2013 CarswellOnt 13556, 2013 ONSC 5779

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R. v. **CTV**

Her Majesty the Queen, Respondent and **CTV**, a division of Bell Media Inc., The Globe and Mail, Canadian Broadcasting Corporation, Shaw Television Limited Partnership, Postmedia Network Inc., and Toronto Star Newspapers Ltd., Applicants and Sun Media Corporation, Applicant and Chiheb Esseghaier and Raed **Jaser**, Respondents

Ontario Superior Court of Justice

Durno J.

Heard: July 23, **2013**; July 26, **2013**
Judgment: September 20, **2013**
Docket: CR-303-00

Counsel: Sarah Shaikh, for Respondent / Crown

P.A. Jacobsen, for Applicants, **CTV**, a division of Bell Media Inc., The Globe and Mail, Canadian Broadcasting Corporation, Shaw Television Limited Partnership, Postmedia Network Inc., and Toronto Star Newspapers Ltd.

I. MacKinnon, for Applicant, Sun Media Corporation

Chiheb Esseghaier, for himself

J. Norris, for Respondent, Raed **Jaser**

Subject: Criminal; Constitutional

Criminal law --- Pre-trial procedure — Public or publication ban order — Miscellaneous

Sealing orders — Two accused were charged with terrorism offences arising from train derailment — Sealing orders were granted in relation to six informations to obtain (ITOs) — Media outlets ("media") applied to unseal orders that

were granted relating to search warrants, general warrants, and production orders, and to be able to publish contents with agreed-upon redactions — Application granted in part — Once search warrant is executed, warrant and ITO upon which it was issued must be made available to public unless issuing judge or justice orders that they be sealed — Continued sealing must be supported by particularized grounds related to specific investigation that is imperilled — Dagenais-Mentuck test applies when considering whether to grant or impose discretionary order that limits freedom of expression and freedom of press at any stage of criminal proceeding — Media's application was not premature — Publication ban under s. 517 of Criminal Code does not cover information obtained by media from another source outside bail hearing — Expert evidence is not required where circumstantial evidence permits court to draw inference of serious risk to proper administration of justice — In addition to sustained pre-trial publicity, there were concerns about nature of information and evidence that would be published — Reasonable alternative measures were not available — Publication ban on evidence would assist in fair trial context, and would enhance efficacy of administration of justice and public interest in fair trial — There was high probability of serious risk to proper administration of justice if information in ITOs were published, and beneficial effects of ban were significant in relation to accused's fair and public trial rights — Public Prosecution Service of Canada (PPSC) and accused J had met their onus on both branches of Dagenais-Mentuck test to rebut presumption of openness — PPSC was ordered to produce copies of ITOs.

Criminal law --- Charter of Rights and Freedoms — Freedom of expression [s. 2(b)]

Two accused were charged with terrorism offences arising from train derailment — Sealing orders were granted in relation to six informations to obtain (ITOs) — Media outlets ("media") applied to unseal orders that were granted relating to search warrants, general warrants, and production orders, and to be able to publish contents with agreed-upon redactions — Application granted in part — Once search warrant is executed, warrant and ITO upon which it was issued must be made available to public unless issuing judge or justice orders that they be sealed — Continued sealing must be supported by particularized grounds related to specific investigation that is imperilled — Dagenais-Mentuck test applies when considering whether to grant or impose discretionary order that limits freedom of expression and freedom of press at any stage of criminal proceeding — Where accused person's rights are in direct conflict with media's expressive rights, common law proportionality analysis must be applied in manner reflecting fact that two fundamental rights are in jeopardy — While measures which prohibit media from publishing information deemed of interest restrict freedom of press, in some circumstances, public access to confidential or sensitive information related to court proceedings will endanger integrity of justice system — Risk must be real and substantial one, reality of which is well-grounded in evidence, that poses serious threat to proper administration of justice — Publication ban on evidence would assist in fair trial context, and would enhance efficacy of administration of justice and public interest in fair trial — There was high probability of serious risk to proper administration of justice if information in ITOs were published, and beneficial effects of ban were significant in relation to accused's fair and public trial rights — Public Prosecution Service of Canada (PPSC) and accused J had met their onus on both branches of Dagenais-Mentuck test to rebut presumption of openness — PPSC was ordered to produce copies of ITOs.

Criminal law --- Charter of Rights and Freedoms — Presumption of innocence [s. 11(d)] — Right to fair trial

Two accused were charged with terrorism offences arising from train derailment — Sealing orders were granted in relation to six informations to obtain (ITOs) — Media outlets ("media") applied to unseal orders that were granted relating to search warrants, general warrants, and production orders, and to be able to publish contents with

agreed-upon redactions — Application granted in part — Once search warrant is executed, warrant and ITO upon which it was issued must be made available to public unless issuing judge or justice orders that they be sealed — Continued sealing must be supported by particularized grounds related to specific investigation that is imperilled — Dagenais-Mentuck test applies when considering whether to grant or impose discretionary order that limits freedom of expression and freedom of press at any stage of criminal proceeding — Where accused person's rights are in direct conflict with media's expressive rights, common law proportionality analysis must be applied in manner reflecting fact that two fundamental rights are in jeopardy — While measures which prohibit media from publishing information deemed of interest restrict freedom of press, in some circumstances, public access to confidential or sensitive information related to court proceedings will endanger integrity of justice system — Risk must be real and substantial one, reality of which is well-grounded in evidence, that poses serious threat to proper administration of justice — Publication ban on evidence would assist in fair trial context, and would enhance efficacy of administration of justice and public interest in fair trial — There was high probability of serious risk to proper administration of justice if information in ITOs were published, and beneficial effects of ban were significant in relation to accused's fair and public trial rights — Public Prosecution Service of Canada (PPSC) and accused J had met their onus on both branches of Dagenais-Mentuck test to rebut presumption of openness — PPSC was ordered to produce copies of ITOs.

Criminal law --- Charter of Rights and Freedoms — Onus and standard of proof

Two accused were charged with terrorism offences arising from train derailment — Sealing orders were granted in relation to six informations to obtain (ITOs) — Media outlets ("media") applied to unseal orders that were granted relating to search warrants, general warrants, and production orders, and to be able to publish contents with agreed-upon redactions — Application granted in part — Once search warrant is executed, warrant and ITO upon which it was issued must be made available to public unless issuing judge or justice orders that they be sealed — Continued sealing must be supported by particularized grounds related to specific investigation that is imperilled — Dagenais-Mentuck test applies when considering whether to grant or impose discretionary order that limits freedom of expression and freedom of press at any stage of criminal proceeding — Public Prosecution Service of Canada (PPSC) and accused J, as parties seeking restrictions on presumption of openness, to rebut that presumption — Sealing order was obtained in ex parte application when there was presumption that ITO would not be public because of ongoing investigation — Presumption no longer applied after warrants were executed — To put onus on media would be to reverse presumption in Dagenais-Mentuck — Publication ban on evidence would assist in fair trial context, and would enhance efficacy of administration of justice and public interest in fair trial — There was high probability of serious risk to proper administration of justice if information in ITOs were published, and beneficial effects of ban were significant in relation to accused's fair and public trial rights — PPSC and J had met their onus on both branches of Dagenais-Mentuck test to rebut presumption of openness — PPSC was ordered to produce copies of ITOs.

Cases considered by *Durno J.*:

Canadian Broadcasting Corp. v. New Brunswick (Attorney General) (1996), 2 B.H.R.C. 210, 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463 (S.C.C.) — considered

Canadian Newspapers Co. v. Canada (Attorney General) (1988), 65 C.R. (3d) 50, [1988] 2 S.C.R. 122, 52 D.L.R. (4th) 690, *(*sub nom. *Canadian Newspapers Co. v. Canada)* 87 N.R. 163, 43 C.C.C. (3d) 24, 38 C.R.R. 72, 65

O.R. (2d) 637 (note), 32 O.A.C. 259, 1988 CarswellOnt 1023, 1988 CarswellOnt 1023F (S.C.C.) — referred to

Dagenais v. Canadian Broadcasting Corp. (1994), 1994 CarswellOnt 1168, 1994 SCC 102, 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), 1989 SCC 133, [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — referred to

MacDonell c. Flahiff (1998), *(*sub nom. *R. v. Flahiff)* 157 D.L.R. (4th) 485, *(*sub nom. *Flahiff c. MacDonell)* [1998] R.J.Q. 327, 17 C.R. (5th) 94, 1998 CarswellQue 19, *(*sub nom. *R. v. Flahiff)* 123 C.C.C. (3d) 79, 1998 CarswellQue 4929 (Que. C.A.) — considered

MacDonell c. Flahiff (1998), 232 N.R. 197 (note) (S.C.C.) — referred to

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 1982 CarswellNS 21, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, *(*sub nom. *Nova Scotia (Attorney General) v. MacIntyre)* 65 C.C.C. (2d) 129, 1982 CarswellNS 110 (S.C.C.) — followed

Michaud c. Québec (Procureur général) (1996), 1996 CarswellQue 908, 1996 CarswellQue 909, *(*sub nom. *Michaud v. Quebec (Attorney General))* 201 N.R. 241, *(*sub nom. *Michaud v. Quebec (Attorney General))* 109 C.C.C. (3d) 289, 1 C.R. (5th) 1, [1996] 3 S.C.R. 3, *(*sub nom. *Michaud v. Quebec (Attorney General))* 38 C.R.R. (2d) 230, *(*sub nom. *Michaud v. Quebec (Attorney General))* 138 D.L.R. (4th) 423 (S.C.C.) — considered

Ottawa Citizen Group Inc. v. Ontario (2005), *(*sub nom. *Ottawa Citizen Group Inc. v. Canada (Attorney General))* 201 O.A.C. 208, 2005 CarswellOnt 2205, *(*sub nom. *Ottawa Citizen Group Inc. v. Canada (Attorney General))* 131 C.R.R. (2d) 332, 31 C.R. (6th) 144, *(*sub nom. *Ottawa Citizen Group Inc. v. R.)* 75 O.R. (3d) 590 (Ont. C.A.) — considered

Ottawa Citizen Group Inc. v. Ontario (2005), *(*sub nom. *Ottawa Citizen Group Inc. v. Canada (Attorney General))* 201 O.A.C. 208 at 223, 2005 CarswellOnt 2364, *(*sub nom. *Ottawa Citizen Group Inc. v. Canada (Attorney General))* 197 C.C.C. (3d) 514, *(*sub nom. *Ottawa Citizen Group Inc. v. Canada (Attorney General))* 255 D.L.R. (4th) 149, *(*sub nom. *Ottawa Citizen Group Inc. v. R.)* 75 O.R. (3d) 607 (Ont. C.A.) — considered

Phillips v. Nova Scotia (Commissioner, Public Inquiries Act) (1995), 1995 CarswellNS 12, 1995 CarswellNS 83, 39 C.R. (4th) 141, 31 Admin. L.R. (2d) 261, *(*sub nom. *Phillips v. Richard, J.)* 180 N.R. 1, *(*sub nom. *Phillips v. Richard, J.)* 141 N.S.R. (2d) 1, *(*sub nom. *Phillips v. Richard, J.)* 403 A.P.R. 1, *(*sub nom. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy))* 98 C.C.C. (3d) 20, *(*sub nom. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy))* 124 D.L.R. (4th) 129, *(*sub nom. *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy))* [1995] 2 S.C.R. 97, *(*sub nom. *Phillips v. Nova Scotia*

(Commission of Inquiry into the Westray Mine Tragedy)) 28 C.R.R. (2d) 1 (S.C.C.) — referred to

Phillips v. Vancouver Sun (2004), 2004 CarswellBC 32, 2004 BCCA 14, 19 C.R. (6th) 55, 238 D.L.R. (4th) 167, 182 C.C.C. (3d) 483, 192 B.C.A.C. 250, 315 W.A.C. 250, 27 B.C.L.R. (4th) 27 (B.C. C.A.) — considered

