CITATION: R .v. Millard and Smich, 2015 ONSC 7561
COURT FILE NO.: 14-4348
DATE: 2015/12/16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
DELLEN MILLARD	R. Pillay on behalf of the Applicant, Millard
- and-	
MARK SMICH	T. Dungey on behalf of the Applicant, Smich
Applicants	
– and –	
CANADIAN BROADCASTING CORPORATION, POSTMEDIA NETWORK INC., SUN MEDIA CORPORATION, CTV, A DIVISION OF BELL MEDIA INC., THE GLOBE AND MAIL INC., HAMILTON SPECTATOR, CHCH-TV, TORONTO STAR	I. MacKinnon on behalf of the Respondents, Canadian Broadcasting Corporation, Postmedia Network Inc., Sun Media Corporation, CTV, a Division of Bell Media Inc., The Globe and Mail Inc.,
– and –	B. Rogers on behalf of the Hamilton Spectator, CHCH-TV, Toronto Star
HER MAJESTY THE QUEEN	
Respondents	B. Moodie, on behalf of the Respondent, Crown
	HEARD: December 2, 2015

A. J. Goodman J.:

THIS RULING IS SUBJECT TO A BAN ON PUBLICATION PURSUANT TO S. 648(1) OF THE CRIMINAL CODE OF CANADA AND SHALL NOT BE TRANSMITTED, REPRODUCED OR BROADCAST IN ANY MANNER UNTIL A FURTHER ORDER OF THIS COURT ALLOWS.

RULING ON APPLICATION TO PROHIBIT THE PUBLICATION OF TRIAL EVIDENCE

[1] The applicant, Dellen Millard ("Millard") is joined by his co-accused, Mark Smich ("Smich") in bringing an application to delay or ban the publication of all evidence to be adduced at this trial until the completion of other proceedings facing both accused.[1] In the alternative, the applicants seek an order extending the s. 648 *Criminal Code* publication ban of the pre-trial motions heard in this case to an unspecified date following the completion of their other murder trials in Toronto.

[2] The application is opposed by representatives of the media ("media coalition"), who were granted standing, as well as the Crown attorney.

Background:

[3] Millard and Smich stand charged with first-degree murder in relation to the death of Timothy Bosma ("Bosma"). The Crown alleges that Bosma was abducted and subsequently murdered after taking Millard and Smich on a test drive of his vehicle on May 6, 2013.

[4] Both Millard and Smich also stand charged with the first-degree murder of Laura Babcock ("Babcock"). Millard faces a third murder allegation involving the death of his father, Wayne Millard.

[5] The Crown alleges that the Babcock murder was committed between 7:03 p.m. on July 3 and 10:43 a.m. on July 4, 2012. The Crown further alleges that Babcock's remains were incinerated in the Eliminator on July 23, 2012.

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[1] For ease of reference, I will refer to both Millard and Smich as the "applicants".

[6] Millard stands charged alone with the alleged murder of his father, Wayne Millard, on November 29, 2012. Wayne Millard was shot in the home he shared with Millard. The death was initially deemed a suicide. Following Millard's arrest in relation to Bosma's death, the Toronto Police Service Homicide Squad commenced an investigation into the death of Wayne Millard. The Crown alleges that Millard shot his father and staged the scene to make it appear as a suicide. Millard was not arrested and charged with his father's death until April 2014. A preliminary hearing has been scheduled for early January 2016.

[7] The Crown alleges that the applicants' incinerated Bosma's remains after they had murdered him in an animal incinerator called the Eliminator. The proposed evidence about the Eliminator stretches back to the summer of 2012. The Crown will lead evidence as to the Eliminator's purchase, use storage and other factors. This evidence may include documents, text messages, emails, photographs, expert anthropological opinion and *viva voce* testimony.

[8] The Crown anticipates leading evidence regarding the applicants' intended use of the Eliminator, (without specific reference to the Babcock incident) giving rise to inferences of knowledge, planning or the *actus reus* leading up to the alleged Bosma murder.

