The Vancouver Sun *Appellant*

v.

Attorney General of Canada,
Attorney General of British Columbia,
"The Named Person", Ajaib Singh Bagri and
Ripudaman Singh Malik *Respondents*

and

Attorney General of Ontario *Intervener*

Indexed as: Vancouver Sun (Re)

Neutral citation: 2004 SCC 43.

File No.: 29878.

2003: December 10; 2004: June 23.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

on appeal from the supreme court of british columbia

Criminal law — Terrorism — Investigative hearings — Open court principle — Level of secrecy applicable to judicial investigative hearing proceedings — Whether Crown's application for order for investigative hearing properly heard in camera — Whether existence of order for investigative hearing ought to have been secret — Whether hearing for determining constitutional validity of investigative hearing provision and validity of order for investigative hearing should have been conducted in camera — Whether investigative hearing must be held in camera — Applicability of Dagenais/Mentuck test — Criminal Code, R.S.C. 1985, c. C-46, s. 83.28.

B and M were jointly charged with several offences in relation to the explosion of Air India Flight 182 and the intended explosion of Air India Flight 301. Shortly after the beginning of their trial, the Crown brought an *ex parte* application seeking an order that a Named Person, a potential Crown witness at the Air India trial, attend a judicial investigative hearing for examination pursuant to s. 83.28 of the *Criminal Code*. The application judge granted the order and set a number of terms and conditions to govern the conduct of the investigative hearing, among others, the hearing was to be conducted *in camera* and notice of the hearing was not to be given to the accused in the Air India trial, to the press or to the public. Counsel for the accused became aware of the proceedings and the application judge held that they could make submissions on the validity of the initial order to the judge presiding over the s. 83.28 hearing. The presiding judge began to hear the accused's submissions and a challenge to the constitutional validity of s. 83.28 by the Named Person *in camera*. A reporter of the Vancouver Sun, who had recognized lawyers from the Air India trial entering a closed courtroom, was denied access to the proceedings. The Vancouver Sun filed a notice of motion before the hearing judge seeking an order that the court

proceedings be open to the public and that its counsel and a member of its editorial board, upon filing an undertaking of confidentiality, be provided with access to the pleadings and all materials from the proceedings to date. Prior to hearing the motion, the hearing judge concluded, *in camera*, that the initial s. 83.28 order had been validly issued and that s. 83.28 was constitutionally sound. She varied the initial order to permit counsel for the accused to attend the investigative hearing and examine the Named Person under certain conditions. She ordered that her judgment was to be sealed until the conclusion of the hearing or the making of any contrary order of the court. When the courtroom was finally opened to the public, the hearing judge delivered, in open court, a synopsis of her reasons for judgment. The Vancouver Sun then made its motion, which was dismissed. The Vancouver Sun was granted leave to appeal to this Court from the order dismissing its motion.

Held (Bastarache and Deschamps JJ. dissenting in part): The appeal should be allowed in part and the order made by the hearing judge varied.

Per McLachlin C.J. and Iacobucci, Major, Binnie, Arbour and Fish JJ.: Section 83.28 of the *Criminal Code* must be interpreted consistently with the Preamble to the *Anti-terrorism Act* and the fundamental characteristics of a judicial process, including the open court principle. This principle, a hallmark of democracy and a cornerstone of the common law, guarantees the integrity of the judiciary and is inextricably linked to the freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The open court principle, which should not be presumptively displaced in favour of an *in camera* process, extends to all judicial proceedings, and the *Dagenais/Mentuck* test should be applied to all discretionary judicial decisions that limit freedom of expression by the press.

In the context of s. 83.28, one must distinguish between an application for an investigative hearing and the holding of that hearing. The application for an order that such a hearing be held to gather information is procedurally similar to the application for a search warrant or for a wiretap authorization. Section 83.28(2) provides that applications are *ex parte*, and by their nature, they must be *in camera*. There is no express provision, however, for any part of the investigative hearing to be *in camera*. This hearing requires full judicial participation in the conduct of the hearing itself, and the proper balance between investigative imperatives and openness will best be achieved through the discretion granted to judges to impose terms and conditions on the conduct of a hearing under s. 83.28(5)(*e*). In exercising that discretion, judges should reject the presumption of secret hearings. Parliament chose hearings of a judicial nature and they must contain as many of the guarantees and indicia that come from judicial involvement as is compatible with the task at hand. The presumption of openness should thus be displaced only upon proper consideration of the competing interests at every stage of the process. The existence of an order, and as much of its subject-matter as possible, should be made public unless, under the balancing exercise of the *Dagenais/Mentuck* test, secrecy becomes necessary.

In this case, the level of secrecy was unnecessary. While the s. 83.28(2) application was properly heard *ex parte* and *in camera*, there was no reason to keep secret the existence of the order or its subject-matter. The identity of the Named Person was properly kept confidential in light of the position taken by the Named Person at that stage, but that should have been subject to revision by the hearing judge. Since a potential Crown witness in the Air India trial was the subject of the investigative order, third party interests ought to have been considered and notice should have been given promptly to counsel for the accused in the Air India trial. As

much information about the Named Person's constitutional challenge as could be revealed without jeopardizing the investigation should have been made public, subject, if need be, to a total or partial publication ban. The constitutional challenge should not have been conducted *in camera* since much of it could have been properly argued without the details of the information submitted to the application judge being revealed.

The Named Person now takes the position that the investigative hearing should be public, and the only factors now favouring secrecy relate to the protection of an ongoing investigation or other vital but unstated reasons. In a case in which so much of the information relating to the offence is already in the public domain, and in which recourse to an investigative hearing is sought in the midst of an ongoing non-jury trial, the case for extensive secrecy is a difficult one to make and was not made out here. Accordingly, the name of the Named Person should be made public and the order made by the hearing judge should be varied so that the investigative hearing is held in public, subject to any order of the hearing judge that the public be excluded and/or that a publication ban be put in place regarding aspects of the anticipated evidence to be given by the Named Person. At the end of the investigative hearing, the hearing judge should review the need for any secrecy and release publicly any gathered information that can be made public without unduly jeopardizing the interests of the Named Person, third parties or the investigation.

Per LeBel J.: Subject to the comments in *Application under s. 83.28 of the Criminal Code (Re)*, there is agreement with the reasons of the majority and with their proposed disposition.