R. v. Ahmad (2009), 2009 CarswellOnt 9310 (Ont. S.C.J.) — considered

R. v. Brown (1998), 1998 CarswellOnt 477, 49 C.R.R. (2d) 343, 126 C.C.C. (3d) 187 (Ont. Gen. Div.) — referred to

R. v. Canadian Broadcasting Corp. (2008), 236 O.A.C. 232, *(*sub nom. *R. v. Gardiner)* 231 C.C.C. (3d) 394, 2008 ONCA 397, 2008 CarswellOnt 2877 (Ont. C.A.) — considered

R. v. Généreux (1992), [1992] 1 S.C.R. 259, 70 C.C.C. (3d) 1, 88 D.L.R. (4th) 110, 8 C.R.R. (2d) 89, 133 N.R. 241, 1992 CarswellNat 668, 1992 CarswellNat 668F (S.C.C.) — referred to

R. v. Hennessey (2008), 2008 CarswellAlta 2332, 478 A.R. 47, 2008 ABQB 312 (Alta. Q.B.) — considered

R. v. Khalid (2010), 183 O.R. (3d) 600, 266 C.C.C. (3d) 405, 272 O.A.C. 228, 2010 ONCA 861, 2010 CarswellOnt 9671 (Ont. C.A.) — referred to

R. v. Lake (November 21, 1997), McCombs J. (Ont. Gen. Div.) — referred to

R. v. Mason (2005), 2005 CarswellOnt 7188, [2005] O.T.C. 1060, 138 C.R.R. (2d) 210 (Ont. S.C.J.) — considered

R. v. McGregor (1992), 14 C.R.R. (2d) 155, 1992 CarswellOnt 730 (Ont. Gen. Div.) — referred to

R. v. Mentuck (2001), 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 163 Man. R. (2d) 1, 269 W.A.C. 1, 2001 CarswellMan 535, 2001 CarswellMan 536, 2001 SCC 76, 47 C.R. (5th) 63, [2002] 2 W.W.R. 409, 277 N.R. 160, [2001] 3 S.C.R. 442 (S.C.C.) — followed

R. v. Parent (2003), 2003 CarswellOnt 1914 (Ont. S.C.J.) — considered

R. v. Sandham (2007), 2007 CarswellOnt 9428 (Ont. S.C.J.) — referred to

R. v. Tutin (2004), 2004 NWTSC 46, 2004 CarswellNWT 38 (N.W.T. S.C.) — considered

R. v. Twitchell (2009), 2009 CarswellAlta 2363, 2009 ABQB 644, 529 A.R. 76 (Alta. Q.B.) — considered

R. v. Y. (N.) (2008), 2008 CarswellOnt 1705 (Ont. S.C.J.) — considered

Thibault, Re (2009), 2009 QCCS 572, 2009 CarswellQue 484 (Que. S.C.) — referred to

Thibault c. Société Radio-Canada (2009), 2009 QCCA 903, 2009 CarswellQue 4399 (Que. C.A.) — referred to

Toronto Star Newspapers Ltd. v. Ontario (2005), 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, 197 C.C.C. (3d) 1, [2005] 2 S.C.R. 188, 2005 SCC 41, 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, 76 O.R. (3d) 320 (note), *(*sub nom. *R. v. Toronto Star Newspapers Ltd.)* 335 N.R. 201, *(*sub nom. *R. v. Toronto Star Newspapers Ltd.)* 200 O.A.C. 348, 132 C.R.R. (2d) 178 (S.C.C.) — followed

Toronto Star Newspapers Ltd. v. R. (2006), 2006 CarswellOnt 4635, *(*sub nom. *R. v. Ahmad)* 211 C.C.C. (3d) 234, *(*sub nom. *Toronto Star Newspapers Ltd. v. Canada)* 98 O.R. (3d) 339 (Ont. S.C.J.) — considered

Toronto Star Newspapers Ltd. v. R. (2010), *(*sub nom. *Toronto Star Newspapers Ltd. v. Canada)* 320 D.L.R. (4th) 64, [2010] 8 W.W.R. 193, *(*sub nom. *Toronto Star Newspapers Ltd. v. Canada)* 255 C.C.C. (3d) 473, *(*sub nom. *Toronto Star Newspaper Ltd. v. Canada)* 490 W.A.C. 66, *(*sub nom. *Toronto Star Newspaper Ltd. v. Canada)* 482 A.R. 66, *(*sub nom. *Toronto Star Newspapers Ltd. v. Canada)* 263 O.A.C. 4, *(*sub nom. *Toronto Star Newspapers Ltd. v. Canada)* 402 N.R. 206, *(*sub nom. *Toronto Star Newspapers Ltd. v. Canada)* 212 C.R.R. (2d) 29, 2010 CarswellOnt 4306, 2010 CarswellOnt 4307, 2010 SCC 21, 23 Alta. L.R. (5th) 242, 75 C.R. (6th) 1, *(*sub nom. *Toronto Star Newspapers Ltd. v. Canada)* 103 O.R. (3d) 399 (note), *(*sub nom. *Toronto Star Newspaper Ltd. v. Canada)* [2010] 1 S.C.R. 721 (S.C.C.) — considered

Vickery v. Nova Scotia (Prothonotary, Supreme Court) (1991), 64 C.C.C. (3d) 65, 124 N.R. 95, 104 N.S.R. (2d) 181, 283 A.P.R. 181, [1991] 1 S.C.R. 671, 1991 CarswellNS 413, 1991 CarswellNS 461 (S.C.C.) — considered

Winnipeg Free Press, Re (2006), 2006 MBQB 43, 2006 CarswellMan 85, 200 Man. R. (2d) 196 (Man. Q.B.) — followed

Y. (X.) v. United States of America (2013), 2013 ONCA 497, 2013 CarswellOnt 10187 (Ont. C.A.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 2(b) — considered

s. 7 — considered

s. 11 — referred to

s. 11(d) — considered

s. 24(1) — considered

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

Generally — referred to

s. 187(1) — considered

s. 187(1)(a)(iii) — considered

s. 187(1.3) [en. 1993, c. 40, s. 7] — referred to

s. 193 — considered

s. 193(1) — considered

s. 193(3) — considered

s. 469 — considered

s. 487 — referred to

s. 487.01 [en. 1993, c. 40, s. 15] — referred to

s. 487.012 [en. 2004, c. 3, s. 7] — referred to

s. 487.3 [en. 1997, c. 23, s. 14] — considered

s. 487.3(2)(b) [en. 1997, c. 23, s. 14] — considered

s. 487.3(4) [en. 1997, c. 23, s. 14] — considered

s. 515(11) — referred to

s. 517 — considered

APPLICATION by media outlets pursuant to s. 487.3 of *Criminal Code* to unseal orders in relation to search warrants, general warrants and production orders pertaining to two accused charged with terrorism offences and to be able to publish redacted contents.

***Durno J.*:**

1 Chiheb Esseghaier and Raed **Jaser** are charged with terrorism offences. During the police investigation prior to and at the time of their arrests, in addition to authorizing the interception of private communications, I granted a series of orders, including three search warrants issued pursuant to s. 487 of the *Criminal Code*, two general warrants issued pursuant to s. 487.01, and one production order issued pursuant to s. 487.012. Sealing orders were granted in relation to the six Informations to Obtain (ITOs). The ITOs encompass between 700 to 750 pages.

2 **CTV**, a division of Bell Media Inc., The Globe and Mail, Canadian Broadcasting Corporation, Shaw Television Limited Partnership, Postmedia Network Inc., Toronto Star Newspapers Ltd., and Sun Media Corporation (the media) apply to unseal the orders in relation to the search warrants, general warrants and production orders pursuant to s. 487.3 of the *Criminal Code* and to be able to publish the contents with certain agreed upon redactions. They do not seek to unseal the wiretap authorizations.

3 The Public Prosecution Service of Canada (PPSC) submits the sealing orders should be varied to permit some access but portions of the ITOs should be subject to a publication ban.

4 Raed **Jaser** submits the sealing orders should remain. In the alternative, he agrees with the PPSC's position.

5 Chiheb Esseghaier, representing himself, does not oppose the unsealing application nor the publication of the contents with one qualification that does not arise in the ITOs.

The Hearing

6 As a result of an earlier ruling, redacted copies of the ITOs were provided to counsel for the media so that they could present their arguments. The PPSC provided charts for each order setting out the redacted paragraphs and the reason why the portions were redacted such as 'national security.' The media's counsels signed undertakings that only counsel and their assistants were permitted to view the ITOs. The media filed facta setting out their positions and the PPSC and Mr. **Jaser** filed responding material. All facta were subject to sealing orders as they referred to matters that were subject to the original sealing orders. While given an opportunity to do so, Mr. Esseghaier did not file any written material.

7 During the argument the court remained open, with counsel, when necessary, making submissions referring to the relevant paragraphs in the facta and ITOs without providing the details that are sealed. This procedure was suggested recently in *Y. (X.) v. United States of America*, 2013 ONCA 497 (Ont. C.A.), at para. 15. While counsel were

told that if they could not make their submissions without referring to the details, the court could be closed for that portion of their submissions, no counsel requested the court be closed.

8 On two occasions when Mr. Esseghaier wanted to make submissions the court was closed until his arguments were heard to insure that he was not disclosing the sealed material. On the first, his argument was summarized for the members of the media when they returned. On the second, when Mr. Esseghaier had his opportunity to present his arguments in relation to the various issues raised, the media were permitted to return to the courtroom to hear his submissions once it became clear that he would not be referring to any sealed information.

The Issues

9 As a result of the material provided, written responses and submissions, there is agreement between the PPSC, **Jaser** and the media on the following areas[FN1] :

(a) The following areas will remain sealed:

(i) National security claims: the media no longer object to redactions upon which the PPSC claimed national security concerns, acknowledging that any claim in that regard would have to be determined in the Federal Court.

(ii) The location where the sealed packets are retained: the media no longer object to the redactions regarding the location where the sealed packets are retained.

(iii) The names of undercover operators and cover officers. The media does not object to the redactions of the officers' names and surnames.

(b) The following areas will no longer be sealed:

(i) Investigative techniques: the PPSC has abandoned its claim for partial redactions because to unseal those portions would disclose investigative techniques.

(ii) The name of an FBI employee: The PPSC no longer claims that the name of a non-undercover FBI employee mentioned in the sealed materials should be redacted and subject to publication bans.

(c) The following areas remain contested:

(i) Does the media or the PPSC and **Jaser** bear the onus on this application?

(ii) Is the media's application premature?

(iii) Should the evidence that the PPSC submits will be used to establish the alleged offences be accessible to the media and subject to a publication ban or remain sealed? Included in this area is whether the s. 517 publication ban in relation to **Jaser's** bail hearing precludes publication of this information and whether the s. 517 order is relevant when considering the *Dagenais-Mentuck* test.

(iv) What orders, if any, should be made in relation to the following categories of third parties:

(a) Persons whose private communications were intercepted without their consent and who are not charged with any offence;

(b) Two acquaintances of the accused persons;

(c) A potential witness; and

(d) Members of the accused person.s families, friends, co-workers and other acquaintances, including their names, addresses, phone numbers and any other identifying characteristics.

(e) Should references to an ongoing police investigation remain subject to the sealing order?

The Law

Obtaining Search Warrants, General Warrants and Production Orders

10 Generally, all court proceedings are subject to the open court principle, that all proceedings are open to the public. However, there are exceptions. For example, search warrants and general warrants are issued through *ex parte* applications *in camera* based on the ITOs. The ITO can be ordered sealed by the issuing judge or justice of the peace.

11 Before a search warrant is executed, the presumption of openness in the courts is rebutted, but not thereafter. Unless the issuing judge or justice of the peace orders that the warrant and ITOs sealed, once a search warrant is executed, the warrant and ITO upon which it was issued, must be made available to the public. Where the material has been sealed, an application can be brought to unseal the ITOs. Where there has been no sealing order and a party seeks one after the warrant has been executed, an applicant seeking a sealing order must demonstrate that public access would subvert the ends of justice. Even where the investigation continues after the execution of the warrant, continued sealing cannot be justified on assertions in the abstract. It must be supported by particularized grounds related to the specific investigation that is imperilled. *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 (S.C.C.), (Toronto Star, 2005), at para. 23.

