p. 277). Instead, he concluded that the right to freedom of expression and to a fair trial must both be considered in applying Dagenais.

10 Menzies J. noted that the burden was on the Crown, as the party seeking the publication ban, to lay an evidentiary foundation for the necessity of such a ban, relying on Canadian Broadcasting

Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 72. The Crown adduced evidence that the officers involved in this operation continued to be involved in undercover operations, that the identity of officers in the field would be compromised if their undercover techniques were to become known to the public, and that the overall efficacy of these types of undercover operations would also be jeopardized (pp. 278-79). Menzies J. discounted these concerns, finding that the right of the accused to a fair trial and the right to freedom of the press are both protected by the Charter, while "[t]he right of the police to maintain investigative techniques in the name of the proper administration of justice does not bring a constitutional guarantee" (p. 279).

11 He therefore declined to issue the requested ban as to operational methods employed by the police, favouring instead the subjection of police techniques to the "penetrating light of public scrutiny" (p. 279). However, Menzies J. did issue the ban as to identity for a period of one year (p. 280).

V. Issues

12 1. Does this Court have jurisdiction under s. 40 of the Supreme Court Act to hear this appeal?

2. What is the appropriate scope of the publication ban in this case?

VI. Analysis

A. Jurisdiction

13 This Court has considered questions of its jurisdiction in respect of appeals of publication bans from the court of first instance in two recent decisions, namely Dagenais, supra, and R. v. Adams, [1995] 4 S.C.R. 707. In Adams, the trial judge granted a ban on publication of the name of the complainant in a sexual assault case. Upon acquitting the accused, he also ordered that the ban on publication be lifted. The Crown argued that the ban should not have been lifted. At a subsequent hearing, the trial judge upheld his own ruling revoking the ban. The Crown was not permitted to appeal the decision to the Court of Appeal because of the strictures of s. 676(1) of the Criminal Code, which allows Crown appeals only in limited circumstances. Since the order in issue had been made after the acquittal of the accused, and since no point of law alone was raised, the Crown appeal was barred by s. 676(1).

14 Sopinka J. found that this Court had jurisdiction under s. 40(1) of the Supreme Court Act to hear a direct appeal. Section 40(1) allows this Court to hear appeals by leave from "any ... judgment ... of the highest court of final resort in a province, or a judge thereof". Since the Crown was unable to appeal the order to any other court, the trial court became the "highest court of final resort" with respect to the question at issue. Sopinka J. then considered s. 40(3) of the Supreme Court Act, which removes from this Court's s. 40(1) jurisdiction appeals from the judgment of any court acquitting, convicting, setting aside or affirming a conviction, or setting aside or affirming an acquittal. He found that the order revoking the ban was not an order "integrally related" to any of the prohibited forms of appeal. Rather, it was "an order ... ancillary to the underlying judgment rendered by the court", and thus not barred by s. 40(3): R. v. Hinse, [1995] 4 S.C.R. 597, at para. 28 (emphasis in original). As such, the Court had jurisdiction to hear the appeal pursuant to s. 40(1).

15 Dagenais, supra, raised a similar issue. The appellant Canadian Broadcasting Corporation ("C.B.C.") was enjoined by order of the Ontario Court (General Division) from broadcasting a fic-

tional mini-series about physical and sexual abuse of children in a Catholic institution. The applicants in the case were members of a Catholic religious order, all of whom were charged with physical and sexual abuse of young boys in their care at a Catholic training school. The applicants sought and obtained the order on the basis that their right to a fair trial would be compromised by influencing the jurors both in ongoing cases and in cases in which the juries had not yet been selected. The order was appealed to the Ontario Court of Appeal where the ban on publishing the facts of the proceedings and the sealing of the record were lifted. The broadcast was restrained in Ontario and Montreal until completion of the four criminal trials: Canadian Broadcasting Corp. v. Dagenais (1992), 12 O.R. (3d) 239. The remaining order was appealed to this Court.

16 Lamer C.J., writing for a majority of the Court, found that there was jurisdiction under s. 40 of the Supreme Court Act to hear the appeal. After canvassing all of the options for appeal of publication bans by third parties, he found that such orders when made by provincial court judges should be reviewed by way of certiorari, and such orders when made by superior court judges should be appealed to the Supreme Court under s. 40 of the Act. Because the intention of the jurisdiction-limiting provisions of the Criminal Code was to establish a comprehensive system of appeals that would replace the former system of writs of error, and not to minimize or reduce this Court's jurisdiction, he found that the Supreme Court Act governed our jurisdiction over appeals not explicitly excluded by the Criminal Code. The Court of Appeal did not have jurisdiction to hear the appeal, so the C.B.C. should have appealed directly to the Supreme Court. Because the trial judge issuing the ban in that case was the "court of final resort" in the matter, the Court had jurisdiction under s. 40 to hear the appeal by leave.