Per Bastarache and Deschamps JJ. (dissenting in part): Although openness of judicial proceedings is the rule and covertness the exception, where the rights of third parties would be unduly harmed and the administration of justice rendered unworkable by the presence of the public, a court may sit *in camera*. Such is normally the case for investigative proceedings under s. 83.28 of the *Criminal Code*. There is a legitimate law enforcement interest in maintaining the confidentiality of a witness's identity and testimony, since the premature disclosure of information about a terrorism offence would compromise and impede the very investigation of the information gathered at the hearing and would normally render the s. 83.28 proceedings ineffective as an investigative tool. The police cannot gather information and act upon it at the same time it is disseminated to the public and the media. With respect to third parties, the confidentiality of the investigative hearing will protect the innocent from unreliable and untruthful testimony, and confidentiality will encourage witnesses to come forward and be honest. Furthermore, the disclosure of a witness's identity may place that person at serious risk of harm from suspects or their allies. The same can be said for third parties identified by the witness as having information to provide. Without knowing what information will be revealed at the investigative hearing, it is not possible to evaluate the risk to third parties' rights and to the proper administration of justice. Consequently, the *Dagenais/Mentuck* test cannot guide a judge's discretion under s. 83.28 to order an *in camera* investigative hearing. Under that test, a convincing evidentiary basis for denial of access is generally necessary to rebut the presumption of open courts. This framework is not appropriate because it is only after the information and evidence has been gathered by the Crown at the investigative hearing that the presiding judge will be able to balance the competing interests at stake and release non-prejudicial information. Since openness is the presumption, the

person who wishes to deny the right of public access after the investigative hearing has the burden of proof and must satisfy the *Dagenais/Mentuck* test.

The fact that the investigative hearing was about the constitutional validity of s. 83.28 did not make the open court principle more compelling, because the constitutional challenge could not realistically be separated from the actual investigative hearing. Nor would advance notice to the media have served any useful purpose.

Cases Cited

By Iacobucci and Arbour JJ.

Referred to: *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42, aff'g [2003] B.C.J. No. 1749 (QL), 2003 BCSC 1172; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *R. v. Reyat*, [1991] B.C.J. No. 2006 (QL); *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Scott v. Scott*, [1913] A.C. 417; *Ambard v. Attorney-General for Trinidad and Tobago*, [1936] A.C. 322; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41; *R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60; *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75.

By LeBel J.

Referred to: *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42.

By Bastarache J. (dissenting in part)

Attorney General of Nova Scotia v. MacIntyre, [1982] 1 S.C.R. 175; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Southam Inc. v. Coulter* (1990), 60 C.C.C. (3d) 267; *R. v. A*, [1990] 1 S.C.R. 992; *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3; *R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60; *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42.

Statutes and Regulations Cited

Anti-terrorism Act, S.C. 2001, c. 41, Preamble.

Canadian Charter of Rights and Freedoms, ss. 2(*b*), 7.

Criminal Code, R.S.C. 1985, c. C-46, ss. 2, 83.28 [ad. 2001, c. 41, s. 4], 83.31, 83.32(1), 486(1).

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Burton, John Hill, ed. *Benthamiana: Or, Select Extracts from the Works of Jeremy Bentham, With an Outline of His Opinions on the Principal Subjects Discussed in His Works.* Edinburgh: William Tait, 1843.

APPEAL from a judgment of the British Columbia Supreme Court, [2003] B.C.J. No. 1992 (QL), 2003 BCSC 1330, dismissing an application for access to the proceedings and for a declaration that proceedings should not be *in camera*. Appeal allowed in part, Bastarache and Deschamps JJ. dissenting in part.

Robert S. Anderson and *Ludmila B. Herbst*, for the appellant.

George Dolhai and *Bernard Laprade*, for the respondent the Attorney General of Canada.

Dianne Wiedemann and *Mary T. Ainslie*, for the respondent the Attorney General of British Columbia.

Kenneth Westlake, *Howard Rubin* and *Brian A. Crane*, *Q.C.*, for the respondent the "Named Person".

William B. Smart, *Q.C.*, and *Brock Martland*, for the respondent Ripudaman Singh Malik.

Michael A. Code and *Jonathan Dawe*, for the respondent Ajaib Singh Bagri.

Michael Bernstein and *Sandy Tse*, for the intervener.

The judgment of McLachlin C.J. and Iacobucci, Major, Binnie, Arbour and Fish JJ. was delivered by

IACOBUCCI AND ARBOUR JJ. —

I. Introduction

1 This appeal is a companion to *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42 (the "constitutional appeal"), released concurrently. For a comprehensive review of all of the issues on the constitutionality and application of s. 83.28 of the *Criminal Code*, R.S.C. 1985, c. C-46 (as amended by the *Anti-terrorism Act*, S.C. 2001, c. 41), the constitutional appeal should be read first.

2 The judicial investigative hearing provided for in s. 83.28 of the *Code* is a procedure with no comparable history in Canadian law. It provides essentially that a peace officer, with the prior approval of the Attorney General, may apply *ex parte* to a judge for an order for "the gathering of information". The gathering of information is in relation to a terrorism offence, which is described in s. 2 of the *Code*. The information to be gathered relates both to the circumstances of the offence and the whereabouts of possible suspects. If satisfied that proper grounds have been established, the court may order the attendance of a person for examination under oath before a judge, and the person must remain in attendance and answer questions put to him or her by the Attorney General or his agent. Although the person who is the subject of the order cannot refuse to answer a question on the ground that it may incriminate him or her or subject him or her to any proceeding or penalty, his or her answers receive full direct and derivative use immunity. The person has the right to retain and instruct counsel, and the judge has a wide discretion to impose terms and

conditions to protect the person named in the order, third parties, as well as the integrity of ongoing investigations.

3 In our view, this unique judicial procedure must be interpreted and applied in light of the two following principles:

1. The interpretation of s. 83.28 must be guided by the Preamble to the *Anti-terrorism Act*, which amended the *Criminal Code* to include s. 83.28. The Preamble stresses the imperatives of an effective response to terrorism as well as a continued commitment to the values and constraints of the *Canadian Charter of Rights and Freedoms*;

2. Section 83.28 should be interpreted in a manner consistent with the fundamental characteristics of a judicial process insofar as the section contemplates a judicial proceeding.

4 The issue in this appeal deals with the level of secrecy with which the judicial investigative hearing was conducted. We have concluded that the open court principle is a fundamental characteristic of judicial proceedings, and that it should not be presumptively displaced in favour of an *in camera* process. The need to close the courtroom doors for the whole or parts of the judicial investigative hearing is governed by the principles expressed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76.

II. The Facts

5 The judicial investigative hearing relates to two alleged acts of terrorism that occurred on June 23, 1985. An explosion caused the deaths of two baggage handlers and injured four others at the Narita Airport in Japan. A second explosion caused Air India Flight 182 to crash off the west coast of Ireland, causing the death of all 329 passengers and crew.

6 On February 4, 1988, the first accused, Inderjit Singh Reyat, was arrested in England where he was living with his family. Mr. Reyat was extradited to Canada on December 13, 1989, to face a number of charges relating to the explosion at Narita Airport. On May 10, 1991, he was convicted on seven counts: *R. v. Reyat*, [1991] B.C.J. No. 2006 (QL) (S.C.).

7 On October 27, 2000, Ripudaman Singh Malik and Ajaib Singh Bagri were jointly charged with respect to both explosions and the intended explosion of Air India Flight 301. A few months later, on March 8, 2001, a direct indictment was filed against the accused, Mr. Malik and Mr. Bagri, and on June 5, 2001, a new indictment was filed, adding a third accused, Mr. Reyat. Mr. Reyat plead guilty on February 10, 2003, to a new indictment that charged him with aiding or abetting the construction of the explosive device that was placed on Air India Flight 182. He was sentenced to five years imprisonment in addition to the time already spent in custody.