Positions of the Parties:

[9] The applicants' submit that in these rare circumstances, the freedom of the press must yield to the greater concern of ensuring that an accused receive a fair trial as guaranteed by section 11(d) of the *Charter*. The integrity of the administration of justice suffers where the public is exposed to evidence that could poison the minds of potential jurors and deprive the accused of the right to a fair trial by an impartial jury.

[10] Both applicants submit that the salutary objectives of a publication ban outweigh any deleterious effects. While the public certainly has a right to know, the applicants assert that they have a more important right to a fair trial. Millard says that he has been charged with three high-profile murders. There has been extensive media coverage of this and his other cases. The media interest continues unabated and will increase once the trial commences. Much of that coverage will remain fixed in cyberspace, available for any potential juror to review long after this trial is complete. The applicants submit that their rights to a fair and impartial jury on the Babcock case and Millard's rights with respect to the Wayne Millard charges necessitate a ban on the publication of evidence from the Bosma trial.

[11] In support of his position, Millard submits that the publication of the evidence related to the Eliminator or Smich's admissions could cause potential jurors to immediately conclude that the applicant must be guilty of the Babcock disappearance. It is submitted that it will be impossible for jurors to sufficiently purge their subconscious of this sort of evidence to ensure a fair trial.

[12] In the alternative, the applicants submit that the evidence adduced during these pre-trial motions, if released once the jury is sequestered in this case, could prejudice them in the subsequent Babcock trial. It is argued that much of the salient evidence in this case, excluded by various rulings or otherwise referred to in these pre-trial motions, have a direct powerful and material connection to the alleged Babcock murder. Any future application to the trial judge in the Babcock matter which will involve similar evidence would be all but neutered if the media were permitted to publish information or the evidence ruled inadmissible in this case once the jury is sequestered.

[13] The media coalition submits that numerous cases from the Supreme Court of Canada and the courts of appeal have established that the principle of openness lies at the very foundation of our judicial system. It is an essential right of the public to learn about judicial proceedings, on a timely basis, so that they can be subject to public scrutiny and discussion in our democratic society. In a free and democratic society, the public needs to be informed of information concerning a criminal trial at the time it occurs.

[14] The media coalition submits that there is significant and understandable public interest in the murder charges and trial related to Bosma's death. The public has a right to scrutinize and comment upon the administration of justice based upon the evidence and facts entered at trial. Postponing that right and opportunity to an unknown date far in the future, after two more trials are completed, is an unjustified breach of freedom of expression rights and will leave the community in the dark about evidence of the alleged crime and the basis for any verdict that is rendered. The public needs to be able to follow the trial as the evidence comes out.

[15] The media coalition argues that a publication ban is simply not necessary in the circumstances. Further, the applicants have not met their onus as they have failed to lead any evidence to support their argument that publication of the evidence in the Bosma trial will prevent the two defendants from receiving fair trials in the Babcock and Wayne Millard cases.

[16] The respondent Crown attorney effectively joins with the media coalition's position. The Crown submits the applicants have not met their onus in that such a delay of publication is warranted and therefore the open court principles should continue to apply. The application should be denied as

standard jury safeguards and a publicity based challenge for cause provide adequate protection to all potential concerns raised by the applicants.

[17] The Crown does not oppose the applicant's request for an extension of the s. 648 *Criminal Code* publication ban with respect to the pre-trial motions.

Legal Principles:

[18] I have already discussed the applicable legal principles in a companion ruling rendered to the parties on October 28, 2015.[2] However, as this issue is of significant import, it is incumbent on me to again canvass the relevant jurisprudence on this issue.

[19] The significance of court proceedings being open and reportable to the public is well-established at common law. The open court principle, permitting public access to court proceedings, is deeply rooted in the Canadian justice system. Public policy in favour of openness and of maximum accountability in respect of judicial proceedings pre-dates the *Charter*: *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 184. As Dickson J. stated at pp. 186-187: "At every stage the rule should be one of public accessibility and concomitant judicial accountability" and "curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance".

[20] Now recognized as a fundamental right guaranteed by s. 2(b) of the *Charter*, the open court principle has taken on added force as "one of the hallmarks of a democratic society" that deserves constitutional protection: *Canadian Broadcasting Corp. v. New Brunswick (A.G.)*, [1996] 3 S.C.R. 480. The open court principle and the rights conferred by s. 2(b) of the

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[2] The citation is [2015] ONSC 6583, released only to the parties at this juncture.