12 "What should be sought is maximum accountability and accessibility but not such that it harms the innocent or impairs the search warrant as a weapon in society's never-ending fight against crime." *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), (*McIntyre*), at para. 18. The principles derived from *MacIntyre* were subsequently adopted by Parliament and codified in s. 487.3. *Toronto Star*, at para. 22.

13 Section 487.3 of the *Code* provides:

> 487.3 (1) A judge or justice may, on application made at the time of issuing a warrant under this or any other Act of Parliament or a production order under section 487.012 or 487.013, or of granting an authorization to enter a dwelling-house under section 529 or an authorization under section 529.4 or at any time thereafter, make an order prohibiting access to and the disclosure of any information relating to the warrant, production order or authorization on the ground that
>
> (a) the ends of justice would be subverted by the disclosure for one of the reasons referred to in subsection (2) or the information might be used for an improper purpose; and
>
> (b) the ground referred to in paragraph (a) outweighs in importance the access to the information.
>
> (2) For the purposes of paragraph (1)(a), an order may be made under subsection (1) on the ground that the ends of justice would be subverted by the disclosure
>
> (a) if disclosure of the information would
>
> (i) compromise the identity of a confidential informant,
>
> (ii) compromise the nature and extent of an ongoing investigation
>
> (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or
>
> (iv) prejudice the interests of an innocent person; and
>
> (b) for any other sufficient reason.
>
> (3) Where an order is made under subsection (1), all documents relating to the application shall, subject to any terms and conditions that the justice or judge considers desirable in the circumstances, including, without limiting the generality of the foregoing, any term or condition concerning the duration of the prohibition, partial disclosure of a document, deletion of any information or the occurrence of a condition, be placed in a packet and sealed by the justice or judge immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in any other place that the justice or judge may authorize and shall not be dealt with except in accordance with the terms and conditions specified in the order or as varied under subsection (4).
>
> (4) An application to terminate the order or vary any of its terms and conditions may be made to the justice or judge who made the order or a judge of the court before which any proceedings arising out of the investigation in

relation to which the warrant or production order was obtained may be held.

14 This application is brought pursuant to ss. (4).

The Canadian Charter of Rights and Freedoms Considerations

15 The following sections of the *Canadian Charter of Rights and Freedoms* play a prominent role in the determinations to be made:

Section 2(b): Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communications.

Section 7:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice

Section 11(d):

Any person charged with an offence has the right: To be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The Dagenais-Mentuck Test

16 When considering whether to grant or impose a discretionary order that limits freedom of expression and freedom of the press at any stage of a criminal proceeding, including pre-trial procedures, the *Dagenais-Mentuck* test applies. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.); *R. v. Mentuck*, [2001] 3 S.C.R. 442 (S.C.C.); *Toronto Star Newspapers Ltd. v. Ontario*, [2005] 2 S.C.R. 188 (S.C.C.) (*Toronto Star*, 2005).

17 The test provides that a discretionary publication ban can only be granted when the following criteria are established on a balance of probabilities:

• such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and

• 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.

Applying the Dagenais-Mentuck Test

18 The important elements of the first branch can be collapsed into the concept of necessity. *Mentuck*, at para. 34. The second branch involves a balancing of the beneficial and harmful effects of a publication ban.

19 The test was meant to be applied in a flexible and contextual manner, not mechanistically. The circumstances under which the application is brought must be taken into consideration. The perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. *Toronto Star*, at para. 7. A serious risk to the administration of justice during the investigative stage will often become irrelevant at the time the trial is being held.

20 Applications to intrude on the freedom of expression and freedom of the press must be subject to close scrutiny and meet rigorous standards. *Toronto Star*, at paras. 8-9, 31. At any stage, the party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficiency. Otherwise, the presumption would favour secrecy instead of openness, an unacceptable result.

21 While the pre-*Charter* common law rules covering publication bans emphasized the right to a fair trial over freedom of expression interests, such a balance is inconsistent with *Charter* principles, in particular, the equal status given by the *Charter* to ss. 2(b) and 11(d). *Dagenais*, at para. 72. When the protected rights of accused persons comes into conflict with the freedom of the press, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights. *Dagenais*, at para. 72.

22 In *Dagenais*, Lamer C.J.C., found it important to recognize that publication bans should not *always* be seen as a clash between two titans - freedom of expression for the media versus the right to a fair trial for accused persons. (emphasis added) While blindly applying the "clash model" between the rights of the accused and media is wrong, there are times when the accused person's rights will be in direct conflict with the media's expressive rights. Where that occurs, it is necessary to apply the common law proportionality analysis in a manner reflecting the fact that two fundamental rights are in jeopardy.

The Canadian Charter of Rights and Freedoms, s. 2 (b)

23 A democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.), at pp. 1336-7.

24 Freedom of the press is an important and essential attribute of a free and democratic society. Measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom. *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122 (S.C.C.), at p. 129. It is difficult to imagine a right more important to a democratic society than freedom of expression. *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.), at 1336-7.

25 Freedom of communication and freedom of expression, fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What occurs in courts ought to be, and manifestly is, of central concern to Canadians. However, while fundamental, the freedoms are not absolute. In some circumstances, public access to confidential or sensitive information related to court proceedings will endanger the integrity of the justice system. In some of the circumstances, a temporary shield will suffice; in others a permanent ban is warranted. *Toronto Star*, at para. 3.

The Nature of the Risk

26 The risk must be a serious one, a real and substantial risk. 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 - a serious danger that is sought to be avoided, not a substantial benefit or advantage to the administration of justice sought to be obtained. *Mentuck*, at para. 34. The questions is whether the ban is necessary in order to protect the proper administration of justice, not specifically to protect the fair trial rights of the accused although those fair trial rights are a part of the proper administration of justice. *Mentuck*, at para. 40. Before issuing a publication ban, the judge must have a convincing evidentiary basis for issuing the ban. *Mentuck*, at para. 39.

27 What must be shown is a high probability that the effect of publicity will be to leave potential jurors so irreparably prejudiced or to so impair the presumption of innocence that a fair trial is impossible. That conclusion does not necessarily flow from proof that there has been or will be a great deal of publicity about the ITOs. Evidence of the probable effects is required. Accused persons enjoy the right to a fair trial, not the right to be free from excessive adverse publicity before his or her trial. Negative publicity alone does not preclude a fair trial. While the nexus between publicity and its lasting effects is not susceptible of scientific proof, the focus must be on that link, not the mere existence of publicity. Any alleged impartiality of jurors can only be measured in the context of the safeguards which have evolved in order to prevent such problems. *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)* (1995), 98 C.C.C. (3d) 20 (S.C.C.), at paras. 128-130.

The Proper Administration of Justice

28 There is no finite list of dangers to the proper administration of justice that will make a publication ban necessary. While judges should be cautious in deciding what can be regarded as part of the administration of justice, s. 11 of the *Charter*, fair trial rights, the use of police operatives, informers, and practices such as witness protection programs are included. *Mentuck*, at paras. 35 and 40.

Fair Trial Rights

29 One of the objectives of s. 11(d) of the *Charter* is to ensure that a person is tried by a tribunal that is not biased in any way, is in a position to render a verdict based solely on the evidence presented in court and according to law and that cannot be influenced by outside forces. *R. v. Généreux*, [1992] 1 S.C.R. 259 (S.C.C.), at p. 282. While the *Charter* provides safeguards against actual bias and situations that give rise to a serious risk of a jury's impartiality being tainted, it does not require that all conceivable steps be taken to remove even the most speculative of risks. The *Charter* does not always guarantee the ideal. The objective of a publication ban is to prevent real and substantial risks

of trial unfairness. Bans are not available as protection against remote and speculative dangers. *Dagenais*, at para. 76

30 What must be determined is whether the publication ban was necessary on the facts of the case having regard to whether reasonable alternative measures were available to guard against the risk of the trial being unfair. Those "reasonable alternative measures" include adjourning the trial, changing the venue, sequestering jurors, allowing challenges for cause and *voir dires* during jury selection, and providing strong judicial direction to the jury. *Dagenais*, at paras. 78-9.

31 In *MacDonell c. Flahiff*, [1998] J.Q. No. 2 (Que. C.A.), the Quebec Court of Appeal held:

> I would, respectfully, go somewhat further. The "fairness" of a trial is not limited to a fair outcome or verdict, although that, of course, is critically important. A fair trial also involves the fairness of the process in which it is to be conducted. No accused should have to face his trial in an ongoing torrent of unfair publicity. No judge or jury should have to strain to banish unfair and unsupported publicity from their minds so that they can reach an impartial verdict based on the evidence. Fairness in a trial involves, in some measure, the impartiality and serenity of the atmosphere in which the trial is conducted.

Pre-trial Publicity and Concerns for Jurors' Impartiality

32 In the global electronic age, placing meaningful restrictions on the flow of information is becoming increasingly difficult, substantially diminishing the actual effect of the bans. *Dagenais*, at para. 89. As Sproat J. held in *R. v. Y. (N.)*, [2008] O.J. No. 1217 (Ont. S.C.J.), at para. 51, "The starting point, therefore, is that in 2008 no publication ban is likely to be completely effective." In 2013-14, the challenges posed from the global electronic age are even more pronounced than in 2008. How effective a ban would be is a relevant consideration in determining whether to impose a ban. *Dagenais*, at para. 90. However, while it is possible that a ban will have no influence on trial fairness, such a case would be rare. *Dagenais*, at para. 91.

33 The Supreme Court has strongly endorsed the ability of jurors to follow explicit instructions and disabuse their minds of information they are not entitled to consider. *Dagenais*, at para. 87.

34 While jurors are not always adversely influenced by publications there will be some cases where common sense dictates that jurors may be adversely affected. However, jurors have been shown to be capable of following instructions and ignore information not presented to them in the courtroom. Jurors can disabuse their minds of problematic information in case where there is an "identifiable and finite" source of pre-trial publicity. *Dagenais*, at para. 87.

35 Lamer C.J.C.'s continued at para. 88:

> More problematic is the situation in which there is a period of sustained pre-trial publicity concerning matters that will be the subject of the trial. In such circumstances, the effect of instructions is considerably lessened. Impressions may be created in the minds of the jury that cannot be consciously dispelled. The jury may at the end of the

> day be unable to separate the evidence in court from information that was implanted by a steady stream of publicity.

36 In *Toronto Star*, Fish J. wrote:

> Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice.

The Onus

The Positions of the Parties

37 Raed **Jaser** agrees that the *Dagenais-Mentuck* test is applicable on this application. However, he submits that while binding authorities establish the burden of displacing the presumption of openness is on the party seeking to defeat the presumption, those authorities do not apply where a presumptively valid order limiting the openness of judicial proceedings has already been made. Here, when the search warrants, general warrants and production orders were granted, I was persuaded to seal the ITOs. Mr. Norris argues that there is a distinction between an application to seal and an application to unseal as occurred in *Toronto Star*. In these circumstances, the "general rule that the burden of proof rests on the moving party should apply." Accordingly, the burden is on the media and Mr. Esseghaier.

38 By analogy, **Jaser** submits that all documents related to an application to intercept private communication are confidential and shall be sealed, remain sealed and kept in the custody of the court in a place to which the court has no access or in such other place as the judge may authorize. There is a presumption of privacy. S. 187(1) of the *Criminal Code* Mr. Norris argues that non-accused targets of intercepted private communication authorizations do not have a right to have the sealed packet opened and the contents disclosed to him relying on *Michaud c. Québec (Procureur général)*, [1996] 3 S.C.R. 3 (S.C.C.), at p. 53.

39 Lamer C.J.C. held that the discretion vested under s. 187(1)(a)(iii) [now s. 187(1.3)] permitting judges to unseal the packets for the purpose of copying and examining the documents upon which the wiretap authorization was granted, should generally be vested only where the target makes a preliminary showing which tends to indicate that the initial authorization was obtained in an unlawful manner. While a wiretap packet must be sealed initially, **Jaser** contends there is no difference in principle from applications to vary initial mandatory sealing orders and an application to vary an initial discretionary order. In both instances, there has been a judicially authorized state intrusion on private interests for investigative purposes. This is particularly so, considering the public interest grounds for both orders are the same. The media here should not be in a more favourable position than a non-accused target of the judicially authorized investigative technique.