17 It remains the case that Parliament has not seen fit to amend the Criminal Code to provide for clear avenues of appeal in publication bans, for the Crown, the accused, or interested third parties such as the media. Faced with this continuing "jurisdictional lacuna", as Lamer C.J. put it in Dagenais, the reasoning in Dagenais and in Adams governs the appeal process to be followed in publication ban cases. I would here reiterate Lamer C.J.'s observation that the current situation, which fails to provide satisfactory routes of appeal despite the fundamental rights at stake, is "deplorable", and again express the hope that Parliament will soon fill this unnecessary and troublesome gap in the law. In that respect, I should like to emphasize that our Court and our judicial system generally greatly benefit from the role of the courts of appeal, and to eliminate their input on these important questions is most regrettable.

18 The reasoning in Dagenais and Adams should be read together in order to define this Court's jurisdiction under s. 40(1) in cases such as the instant one where no statutory appeal lies. It remains true that the Crown and the accused have, in most cases, "established avenues to follow when seeking or challenging a ban". Dagenais, supra, at p. 857. But since Dagenais dealt only with the process to be followed by appellants who are third parties to the criminal process giving rise to such a ban, it should not be taken as foreclosing this Court's jurisdiction where s. 40 of the Act can be read to allow it. The direction that the Crown and accused follow the ordinary routes of appeal available in the Criminal Code is obviously restricted to cases where there is an available avenue of appeal.

19 In Adams, Sopinka J. applied the reasoning in Dagenais. Having found that a publication ban order had no statutory appeal process under the Criminal Code, he concluded that such an order by a superior court judge was an order by the "court of final resort". He also concluded that s. 40(3) of the Act precluded appeals to this Court of both those matters set out in the Criminal Code and those matters that are an integral part of any judgment convicting or acquitting the accused. The

section thereby prevents a multiplicity of appeals from the "vast array of interlocutory orders and rulings made at trial with respect to the conduct of the proceedings". Adams, supra, at para. 17. However, the section does not preclude appeals from orders that are ancillary, or not integrally related, to the process of conviction or acquittal of the accused. Adams, supra, at para. 18; Hinse, supra, at para. 28.

20 The Supreme Court Act was passed to allow this Court to serve as a "general court of appeal for Canada", and s. 40 must be read in light of the purpose of the Court's enabling legislation. Unless the Court is specifically prohibited from entertaining appeals by s. 40(3) of the Act, it may grant leave to hear any appeal from the decision of any "court of final resort" in Canada. Parliament has seen fit to provide generally for rational routes of appeal in criminal cases. In these cases, we cannot take jurisdiction, nor would we wish to. But a purposive approach to s. 40 requires the Court to take jurisdiction where no other appellate court can do so, unless an explicit provision bars all appeals. Section 40(1) ensures that even though specific legislative provisions on jurisdiction are lacking, this Court may fill the void until Parliament devises a satisfactory solution. Concomitantly, s. 40(3) ensures that this Court is not overrun by a large volume of appeals on interim and interlocutory orders made in the context of a criminal proceeding, where Parliament has decided it best that such appeals be conducted in an orderly fashion at the conclusion of the trial and in accordance with the procedures provided in the Criminal Code.

21 The situations in which this Court has jurisdiction under s. 40 of the Supreme Court Act over direct appeals from the court of first instance are, therefore, appeals where (a) an order deals with issues ancillary, or not integrally related, to the guilt or innocence of the accused; and (b) where there is no other available right of appeal or any explicit bar to appeal. In this case, the publication ban was not integrally related to the guilt or innocence of the accused. It was neither intended to preserve the fair trial rights of the accused, nor to secure evidence that might lose its value in the context of the trial if widely known. Rather, it was sought in order to maintain the secrecy of police operations in other investigations, where breach of such secrecy was alleged to endanger the efficacy of these investigations. In addition, there was no other possible route of appeal in this case. The publication ban was issued by a superior court judge, not a provincial court judge. An order by a provincial court judge could be reviewed by way of the exceptional remedy of certiorari: Dagenais, supra, at p. 865. The harm caused by the issue or refusal of the ban could not be cured by the outcome of the trial, making this interlocutory order "final". No appeal was available under s. 676(1) of the Criminal Code, and neither the Code nor s. 40(3) of the Supreme Court Act bars the appeal. I therefore conclude that this Court has jurisdiction to hear the appeal under s. 40 of the Supreme Court Act.