8 Following Mr. Reyat's guilty plea to a charge of manslaughter in February 2003, Mr. Malik and Mr. Bagri re-elected, before Josephson J. of the Supreme Court of British Columbia, to be tried by a judge alone. The trial of Mr. Malik and Mr. Bagri (the "Air India Trial") commenced on April 28, 2003 and continues to this date.

9 On May 6, 2003, the Crown applied to a judge *ex parte* for a s. 83.28 order to gather information regarding the Air India offences from the Named Person. Dohm A.C.J. of the British Columbia Supreme Court issued the s. 83.28 order for a judicial investigative hearing on the strength of an affidavit by a member of the RCMP's Air India Task Force. He directed the hearing to be held *in camera* and no notice was given to the accused in the Air India Trial, to the press, or to the public. He also prohibited the Named Person from disclosing any information or evidence obtained at the hearing.

10 Sometime prior to May 20, 2003, when the hearing was to be held, counsel for Mr. Malik and Mr. Bagri fortuitously became aware of the order and advised Dohm A.C.J. that they wished to make submissions. The Named Person retained counsel, and on June 16, 2003, Dohm A.C.J. was advised that the Named Person wished to challenge the constitutional validity of s. 83.28. Dohm A.C.J. directed that, seven days later, all submissions be heard by Holmes J. The constitutional challenge to s. 83.28 and the application to have the hearing order of Dohm A.C.J. set aside commenced on June 23, 2003. Neither the public nor the press was informed.

11 On June 27, 2003, the Air India Trial adjourned for the summer. That same day, Ms. Bolan from the Vancouver Sun recognized lawyers from the Air India trial and attempted to follow them into a closed courtroom where *in camera* proceedings were taking place. The trial list disclosed that "R v. I.*(conference)" was taking place before Holmes J. in courtroom 33. Ms. Bolan contacted counsel for the Vancouver Sun who knocked on the door of courtroom 33. Counsel was informed by a sheriff that the judge would not entertain a motion at that time for the proceedings to be opened to the public.

12 The Vancouver Sun then filed a Notice of Motion and a letter setting out the background with the Supreme Court of British Columbia and asked for an early date for its motion to be heard. The motion sought an order that counsel for the appellant and a member of the Vancouver Sun's editorial board, upon filing an undertaking of confidentiality, be provided with access to the pleadings and all materials from the proceedings to date and for an order that the court proceedings be open to the public. The Vancouver Sun was informed, on July 3, 2003, that Holmes J. would hear its application on July 23, 2003.

13 The hearing before Holmes J. continued *in camera*, and on July 21, 2003, she issued her reasons dismissing the application to set aside the s. 83.28 judicial investigative hearing. She did, however, vary the order of Dohm A.C.J. to allow counsel for Malik and Bagri to attend the investigative hearing with the right to cross-examine the Named Person, subject to the restriction that any information received was to be kept confidential by counsel and was not to be shared with the two accused. The Named Person immediately applied to Holmes J., who, on July 22, 2003, stayed the investigative hearing to September 2, 2003, so that the Named Person could seek leave to appeal to this Court. None of this was known to the public or press.

14 On July 22, 2003, the Vancouver Sun received a call from the registry of the British Columbia Supreme Court indicating that the hearing of its application had been delayed to 10 a.m. the following day, apparently to allow the s. 83.28 proceedings to continue *in camera* earlier in the morning. When the courtroom was finally opened to the public, the Vancouver Sun made its application to be allowed further access to pleadings and proceedings on the filing of an undertaking of

confidentiality and for a declaration that s. 83.28 proceedings should not be *in camera*. The application was dismissed by Holmes J. on July 24, 2003: [2003] B.C.J. No. 1992 (QL), 2003 BCSC 1330.

15 Immediately prior to Vancouver Sun's application, Holmes J. delivered, in open court, a synopsis of her reasons for judgment dated July 21, 2003 in which she set out that the hearing before her had involved the constitutional validity of s. 83.28 and the validity of a s. 83.28 order for a judicial investigative hearing. Holmes J. gave a synopsis because the reasons for judgment were sealed. She also revealed that the questioning of the Named Person had not yet commenced. It was at this point that the appellant learned that the British Columbia Supreme Court had been involved in the first-ever application by the Crown under s. 83.28 of the *Criminal Code* for an order requiring a witness to attend a judicial investigative hearing. The appellant contends that but for serendipity and their persistence, no "synopsis" would have been released and the existence of proceedings under s. 83.28 would not have been made public.

16 The synopsis of reasons for judgment dated July 21, 2003, [2003] B.C.J. No. 1749 (QL), 2003 BCSC 1172, set out that "[t]he proceedings concerned the interpretation, application, and constitutionality of the new s. 83.28 of the *Criminal Code*, which provides for investigative hearings in relation to terrorism offences, as now defined in s. 2 of the *Code*" (para. 1). Holmes J. then explained that an order had been issued under s. 83.28 for a judicial investigative hearing as part of the ongoing Air India Investigation but that the Named Person who was required to attend was neither a suspect nor an accused. She summarized her findings that the order was validly issued and constitutionally sound; that counsel for Mr. Malik and Mr. Bagri would participate in the investigative hearing because of the unusual circumstance that

the Air India Trial was underway; the hearing might have an incidental effect on the Air India Trial but the predominant purpose of the hearing is to further the ongoing investigation; the hearing is subject to restrictions protecting the privacy and other rights and interests of the Named Person and the integrity of the investigation.

17 After delivering her synopsis, Holmes J. stated that the s. 83.28 proceeding had been adjourned so that the Named Person could seek leave to appeal to this Court. On July 25, 2003, LeBel J. ordered that the Supreme Court of Canada file be sealed and that the application for leave be expedited. Leave was granted on August 11, 2003, to appeal the order of Holmes J. of July 21, 2003.

18 On October 6, 2003, the Vancouver Sun was granted leave to appeal the July 24, 2003 order of Holmes J. dismissing its application for access to the materials in the courts below: [2003] 2 S.C.R. xi. The Vancouver Sun, the National Post, and Global Television Network Inc. were also given intervener standing in the constitutional appeal, limited to issues of media access. Submissions were also made at the October 6 hearing on whether all or part of the constitutional appeal could be opened to the public and the media.

19 At the October 6, 2003 leave hearing, the Named Person indicated the constitutional appeal could be conducted in public. The Attorney General of British Columbia took the position that parts of the appeal, constituting stand-alone issues, could be held in public: the constitutionality of s. 83.28 of the *Criminal Code*, the role of the judge, and retrospective application of the provision. Mr. Bagri submitted that grounds of appeal relating to self-incrimination and privacy under s. 7 of the *Charter*, judicial independence, and retrospectivity could be heard in public.