40 The media submits **Jaser's** argument flies in the face of the law consistently enunciated by the Supreme Court of Canada in *MacIntyre*, *Dagenais*, *Mentuck*, *Toronto Star* and many other seminal decisions. The very essence of the *Dagenais-Mentuck* test is the presumption in favour of public access. Yet **Jaser's** argument is that it does not apply because of the sealing order that was obtained *ex parte* at an earlier stage of the prosecution. The argument, the media contends, is internally inconsistent. If *Dagenais-Mentuck* applies, the starting point is the presumption of openness

and the onus is on the party seeking restrictions on that presumption - here **Jaser** and the PPSC.

41 The other parties did not address this issue.

Analysis

42 While there appears to have been no previous cases where this argument has been presented, I am persuaded the onus is on the PPSC and Raed **Jaser** for the following reasons.

43 First, the sealing order was obtained in an *ex parte* application in chambers at a time when there was a presumption that the ITO would not be public because of the ongoing investigation. That presumption no longer applies after the warrants were executed. The context in which the determination is made has changed. The presumption of sealing no longer applies. , *2005*, at para. 23. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.), at para. 71, LaForest J. held that "[t]he burden of displacing the general rule of openness lies on the party making the application." I am not persuaded the reference in *New Brunswick* to the party making the application relates to an application to unseal because it refers to displacing the general rule.

44 Second, to put the onus on the media would be to reverse the presumption in *Dagenais-Mentuck*. The effect would be that if a judge was persuaded to seal the ITO during the investigative stage, the presumption of openness would be reversed when the investigation was completed.

45 Third, *Michaud*, relied upon by **Jaser**, was a case involving a presumption of secrecy, not one of openness. That *Michaud* was unsuccessful in overcoming the presumption of secrecy does not assist Mr. **Jaser**.

46 Fourth, in *Dagenais*, Lamer C.J.C. provided general guidelines in regard to publication bans including that "the party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation." That party must establish, on a balance of probabilities, that a ban is necessary, as it relates to an important objective that cannot be achieved by reasonably available and effective alternative measures, that its scope is as limited as possible, and that there is a proportionality between the salutary and deleterious effects of the ban. at para. 98(c). Generalized assertions would not support a publication ban. *Toronto Star* The party seeking confidentiality must allege a serious and specific risk. See also: *MacIntyre*, at p. 189, *Mentuck*, at para. 38 I appreciate that in *Toronto Star Newspapers Ltd. v. Ontario* (2005), 197 C.C.C. (3d) 1 (S.C.C.) the court was dealing with a sealing application as opposed to an unsealing application. However, the principles regarding the party opposing openness having the onus remain.

47 While the argument raised here was not argued in *Dagenais*, there are no qualifications in *Dagenais* about the times when the presumption applies.

The Relevance of Mr. Esseghaier's position

48 Before leaving the onus issue, I will examine the relevance of Chiheb Esseghaier supporting the media's po-

sition. He does not oppose the application provided it does not involve access to or publication of video surveillance from inside his apartment. There are no videos or references to their contents in the ITOs.

49 For the following reasons, I find Mr. Esseghaier's consent is one of many factors to take into consideration when applying the *Dagenais-Mentuck* test.

50 First, there appears to be a consensus among counsel that his consent is a relevant consideration when considering the *Dagenais-Mentuck* test. I agree with Mr. Jacobsen that the fact Mr. Esseghaier does not oppose the comments attributed to him being published is a relevant consideration if individual paragraphs of the ITOs are being considered in terms of potential prejudice. However, that he is presumptively being tried with Mr. **Jaser** cannot be ignored even in regards to comments attributed to Esseghaier when **Jaser** is not present. It is unrealistic to assume that there is no fair trial risks for co-accused persons from statements attributed to the other accused.

51 Second, that Mr. Esseghaier does not oppose the application does not result in the application being granted. The application is opposed by Mr. **Jaser** and the PPSC. As is the case with publication bans at bail hearings, where one co-accused seeks an order and the other(s) does not, if a ban is issued it applies to all accused regardless if they sought the order. *Toronto Star Newspapers Ltd. v. R.*, [2010] 1 S.C.R. 721 (S.C.C.), at para. 61. It would make no sense to prohibit access and or publication in relation to one of two co-accused and not the other.

52 I turn next to the various issues to be addressed.

The Evidence in Support of the Charges - s. 517 Issue (Bail Hearing Evidence and Submissions)

53 This is the area of greatest dispute between the parties because it is the basis for the majority of the PPSC's proposed redactions. For example, for the November 12, 2012 general warrant ITO, the PPSC seeks to prohibit publication of roughly one half of the 83 paragraphs and for the April 22, 2013 search warrant ITO, 92 of 121 paragraphs.

54 Neither accused has had a bail hearing. Because one of the charges they face is included in s. 469 of the *Criminal Code* (conspiracy to commit murder) only a Superior Court judge has jurisdiction to conduct the bail hearing. When a person charged with a s. 469 offence first appears in the Ontario Court of Justice, the justice must order them detained in custody. *Criminal Code*, s. 515(11). Unless the accused applies for bail in the Superior Court, they remain in custody until the completion of the case without a bail hearing. If an application for bail is brought, the onus is on the accused to show why he or she should be released.

55 When Mr. **Jaser** appeared in the Ontario Court of Justice his counsel sought and was granted a s. 517 order. I infer that out of an abundance of caution, his counsel arranged for an appearance in the Superior Court at which time a second s. 517 order was granted covering the bail hearing. Notwithstanding that the hearing has not commenced, the s. 517 order can be granted before the start of the hearing. *Toronto Star Newspapers Ltd. v. R.* (2006), 98 O.R. (3d) 339 (Ont. S.C.J.), at para. 83. Accordingly, there is a valid s. 517 order in place in the Superior Court of Justice, the court in which the bail application will be brought.

56 Section 517 reads:

> 517. (1) If the prosecutor or the accused intends to show cause under section 515, he or she shall so state to the justice and the justice may, and shall on application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as
>
> (a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or
>
> (b) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.
>
> (2) Everyone who fails without lawful excuse, the proof of which lies on him, to comply with an order made under subsection (1) is guilty of an offence punishable on summary conviction.
>
> (emphasis added)

57 To the date of submissions on this application, no date had been set for the bail hearing. I accept that Mr. **Jaser** has instructed his counsel to bring the application and that the PPSC and his counsel are preparing for that hearing. As is common with s. 469 offence bail hearings, written outlines of the evidence have been prepared to be put before the presiding judge. An investigating officer frequently is called at the outset to provide the allegations and evidence upon which the prosecution relies whether a written outline has been filed or not.

The Position of the Parties

58 The PPSC submits that the references to the evidence in support of the charges should be unsealed and the media given access but those portions of the ITO would be subject to a publication ban to ensure that the trial is scrupulously fair. Jurors would not be exposed to prejudicial information and evidence that may be inadmissible or not introduced at the trial.

59 In addition, publication of the evidence would violate the s. 517 order that is in place in relation to the evidence to be called at **Jaser's** bail hearing. The PPSC submits that while the s. 517 order is not the total answer to this application, it is a factor to consider in applying the *Dagenais-Mentuck* test.

60 Raed **Jaser's** main submission is that no evidence in support of the charges should be unsealed because it is covered by the s. 517 publication ban. That is a complete answer to the application. In addition, he argues that the application is premature. Raed **Jaser** contends that it is early in the proceedings and everyone should "just go away" for the time being. The application to unseal should be dismissed without prejudice for the media to re-apply at a later date. The accused were arrested April 22, 2013. This application is brought early in the prosecution, full disclosure has not been provided and neither accused has had their bail hearing. Mr. Norris submits that there is no indication of the

public desire to access this information.

61 In the alternative, Mr. **Jaser** agrees with the PPSC's position. However, as regards, access with a publication ban, Mr. Norris queries what purpose access alone would serve. The media could not publish the contents nor engage in any meaningful analysis of the contents without revealing information that is subject to the publication ban.

62 The media submits the reliance on the s. 517 publication ban is misplaced. First, it applies to publication and not access. Second, the presumption of openness that attaches to ITOs after the warrants are executed cannot be overridden by a prediction or the potential that the same information will be introduced at a bail hearing. Third, the PPSC and **Jaser** have not provided case-specific concerns regarding the risk to the potential jury pool. Their submissions are generic and would apply to any criminal investigation. They have not pointed to any portion of the evidence upon which to base a finding that there is a serious risk to the administration of justice in this case. Finally, the media submit that with the trial date years or many months away, the PPSC's and **Jaser's** concerns for juror tainting is unfounded.

63 Chiheb Esseghaier does not oppose the media's application provided it does not breach his personal privacy in his own apartment by revealing the video surveillance.

Analysis

64 Determining whether to unseal, permit publication or impose a publication ban requires a determination of the following questions:

1) Is the media's application premature?

2) Does the s. 517 order for **Jaser's** bail hearing apply to the evidence in support of the charges in the ITOs? Included in this area is whether the s. 517 order is a complete answer to the media's application.

3) If s. 517 is not a complete answer to the application, does it factor into the *Dagenais-Mentuck* test?

4) Applying the *Dagenais-Mentuck* test should the information be unsealed and if so, should there be a publication ban?

Is the Application Premature?

65 I am not persuaded by Mr. **Jaser** that the media's application is premature. When the submissions were heard no date had been set for the bail hearing. Waiting until after the bail hearing would permit certainty as to what evidence and information is covered by the s. 517 order. It would remove the media's contention that the s. 517 issue is speculative because no one can tell what evidence and information is going to be introduced at the bail hearing. However, it would not remove the media's contention that it does not matter what is introduced at the bail hearing, if the ITOs are unsealed and not subject to a publication ban, there is a free-standing right to publish unaffected by the s. 517 order.

The scope of the s. 517 order is going to have to be determined at some time and nothing is going to change in that regard.

66 In addition, I am not persuaded that waiting for full disclosure will assist in the issues to be determined. While the issues to be contested at trial remain uncertain, waiting for counsel to finalize the contentious issue can be a lengthy and, in some cases, a futile exercise. In this case, there is an added element in terms of identifying and restricting the issues to be contested - at this stage Mr. Esseghaier is not represented by counsel. Given his current precondition to retaining counsel, he could remain self-represented for his trial. How far a self-represented person's agreements can be taken is uncertain.

67 Setting aside the s. 517 order, I am unable to see how waiting until full disclosure is provided is going to change anything in relation to the ITOs. The PPSC's obligation to disclose is not determined by a "line in the sand" date. It is an ongoing obligation that continues throughout the prosecution and after should relevant information becomes known to the prosecution. In terms of the arguments to be presented on this application, I am unable to see any case-specific arguments that anything will change.

68 In addition, I am not persuaded that an accused person can defeat the presumption of openness after the execution of a search warrant by getting a s. 517 order before the bail hearing. Indeed, I am not persuaded there can be a breach of an order that will be in effect in the future. Mr. Norris agreed that there would have to be some point in time when the pending bail hearing could no longer frustrate the presumption. However, he submits that point has not been reached in this case. The problem with that approach is the uncertainty - is it six months after the arrest, nine months or some period to be determined in each case? In addition, the longer the delay, the closer the case comes to trial. It could then be argued that publication so close to trial would jeopardize trial fairness.

Does the s. 517 order for Jaser's bail hearing apply to the evidence in support of the charge found in the ITOs?

69 Before examining the arguments advanced two preliminary observations will place this issue in context. First, I am not persuaded that what will be introduced at the bail hearing(s) is as speculative as the media suggests. From the affidavit of RCMP officer Sean Culligan a 205 page Substantive Event Summary including excerpts of intercepted communications as it relates to the investigation into the alleged offences has been prepared. He compared that summary with the six orders in issue here and confirmed that the portions identified by the Crown as evidence that is anticipated to be called at the bail hearing are contained in the summary. He was advised by Ms. Shaikh that the summary was disclosed to both accused and "will be filed with the court" at the bail hearing(s). Further, additional evidence not contained in the summary may also be relied upon depending on the circumstances as they arise.