B. The Publication Ban

(1) The Relevant Legal Principles

22 In considering whether this publication ban ought to have been issued, the starting point is once again this Court's decision in Dagenais, supra. In Dagenais, as I discussed above, an order was sought by four accused persons prohibiting the broadcast of a fictional television mini-series depicting factual circumstances extremely similar to the facts in issue at each of their trials, namely, physical and sexual abuse of young boys at religious training institutions. There, as here, the ban was sought on the basis of the court's common law jurisdiction to order publication bans. However,

the specific rationale for the publication ban in that case was, unlike in the instant case, the need to guard the fair trial interests of accused persons.

23 Lamer C.J. found that the "pre-Charter common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban". (Dagenais, supra, at p. 877). Given the courts' obligation to develop the common law in a manner consistent with Charter values, however, he found that it was inappropriate to continue assigning this priority to the right of the accused to a fair trial, when s. 2(b) of the Charter recognized an equally important right to freedom of expression. Instead, he adopted a new approach to assessing whether a common law publication ban should be ordered. This new approach aimed to balance both the right to a fair trial and the right to freedom of expression rather than enshrining one at the expense of the other. The approach adopted was intended to reflect the substance of the Oakes test and its valuable function in determining what reasonable limits on the rights to be balanced might be. Accordingly, in Dagenais, supra, Lamer C.J. found at p. 878, that:

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

24 This Court considered a similar issue -- the power to exclude media and the public from a trial -- in New Brunswick, supra. In that case, the Crown moved to exclude the public and the media from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused (who had pled guilty). The trial judge, acting pursuant to s. 486(1) of the Criminal Code, granted the order. At the request of the C.B.C., the trial judge gave reasons, which set out that he had granted the order in the interests of "the proper administration of justice", and specifically on the basis that the order would avoid "undue hardship on the persons involved, both the victims and the accused" (para. 79). The C.B.C. then brought a Charter challenge to s. 486(1). The Court of Queen's Bench concluded that s. 486(1) offended the right of freedom of expression in s. 2(b) of the Charter but was justifiable under s. 1. The Court of Appeal affirmed this judgment.

25 La Forest J., writing for a unanimous Court in New Brunswick, supra, found that the exclusion of the public and media from the courtroom under s. 486(1) was a violation of the freedom of the press under s. 2(b). Section 486(1) restricted expressive activity on its face by providing a "discretionary bar on public and media access to the courts": New Brunswick, supra, at para. 33. However, La Forest J. also found that the violation was a reasonable limit demonstrably justified under s. 1 of the Charter, provided that the discretion was exercised in accordance with the Charter's demands in each individual case. He then found, building on the Court's decision in Dagenais, that the trial judge must conduct a similar exercise in applying s. 486(1) as in applying the common law rule. That is, a judge, in exercising the discretion provided by s. 486(1), must:

> (a) ... consider the available options and consider whether there are any other reasonable and effective alternatives available;
> (b) ... consider whether the order is limited as much as possible; and

> (c) ... weigh the importance of the ... particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.
>
> (New Brunswick, supra, at para. 69)

26 La Forest J. also noted that the burden of displacing the presumption of openness rested on the party applying for the exclusion of the media and public. Furthermore, he found that there must be a sufficient evidentiary basis on the record from which a trial judge could properly assess the application (which may be presented in a voir dire), and which would allow a higher court to review the exercise of discretion: New Brunswick, at para. 69. In considering the various factors, La Forest J. found that the order granted to protect the complainants was improperly granted. The evidence of potential undue hardship to the complainants, which primarily rested on the Crown's submission that the evidence to be brought was of a "'delicate' nature", did not displace the presumption in favour of an open court.

27 Both Dagenais and New Brunswick set out a similar approach to be used in deciding whether to order publication bans, in view of the rights to freedom of expression and freedom of the press protected by s. 2(b) of the Charter. This approach, in ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the Charter than legislative enactment, incorporates the essence of s. 1 of the Charter and the Oakes test. In my view, the same principles are to be applied in cases such as the instant case.