20 This Court heard the constitutional appeal on December 10 and 11, 2003, in its entirety in open court subject to a number of restrictions specified at the start of the oral hearing by the Chief Justice. During the oral arguments, counsel refrained from mentioning the name and gender of the Named Person, any facts that could identify this person, and any material supporting the order for an investigative hearing. In addition, the hearing was not broadcast, contrary to the usual practice of the Court.

III. Analysis

21 The issue on appeal is the level of secrecy that should apply to the application for and conduct of a judicial investigative hearing under s. 83.28 of the *Criminal Code*.

A. *The Parameters of the Open Court Principle*

22 Section 83.28 of the *Criminal Code*, which provides for the judicial investigative hearing, will cease to apply at the end of the fifteenth sitting day of Parliament after December 31, 2006, unless its application is extended by resolution passed by both Houses of Parliament: *Criminal Code*, s. 83.32(1). Until that time, the Attorney General must make accessible to the public an annual report on its use: *Criminal Code*, s. 83.31. The sunset clause and annual reporting requirements underscore the unusual and serious nature of the judicial investigative hearing. It is therefore important to allow the public to scrutinize and discuss the reasoning and deliberations of a Court when it deals with a challenge to the constitutionality of that proceeding. It is also important to allow the legal profession and the public at large

to observe how such a procedure is actually used, as long as this can be done, in full or in part, without undue injury to the administration of justice or without frustrating the purpose of s. 83.28.

23 This Court has emphasized on many occasions that the "open court principle" is a hallmark of a democratic society and applies to all judicial proceedings: *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 187; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at paras. 21-22; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. "Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized": *Edmonton Journal*, *supra*, at p. 1336.

24 The open court principle has long been recognized as a cornerstone of the common law: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 21. The right of public access to the courts is "one of principle . . . turning, not on convenience, but on necessity": *Scott v. Scott*, [1913] A.C. 417 (H.L.), *per* Viscount Haldane L.C., at p. 438. "Justice is not a cloistered virtue": *Ambard v. Attorney-General for Trinidad and Tobago*, [1936] A.C. 322 (P.C.), *per* Lord Atkin, at p. 335. "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity": J. H. Burton, ed., *Benthamiana: Or, Select Extracts from the Works of Jeremy Bentham* (1843), p. 115.

25 Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

26 The open court principle is inextricably linked to the freedom of expression protected by s. 2(*b*) of the *Charter* and advances the core values therein: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 17. The freedom of the press to report on judicial proceedings is a core value. Equally, the right of the public to receive information is also protected by the constitutional guarantee of freedom of expression: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Edmonton Journal*, *supra*, at pp. 1339-40. The press plays a vital role in being the conduit through which the public receives that information regarding the operation of public institutions: *Edmonton Journal*, at pp. 1339-40. Consequently, the open court principle, to put it mildly, is not to be lightly interfered with.

27 Furthermore, the principle of openness of judicial proceedings extends to the pretrial stage of judicial proceedings because the policy considerations upon which openness is predicated are the same as in the trial stage: *MacIntyre*, *supra*, at p. 183. Dickson J. found "it difficult to accept the view that a judicial act performed during a trial is open to public scrutiny but a judicial act performed at the pretrial stage remains shrouded in secrecy": *MacIntyre*, at p. 186.

28 This Court has developed the adaptable *Dagenais*/*Mentuck* test to balance freedom of expression and other important rights and interests, thereby incorporating the essence of the balancing of the *Oakes* test: *Dagenais, supra*; *Mentuck, supra*; *R. v. Oakes*, [1986] 1 S.C.R. 103. The rights and interests considered are broader than simply the administration of justice and include a right to a fair trial: *Mentuck*, *supra*, at para. 33, and may include privacy and security interests.

29 From *Dagenais* and *Mentuck*, this Court has stated that a publication ban should be ordered only 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.
>
> (*Mentuck*, *supra*, at para. 32)

30 The first part of the *Dagenais/Mentuck* test reflects the minimal impairment requirement of the *Oakes* test, and the second part of the *Dagenais/Mentuck* test reflects the proportionality requirement. The judge is required to consider not only "whether reasonable alternatives are available, but also to restrict the order as far as possible without sacrificing the prevention of the risk": *Mentuck*, *supra*, at para. 36.

31 While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of

expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban (*Dagenais*, *supra*; *Mentuck*, *supra*); is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, 2002 SCC 41). The burden of displacing the general rule of openness lies on the party making the application: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, at para. 71.

B. *The Nature of the Judicial Investigative Hearing Under Section 83.28*

32 We have reproduced the relevant statutory provisions of the *Criminal Code* in the appendix to these reasons. From the perspective of the open court principle, the proceedings under s. 83.28 can be usefully broken down into three steps:

> (a) the *ex parte* application under s. 83.28(2) for an order for the gathering of information;
>
> (b) the hearing itself, under the terms and conditions contemplated in s. 83.28(5)(*e*); and
>
> (c) the post-hearing stage, at which non-public information may be released publicly, again subject to the terms and conditions in s. 83.28(5)(*e*).

Section 83.28 does not expressly provide for any part of the judicial investigative hearing to be held *in camera*.

33 Competing views about the proper interpretation of the provision as a whole are as follows: on the one hand, the appellant argues that the open court principle applies to the entire process and should only be displaced in accordance with the *Dagenais*/*Mentuck* test. The respondents, on the other hand, submit that when Parliament enacted the section, it was entitled to rely on this Court's jurisprudence to the effect that investigative processes, even if they involve a judicial officer, are presumptively held *in camera* (referring, for example to an application for a search warrant: *MacIntyre*, *supra*).

34 The validity of the respondents' submission rests on the assumption that the s. 83.28 hearing is an investigative measure akin to the issuance of a search warrant. This assumption is only partly accurate because one must distinguish between an application for a s. 83.28 judicial investigative hearing and the holding of the judicial investigative hearing. The application for an order that a judicial investigative hearing be held is procedurally similar to the application for a search warrant or for a wiretap authorization. Section 83.28(2) provides that the application, made by a peace officer with prior consent of the Attorney General (83.28(3)), is *ex parte*. By its very nature, this application must be presented to a judge *in camera*.

35 In that *in camera* procedure, the judge is directed to determine, for a past offence under s. 83.28(4)(*a*), whether (1) there are reasonable grounds to believe that a terrorism offence has been committed; and (2) information about the offence, or about a suspect, is likely to be obtained by the holding of a judicial investigative

hearing. The judge may also determine, for a future offence under s. 83.28(4)(*b*), whether (1) there are reasonable grounds to believe that a terrorism offence will be committed; (2) that the person has information about the offence or a third party who may commit that offence; and (3) reasonable attempts have already been made to obtain that information from the person.

36 This first step of the process is akin to the application for the issuance of a search warrant. Although that application is heard by a judge, the imperatives of the investigation require that it not be made public: *MacIntyre*, *supra*, at pp. 177-78. The same is true of a wiretap application, and, in most cases, of an application for a DNA warrant (although, in *R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60, we left open the discretion of a judge to hold a contested hearing on the appropriateness of issuing a DNA warrant). In any event, since that process must be held *ex parte*, it follows that in that context it could not be held in open court: see *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75.