70 The unchallenged affidavit evidence established the portions of the ITOs identified by the PPSC under this category will be introduced at the bail hearing and be subject to the s. 517 order. The summary does not, nor could it purport to cover all the evidence or information that will be introduced at the bail hearing. It is a reasonable inference that there will be additional, unknown information introduced. That information may or may not be in these ITOs.

71 In addition, setting aside the Culligan affidavit, I am not persuaded that it is speculation at this stage of the prosecution what evidence and information will be introduced at the bail hearing(s). This does not involve the

somewhat more challenging task of predicting what evidence would be called at a preliminary inquiry as arose in some of the cases relied upon. As regards the bail hearing, predicting *all* of the evidence, information or representations that will be introduced would be difficult, if not impossible. However, it would not be difficult to determine some, if not most of the evidence, information and submissions that will be introduced by the PPSC and **Jaser** at his bail hearing. Bail hearing outlines include what the Crown alleges the accused did, how the prosecution is going to attempt to prove the allegations, whether the accused has a criminal record and/or outstanding charges, whether they are Canadian citizens, have roots in the community, whether there are any case-specific concerns the accused will appear for his or her trial, whether there are case-specific concerns he or she would commit further offences if released or interfere with witnesses or evidence, whether there are any mental health concerns, the likely sentence if convicted and the strength of the prosecution's case. Applying those considerations to the ITOs permits a reasonable assessment of *some* of the evidence, information and representations to be given at the bail hearing.

72 Second, while all of the evidence, information, representation and reasons from the bail hearing will be subject to a publication ban, s. 517 is silent on the issue of access to the items covered by a publication ban. Regardless of the merits of the "s. 517 is a complete answer" argument, it does not address access with a publication ban.

73 Turning to the substantive issues, I will first address the issue that Mr. Jacobson submits has never been directly addressed one way or the other in previous cases[FN2] - does the s. 517 publication ban cover information obtained by the media from another source outside of the bail hearing even though the same information is introduced at the bail hearing? For the following reasons, I find it does not.

74 First, by its wording s. 517 prohibits the publication of "the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice." The order can be made before or at any time during the bail hearing. The wording of the section does not directly prohibit publication of evidence, information or representations that are given at the bail hearing when the same information is available from other sources.

75 Second, as far as I am aware, s. 517 has never been interpreted as covering the information obtained outside of the bail hearing. A s. 517 order prohibits publication until the accused is discharged at his or her preliminary inquiry or his or her trial has ended. There are limits to the section's scope. First, contrary to the media's submission that if Mr. Norris is right, the name of an accused person who has a bail hearing could not be published, the Supreme Court of Canada has held that with a s. 517 order the media can "publish the identity of the accused, comment on the facts and the offence that the accused is charge with, and that an application for bail has been made as well as report on the outcome of the application." *Toronto Star*, at para. 38. However, that media can "comment on the facts and the offence," areas covered in the evidence and information at the bail hearing, supports the conclusion that the media is not prohibited from publishing information obtained outside the bail hearing.

76 Third, if the order applied to blanket all evidence and information, it would cover the preliminary inquiry to the extent that the same evidence or information was introduced, even if there was not s. 538 preliminary inquiry publication ban.

77 As is apparent from the foregoing, there are some limits on the scope of s. 517 orders. It does not cover all the

information given at the bail hearing until the accused is discharged at the preliminary inquiry or the trial has ended.

78 Fourth, the s. 517 as the complete answer approach would result in significant uncertainty regarding what could be published. For example, if the police conducted a press conference at the time of arrests and outlined the allegations, the nature of some of the evidence and that same evidence were given at the bail hearing, would the media be precluded from reporting what had been said at the press conference? Assuming the ITOs were unsealed and access or publication permitted, would the media have to obtain a copy of the bail hearing transcript to determine whether what they intended to publish was covered at the bail hearing despite the fact they obtained the information from another source?

79 Counsel were asked for additional submission in this area including the following scenario: The police release a surveillance video of a person committing an offence to enlist the public's assistance in apprehending the suspect. At the bail hearing following an arrest, the Crown plays the videotape. Could the media continue to play the video if there was a s. 517 ban. Mr. Norris says they could not. The media submits this illustrates the problems with the s. 517 is the complete answer argument.

80 The same sort of issues arise as with the press conference scenario. Would it be impractical and unrealistic to expect the media to determine whether the video was shown at the bail hearing before showing it again?

81 Fifth, that a sealing order is made in relation to some information in one context does not mean that it applies in others. For example, it would not be unusual or surprising that some of the information contained in a wiretap application is the same as that contained in a general warrant ITO. Both are investigative tools. That some of the information in the ITOs is sealed pursuant to the wiretap legislation does not mean all of the ITOs are effectively sealed.

82 Sixth, the scope of a s. 517 order was addressed several years ago in *Toronto Star Newspapers Ltd. v. R.* (2006), 98 O.R. (3d) 339 (Ont. S.C.J.) (*Toronto Star*, 2006), at para. 83 and *R. v. Y. (N.)*, [2008] O.J. No. 1217 (Ont. S.C.J.), at para. 18. In *Toronto Star*, I examined whether a s. 517 order obtained by one co-accused applied to the bail hearings of accused who did not apply for a s. 517 order. In doing so, I considered the judgment in *R. v. Parent*, [2003] O.J. No. 2038 (Ont. S.C.J.) where in the course of a preliminary inquiry for three accused, one was committed from trial on a charge of manslaughter and appeared in the Superior Court to plead guilty to that charge while the former accused persons' preliminary inquiry continued on murder charges. The Crown applied for a publication ban on the agreed statement of facts upon which the plea was based, in part because the preliminary inquiry publication ban for the other accused continued in effect and because portions of the agreed statement were taken from the preliminary inquiry evidence. Ratushny J. held that the preliminary inquiry ban continued in effect and covered the facts on the guilty plea that were from the preliminary inquiry evidence. In effect, the s. 539 preliminary inquiry publication ban covered proceedings in the Superior Court on a guilty plea.

83 *Parent* was a case in which the agreed statement of facts for the guilty plea included excerpts from the preliminary inquiry evidence, a hearing that was continuing. While in some cases, agreed statements contain preliminary inquiry evidence, that is not always the case. I do not read the judgment as holding that s. 538 orders applied to all agreed statements of fact, regardless of the source of the content. *Parent* was followed in *R. v. Tutin*, [2004] N.W.T.J. No. 40 (N.W.T. S.C.).

84 *Parent* was not followed in a subsequent Ontario case of *R. v. Mason*, [2005] O.J. No. 5294 (Ont. S.C.J.) where Graham J. who was hearing a guilty plea of one accused was asked to prohibit publication of the plea because two co-accused were going to trial two months later. His Honour imposed a publication ban but held that the determination of whether there should be a publication ban was a matter for the Court hearing the plea without reliance on the order from the preliminary inquiry.

85 In *Toronto Star*, I found it was not necessary to determine if *Parent* or *Mason* were correct. While noting that the *Parent* approach was attractive from a practical perspective, I was inclined to the view that the preliminary inquiry s. 539 publication ban did not attach to the preliminary inquiry evidence included in the facts on the guilty plea. at para. 143.

86 In *Y. (N.)*, the PPSC and some of the adult accused applied to prohibit the publication of the names of the adult accused that would be given in evidence at the Young Person's trial that was held before the adults' trial started. One of the arguments presented to Sproat J. by one of the adult accused was that there was no need for the publication ban because the s. 517 orders from the adult bail hearings applied to the evidence. Since it would be the same evidence at the trial, the publication ban followed the evidence. In the alternative, he argued that there should be a publication ban in similar terms to a s. 517 order. Sproat J. after referring to *Toronto Star*, declined to make a "s. 517-like order" in part because of the comments in *Toronto Star*. The adult's counsel then submitted that there should be no publication ban, relieving Sproat J. of the necessity of the dealing with the argument the s. 517 order followed the bail hearing evidence

87 Having reconsidered the cases in light of the submissions in this case and several occasions in which pleas have been entered by one of several co-accused, first, I am not persuaded the s. 517 order is a complete answer to the media's application as it pertains to the evidence in support of the charges. Second, I am not persuaded that a s. 517 publication ban prohibits the publication of the evidence, information and representations given at the bail hearing provided the information is obtained from a source outside of the bail hearing.

88 While I appreciate the effect of this finding could be to eviscerate s. 517 orders in some cases, applications under s. 487.3 are rare. In addition, that the s. 517 order does not cover information obtained from other sources, does not automatically mean it can be published.

Does the s. 517 order factor into the Dagenais-Mentuck test analysis?

89 That the s. 517 order is not the complete answer does not end all consideration of the s. 517 publication ban and why that section was found to be constitutional. When dealing with trial fairness, the Supreme Court of Canada has held that defining the interest at issue requires the context must be taken into account. *Dagenais*, at para. 22. If the s. 517 orders and the justifications for those orders were eliminated from consideration when applying the *Dagenais-Mentuck* test, it would distort the test by eliminating valid considerations.

90 There is no dispute that if granted, this application could result in inconsistent rulings in regards to the same information and evidence. For example, if the s. 517 order does not apply to the ITOs, and **Jaser's** bail hearing were held on one day in courtroom A and the media's unsealing application were heard on the same day in courtroom B,

assuming the ITOs contained 25 pages of evidence and the synopsis read out at the bail hearing contained the same 25 pages, the judge in courtroom A could ban publication of the 25 pages and the judge in courtroom B could unseal the same 25 pages and permit publication. To submit that the s. 517 orders are irrelevant to the *Dagenais-Mentuck* test would preclude the PPSC, **Jaser**, and other accused persons, from relying on those orders and the reasons they are constitutional in attempting to overcome the presumption of openness. It would result in a non-contextual application of the *Dagenais-Mentuck* test.

91 I note as well that in *R. v. Hennessey*, [2008] A.J. No. 1563 (Alta. Q.B.), Ross J. held that a similar application could not be resolved solely by reference to the s. 517 order or the anticipated publication ban at the preliminary inquiry under s. 538. However, His Honour found the relevance of those orders was that the bans "prevented and are expected to continue to prevent pre-trial publication of information similar to that at issue in this application." at para. 57. Also part of His Honour's justification for removing s. 517 from consideration was that at the time of the judgment the Alberta Court of Appeal had found s. 517 unconstitutional. That decision was reversed in *Toronto Star*.

Applying the Dagenais-Mentuck Test to the Evidence in Support of the Charges

The Positions of the Parties

92 The thrust of the PPSC's and **Jaser's** submissions is that potential jurors would be tainted if they were exposed to the information contained in the ITOs before trial. To release the information would jeopardize **Jaser's** fair trial rights. In Mr. Norris' words, to release the information would be to release a virus and hope no one in the jury panel caught it. While *Dagenais* was limited to averting juror bias, Mr. Norris notes that trial fairness can be interpreted in different ways, including encompassing all measures whose purpose it is to protect the fundamental rights of the accused, referencing *Dagenais*, at para. 22.

93 The media says those concerns are generic speculation that could apply to any criminal prosecution. What is required is case-specific concrete risks and there are none here. Those in opposition to the application have not met their onus. Mr. Jacobsen replies to Mr. Norris' analogy saying jurors have a healthy immune system.

94 Mr. Esseghaier does not oppose the release and publication of the evidence in support of the charges except the video surveillance from his apartment which is not included in the ITOs.

Analysis

95 The first element of the *Dagenais-Mentuck* test the PPSC and Mr. **Jaser** must satisfy is that:

> ...such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk...

96 The PPSC and **Jaser** have to answer the following question: what is it about this case that makes continued sealing or unsealing with a publication ban necessary?

97 While the onus may be difficult to meet at an early stage of the proceedings, the onus remains on the PPSC and **Jaser**. *Toronto Star* at para. 8. What is required is a case-specific analysis to determine if the onus has been met.