Charter embrace not only the media's right to publish or broadcast information about court proceedings, but also the media's right to gather that information, and the rights of listeners to receive the information. "[T]he press must be guaranteed access to the courts in order to gather information" and "measures that prevent the media from gathering that information, and from disseminating it to the public, restrict the freedom of the press": *CBC v. New Brunswick,* at para. 26.

[21] In *CBC v. New Brunswick*, the openness principle was recognized by the Supreme Court of Canada as an important aspect of s. 2(b) of the *Charter*. At para. 23, LaForest J. stated the following:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place. Cory J. in *Edmonton Journal* described the equally important aspect of freedom of expression that protects listeners as well as speakers and ensures that this right to information about the courts is real and not illusory. At pages 1339-40, he states:
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> > That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role. It is exceedingly difficult for many, if not most, people to attend a court trial. Neither working couples nor mothers or fathers house-bound with young children, would find it possible to attend court. Those who cannot attend rely in large measure upon the press to inform them about court proceedings – the nature of the evidence that was called, the arguments presented, the comments made by the trial judge – in order to know not only what rights they may have, but how their problems might be dealt with in court. It is only through the press that most individuals can really learn of what is transpiring in the courts. They as "listeners" or readers have a right to receive this information. Only then can they make an assessment of the institution. Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired

> in court. Practically speaking, this information can only be obtained from the newspapers or other media.

[22] The Supreme Court of Canada has also recognized the importance of freedom of expression to a free and democratic society and has held that it should only be limited in the clearest of cases. As Cory J. stated in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336:

> Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

[23] In *R. v. Canadian Broadcasting Corp.*, 2010 ONCA 726 (CanLII), at para. 24, the Court of Appeal summarized the importance of the open court principle:

> The Supreme Court of Canada described the openness of the courts and judicial processes as being necessary to maintain the independence and impartiality of courts, integral to public confidence in the justice system and a principal component of the legitimacy of the judicial process.

[24] In the seminal cases of *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, [2001] 3 S.C.R. 442, the Supreme Court of Canada developed what has been referred to as the "*Dagenais/Mentuck* test". This standard of analysis or "test" has been consistently and applied to all discretionary judicial orders limiting the openness of judicial proceedings. In circumstances where the test is applicable, in *Mentuck* at para. 32, the Supreme Court of Canada directs that when considering a publication ban, a court ought to determine that:

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

b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[25] In *Dagenais*, the Supreme Court of Canada reaffirmed that the pre-*Charter* common law rule regarding publication bans gave inadequate recognition to the importance of s. 2(b) of the *Charter* and the public's right to know about court proceedings. In discussing the import of the open court principles in the post-*Charter* era, Lamer C.J. stated at p. 915, that "the pre-*Charter* common law rule governing publication bans [which] emphasizes the right to a fair trial over the free expression interests of those affected by the ban" was "inconsistent with the principles of the *Charter*", and in particular, the equal status given by the *Charter* to ss. 2(b) and 11(d): *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332 at paras. 24-26, *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, [2010] 1 S.C.R. 721.

[26] The *Dagenais/Mentuck* test requires that any risk to a fair trial be "well-grounded in the evidence" and that the court must be provided with "a convincing evidentiary basis for issuing a ban". A convincing evidentiary basis for issuing a ban should not be used to protect against remote and hypothetical dangers or merely speculative risks of prejudice.

Analysis:

[27] In this application, one accused, supported by the other, is requesting an unprecedented publication delay or ban over all of the evidence to be tendered at trial.

[28] At the outset, I am not persuaded that there is any factual basis or evidential overlap between the Wayne Millard case and the evidence related to this trial. While there are several witnesses who may testify at both trials, there is no support for Millard's submissions that prejudice would inure if the reporting of this case is permitted prior to the Wayne Millard prosecution. Millard has not established a compelling nexus to any prejudicial evidence that may relate to both matters and thereby pose a serious risk to the proceedings. In any event, Mr. Pillay did not stress this point in oral submissions. I summarily reject this application for a delay or ban on publication as it relates to the looming Wayne Millard trial.