28 Dagenais involved the proper application of a common law rule allowing publication bans. The ban in this case was also sought pursuant to the common law jurisdiction of the Queen's Bench as a Superior Court. However, the facts of this case invoke a different purpose and different interests from those raised by the facts of Dagenais. While the Court in Dagenais was required to reconcile the accused's interest in a fair trial with society's interest in freedom of expression, the accused's right to a fair trial in this case is not, and was never, in issue. Indeed, the accused wishes to have the information disclosed, and views the publication of certain of the details of his arrest and trial as essential to the fulfilment of his fair trial interest. Instead, it is the Crown that seeks a publication ban in order to protect the safety of police officers and preserve the efficacy of undercover police operations. Thus, a literal application of the test as set out in Dagenais will not properly account for the interests to be balanced.

29 The form of the test set out in Dagenais must, therefore, be reconfigured to account for the different purpose for which the order is sought and the different effects it will have. Lamer C.J. recognized in Dagenais that publication bans have a variety of purposes and effects. Significantly, he noted, at p. 882, that:

> ... it is not the case that freedom of expression and the accused's right to a fair trial are always in conflict. Sometimes publicity serves important interests in the fair trial process. For example, in the context of publication bans connected to criminal proceedings, these interests include the accused's interest in public scrutiny of the court process, and all the participants in the court process.

30 This appeal implicates precisely that interest. The accused has a Charter right to a "fair and public hearing", guaranteed by s. 11(d), which he has invoked in opposition to the publication ban.

The right to freedom of expression, argued by the interveners the Winnipeg Free Press and the Brandon Sun, also falls to the side opposing the publication ban. Were we to simply weigh, as in Dagenais, the accused's right to a fair trial and the public interest in freedom of expression, this would be an open and shut inquiry, since both of the competing interests recognized in the factual context of Dagenais are aligned in opposition to granting the ban.

31 However, the common law rule under which the trial judge considered the publication ban in this case is broader than its specific application in Dagenais. The rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflec[t] the substance of the Oakes test", we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right. Dagenais, supra, at p. 878. Dagenais envisioned situations where the right to a fair trial and the right to free expression directly conflicted, and the specific terms Lamer C.J. used in that case were tailored to apply in that situation. Accordingly, the test we must apply in order to determine whether the common law rule allowing trial judges to issue publication bans in the interest of the proper administration of justice will differ in specific content from the test used in Dagenais, though not in basic principle.

32 The Dagenais test requires findings of (a) necessity of the publication ban, and (b) proportionality between the ban's salutary and deleterious effects. However, while Dagenais framed the test in the specific terms of the case, it is now necessary to frame it more broadly so as to allow explicitly for consideration of the interests involved in the instant case and other cases where such orders are sought in order to protect other crucial aspects of the administration of justice. In assessing whether to issue common law publication bans, therefore, in my opinion, a better way of stating the proper analytical approach for cases of the kind involved herein would be:

> 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.

33 This reformulation of the Dagenais test aims not to disturb the essence of that test, but to restate it in terms that more plainly recognize, as Lamer C.J. himself did in that case, that publication bans may invoke more interests and rights than the rights to trial fairness and freedom of expression. This version encompasses the analysis conducted in Dagenais, and Lamer C.J.'s discussion of the relative merits of publication bans remains relevant. Indeed, in those common law publication ban cases where only freedom of expression and trial fairness issues are raised, the test should be applied precisely as it was in Dagenais. For cases where concerns about the proper administration of justice other than those two Charter rights are raised, the present, broader approach, will allow these concerns to be weighed as well. There may also be other cases which raise interests other than the administration of justice, for which a similar approach would be used, depending of course on the particular danger at issue and rights and interests at stake.

34 I would add some general comments that should be kept in mind in applying the test. The first branch of the test contains several important elements that can be collapsed in the concept of "necessity", but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in Dagenais, a "real and substantial" risk. That is, it must be a risk the reality of which is well-grounded in the evidence. It must also be a risk that poses a serious threat to the proper administration of justice. In other words, it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration of justice sought to be obtained.

35 A second element is the meaning of "the proper administration of justice". I do not wish to restrict unduly the kind of dangers which may make a ban necessary, as discretion is an essential aspect of the common law rule in question. However, judges should be cautious in deciding what can be regarded as part of the administration of justice. Obviously the use of police operatives and informers is part of the administration of justice, as are such practices as witness protection programs. However, courts should not interpret that term so widely as to keep secret a vast amount of enforcement information the disclosure of which would be compatible with the public interest.