Is Expert Evidence Required?

98 While expert evidence would be helpful, it is not mandatory. Instead, as Cory J. noted in *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.), at para. 125, "Perhaps science will one day be able to prove that in certain situations juror prejudice is inescapable. Until that time, common sense must provide guidance in these decisions." See also, *R. v. Y. (N.)*, [2008] O.J. No. 1217 (Ont. S.C.J.), at para. 66, and the following cases where time-limited bans were issued without reference to expert evidence: *R. v. Sandham*, [2007] O.J. No. 5310 (Ont. S.C.J.); *R. v. Mason*, [2005] O.J. No. 5294 (Ont. S.C.J.); *R. v. Brown* (1998), 126 C.C.C. (3d) 187 (Ont. Gen. Div.); *R. v. Lake*, [1997] O.J. No. 5446 (Ont. Gen. Div.). I agree with the conclusion of Ross J. in *R. v. Hennessey*, [2008] A.J. No. 1563 (Alta. Q.B.), that direct evidence of a serious risk is not required where the circumstantial evidence is sufficient to persuade the court to draw an inference of that risk. at para. 69.

99 In addition, it would also be impractical and unfair to an accused person to require expert evidence to be introduced. At the early stages of a criminal prosecution, it is only reasonable to expect that accused persons and their counsel direct their time and resources towards reviewing disclosure, bail applications and trial preparation instead of using funds to retain experts, assuming such an expert exists. Where an accused person is represented pursuant to a legal aid certificate, given the significant restrictions placed on funding and the approval process, whether or not Legal Aid Ontario would fund such an expenditure is most uncertain.

100 From the cases filed and submissions, the following non-exhaustive list contains some of the areas upon which serious risks have been found:

Where the ITO contains:

(i) evidence that is presumptively inadmissible (i.e. confessions, other disreputable conduct, outstanding charges, criminal records, and hearsay (*Flihoff*))

(ii) evidence that appears to be inadmissible (whether some evidence was admissible was considered by Then J. in *Eurocopter*),

(iii) evidence the admissibility and quality of which are live issues (*Hennessy*) including evidence of witnesses who would require a *Vetrovic* warning (*Flihoff*), and

(iv) cases with sustained pre-trial publicity such that impressions may be created in the minds of jurors that will not easily be dispelled. (*Dagenais*)

101 Mr. Jacobson conceded that for some types of evidence such as confessions and DNA evidence, there would

be an argument for a publication ban.

102 In determining whether the PPSC and Mr. **Jaser** have shown there is a serious risk to the proper administration of justice, I consider the following: The accused are charged with most serious offences. *R. v. Khalid* (2010), 183 O.R. (3d) 600 (Ont. C.A.), at para. 32. Presumptively, they will be tried by a jury. The case has attracted significant local, regional, national and international attention since the April 22, 2013 arrests. While the sort of evidence that was filed by the media when challenging the constitutionality of s. 517 is not present here, from the submissions of counsel, living in the area and the fact that seven major media members support this application, I infer that there is significant media interest in the case. In addition, as counsel advised on each appearance at the Old City Hall there continues to be significant media attention. From spending many years in criminal courts, the attendance of numerous representatives of the media on "set date" appearances is exceptional.

103 The media's initial submission that because the trial will be years or many months away the PPSC's and **Jaser's** concern for publication at this time are unfounded is not persuasive for several reasons. When the trial will take place depends upon several factors including whether either accused person remains in custody (to date there has been no indication in this proceeding that Mr. Esseghaier will apply to be released from custody), whether there will be a preliminary inquiry as preferred indictments have been used in some previous prosecutions for similar offences (*R. v. Ahmad*; *R. v. Hersi*), the anticipated duration of the trial, and the availability of a trial judge and courtrooms in Toronto. While a trial is most likely to be many months away, it is far from clear that the trial will be years away at this stage.

104 In addition, as the Supreme Court indicated, in the internet era, after the information is released a time limit on publication in newspapers or on television would be less effective than previously. Once the evidence and information are in the public domain internet access remains a significant concern. No doubt judicial directions are helpful. However, it is difficult to see how jurors could be prevented from researching the internet before they are summonsed or between the time they are summoned and their attendance in court. While jury panel members are not generally alerted to the specific case they would be trying, on occasion jury panel members are told of the potential length of the trial which could be some indication of the trial for which they are summoned. When their summons is read along with media reports of the jury selection date in this case, potential jurors could easily determine the case for which they have been summoned. That pre-dates any judicial directions.

105 In these circumstances, I am persuaded that there will be a period of sustained pre-trial publicity. Not to the extent as occurred in *Y. (N.)* where it was a trial sitting daily, but sustained publicity nevertheless.

106 Turning next to the nature of the ITOs, in addition to sustained pre-trial publicity there are concerns regarding the nature of the information and evidence that would be published. The media argued the PPSC and Mr. **Jaser** had provided no case-specific concerns. That was correct, in the facta. However, in submissions, Mr. Norris referred to case-specific areas of concerns with the ITOs. While evidence that is clearly inadmissible poses significant and likely the greatest concerns, prejudicial evidence that a jury may never hear is also relevant in the *Dagenais-Mentuck* test.

107 First, Mr. Norris directed my attention to Tab 2, Appendix A, paragraphs 19-27 as an area of concern. There are several problematic aspects to that section. First, it contains significant hearsay as the officer quotes from letters.

Clearly, the evidence in that form would not be admissible. Second, as Mr. Norris noted, those wiretap authorizations were not granted under the *Criminal Code*. The inter-relationship between CSIS investigations and RCMP investigations was a significant issue in *R. v. Ahmad* See *R. v. Ahmad*, [2009] O.J. No. 6162 (Ont. S.C.J.), in particular at para. 86. While it is not my task on this application to make rulings on admissibility of evidence, for the purpose of this analysis it is apparent that there are significant issues regarding the admissibility of the information set out at paras. 19-27 and any other evidence from those authorizations. Dawson J. was not asked to rule on the admissibility of the CSIS wiretaps and they were not introduced at the trial. There are real concerns that a jury would ever hear that evidence.

108 Second, there are statement attributed to each of the accused in the ITOs, some through wiretaps and others through witnesses. They are charged with conspiracy between April 1, 2012 and September 25, 2012. Not everything an alleged co-conspirator says or does is necessarily in furtherance of the conspiracy. Some evidence will most likely be admissible only against the declarant or actor and not against the other accused. It will have to be determined whether the acts and statements of each accused to other persons when the other accused is not present are done in furtherance of the conspiracy or common unlawful object. Further, as Mr. Norris pointed out, his client's alleged involvement in the conspiracy ends on September 25, 2013. There is evidence of acts and declarations after that date by both accused. What is admissible against each accused will have to be determined.

109 This is the type of evidence that often necessitates a mid-trial instruction to the jury setting out the uses to which the jury could put the evidence as well as the prohibited uses. Mid-trial instructions are given right before or immediately after the evidence is introduced to alert the jury *at the time they first hear the evidence* that there are limits on its use. The risk of misuse is too great if the judge were to wait to the end of the evidence and counsels' submissions. There is no mid-trial equivalent if the information is published before the trial so that potential jurors are exposed to it.

110 Third, there are also comments, including those at Tab 6, page 31 of 134 attributed to Mr. Esseghaier that are capable of inflaming emotions and being difficult to remove from the minds of potential jurors. Using Lamer C.J.C.'s phrase from *Dagenais*, it is the type of evidence that would create impressions in the minds of jurors that could not be consciously dispelled. That Mr. Esseghaier does not oppose publication is a relevant consideration since he is alleged to have made the comments. However, that Mr. **Jaser** opposes unsealing with a publication ban is also quite relevant given it is a joint trial. Whether a potential juror would distinguish which accused person made the statement is problematic. As noted earlier, were it determined that the comments were in furtherance of the conspiracy it would be admissible against both provided the necessary findings were made in relation to both accused. If it were not, there would be a limiting instruction.

111 There are also comments attributed to Mr. **Jaser** that would be similarly viewed. Tab 6, p. 6 of 134, para. 11.

112 Fourth, I also take into consideration that the ITOs include non-consent intercepted private communications of non-accused persons. The wiretap regime is intended to be confidential. As was the case in *Hennessey* this is a relevant factor is considering the *Dagenais-Mentuck* test and would support at least a ban on publication. However, it is but one factor to consider.

113 Fifth, ITOs themselves are generally not admissible before juries. While there might be scenarios in which a

jury would see the ITOs, it would be a very rare occasion. They are routinely relied upon in pre-trial applications and viewed by the judge, not the jury. Accordingly, hearsay and police officers' conclusions, opinions and impressions drawn would not be heard by the jury. Were the contents of the ITOs to be published they contain this type of information, information the jurors will never hear at trial.

114 Sixth, in considering the case-specific context, I have also taken into consideration the timing of some of the warrants, placing this application in context. Often warrants are issued in the early stages of the investigation as the evidence gathering commences. Here, two of the ITOs are issued on the date of the arrests, at the end of the investigation, one on the arrests date and one after the arrests. Accordingly, significant portions of the prosecution's case are in those ITOs. Indeed, I infer that significant portions of the Crown's disclosure brief are included in the ITOs.

115 Seventh, that portions of the ITOs will be subject to the s. 517 order is a relevant consideration, albeit far from determinative. More relevant is the reasoning why s. 517 publication bans are constitutional.

116 What the Supreme Court of Canada said in relation to the information, evidence and representations made at bail hearings applies to the contents of the ITOs in this case. Deschamp J. wrote in regard to the s. 517 orders:

> The information the media are prevented from publishing is untested, and is often one-sided, and largely irrelevant to the search for the truth.

117 In upholding a publication ban in *MacDonell c. Flahiff*, [1998] J.Q. No. 2 (Que. C.A.), leave to appeal refused, [1998] S.C.C.A. No. 87 (S.C.C.), the Quebec Court of Appeal said the following at paras. 30 and 42:

> If appellants would be protected under the *Criminal Code* from the publication of this kind of evidence, if made at preliminary inquiry or at a bail hearing, it seems to me there ought to have been sufficient reason to prohibit publication of an affidavit containing hearsay evidence of an informer and accomplice that has not even been tested by cross-examination. It seems to me incongruous that the media should now be entitled to publish hearsay evidence of an informer and an accomplice on which he cannot now be cross-examined, while the media can be prevented from publishing his evidence at preliminary inquiry when he can be cross-examined and where he is under oath.

118 I appreciate that those comments pre-date *Dagenais* and the judgment has been questioned in a subsequent Quebec Superior Court case, because the judgment "might well have been overtaken by the ruling in *Mentuck* and subsequent decisions of the Supreme Court of Canada" and that there was no analysis of reasonable and effective alternatives to a publication ban. *Thibault, Re*, 2009 QCCS 572 (Que. S.C.), affirmed 2009 QCCA 903 (Que. C.A.) However, after the release of *Dagenais*, our Court of Appeal has referred to *Flahiff* as follows in *Ottawa Citizen Group Inc. v. Ontario* (2005), 75 O.R. (3d) 590 (Ont. C.A.):

> 57 In my view, the balance struck in the excellent reasons of Rothman J.A. of the Quebec Court of Appeal in *Flahiff* is a sound basis for the balance to be struck in this case. In *Flahiff*, the court held that a publication ban with respect to search warrant materials was necessary in order to ensure a fair trial for the well-known accused. However, in reasoning that anticipated (by three years) the "reasonably alternative measures" component of the

Mentuck test, Rothman J.A. said at p. 92:

> To assure that the impact of the publication ban is as narrowly circumscribed as possible, I would nonetheless permit the press and the media generally to have access to the documents so that they have full knowledge of the contents of the search warrant as well as the affidavit or information on which it was based. This would allow the press full scrutiny, in the public interest, of the search warrant documents notwithstanding the temporary ban on publication
>
> [emphasis added].