37 The real issue is whether, because of the investigative nature of the judicial hearing, it too must, by necessity, be presumptively held in secret. In that respect, the analogy to the execution of search warrants, as opposed to their issuance, is not particularly helpful. It is true that search warrants are not only issued, but executed in secret. On the other hand, they are not executed by judges. The judicial role consists of ensuring that there are reasonable grounds to authorize a particular police action. In contrast, the judicial investigative hearing requires full judicial participation in the conduct of the hearing itself.

38 The proper balance between the investigative imperatives and the judicial assumption of openness is best achieved by a proper exercise of the discretion granted to judges to impose terms and conditions on the conduct of the hearing under s. 83.28(5)(*e*). In exercising that discretion, judicial officers should reject the notion of presumptively secret hearings. This conclusion is supported by the choice of Parliament to have investigative hearings of a judicial nature; these hearings must contain as many of the guarantees and indicia that come from judicial involvement as is compatible with the task at hand.

39 One such guarantee is a presumption of openness, which should only be displaced upon proper consideration of the competing interests at every stage of the process. In that spirit, the existence of an order made under s. 83.28, and as much of its subject-matter as possible should be made public unless, under the balancing exercise of the *Dagenais*/*Mentuck* test, secrecy becomes necessary. Similarly, once a search warrant has been executed and something has been found, the necessity for secrecy has abated and continued limits on public accessibility should only be "undertaken with the greatest reluctance": *MacIntyre*, *supra*, at p. 189.

40 If the existence of the order is made public, the issuing judge, acting under s. 83.28(5)(*e*), would determine, still under the guidance of the *Dagenais*/*Mentuck* test, whether any information ought to be withheld from the public. For example, even though there may be no reason to hide an order for a judicial investigative hearing in relation to an identified alleged terrorist act, it may not be appropriate to reveal the reasonable grounds upon which the police relied to obtain the order. Whether the name of the person who will be heard at the hearing needs to be kept confidential may largely dictate whether the time and place of the hearing will also be the subject of a

non-disclosure order. Of course, should the hearing proceed in a public forum, the Crown would be expected to request that parts of the hearing proceed *in camera* in light of the sensitive nature of the information sought.

41 It may very well be that by necessity large parts of judicial investigative hearings will be held in secret. It may also very well be that the very existence of these hearings will at times have to be kept secret. It is too early to determine, in reality, how many hearings will be resorted to and what form they will take. This is an entirely novel procedure, and this is the first case — to our knowledge — in which it has been used.

42 The parties on the present appeal seem to agree that this is a "unique" case, in the sense that this is not a "typical" set of circumstances in which such a hearing will be sought. This may be so. We cannot speculate as to what will be more "typical". Resort to "reasonable hypotheticals" is fraught with difficulties in an environment as unprecedented as this one. Applying this novel legislation to the fact situation before us, it becomes apparent that at least in this case, the level of secrecy imposed from the outset was unnecessary. It is therefore prudent to proceed with as little departure as possible from the basic tenets of judicial proceedings, all the while developing a discretionary framework that will reflect the unique investigative role of the judge acting under s. 83.28.

43 In applying the *Dagenais/Mentuck* approach to the decision to hold the investigative judicial hearing *in camera*, judges should expect to be presented with evidence credible on its face of the anticipated risks that an open inquiry would present, including evidence of the information expected to be revealed by the witness.

Even though the evidence may reveal little more than reasonable expectations, this is often all that can be expected at that stage of the process and the presiding judge, applying the *Dagenais/Mentuck* test in a contextual manner, would be entitled to proceed on the basis of evidence that satisfies him or her that publicity would unduly impair the proper administration of justice.

C. *Application to This Case*

44 At the outset, we must state that this judicial investigative hearing is the first to our knowledge, and our comments are not to be taken as critical of the judges below who dealt with these novel matters under great pressure and time constraints. Properly adapted to the circumstances of this case, the *Dagenais/Mentuck* test in our view leads to the following conclusions.

45 The application for the order for the judicial investigative hearing under s. 83.28(2) before Dohm A.C.J. on May 6, 2003, was properly heard *ex parte* and *in camera*.

46 On the other hand, there was no reason for keeping the existence of the order secret, nor the fact that the investigative hearing ordered by Dohm A.C.J. was in relation to the explosion that caused the crash of Air India Flight 182 in June 1985.

47 In light of the position taken by the Named Person at that stage, the identity of the person was properly kept confidential. That direction should have been made subject to revision by the judge presiding at the judicial investigative hearing.

48 It is apparent on the facts that notice of the hearing should have been given to counsel for Mr. Malik and Mr. Bagri promptly. In the circumstances of this case where a potential Crown witness in an ongoing trial becomes the subject of the investigative order, it is obvious that third party interests have to be considered. Section 83.28(5)(*e*) specifically contemplates the imposition of terms and conditions that are "desirable . . . for the protection of the interests of . . . third parties". The subsequent participation of counsel for Mr. Malik and Mr. Bagri in the hearings before Holmes J. merely emphasizes that they should have received notice in the first instance. Instead, in light of the secrecy surrounding the very existence of the judicial investigative hearing ordered by Dohm A.C.J., counsel found out only accidentally of its existence. They then persuaded Holmes J. that the interests of their clients required their participation in the hearing. A proper application of the principles in the *Dagenais*/*Mentuck* test reveals that there was no justification for the order that counsel for Mr. Malik and Mr. Bagri not be given notice of the hearing at the outset. It is particularly incumbent on the presiding judge to turn his or her mind to the *Dagenais*/*Mentuck* test in *ex parte* applications because the media is not present to represent its own rights and interests: *Mentuck*, *supra*.

49 It is not necessary in this appeal, given our conclusion that the hearing should have been held in open court, to decide whether an appropriate condition under s. 83.28(5)(*e*) could include an order that counsel be present but be prohibited from disclosing to their clients the content of the information revealed in the hearing. It is difficult to anticipate all the difficulties that such an order may pose. In the same way, we would not endorse the suggestion made by the Vancouver Sun that some members of its Editorial Board be allowed to attend the hearings and have access to the

materials but be subject to an undertaking of confidentiality. It is difficult again to understand how the public good is better served by the qualified participation of professionals who cannot discharge fully their publicly entrusted mandate. In any event, these issues can be left for another day, and should be debated amongst the professional bodies involved so that court-imposed conditions can properly consider ethical standards and best practices in the professions involved.

50 Keeping in mind our statements about the novelty of this case, the present facts clearly illustrate the mischief that flows from a presumption of secrecy. Secrecy then becomes the norm, is applied across the board, and sealing orders follow as a matter of course.