[29] Turning to the issues implicating the Bosma case and the Babcock murder, I am cognizant that the Supreme Court of Canada and appellate courts have established that the principle of openness lies at the very foundation of the judicial system. Indeed, it is not contested that the public has an essential right to learn about judicial proceedings, on a timely basis, in order that they can be informed and the proceedings can be subject to public scrutiny and discussion in a free and democratic society. This maintains and enhances the public confidence in the administration of the justice.

[30] This is not the first case where accused persons have sought a delay or outright publication ban on evidence to be adduced at trial. However, as the applicants concede, the scope or nature of order sought here has never been granted by any Superior Court of a Province in Canada nor has been the subject of a favourable ruling by any Court of Appeal.

[31] The underlying issue is whether twelve impartial and fair jurors can be empanelled for the future trials of either or both accused. The law does not require twelve ignorant or oblivious jurors to be selected. It would be

naïve to believe that jurors can be impartial and fair only if they are devoid of any knowledge of a case. The strength of the jury system relies on the assumption that jurors will follow their oath seriously and decide the case before them only on the evidence and submissions they hear in court.

[32] In this vein, I am persuaded by the sage reasoning of my colleague Nordheimer J. in the oft-quoted case of *R. v. J. S-R.*, [2008] O.J. No. 4160 (S.C.) (known as the "Jane Creba Murder case"). Justice Nordheimer was faced with requests for a publication ban in the context of staggered trials. In that case, there were three separate trials scheduled for the various co-accused at various intervals. Much of the evidence at the three trials was going to be overlapping. As a result, both the Crown and accused sought publication bans on character evidence introduced at the first trial that referred to the accused in a later trial. Justice Nordheimer refused to grant any publication ban and made the following instructive comments at paras. 38 and 40:

> Additionally, courts have accepted that the simple fact that people are made aware of an event, and may even form initial impressions of it, does not preclude them from acting as jurors and undertaking their duties as such in an impartial and objective manner. In this day and age, when there are so many sources of information and persons are subjected to so much publicity regarding events deemed by the media to be 'newsworthy', it would be facile to reject persons as jurors unless they could claim no knowledge of the events relating to any subsequent trial might arise from such events.
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> . . .
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> First and foremost, there is a very different effect, it seems to me, in twelve persons, having been selected as jurors and knowing that they are tasked with deciding the issue of the guilt of the accused, learning of problematic material in the midst of the trial contrasted with the effect on persons learning of such material when they have no idea that they will be a juror in the case to which the material relates. In the former situation there is not only the immediacy of the impact of such material on the jurors given their role, there are compelling reasons for the jurors to remember the information in the trial context that do not exist in the pre-trial context.

> Second, there are many instances where, despite the best efforts of all involved, jurors hear things that they should not. The instances where this occurs and the trial proceeds nonetheless because the judge concludes that the fair trial rights of the accused have not been impaired are numerous and the instances where the opposite result is reached are rare. Third, there are also many instances where evidence has permissible uses along with impermissible uses and, even so, we permit jurors to receive the evidence because we are confident that jurors will use the evidence only in the permitted fashion as directed by the trial judge.

[33] This passage was also cited in *R. v. Haevischer*, 2014 BCSC 2085, a case where a number of RCMP officers were charged with breach of trust, obstruction of justice, and fraud in connection with alleged misconduct while investigating the "Surrey Six" murders. Two men were convicted of those murders, and they sought to stay the proceedings against them and have their convictions set aside. The evidence on the stay application was the very conduct that formed the basis of the charges against the officers, scheduled for trial 10 months after the stay application was brought. The officers claimed the evidence would be "front page news" because of its sensational and scandalous nature and requested a publication ban on the stay application. The court denied the request and noted that: "measures such as rigorous challenges for cause and firm judicial instructions to the jury to decide the case solely on the evidence before them will be capable of addressing any risks to the fair trial rights of the Applicants."