119 *Flahiff* is not authority for the general proposition that pre-trial publication of any information found in search warrant material will prejudice an accused in a way that adversely affects the right to a fair trial. *R. v. Canadian Broadcasting Corp.* (2008), 231 C.C.C. (3d) 394 (Ont. C.A.) (*C.B.C.*), at para. 29. The nature of the evidence is relevant. I note as well that in *Ottawa Citizen*, the Court of Appeal again dealt with *Flahiff* with no mention of the concerns with *Flahiff* raised by the media on this application.

120 In *Canadian Broadcasting Corp.*, after reviewing the facts and comments of Rothman J.A. in *Flahiff*, Juriansz J.A. continued at para. 32:

> The type of information at issue in *Flahiff* is very different from the information released by the application judge in this case. Here, the disclosed information does not constitute incriminating evidence against the appellant Gardiner. The descriptions of police observations of the crime scene and the condition of the victims do not serve to implicate Gardiner in any way in these deaths. Furthermore, the nature of the descriptions cannot be said to be so graphic or shocking that potential jurors would be unduly affected thereby. Nor, more generally, would pre-trial publication of the disclosed information place irreversible ideas in the minds of potential jurors that would prevent them from being impartial at the trial, or that would make it impossible for them to distinguish between evidence heard during the trial and information acquired outside of the courtroom.

121 Eighth, that Mr. Esseghaier does not oppose publication is a factor to consider as noted earlier. However, Mr. **Jaser**, his co-accused takes the contrary view.

122 Ninth, while I am generally aware of the information that is already in the public domain about this case, no one filed evidence or made submissions regarding the information that was already in the public domain from the police press conference or other sources that is included in the ITOs related to evidence to establish the offences.

Are there reasonable alternative measures available?

123 Examining the alternative measures noted earlier, first, it is inconceivable that there will not be at least a publicity-based challenge for cause in this case. There may also be other bases for challenges. Jurors are presumed to answer honestly and abide by the directions given during the challenge. There has never been a case in Canada where a jury could not be selected because of pre-trial publicity or other causes rendering the jury panel members par-

tial.[FN3] In *R. v. Ahmad*, held in Brampton several years ago involving similar charges, the vetting and selecting of the jury was completed in two weeks with three accused.

124 However, if a challenge for cause was always the answer to publicity concerns there would never be publication bans in applications of this nature. As the cases relied upon by counsel illustrate, that is not what has occurred. There will be cases in which there is a serious risk if evidence is published for which a challenge for cause is not the answer. This is one of those cases.

125 While judicial directions are helpful, as is the case with challenges for cause, there will be cases where directions will not suffice.

126 Adjourning the trial to a later date is not feasible. At this stage both accused are in custody. In addition, with information published the evidence would be available on the internet.

127 Neither am I persuaded that the threat of contempt for publication close to or during trial is a reasonable alternative. In *Hennessey*, at para. 86, Ross J. held that there are problems with the use of contempt to prevent the risk of publication and that the use or threat of the use of contempt powers could exacerbate the problem. The concerns here are not simply publications close to trial.

128 The second part of the *Dagenais-Mentuck* test reads:

> ... 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.

129 As indicated earlier, this part of the test involves a balancing of the beneficial and harmful effects of a publication ban. The beneficial effects have been canvassed earlier. A publication ban on this evidence will attempt to insure the accused persons' fair trial rights. It will assist in the fair trial context and will enhance the efficacy of the administration of justice. I find it will also enhance the public interest in a fair trial. In addition, it should facilitate jury selection.

130 To be sure, there are harmful effects regarding the openness of court proceedings. However, two factors reduce the harmful effects to a tolerable level.

131 First, the publication ban is time limited.

132 Second, in order to make the impact of the ban as narrowly focused as possible, the media and members of the public will have access to the material. While the PPSC and Mr. **Jaser** questioned what public interest would be served by providing access with a publication ban, counsels for the media and a review of the authorities have persuaded me that there is a benefit from access. As the Quebec Court of Appeal held in *Flahiff*, access will permit the media to have "full knowledge of the contents of the search warrant as well as the affidavit or information on which it is based. This

would allow the press full scrutiny." *Flahiff*, at para. 51.

Conclusions Regarding the Evidence in Support of the Charges

133 Having regard to all the circumstances, I am persuaded the PPSC and **Jaser** have met their onus on the first branch of the test. There is a high probability there is a serious risk to the proper administration of justice if the information in the ITOs was published subject to the following consideration of alternative measures to address the concern. In reaching this conclusion some of the comments of Sproat J. in *Y. (N.)* apply to this case as well. This case must as well be near the top of the list in terms of cases in which massive media coverage raised a concern that fair trial rights may be compromised. at para. 27. The allegations regarding a train derailment are sensational and most troubling. They are of a type that is likely to evoke an emotional or prejudicial response because the terrorist threat alleged would have posed a serious threat to the members of the public. The allegations and some of the comments attributed to the accused in the ITO are such that they could enflame potential jurors. Some potential jurors would be irreparably prejudiced. Impressions would be created that could not be completely dispelled. Strong emotions can contribute to impressions that cannot consciously be dispelled. at para. 39.

134 Unlike the situation in *Canadian Broadcasting Corp.*, the information is highly incriminating and there are reasons for caution as to what evidence will be ruled admissible. Indeed, there is information in the ITOs that the prosecution will not attempt to introduce because it is inadmissible.

135 For the reasons noted earlier, the beneficial effects of the ban are significant in relation to the accused persons' fair and public trial rights. What is sought is fair trial for both accused persons, one that will produce a fair and just result - one that is sought in the best interests of the administration of justice. I am persuaded the beneficial effects outweigh the harmful effects. The PPSC and **Jaser** have met their onus on the second ground of the *Dagenais-Mentuck* test.

Access

136 How the access is to be accomplished was a matter upon which I asked for additional submissions. When the issue was first raised, it was suggested that practical problems with allowing access to over 700 pages of information could be a basis for denying access. On reflection, I am not persuaded that once access is deemed appropriate the practical issues of how to permit access in this case should override the finding that there should be access.

137 Whether access should be to just the media as appears to have occurred in *Flahiff* or the public as well as occurred in all other cases was the subject of further submissions from counsel. First, I am persuaded that access must also include members of the public. Restricting access to only the media or as one counsel suggested, just to the applicants would unduly restrict access.

138 Second, not without some reservations, I am persuaded that requiring the media and public to sit or stand in a room at the Davis Court House and read over 700 pages is not practical. Whether there is any room available is problematic given the space constraints in the building. How the reader would be monitored is also problematic. In the circumstances, I am persuaded that members of the media and public can obtain copies but only if they produce photo

identification and sign an undertaking that they are aware there can be no publication of the contents or making them publicly accessible in print or **via** the internet.

139 Subject to further input from counsel, the following will apply to the access:

i. The PPSC will produce copies of the ITOs in compliance with this ruling to the Trial Coordinator. Initially, twenty-five copies will be provided.

ii. The evidence in support of the charges will be highlighted so that it is readily identifiable as subject to the publication ban.

iii. Copies will be kept at the Trial Co-ordinator's Office.

iv. Any member of the media or public may obtain a copy upon providing their name, address and photo identification. In addition, they will be required to sign an undertaking regarding the limitations on the use of the information.

v. The ITOs will not be available within six months of the trial date.

The Innocent Third Parties Issues

140 Section 487.3(2)(b) provides that in determining whether the ends of justice would be subverted by disclosure of the ITO contents, one of the basis is that disclosure would prejudice the interests of innocent third persons.

141 Innocent persons must be interpreted in light of a broad range of factors. *Ottawa Citizen Group Inc. v. Ontario* (2005), 197 C.C.C. (3d) 514 (Ont. C.A.), at para. 35. The following cases where the term has been considered will assist in setting out its scope. In *Vickery v. Nova Scotia (Prothonotary, Supreme Court)*, [1991] 1 S.C.R. 671 (S.C.C.), a person whose murder conviction was reversed because of violations of his *Charter* rights was found to be an innocent person on a media application to access trial exhibits. In *Phillips v. Vancouver Sun* (2004), 182 C.C.C. (3d) 483 (B.C. C.A.), a police officer who was investigated but never charged was an innocent person even though items were seized from his office in the course of a search. Finally, in *Ottawa Citizen*, search warrants were executed at several homes in relation to individuals who were incarcerated in Syria. Items were seized but no charges were laid. The Court of Appeal upheld the applications judges' findings that the occupants of the locations searched were innocent persons.

142 In *Dagenais*, Lamer, C.J.C. noted there is a need to protect interests other than fair trial rights. To do so, would maximize the chances of witnesses testifying because they will not fear the consequences of publicity and preserving the privacy of individuals involved in the criminal process. In *R. v. Twitchell*, [2009] A.J. No. 1558 (Alta. Q.B.), at paras. 41-45, the Court ordered redacted the names, phone numbers, addresses, careers and occupations of any innocent third party.

143 In *MacIntyre*, Dickson J. noted the curtailment of public accessibility could only be justified where there is a present need to protect social values of superordinate importance. One need was to protect the innocent. He questioned whether persons whose property is searched and nothing is found must endure the stigmatization to name and reputation that would follow publication of the search. Protecting the innocent from unnecessary harm is a valid and important social consideration. at p. 147.

144 In *Eurocopter*, Then J. wrote that innocent third parties deserve protection to prevent the "unjust possibility of stigmatization" that could occur for non-targets of searches who would nevertheless be implicated. at para. 21.

145 There are at least twelve persons named in the ITOs who are not charged with any offence. They fall into four categories. First, persons whose private communications were intercepted without their consent - the s. 193 non-consent private communications interceptions. Second, two acquaintances of the accused who are referred to in the ITOs and have not been charged with any criminal offence. Third, a potential witness whose statement is included in the ITOs. Fourth, members of the accused's families, co-workers, friends and other acquaintances. I will deal with each group separately examining the positions of counsel and analysing each issue.

The s. 193 Issue

The Position of the Parties

146 The PPSC and **Jaser** submit that if any further disclosure on the non-consent wiretap communications offends s. 193, then all references to those interceptions must remain sealed. However, if the disclosure would not offend s. 193, any reference to the names of the innocent third parties should remain sealed, including any information that might tend to identify them and the contents of the communications should be subject to a publication ban under the *Dagenais-Mentuck* analysis. Any pre-trial publication of the communications would severely impact on the fair trial rights of the accused.

147 The PPSC submits with regard to the third parties in each of the four categories that the ITOs include their names, telephone numbers, the contents of statements given to police, the content of intercepted private communications involving non-accused with discussions referring to radical views and terrorism, Jihad and recruiting others for the "plot."

148 The media submits that the PPSCs redactions precluded the media from seeing several passages covered by this category. In the result, their submissions have limitations on the contents. The media submits the passages should be provided to the media in unredacted form to permit counsel to review them with a view to narrowing what, if any, information the media seeks under this category. Any issues of notice should be determined after counsel for the media have an opportunity to determine the scope of their request.

Analysis

149 The first issue is whether s. 193 precludes unsealing in relation to the non-consent communications. If it does,

all of this information remains subject to the sealing order. Section 193 states:

> 193. (1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, everyone who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully
>
> (a) uses or discloses the private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or
>
> (b) discloses the existence thereof, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. Exemptions
>
> (3) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication
>
> (a) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath;
>
> (b) in the course of or for the purpose of any criminal investigation if the private communication was lawfully intercepted;
>
> (c) in giving notice under section 189 or furnishing further particulars pursuant to an order under section 190;
>
> (d) in the course of the operation of
>
> i. a telephone, telegraph or other communication service to the public,
>
> ii. a department or an agency of the Government of Canada, or
>
> iii. services relating to the management or protection of a computer system, as defined in subsection 342.1(2),
>
> if the disclosure is necessarily incidental to an interception described in paragraph 184(2)(c), (d) or (e);
>
> (e) where disclosure is made to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere; or

> (f) where the disclosure is made to the Director of the Canadian Security Intelligence Service or to an employee of the Service for the purpose of enabling the Service to perform its duties and functions under section 12 of the *Canadian Security Intelligence Service Act.*
>
> Publishing of prior lawful disclosure
>
> (3) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication where that which is disclosed by him was, prior to the disclosure, lawfully disclosed in the course of or for the purpose of giving evidence in proceedings referred to in paragraph (2)(a).