51 When the Named Person indicated an intention to challenge the constitutionality of the order, the imperatives of the open court principle became even more compelling. The constitutional challenge, and as much of the information about the case as could be revealed without jeopardizing the investigation, should have been made public, subject, if need be, to a total or partial publication ban. When that matter resumed before Holmes J., it became apparent that the existence of a judicial investigative hearing related to the Air India case was already known to counsel for Mr. Malik and Mr. Bagri and later to the Vancouver Sun.

52 The unfolding of events in this case also illustrates how antithetical to judicial process secret court hearings are. Courthouses are public places. In the course of a public hearing a judge may order that part of the proceedings be held *in camera*, thus excluding the public from that part of the hearing. But, of course, in such a case, the fact that an *in camera* hearing is taking place, as well as the overall context

in which it was ordered, are in the public domain, subject to challenge, *inter alia* by the press and to comments by interested parties and by the public. Whether better notice should be given to the press, or to other possibly interested parties, of proceedings that are held *in camera* or that are subject to a publication ban is beyond the scope of the issues raised on this appeal but we again suggest serious consideration should be given to this matter by the legal profession, the media, and the courts.

53 In retrospect, the hearing of the constitutional challenge that was held in open court before us could and should have been held in the same manner before Holmes J. Although she may have felt bound by the secrecy order issued by Dohm A.C.J., it is clear under s. 83.28(5)(*e*) that the terms and conditions attached to the judicial investigative hearing must be varied and adjusted to achieve the proper balance between confidentiality and publicity as the matter progresses.

54 Here, for instance, the Named Person now takes the position that the proceedings should be held in public and no longer wishes that his or her identity be protected. Although this is only one factor to consider and certainly not dispositive of the issue, it removes in part the concerns that the investigative judge may have had regarding the privacy interests of the Named Person. The only factors militating in favour of a degree of secrecy in this case are the factors related to the protection of an ongoing investigation or for other vital but unstated reasons. In a case in which so much of the information relating to the offence is already in the public domain, and in which recourse to a judicial investigative hearing is sought in the midst of an ongoing non-jury trial, the case for extensive secrecy is a difficult one to make and was not made out here.

55 We again emphasize that in the difficult circumstances of this unusual application of a novel criminal procedure, Holmes J. did excellent work in fleshing out the issues and addressing them as best she could. Any shortcomings in her decision become much easier to identify with hindsight, particularly since much of the ordered secrecy in this case has been lifted causing no apparent damage to the investigation. Furthermore, shortcomings in the original decision also become apparent when a hearing is truly adversarial, with all affected interests represented.

56 It is therefore clear that the constitutional challenge here should not have been conducted *in camera*. We would add that there would have been no need to give the Vancouver Sun (through some members of its editorial board or otherwise) preferential and confidential access to secret information in this case if much of the constitutional challenge had been conducted in open court, along the lines of the process followed in this court, with the helpful cooperation of all parties. Much of the constitutional case can be properly argued without the details of the information submitted to the application judge being revealed.

IV. Disposition

57 We would therefore order that:

The appeal be allowed in part and that the order made by Holmes J. be varied.

That the name of the Named Person be made public.

That the proposed judicial investigative hearing be held in public, subject to any order of the presiding judge that the public be excluded and/or that a publication ban be put in place regarding aspects of the anticipated evidence to be given by the Named Person.

58 In any event, we would also order that the investigative judge review the continuing need for any secrecy at the end of the investigative hearing and release publicly any part of the information gathered at the hearing that can be made public without unduly jeopardizing the interests of the Named Person, of third parties, or of the investigation: *Criminal Code*, s. 83.28(5)(*e*). Even in cases where the very existence of an investigative hearing would have been the subject of a sealing order, the investigative judge should put in place, at the end of the hearing, a mechanism whereby its existence, and as much as possible of its content, should be publicly released.

The reasons of Bastarache and Deschamps JJ. were delivered by

BASTARACHE J. (dissenting in part) —

I. Introduction

59 I agree with Iacobucci and Arbour JJ.'s discussion on the importance of openness of judicial proceedings, both as a principle of common law and as an aspect of s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* guaranteeing freedom of the press (paras. 23-36). However, I respectfully cannot agree with their analysis or disposition in this appeal.

60 While I do recognize that openness of judicial proceedings is the rule and covertness the exception, this Court has held that public access to judicial proceedings can be curtailed "where there is present the need to protect social values of superordinate importance": *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at pp. 186-87. In my view, several considerations of superordinate importance, such as the proper administration of justice as well as the protection of the interests, rights and safety of third parties, warrant the curtailment of public access to investigative proceedings under s. 83.28 of the *Criminal Code*, R.S.C. 1985, c. C-46, in most instances. As discussed below, I believe that public access to investigative hearings would normally defeat the purpose of the proceedings by rendering them ineffective as an investigative tool.

II. Inapplicability of the *Dagenais/Mentuck* Framework

61 This Court developed, in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76, a framework to guide the exercise of judicial discretion in restricting access to judicial proceedings. Nevertheless, with respect, I do not believe that the *Dagenais/Mentuck* test can guide a judge's discretion in ordering that the investigative proceedings under s. 83.28 should be held *in camera*.

62 The first requirement of the *Dagenais/Mentuck* test is that a public ban should only be ordered when "such an order is necessary in order to prevent a serious risk to the proper administration of justice" (*Mentuck*, *supra*, at para. 32). This requirement was explained by our Court in *Mentuck*, at para. 34:

> 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. [Emphasis added.]

63 Thus, in order to deny access to judicial proceedings, this test requires, at the outset, the existence of a serious risk that is well grounded in the evidence. But where the purpose of the investigative proceeding under review is to gather information and possibly evidence, it would be quite difficult if not impossible to present an application for denial of access that is well grounded in the evidence. The presumption of openness cannot operate in circumstances where it cannot in fact be rebutted. This is the case because there is no evidence before the hearing actually takes place. The very object of the hearing is to gather information and evidence.

64 In my opinion, the only evidence on which a judge presiding over an investigative hearing could assess the risk under the *Dagenais/Mentuck* test would be the information, if any, supporting the reasonable grounds presented by the peace officer to satisfy the judge hearing the application (s. 83.28(3) and (4)). However, I do not think that reasonable grounds to believe that a person has direct and material information that relates to a past or future terrorist offence, or that relates to the whereabouts of an individual suspected of having committed a terrorism offence, is sufficient evidence upon which a judge can assess the application and upon which he or she may exercise his or her judicial discretion. It is imperative to bear in mind that the information sought has not yet been obtained, and that neither the investigators, the Crown nor the presiding judge is able to predict what the witness will say during the

hearing. Consequently, if the presumption of openness applies to investigative hearings, an applicant seeking a denial of public access for the s. 83.28 proceedings could never satisfy the *Dagenais/Mentuck* test. It is not possible for the presiding judge to assess, in an evidentiary vacuum, the degree of risk that would be created if the hearing were open to the public. In light of this inherent uncertainty with which presiding judges are confronted, public access to all investigative hearings under s. 83.28 must be very limited.