36 The third element I wish to mention was recognized by La Forest J. in New Brunswick, supra, at para. 69, when he formulated the three part test discussed above. La Forest J.'s second step is clearly intended to reflect the minimal impairment branch of the Oakes test, and the same component is present in the requirement at common law that lesser alternative measures not be able to prevent the risk. This aspect of the test for common law publication bans requires the judge not only to consider whether reasonable alternatives are available, but also to restrict the order as far as possible without sacrificing the prevention of the risk.

37 It also bears repeating that the relevant rights and interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner. Where the accused is seeking the publication ban on the basis that his trial will be compromised, a judge would improperly apply the test if he relied on the right to a public trial to the disadvantage of the accused. This test exists to ground the exercise of discretion in a constitutionally sound manner, not to command the same result in every case. Trial judges must, at the outset, use their best judgment to determine which rights and interests are in conflict. In most cases this will not be overly onerous. The parties will frame their arguments in terms that make clear the interests they feel are threatened by the issuance or refusal of a publication ban and those they are ready to sacrifice in the face of the threat.

38 In some cases, however, most notably when there is no party or intervener present to argue the interests of the press and the public to free expression, the trial judge must take account of these interests without the benefit of argument. The consideration of unrepresented interests must not be taken lightly, especially where Charter-protected rights such as freedom of expression are at stake. It is just as true in the case of common law as it is of statutory discretion that, as La Forest J. noted, "[t]he burden of displacing the general rule of openness lies on the party making the application": New Brunswick, supra, at para. 71; Dagenais, supra, at p. 875. Likewise, to again quote La Forest J. (at paras. 72-73):

> There must be a sufficient evidentiary basis from which the trial judge may assess the application and upon which he or she may exercise his or her discretion judicially... .

> A sufficient evidentiary basis permits a reviewing court to determine whether the evidence is capable of supporting the decision.

In cases where the right of the public to free expression is at stake, however, and no party comes forward to press for that right, the judge must consider not only the evidence before him, but also the demands of that fundamental right. The absence of evidence opposed to the granting of a ban, that is, should not be taken as mitigating the importance of the right to free expression in applying the test.

39 It is precisely because the presumption that courts should be open and reporting of their proceedings should be uncensored is so strong and so highly valued in our society that the judge must have a convincing evidentiary basis for issuing a ban. Effective investigation and evidence gathering, while important in its own right, should not be regarded as weakening the strong presumptive public interest, which may go unargued by counsel more frequently as the number of applications for publication bans increases, in a transparent court system and in generally unrestricted speech on matters of such public importance as the administration of justice.

(2) Application to the Present Appeal

(a) Necessity

40 The test set out above requires an initial consideration of what the rights and interests at issue are, and whether they militate for or against the issue of a ban, before proceeding to evaluate the purpose and effects of the ban. In this case, the interest put forward by the Crown, seeking the publication ban, was the interest of proper administration of justice. Therefore we must assess whether the ban was necessary in order to protect the proper administration of justice, not specifically in order to protect the right of the accused to a fair trial. Although the right to a fair trial is certainly a part of the proper administration of justice, the accused opposed the ban on the strength of his other s. 11 right, the right to a public trial. In addition, the trial is now long over and the right to a fair trial no longer has an immediate relevance for this accused. Thus, it would be inappropriate to consider the accused's fair trial rights under the first branch of the analysis. The second stage is the appropriate place to weigh the effects of the ban -- once it has been shown to be necessary in light of its objective -- on other rights and interests. Under the second branch, in this appeal, we must weigh the effects of the ban on (a) the right of the accused to a public trial; (b) the right of the public and the press to freedom of expression; and (c) the efficacy of the administration of justice.

(i) Ban as to Operational Methods

41 In considering the first step of the analysis, it is helpful to review what is sought to be concealed in this case. The Crown contends that undercover police operations such as the one employed against the respondent may be compromised if the details of such operations are publicized in the mass media. The level of detail claimed to constitute a danger to ongoing and future operations, if disclosed, is relatively general. In the Crown's submission, the following ten facts, the "hallmarks of the operation", must be kept from wide dissemination:

- that Mentuck was given the opportunity to join a criminal organization that would provide him with the potential to earn large sums of money so long as he showed his loyalty by confessing any past criminal activity;
- that he was told that the undercover operator was in trouble with the "Crime Boss" because it was believed that he had recruited a liar;
- that he was asked to pick up a parcel from a bus depot locker and turn the key over to the operator;
- that he was asked to pick up and deliver a vehicle on the instructions of the operator;
- that he was asked to stand guard and report any strange happenings while the undercover operator attended a meeting;
- that he was asked to help count large sums of money;
- that he was paid substantial sums of money for completing these tasks;
- that he met with the "Crime Boss" in a hotel room;
- that he was told he needed to provide details of his involvement in the death of Amanda Cook so that arrangements could be made for a person dying of cancer to confess to the crime;
- that he was told he would be assisted in suing the government for wrongful imprisonment and would be allowed to keep a minimum of $85,000 or 10% of the settlement, which ever was larger.