[34] Turning back to the *J. S-R* case, Nordheimer J. noted at para. 70 that the effect of imposing a publication ban on the first trial would have a serious deleterious effect on section 2(b) rights under the *Charter*:

> The consequence of banning publication of this trial with the result that every member of the public would be precluded from hearing and evaluating the events of December 26, 2005 for a year or more, as various trials proceed and accused persons are found guilty or not guilty, is a result that ought not to be accepted absent a most compelling rationale. As Mr. Justice Oppal observed in *Murrin*, our system of justice cannot be

> so fragile as to mandate that result. The fact remains that the public has a right to know. The public has the right to fairly evaluate whether justice has been done in any given case. The public has the right to know whether all of the players in the criminal justice system are performing their respective roles in a fitting and proper manner. The public cannot be masked from seeing the trial process unfold.

[35] Not only are Nordheimer J.'s comments equally applicable to this case, there is some merit to the media coalition's submissions that the arguments for a publication ban were more compelling in *J.S-R.* than found here. The various accused in *J.S-R.* were all charged with the murder of the same victim, Jane Creba, arising out of the same incident. As mentioned, there was significant overlapping evidence, including bad character evidence and testimony in the first trial that identified an accused as the shooter and whose trial was to follow.

[36] Justice Nordheimer was gain called upon to address a similar issue in the case of *R. v. Kossyrine and Vorobiov*, 2011 ONSC 6081. In that case, he rejected the assertion that high profile criminal cases with significant media attention should be a basis for a publication ban in the context of staggered trials. In reiterating the strength and importance of the jury system, and the valid objective of an accused's right to a fair trial, at para 10, Nordheimer J. stated the following:

> It is contended that if Mr. Ross' plea of guilty is published, along with the surrounding facts that he acknowledged, it will be impossible for the applicants to get a fair trial. I do not agree. To accede to that contention, is to accept the proposition that the jurors selected to decide this case will not honour their duties and obligations as jurors. That proposition has been consistently rejected by all levels of court, most especially by the Supreme Court of Canada.

[37] In discussing the high evidentiary threshold set by the Supreme Court of Canada in *Dagenais*, Nordheimer J. continues with his analysis at para. 16:

> In a similar vein, both the Crown and the defence in the course of their submissions referred to the imposition of a publication ban as being the safer route. Expressions such as "erring on the side of caution" or "out of an abundance of caution" were used in an attempt to justify the request for a ban. The test, of course, is not whether it is safer to impose a publication ban. If that were the test, then publication bans would routinely be granted. The test is whether it is necessary to do so. If we were to simply chose the safer route when these issues arise and impose publication bans because they provide an additional preventative measure to protect the fair trial rights of the accused, it would lead to a result where the right of the public to be informed on a timely basis about significant events occurring in the justice system through the freedom of the press enshrined in s. 2(b) of the *Charter* is relegated to secondary status. That result was, of course, expressly rejected in *Dagenais*.

[38] In *R. v. Riley*, 2009 CanLII 42457 (ONSC), a publication ban was sought to take effect 60 days after the completion of a trial in which the accused was convicted of murder, until the conclusion of pending trials against him on various other charges, including murder.[3] There was overlapping evidence between the various charges and trials. In denying the publication ban over his first trial, Dambrot J. took into consideration the absence of any reason to believe that there would be any significant repetition of the publicity about the case at any future trial against Mr. Riley. Justice Dambrot's analysis also included references to the arsenal of effective techniques available at any subsequent trial to prevent unfairness as a result of pre-trial publicity.

[39] In *R. v. Puddicombe,* [2009] O.J. No. 6472 (S.C.), two co-accused persons were charged with murder and conspiracy to commit murder, and their trials were scheduled to proceed one after the other. The significant pre-trial media coverage included references to the allegation that the two female accused plotted to kill the victim together. The Crown and defence counsel sought a publication ban over all of the evidence in the first trial

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[3] The brief ruling in this case did not provide me with a full understanding whether the accused was facing consecutive trials.

until a jury was selected in the second trial. Justice Benotto refused to impose any ban on evidence from the first trial even though much of the evidence would be overlapping. In highlighting the confidence in juries to follow directions, Justice Benotto noted that there was a far greater risk to trial fairness if the actual jurors were prejudiced by media coverage at the opening of the second trial than the risk that day-to-day reporting on the first trial might influence potential jurors in the second trial. There was no suggestion that the accused did not receive fair trials.