65 In sum, a convincing evidentiary basis for denial of access to any judicial proceeding is generally necessary under the *Dagenais/Mentuck* test to rebut the presumption of open courts, a highly valued democratic principle of our society. However, because of the lack of information and evidence prior to an investigative hearing, this framework is not appropriate to determine denial of access. This situation is not unique.

66 In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, La Forest J. found that in situations where judges are confronted with an uncertain evidentiary record, the evidence should be received by way of a *voir dire*, from which the public is excluded (at para. 72):

> 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. In some cases in which the facts are not in dispute the statement of counsel will suffice. If there is insufficient evidence placed before the trial judge, or there is a dispute as to the relevant facts, the applicant should seek to have the evidence heard *in camera*. This may be done by way of a *voir dire*, from which the public is excluded. . . . The decision to hold a *voir dire* will be a function of what is necessary in a given case to ensure that the trial judge has a sufficient evidentiary basis upon which to act judicially. [Emphasis added.]

67 Thus, it is only after the information and evidence has been gathered by the Crown that the presiding judge will be able to exercise his or her discretion judicially. To act otherwise would present great risks to the proper administration of justice and to the safety, interests and rights of third parties.

III. Risk to the Safety, Interests and Rights of Witnesses and Third Parties

68 The importance of protecting the innocent was considered by Dickson J. in *MacIntyre*, *supra*, at p. 187:

> Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear. [Emphasis added.]

69 In s. 83.28 proceedings, which deal with acts of terrorism, the possibility that information may be disclosed which unfairly prejudices or tarnishes the reputation of innocent people clearly exists. Such proceedings run the risk that "unfounded, even outrageous, allegations of misconduct may be made against the absent target of the information": *Southam Inc. v. Coulter* (1990), 60 C.C.C. (3d) 267 (Ont. C.A.), at p. 275. This unreliable and possibly untruthful testimony could severely damage the reputation of innocent people, who may themselves lack adequate means to counter the effect of information they know to be erroneous or false. This consideration therefore warrants confidentiality in investigative proceedings.

70 With regard to safety, the disclosure of a witness's identity may place that person at serious risk of harm from suspects or their allies. The same can be said for third parties identified by the witness as having information to provide during the investigative hearing. This Court has acknowledged the potential jeopardy to the safety of the witness should it become known that he or she is about to be questioned: *R. v. A*, [1990] 1 S.C.R. 992.

71 As noted by the respondent Attorney General of Canada, for some witnesses, the likelihood that the persons against whom they can provide information will discover their identity or the content of their testimony may cause them to commit perjury or refuse to comply with the order. This would go against society's interest in encouraging the reporting of offences and the participation of witnesses in the investigative process. Given the nature of the threat posed by terrorism and terrorist organizations, confidentiality will likely encourage witnesses to come forward and be honest in their recollection of facts, because they would not fear for their safety.

IV. Risk to the Proper Administration of Justice

72 This Court has held that "the open court principle itself must yield to circumstances that would render the proper administration of justice unworkable": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, at para. 29. This confirmed the findings of our Court in *MacIntyre, supra*, at pp. 187-88:

> The point taken here is that the effective administration of justice would be frustrated if individuals were permitted to be present when the warrants were issued. Therefore, the proceeding must be conducted *in camera*, as an

> exception to the open court principle. I agree. The effective administration of justice does justify the exclusion of the public from the proceedings attending the actual issuance of the warrant. The Attorneys General have established, at least to my satisfaction, that if the application for the warrant were made in open court the search for the instrumentalities of crime would, at best, be severely hampered and, at worst, rendered entirely fruitless. In a process in which surprise and secrecy may play a decisive role the occupier of the premises to be searched would be alerted, before the execution of the warrant, with the probable consequence of destruction or removal of evidence. I agree with counsel for the Attorney General of Ontario that the presence in an open courtroom of members of the public, media personnel, and, potentially, contacts of suspected accused in respect of whom the search is to be made, would render the mechanism of a search warrant utterly useless. [Emphasis added.]

73 Although the investigative hearings under s. 83.28 are a new form of proceeding, the question of public access raises essentially the same issues that this Court has considered in the context of other investigative tools. The necessity of clandestine proceedings in relation to the application for and execution of investigative tools has been accepted by this Court in situations concerning search warrant applications and wiretap authorization proceedings.

74 For example, this Court recognized at para. 51 of *Michaud v. Quebec (Attorney General)*, [1996] 3 S.C.R. 3, that "[t]he reality of modern law enforcement is that police authorities must frequently act under the cloak of secrecy to effectively counteract the activities of sophisticated criminal enterprises." Speaking about electronic surveillance, Lamer C.J. went on to state at para. 52:

> The effectiveness of such surveillance would be dramatically undermined if the state was routinely required to disclose the application and affidavits filed in support of a surveillance authorization to every non-accused surveillance target. The wiretap application will often provide a crucial insight into the *modus operandi* of electronic surveillance, and regular disclosure would permit criminal organizations to adjust their activities accordingly.

75 Secrecy has therefore been recognized as paramount in the context of wiretaps, and public access has been limited to ensure the effectiveness of electronic surveillance as an investigative device. The same could be said of terrorist groups or organizations: if the police cannot investigate and collect information in a confidential environment, their investigation or attempt to prevent the terrorist offence would be undermined because suspects could be "tipped off".

76 The confidentiality of investigative tools was recently confirmed by this Court in *R. v. S.A.B.*, [2003] 2 S.C.R. 678, 2003 SCC 60. In her discussion of the constitutionality of DNA warrants, Arbour J. stated that "as with most investigative techniques, the *ex parte* nature of the proceedings is constitutionally acceptable as a norm because of the risk that the suspect would take steps to frustrate the proper execution of the warrant" (para. 56).

77 I agree with the respondent Attorney General of British Columbia that police cannot gather information and act upon it at the same time it is disseminated to the public and the media. Information gathered may lead to other avenues of investigation and other potential witnesses. Moreover, the information obtained at a s. 83.28 hearing could be used in connection with subsequent applications for search warrants, wiretaps and further s. 83.28 orders against other witnesses. The efficacy of these investigative tools would be seriously compromised if the details of the s. 83.28 proceedings were open to the public. Corruption of witnesses' recollections, the potential fleeing of suspects and the risk of pressure being put on future witnesses to give false testimony are but a few examples.

78 Unlike other investigative proceedings, such as search warrants, where the evidence found and things seized are material, a witness's version of events may vary substantially, especially in response to threats or intimidation. This person could also flee. Thus, there is a legitimate law enforcement interest in maintaining the confidentiality of a witness's identity and testimony, because the premature disclosure of information about a terrorism offence would compromise and impede the very investigation of this gathered information. This would frustrate effective law enforcement, which is meant to benefit society as a whole: *S.A.B.*, *supra*, at para. 51.