42 The Crown submits that these "hallmarks of the operation" need not be kept entirely secret by the publication ban, but that they must be kept out of the mass media, since the type of persons targeted by these operations are much more likely to have access to recent copies of newspapers and to television news reports than to, for instance, legal journals and law reports. Assuming that these publications can be properly identified, this would mean that lawyers, law professors and law students would be aware of the police practices, but not the general public. I find that result disquieting to say the least. But leaving that aside, if persons who are currently, or who may be prospectively, the targets of such operations read accounts of the respondent's investigation, the appellant argues, they may recognize similar experiences that have been orchestrated in the investigations of which they are the target. If this occurs, the operation will be compromised. The suspect will be unlikely to confess once he or she realizes that the criminal organization he or she has joined is a construct of the police. Indeed, the Crown suggests that there may be danger to the persons of the involved officers once the suspect becomes aware that he or she has been "duped".

43 It is my view that, on balance, the appellant does not, at this first stage of the test, make out a case that the ban as to operational methods should have issued. The serious risk at issue here is that the efficacy of present and future police operations will be reduced by publication of these details. I find it difficult to accept that the publication of information regarding the techniques employed by police will seriously compromise the efficacy of this type of operation. There are a limited number of ways in which undercover operations can be run. Criminals who are able to extrapolate from a newspaper story about one suspect that their own criminal involvement might well be a police operation are likely able to suspect police involvement based on their common sense perceptions or on similar situations depicted in popular films and books. While I accept that operations will be compromised if suspects learn that they are targets, I do not believe that media publication will seriously increase the rate of compromise. The media have reported the details of similar operations several times in the past, including this one. In spite of this publicity, Sgt. German, in his af-

fidavit, was only able to positively identify one instance in which media reports arguably resulted in the compromise of an operation.

44 The appellant submitted that this Court's decision in Michaud v. Quebec (Attorney General), [1996] 3 S.C.R. 3, recognized the legitimacy of weighing the state's interest in protecting investigative techniques and the individual's right to privacy. That much is true. However, that case, in upholding the prior existing judicial interpretation of s. 187 of the Criminal Code (a section which authorizes telephone surveillance by police), invoked different dangers from those in this appeal. Specifically, Michaud recognized the real dangers to which police informants are subject in providing the information necessary to persuade a judge that a wiretap is necessary. Real, not pretextual, criminal organizations and individuals are involved and informants will often be at serious and substantial risk of bodily harm. The concerns which drove the Court's decision in Michaud are also properly considered in this case, but do not rise to the level of danger shown in the earlier appeal.

45 I do not doubt that undercover operations can be risky, and that discovery by the targets may result in the resources and efforts of the police being wasted. There is a personal risk, as well, to the officers involved, which we must take seriously, although this risk is much less serious in this type of targeting operation (in which many officers are engaged with a single suspect) than in lone infiltrations of existing, actual criminal organizations. But, the danger to the efficacy of the operation is not significantly increased by republication of the details of similar operations that have already been well-publicized in the past. It is the incremental effect of the proposed ban, viewed in light of what has already been published before, that must be evaluated in this appeal. That is, in terms of the framework adopted above, republication of this information does not constitute a serious risk to the efficacy of police operations, and thus to that aspect of the proper administration of justice. Accordingly, in the final analysis and looking at all the circumstances, in my view this ground by itself is sufficient to dispose of the widest part of the ban as to operational methods.

(ii) The Ban as to Identity

46 However, I accept that the publication of the names and identities of the officers in question would create a serious risk to the efficacy of current, similar operations. Given that the officers involved appear to go by their real names in the course of this undercover work, publishing their names could very easily alert targets that their apparent criminal associates are in fact police officers. Furthermore, since the operations in question have already been commenced, it would obviously be unreasonable for officers to adopt pseudonyms now. The targets already know their real names. Accordingly, I agree with Menzies J. that a ban on the publication of officers' names is necessary and that there is no reasonable alternative.