[40] As I have already expressed at para. 101 of my Reasons with respect to the Change of Venue Application, there are also numerous "mechanisms of protection afforded to an accused" at trial to ensure a fair trial and an impartial jury.

[41] Indeed, it has been well-established in appellate jurisprudence that jurors are capable of following trial judge's instructions and separating pre-trial publicity from the evidence presented to them: *R. v. Vermette*, [1988] S.C. J. No. 47, *R. v. Largie*, [2010] O.J. No. 3384 (C.A.). In *R v. Corbett,* [1988] S.C.J. No. 40, the Supreme Court commented on the ability of jurors to distinguish between admissible and inadmissible uses of evidence. Chief Justice Dickson dealt with this point in his reasons and stated at para. 40:

> ... the court should not be heard to call into question the capacity of jurors to do the job assigned to them. The ramifications of any such statement would be enormous. Moreover, the fundamental right to a jury trial has recently been underscored by s. 11(f) of the Charter. If that right is important, it is logically incoherent to hold that juries are incapable of following the explicit instructions of the judge.

[42] In his written submissions, counsel makes the comparison of statutory publication bans at bail hearings and preliminary hearings to the publication ban he is requesting in this application. There are a number of significant differences between those statutory publication bans, which are

automatically granted when requested at earlier stages of the criminal litigation and the discretionary publication ban sought in this case, a trial on the merits before a jury.

[43] I am also not persuaded by the applicants' submissions that this is a situation in which potential jurors two or three years from now will not be able to separate evidence heard in the Babcock trial, from the steady stream of publicity arising from the Bosma trial.

[44] The Babcock trial is to be heard on a future unspecified date in Toronto, with a metropolitan population of more than 2.5 million people. It was submitted that pre-trial motions in the Babcock trial, is currently anticipated to commence in the fall of 2016. Pre-trial dates have neither been finalized nor have trial dates before a jury. As Mr. Moodie opines, the possibility of the Babcock trial commencing in the fall of 2016 may be a "lofty goal". While no party can say with any certainty, it seems apparent that the Babcock jury trial will not be heard until at least at least six months or longer after the completion of the pre-trial motions.

[45] It is illusory to suggest that the extensive ban being sought in this application – to the conclusion of the Babcock trial, (and for that matter the Wayne Millard matter), which could be several years hence – constitutes only a temporary delay in publication.

[46] Timely scrutiny of the judicial process is a fundamental aspect of the freedom of expression rights protected by section 2(b) of the *Charter*. Were it otherwise, publication bans would be routine. As Nordheimer J. stated in *R v. Toronto Star Newspapers Ltd.*, 2005 CanLII 47737 (ONSC), "transgressions of fundamental freedoms ought not to be readily justified on the basis that any such infringements will be transient or short lived".

[47] If public scrutiny is not timely, it can be lost – particularly where the delay can be extended not just for months, but years. In *R. v. Domm*, [1996] O.J. No. 4300 (C.A.), Doherty J.A. referred to this notion, stating:

> Timely publication may be essential to a meaningful exercise of one's right to freedom of expression. Sometimes an order delaying publication will be tantamount to an outright ban on publication. The values promoted by s. 2(b) are not served by publication when the speaker has lost his audience.

[48] I agree with the media coalition that timing is critical to the public's evaluation of criminal proceedings. The majority of the public cannot attend this trial. Providing that at some future date – particularly one potentially years ahead - the public will learn of what occurred at trial does little to quell public hostility or prevent potential abuses. In *R. v. Kossyrine,* [2011] O.J. No. 4495 (S.C.), at para. 14, Nordheimer J. made the following comment about the importance of contemporaneous reporting:

> The citizens of Toronto should know that Mr. Ross has admitted to his participation in a murder that took place in this city. Like any other event within the court system, they are entitled to have that information as soon as it occurs. While a delay in the publication of that information can be justified in order to ensure that other rights are promoted, such a drastic remedy should only be resorted to if it is shown to be absolutely necessary. That showing is not been made in this case.