79 The predominant purpose of the investigative hearing, like the execution of a search warrant, is to gather information. While the purposes of these investigative tools are similar, this should not be taken as saying that the role of the judge in investigatory proceedings is like that of an agent of the state charged with executing a search warrant. Rather, the companion reasons clearly state that the judge's role in investigative proceedings under s. 83.28 is limited to ensuring that information is gathered in a proper manner and protecting the integrity of the investigation and interests of the witness (*Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42, at paras. 86-87). However, the evidentiary uncertainty preceding both procedures is the same. Without knowing what information will be revealed, it is not possible, in my view, to evaluate the seriousness of the risk to third parties' rights and to the proper administration of justice. Judges simply do not have sufficient evidence on which to make an informed assessment. Thus, in the case of investigative hearings, the presumption of openness must yield to other serious considerations so as to preserve the rights of third parties and ensure the proper administration of justice.

80 In my opinion, the fact that an investigative hearing takes place during an ongoing investigation further supports the confidentiality of the proceedings. For example, the respondent Bagri argues that the premature disclosure of investigative information from a s. 83.28 hearing could compromise the integrity of the ongoing investigations, which could in turn hamper his ability to make full answer and defence in the Air India trial.

81 Likewise, the fact that the hearing was in part about the constitutional validity of s. 83.28 did not make the imperatives of the open court principle more compelling in this case. To the contrary, the public disclosure of this challenge to the provision would ignore the fact that the Named Person's identity and any information that person may disclose should be kept confidential until the completion of the proceeding. An examination of the record shows that the constitutional challenge could not realistically be separated from the actual investigative hearing — in fact, public disclosure of such a challenge would normally have the effect of publicizing the fact that an application has been made under s. 83.28 and that an investigative hearing may be taking place, though I would not rule out the possibility of isolating these proceedings and holding them in open court under the appropriate circumstances. In my view, the protection of the judicial system's integrity does not depend on the public's knowledge of potentially harmful information, especially in light of the fact that any information which is found to be non-prejudicial will be publicly disclosed after the end of the proceeding.

82 For the same reasons, like Holmes J. (*Vancouver Sun (Re)*, [2003] B.C.J. No. 1992 (QL), 2003 BCSC 1330), I see no merit in alerting the media to the fact that an *in camera* hearing is to take place. Advance notice of the s. 83.28 hearing would

serve no useful purpose. The media's pursuit of a newsworthy event at that point would only undermine the proper administration of justice and could potentially damage third parties' rights and interests. The trouble is that until the witness testifies, is it inherently uncertain whether or not public access to the hearing will jeopardize the countervailing interests at stake.

V. Completion of the Investigative Hearing

83 I agree with Holmes J. that different considerations apply after the completion of investigative procedures (para. 27). Much like the execution of a search warrant, the evidentiary uncertainty surrounding investigative proceedings under s. 83.28 is dispelled upon completion of the hearing and "the purposes of the policy of secrecy are largely, if not entirely, accomplished": *MacIntyre*, *supra*, at p. 188. The information gathered by the Crown at the s. 83.28 proceeding will provide a basis upon which the presiding judge can balance the competing interests at stake and more accurately assess the risk presented by the disclosure of information to third parties and to the proper administration of justice. Consequently, all information which is deemed non-prejudicial can be released shortly after the hearing. Because openness is the presumption, the person who wishes to deny the right of public access has the burden of proof and must satisfy the *Dagenais/Mentuck* test.

VI. Conclusion

84 Although the rule is that of openness, where the rights of third parties would be unduly harmed and the administration of justice rendered unworkable by the

presence of the public, the court may sit *in camera*. Such is normally the case for investigative proceedings under s. 83.28.

85 Courts reviewing a trial judge's decision to deny public access must remember that a trial judge is usually in the best position to assess the demands of a given situation: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 77. A reviewing court may look at the facts of this case in hindsight and conclude that the level of secrecy imposed from the outset was unnecessary. Nonetheless, there is no way of knowing this prior to the investigative hearing, because until the witness has testified, judges cannot assess with any degree of accuracy the extent to which the proper administration of justice and third parties' rights could be jeopardized. Accordingly, I find that Holmes J. properly exercised her discretion and did not err by ordering that the s. 83.28 hearing be held *in camera*. For these reasons, I would dismiss the appeal.

The following are the reasons delivered by

86 LEBEL J. — Subject to my comments in the companion case of *Application under s. 83.28 of the Criminal Code (Re)*, [2004] 2 S.C.R. 248, 2004 SCC 42, I agree with the reasons of Iacobucci and Arbour JJ. and with their proposed disposition in this appeal.

APPENDIX

Statutory Provisions

INVESTIGATIVE HEARING

83.28 (1) In this section and section 83.29, "judge" means a provincial court judge or a judge of a superior court of criminal jurisdiction.

(2) Subject to subsection (3), a peace officer may, for the purposes of an investigation of a terrorism offence, apply *ex parte* to a judge for an order for the gathering of information.

(3) A peace officer may make an application under subsection (2) only if the prior consent of the Attorney General was obtained.

(4) A judge to whom an application is made under subsection (2) may make an order for the gathering of information if the judge is satisfied that the consent of the Attorney General was obtained as required by subsection (3) and

(*a*) that there are reasonable grounds to believe that

(i) a terrorism offence has been committed, and

(ii) information concerning the offence, or information that may reveal the whereabouts of a person suspected by the peace officer of having committed the offence, is likely to be obtained as a result of the order; or

(*b*) that

(i) there are reasonable grounds to believe that a terrorism offence will be committed,

(ii) there are reasonable grounds to believe that a person has direct and material information that relates to a terrorism offence referred to in subparagraph (I), or that may reveal the whereabouts of an individual who the peace officer suspects may commit a terrorism offence referred to in that subparagraph, and

(iii) reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph.

(5) An order made under subsection (4) may

(*a*) order the examination, on oath or not, of a person named in the order;

(*b*) order the person to attend at the place fixed by the judge, or by the judge designated under paragraph (*d*), as the case may be, for the examination and to remain in attendance until excused by the presiding judge;

(*c*) order the person to bring to the examination any thing in their possession or control, and produce it to the presiding judge;

(*d*) designate another judge as the judge before whom the examination is to take place; and

(*e*) include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation.

(6) An order made under subsection (4) may be executed anywhere in Canada.

(7) The judge who made the order under subsection (4), or another judge of the same court, may vary its terms and conditions.

(8) A person named in an order made under subsection (4) shall answer questions put to the person by the Attorney General or the Attorney General's agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.

(9) The presiding judge shall rule on any objection or other issue relating to a refusal to answer a question or to produce a thing.

(10) No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty, but

(*a*) no answer given or thing produced under subsection (8) shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136; and

(*b*) no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than a prosecution under section 132 or 136.

(11) A person has the right to retain and instruct counsel at any stage of the proceedings.

(12) The presiding judge, if satisfied that any thing produced during the course of the examination will likely be relevant to the investigation of any

terrorism offence, shall order that the thing be given into the custody of the peace officer or someone acting on the peace officer's behalf.

Appeal allowed in part, BASTARACHE *and* DESCHAMPS JJ. *dissenting in part.*

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