47 I also agree that the ban should be restricted to a period of one year. After ongoing operations have been completed, reasonable alternative measures such as the regular use of pseudonyms, the use of different officers, and the use of different scenarios will become available to the police. Should the circumstances of a particular case change, of course, the ban may need to be shortened or extended. For that reason it will be prudent for such orders of publication bans to be made subject to further order of the court.

(b) Proportionality

(i) Ban as to Operational Methods

48 Although, strictly speaking, it is unnecessary to continue the analysis upon a finding that the ban as to operational methods is not necessary, it will often be useful to bolster that conclusion by nevertheless conducting the second part of the analysis. In this case, even if there were a serious risk demonstrated, I believe that the ban as to operational methods does not meet the proportionality component of the approach set forth in these reasons.

49 The ban as to operational methods would have the salutary effect on the administration of justice of protecting officers in the field and ensuring that the targets of the operation continue to provide useful information. In so far as these effects are real and substantial they will constitute a salutary effect. However, as I noted above, I do not regard the proposed ban as substantially increasing the safety of officers. Since I also found above that the requested publication ban was unlikely to have significant effects on the likelihood that suspects will realize that they are being targeted in undercover operations, I do not regard the salutary effects that would be produced by the requested publication ban as significant, compelling benefits. At most this ban would produce speculative and marginal improvements in the efficacy of undercover operations and the safety of officers in the field.

50 The deleterious effects, however, would be quite substantial. In the first place, the freedom of the press would be seriously curtailed in respect of an issue that may merit widespread public debate. A fundamental belief pervades our political and legal system that the police should remain under civilian control and supervision by our democratically elected officials; our country is not a police state. The tactics used by police, along with other aspects of their operations, is a matter that is presumptively of public concern. Restricting the freedom of the press to report on the details of undercover operations that utilize deception, and that encourage the suspect to confess to specific crimes with the prospect of financial and other rewards, prevents the public from being informed critics of what may be controversial police actions.

51 As this Court recognized in Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at p. 976, "participation in social and political decision-making is to be fostered and encouraged", a principle fundamental to a free and democratic society. See Switzman v. Elbling, [1957] S.C.R. 285; R. v. Keegstra, [1990] 3 S.C.R. 697; Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877. Such participation is an empty exercise without the information the press can provide about the practices of government, including the police. In my view, a publication ban that restricts the public's access to information about the one government body that publicly wields instruments of force and gathers evidence for the purpose of imprisoning suspected offenders would have a serious deleterious effect. There is no doubt as to how crucial the role of the police is to the maintenance of law and order and the security of Canadian society. But there has always been and will continue to be a concern about the limits of acceptable police action. The improper use of bans regarding police conduct, so as to insulate that conduct from public scrutiny, seriously deprives the Canadian public of its ability to know of and be able to respond to police practices that, left unchecked, could erode the fabric of Canadian society and democracy.

52 Secondly, the right of the accused to a "fair and public hearing" would be deleteriously affected by the requested publication ban. This Court has not previously had occasion to elaborate at length on the content of the right to a "public hearing" protected by s. 11(d) of the Charter. As it is not squarely before us, I do not wish to be in any way conclusive on the issue either. It is clear, however, that s. 11(d) guarantees not only an open courtroom, but the right to have the media access that courtroom and report on the proceedings. This Court has consistently adopted a purposive ap-

proach to interpreting the text of the Charter. See, e.g., R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624. The right to a public trial is meant to allow public scrutiny of the trial process. In light of that purpose, the observations of Cory J. in discussing the right to freedom of expression are also apt when applied to the right to a public trial:

> It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers and fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings -- the nature of the evidence that was called, the arguments presented, the comments made by the trial judge -- in order to know not only what rights they may have, but how their problems might be dealt with in court... . Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.
>
> (Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, at pp. 1339-40)

Given the realities of modern life and the inconvenience of the open courtroom to members of the public, the right to a public trial must include the right to have media access and report on the trial as well.

53 This public scrutiny is to the advantage of the accused in two senses. First, it ensures that the judicial system remains in the business of conducting fair trials, not mere show trials or proceedings in which conviction is a foregone conclusion. The supervision of the public ensures that the state does not abuse the public's right to be presumed innocent, and does not institute unfair procedures. See Dagenais, supra, at p. 883.