150 In the preliminary ruling on this application, I noted that there were conflicting decisions as to whether unsealing would have violated s. 193 and it was not necessary to determine which approach was corrent. 2013 ONSC 4078 at para. 45. Further, I held that *at that stage* the names and the contents of the non-consent intercepted communications should be redacted from the information that the media obtained. I was not persuaded at that time, that more information was required to permit the media to make their submissions.

151 First, I am not persuaded that the disclosure of the content of intercepted communications would breach s. 193. The contents are included is sworn affidavits of police officers. They were given in a criminal proceeding and must be under oath. At this time, there are no submissions that the communications were unlawfully intercepted. I am also persuaded that the further disclosure would not breach s. 193 for the same reasons because the section permits the private communications to be disclosed in search warrant applications that are presumptively open to the public through this route. Parliament has permitted the disclosure of intercepted non-consent private communications. This does not mean that the intercepted private communications will be unsealed with or without a publication ban. The determination will be informed by the *Dagenais-Mentuck* test. One of many factors to consider in applying the test is that the ITOs contain intercepted private communications. *R. v. Hennessey*, [2008] A.J. No. 1563 (Alta. Q.B.)

152 Second, in relation to whether the persons included in this area are truly innocent third persons, I am persuaded they are. I reach the same conclusion regarding the persons in each of the four categories. The authorities provide ample examples of persons who were found to be innocent third persons. Who is not an innocent third person has to be inferred from those cases. None of the persons have been charged with any offence. From that I infer the police do not have reasonable and probable grounds to believe they have committed any offence. None are noted as un-indicted co-conspirators. While I appreciate the media's position that they are limited in their submissions because of the redactions, from my review of the material I find the persons in each category are innocent third persons.

153 Third, I am persuaded that the information under this category should be provided to the media with only the person's names, addresses, phone numbers and occupations redacted. The same undertaking that applied on the initial material would continue to apply to this additional material. Once the media has been given this material, they will determine whether they wish to pursue access with or without publication bans.

154 At this stage, the privacy interest of these persons including the risks identified by the PPSC warrant this preliminary step as suggested by the media as a second option before a final determination is made.

The Two Acquaintances

155 The ITOs make reference to two individuals who were known to the accused persons.

The Positions of the Parties

156 The PPSC and **Jaser** submit that there is no public interest in learning the identity of these persons. They are innocent third parties, they have not been charged with any offence and the media have provided no reason to treat them differently than any other third party referenced in the ITOs. There is a real risk of damage to their reputations if there was any publication. Were their names released, they would be unfairly perceived as holding extreme views or being proponents of terrorism. If the Court were to determine that a sealing order is not appropriate, the third parties should be notified and given an opportunity to make submissions. In order to protect their identity, there should be an interim publication ban or sealing order on any further hearing until the Court decides the ultimate issue.

157 The media submit the information relating to these persons should be presumptively open and subject to neither a sealing order nor publication ban. The PPSC has identified no real risk of prejudice to these individuals based on the evidence that may meet the *Dagenais-Mentuck* test. In the alternative, if that test is met, the least restrictive alternative is a publication ban on the names and identifying information pertaining to these persons. It is only if the publication ban is determined to be insufficient, that there should be a sealing order on the names and identifying information. The media contends the scope of the identifying information redacted by the PPSC is overly broad and provides specific examples of that contention. Finally, notice to these individuals is not necessary.

Analysis

158 At this stage, I am not prepared to remove the sealing order in relation to this information. While I agree with the media that the PPSCs concerns for the two persons reputation and the danger of their being proponents of terrorism are generic, the implications of publication of these portions of the ITOs could be significant.

159 Since the media contend that the redactions are overly broad, the PPSC shall provide to the media the information in this category with only the names, addresses, telephone numbers and occupations redacted. The information will be provided subject to the original undertakings. It is unclear how much more information the media will receive, but once they have this information, if the media wishes to pursue access with or without a publication ban, a further hearing would be held.

160 If there is a further hearing, the two acquaintances are entitled to notice of the hearing and would be entitled to make submissions in person or by counsel on their behalf. It may very well be that there are different considerations for each acquaintance.

161 In addition, I agree with the PPSC that for the prosecution, the police, counsel or the court to remove any information that would tend to identify the person before access and-or publication can be a risky endeavour. There

may be something that would identify the person that is not apparent without direct input from the individual. The media's submission that the removal of identifying information can be done without their input is not persuasive. Experience has shown that information that appears innocuous in relation to identity can tell those who are familiar with the person who it is. Accordingly, I am not prepared to accept the media's alternative submission that as much information as possible should be released to the public. To do so, would great too great a risk of identifying persons before that decision has been made.

162 Each acquaintance would only be provided with the excerpts of the ITOs relating to him/her. If they chose to make submissions in person, there would be a publication ban in relation to their names and the submissions made. Whether the courtroom would be open or closed would be subject to submissions at the outset of the hearing.

The Potential Witness

The Position of the Parties

163 The PPSC and **Jaser** submit that while the media contend the person's name should be published because he or she is not a confidential informant, informant status is not a prerequisite to the protection of privacy rights. Here, there are two real risks of prejudice: the witness' fears for his or her safety and that of their family. In addition, pre-trial publicity can reduce the chances of the witness testifying. The witness has expressed concerns for his safety and that of his family. As regards the media's claim that the redactions in this area are overly broad, the statement itself includes information from which the witness would be identifiable. Absent input from the potential witness, the entire statement should remain sealed.

164 The media submit there should be no restrictions on information relating to this person. He/she is not a confidential informant nor has the PPSC identified any real risk of prejudice to this person based on the evidence that may ultimately meet the *Dagenais-Mentuck* test for any restrictions on access to this information. In the alternative, if that test is met, the media submit that the least restrictive alternative is a publication ban on the name and identifying information pertaining to the witness. As with the other redactions in this area, the media submits the redactions are overly broad. Finally, notice to this person is not required.

Analysis

165 That the person is not a confidential informant is not determinative. The person is a potential witness. As noted earlier, there are concerns for the privacy interests of witnesses and legitimate concerns that witnesses might not testify. The PPSCs submission in this category are not generic. The witness has expressed concerns for her/his safety. While not determinative, it is a factor to consider.

166 The nature of this person's involvement is also very different from the other third persons. He/she has come forward to assist the prosecution.

167 At this stage and subject to further submission, I am inclined to the view that there can be access with a

publication ban provided the person's name, address, phone number and occupation or place of employment or education remain sealed. In addition, any information that would tend to identify the witness should remain sealed. In order to make that final determination, the potential witness shall be given an opportunity to see the proposed redactions and provide input to the police or PPSC regarding information that would tend to identify the potential witness. If he/she wishes, the submissions could be given in court by the potential witness or through her or his counsel. The same conditions with regards to those submissions would apply as noted earlier for the two acquaintances.

The Other Persons (the accused persons family members, friends, co-workers and other acquaintances)

The Positions of the Parties

168 The PPSC submits that there is no contest that the names of the other persons whose names appear in the ITOs should remain sealed. As regards the media's claim that the redactions have been overly broad, the PPSC submits that there is no public interest in learning the identities of these persons. They are innocent third parties who have not been charged with any offence. As with those in the second and third categories, there is real risk of damage to the reputation of these persons. If however, the Court determines that a sealing order is not appropriate these persons should be notified and given an opportunity to make submissions. To protect their identities when given that opportunity, there should be an interim publication ban or sealing order on any further hearing until the Court decides the ultimate issue.

169 The media submits that while the information relating to these individuals should be presumptively open and subject to neither a sealing nor a publication ban, they are not seeking to publish the identities of these persons. However, the media object to the overly broad redactions in this area and provides an example. Finally, notice to these persons is not necessary.

Analysis

170 I am persuaded that given the nature of the allegations against the accused persons, there are valid concerns for this broad category of persons' reputations and that they may be stigmatized as favouring terrorism. While those concerns would be greater with respect to some in this category, the concerns would apply to all.

171 However, I am not persuaded by the PPSC or **Jaser** that the information should remain sealed. With regards to whether there is any public interest in this area, the onus is on the PPSC. There is no evidence on the issue. With sealing of their names and anything that would tend to identify them, I am persuaded their interests would be appropriately protected. The order is necessary as referenced earlier and with the deletion of references to their names and identifying information, the balancing in the second part of the *Dagenais-Mentuck* test favours this limited publication ban.

172 Given the considerations noted in the previous section with regards to identity, the PPSC shall provide each of the persons in this area with a copy of the information related to them with their names and what the PPSC deems to be identifying information redacted to obtain their input with respect to other identifying information. If there is no agreement on the redactions, a further hearing can be arranged at which the person would be entitled to make submissions in person or through counsel. The same conditions as noted in the last two areas would apply.

The Ongoing Police Investigation

The Position of the Parties

173 The PPSC and **Jaser** submit that the material presented meets the *Dagenais-Mentuck* test and the sealing order should remain.

174 The media submits that the affidavit evidence on this issue is "somewhat vague" and based on an affiant's belief from reading another affidavit. The media submit that I should read the passages claimed by the PPSC to be covered by this ground and apply the *Dagenais-Mentuck* test to those passages without any opposing arguments being presented by the media.

175 Mr. Esseghaier does not oppose the publication of the information.

Analysis

176 I have considered the written submissions of counsel, the affidavit of Constable Culligan outlining what in the PPSC's submission would be a serious and specific risk to the integrity of another criminal investigation as well as the excerpts the PPSC seeks to remain sealed. In addition, I have relied upon the *Winnipeg Free Press, Re*, [2006] M.J. No. 93 (Man. Q.B.) and the challenges faced when this ground is relied upon.

177 Applying the *Dagenais-Mentuck* test, I am persuaded the PPSC has met the onus of overcoming the presumption of openness for the following reasons. Pursuant to s. 487.3(2)(ii) a sealing order may be made if the disclosure of the information would compromise the nature and extent of an ongoing investigation. I have uncontested sworn evidence that the disclosure of the few excerpts under this heading would cause irreparable harm to ongoing investigations. I accept that evidence.

178 To compromise ongoing investigations would cause a serious risk to the proper administration of justice. In these circumstances on this record, such an order is necessary. There are no alternative measures that could be put in place. Because of the nature of the ongoing investigations and the significant risks disclosure would create, the salutary effects of continuing the sealing order in relation to these portions significantly outweighs the deleterious effect on the rights of the parties and the public. The continued sealing has minimal impact on the right to free expression. While the rights of **Jaser** to a fair trial may not necessarily be impacted by unsealing, access and/or publication, the efficacy to the administration of justice is established on this record.

Conclusion

179 The application to vary the sealing order is allowed to the extent permitted in these reasons.

180 As was done in other cases, the sealing orders and publication bans will remain in force two weeks from

today's date to permit the parties to exercise their rights of appeal. Thereafter, in the absence of another court order relating to sealing and-or publication, the orders contained herein will be effective.

181 Finally, these reasons are provided to counsel and Mr. Esseghaier and are subject to a publication ban. They shall not be distributed in any manner. Counsel will be permitted to provide written submission as to which, if any, paragraphs of this ruling should be redacted from the reasons before the publication ban is removed. The PPSC and **Jaser** shall have seven days from today's date to provide their suggested redactions to the media and the media will have seven days to respond. Any paragraphs upon which there are disagreements will be determined by the Court.

Application granted in part.

FN1 With the exception of the videotapes surreptitiously taken inside his apartment on any reference to their content, Mr. Esseghaier does not oppose publication of all the ITOs.

FN2 In *Toronto Star*, Abella J. in dissent, held s. 517 only protects an accused from disclosure of pre-trial information from a bail hearing. There was no legislative protection from potentially prejudicial information emanating from other sources. The majority did not address the issue.

FN3 There has been at least one case in which concerns for the ability to select an impartial jury resulted in the trial judge granting a *Charter* remedy pursuant to s. 24(1) over-riding the Crowns refusal to permit the defence to elect trial without a jury. *R. v. McGregor*, [1992] O.J. No. 3040 (Ont. Gen. Div.).

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