54 Second, it can vindicate an accused person who is acquitted, particularly when the acquittal is surprising and perhaps shocking to the public. In many cases, it is not clear to the public, without the advantage of a full explanation, why an accused person is acquitted despite what a reasonable person might consider compelling evidence. Where a publication ban is in place, the accused has little public answer. In the present appeal, the public was aware that a confession was in evidence. One might expect public confusion and even anger at such a seemingly nonsensical verdict, as in fact occurred in response to the acquittal underlying the companion to this appeal, O.N.E., supra. If the facts of the police operation were available to the public, the public could make an informed judgment about the reasonableness of the accused's acquittal. The accused could feel vindicated to some extent. On this basis, the publication ban sought would have a deleterious effect on the accused's right to a public trial.

55 It is clear, then, that on balance, even if the requested ban as to operational methods was necessary to prevent a serious risk to the administration of justice, it could not have been granted. The deleterious effects of the proposed ban on the right of the press to freedom of expression and the accused's right to a public trial substantially outweigh the benefits to the administration of justice.

(ii) The Ban as to Identity

56 The situation is, again, different in the case of the requested ban as to identity. The ban will reduce the potential harm to these officers currently in the field. I readily acknowledge that these officers face some degree of risk from their current targets, although the officers will usually outnumber the suspects in these cases. More importantly, the ban will assist in ensuring the efficacy of ongoing operations, since it will prevent the names and descriptions of the officers from reaching the attention of their current targets. I find that the salutary effects of the ban as to identity are significant.

57 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 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. It is true that, in general, the names of police officers who testify against accused persons need not, and should not, be the subject of publication bans in a free and democratic society. However, given the time-limited nature of the ban issued by Menzies J., and given the unusual nature of the work performed by these officers in this case, I am satisfied that this concern is outweighed by the salutary effects of the ban.

58 I disagree, however, with the appellant's request that the ban be made indefinite. As a general matter, it is not desirable for this, or any, Court to enter the business of permanently concealing information in the absence of a compelling reason to do so. The appellant suggests that the officers would be in physical danger if their identities were ever revealed. This is not a substantial enough risk to justify permanent concealment. All police officers are subject to the possibility of retributive violence from criminals they have apprehended and other persons who bear them grudges or ill-will. In rare cases this may result in tragic events, and while all efforts must be deployed to prevent such consequences, a free and democratic society does not react by creating a force of anonymous and unaccountable police. I do not find that these officers are at a substantially greater risk than other police officers. Given a showing on the record of a future case that a specific group of officers indeed suffers a grave and long-term risk to life and limb, a permanent or extended ban would be considered.

59 I do not, however, wish to be taken as creating a bright-line rule restricting publication bans to a year. Different cases will involve different considerations, and there may well be times when the danger to officers or to the importance of the administration of justice of police operations rises to a level of seriousness sufficient to justify the deleterious effects inherent in publication bans of a longer duration. Furthermore, these different considerations may authorize a different approach in some cases to the process of tailoring. There may be cases where a longer ban might be tailored to reduce its impact by prohibiting only the publication of the likeness or photograph of an officer, not his name. Should the police choose to adopt the practice of using pseudonyms in undercover operations, this would clearly be a sensible option that would mitigate some of the dangers of long-term secrecy.

VII. Conclusion

60 With the foregoing in mind, I would find that the ban ordered by Menzies J. was properly issued and was of the appropriate scope in light of the requirements of the Charter. It was properly tailored to meet the real concerns about the safety of officers currently in the field, and about the

efficacy of operations that are still underway. The ban, and similar bans issued in accordance with the considerations set out above and in Dagenais, supra, is to be supervised by the issuing court, in this case by the Manitoba Court of Queen's Bench. Publication bans designed to protect the identity of officers should be tailored, as was done in this case, to ensure the security and anonymity of the officers while involved in undercover operations. However, such bans should not be indefinite. They should be lifted when the undercover operation comes to an end, or when it may be reasonably expected to end. It would be unwise for this Court to countenance the establishment of a permanently anonymous section of the police force in the absence of more evidence of serious and long-term danger to the security of particular officers.

61 The appeal is dismissed and the order of Menzies J. affirmed. As a result, I would quash the previous order granting the requested publication ban in full pending this appeal and restore the order of Menzies J. dated February 2, 2000 subject to further order of the Court of Queen's Bench. However, I substitute proprio motu, in calculating the one-year duration of the allowed ban, the date that this judgment is released for the date Menzies J.'s order was released to comply with the spirit of that order. The respondent should have his costs in this Court and the court below.

cp/e/qllls