[49] In *Phillips v. Nova Scotia* (*Commission of Inquiry into the Westray Mine Tragedy*), [1995] S.C.J. No. 36 at paras. 133-4, the accused facing criminal charges brought an application to stay a public inquiry on the basis that pre-trial publicity would prejudice their right to a fair trial. In allowing the public inquiry to proceed despite the pending criminal trial, Cory J. stated:

> I am of the view that this objective [a fair trial] is readily attainable in the vast majority of criminal trials even in the face of a great deal of publicity. The jury system is a cornerstone of our democratic society. The presence of a jury has for centuries been the hallmark of a fair trial. I cannot accept the contention that increasing mass media attention to a particular case has made this vital institution either obsolete or unworkable. There is no doubt that extensive publicity can prompt discussion, speculation, and the

> formation of preliminary opinions in the minds of potential jurors. However, the strength of the jury has always been the faith accorded to the good will and good sense of the individual jurors in any given case.

[50] A publication ban over an entire trial is unprecedented in Canadian law. The applicants are seeking a distinctive court process that is effectively shielded from public view. It is clear that the public depend on media coverage to follow court proceedings, and the rights affected by such a ban substantially fall on the majority of those individuals who are unable to attend court. They will be denied any ability to evaluate the proceedings as they unfold and yet be expected to accept the resulting verdict even when the evidence can finally be published years later. I recognize that the public has the right to be able to scrutinize the steps in the criminal proceedings contemporaneously with when they occur.

[51] In determining whether the publicity surrounding this trial will create a real and substantial risk to the fair trial rights of the applicants, it is clear that the public's understanding of what transpires in a courtroom is derived from what they read, see and hear through the media. It is the media's role to act as the conduit through which that information is communicated. Even if such information is imparted through the lens of journalistic comment or subjective opinion, there has never been a case in Canada in which it was not possible to empanel a jury even in the face of extensive or notorious publicity or commentary.

[52] The evidence and information adduced at this trial will be factually specific to the events arising to the offence charged. Except for the fact that the accused are the same, the later trials are for murder charges quite distinct from those at the Bosma trial, and arise out of different circumstances. While there is the common element of the alleged use of the Eliminator, any information that may overlap between the trials, such as evidence

about the Eliminator will only be referenced in the context of the facts relevant to each trial.

[53] All parties have agreed that there will be no evidence adduced in this trial in an attempt to show that the Eliminator was also connected to the charges in the Babcock matter. The mere fact that evidence about the Eliminator may be led in the first trial against the accused, without any connection or link made to the later trials, is not sufficient to establish a real and substantial risk that the accused will suffer impending unfair trials.

[54] Potential jury members in the future trials may still be influenced by what they have heard or read about the Bosma case through rumours, gossip, and media coverage and will likely be questioned about any bias they may have against the accused as a result. It seems logical that jury selection in the subsequent Babcock trial would tend to be fairer and more effective if potential jurors were questioned about their actual knowledge of facts and evidence learned through the reporting of the Bosma trial, rather than rumours, speculation and internet blogs unchecked by such reporting.

[55] Even in those cases with notorious and intensive media coverage and where courts found where some sort of limited publication ban was justified, the relief provided was much more focused than the sweeping ban requested here. There have been a number of high profile murder cases that involved an inordinate amount of pre-trial publicity and were followed by staggered trials with overlapping evidence. All have proceeded without the need of an expansive common law publication ban.

[56] In my opinion, the applicants have failed to demonstrate a serious risk to trial fairness. As difficult as it may be to muster, no evidence has been adduced before me that suggest the publication in this case would impinge on a potential juror's ability to decide a case.

[57] I am not persuaded that there is any foundation to the concerns that prospective jurors in the subsequent trials of both accused will be exposed to such prejudicial information and will therefore be unable to discharge their function. I find that the salutary objectives for an overarching delay or ban of publication of the trial evidence in this case is outweighed by its deleterious effects.

[58] That being said, I take a different view with respect to the pre-trial motions. I agree with Mr. Pillay that of all the cases proffered, the situation before me is unique. While the authorities are replete with requests and subsequent denial for bans on publication, nowhere in the jurisprudence could I find a similar case where an accused was facing three first degree murder trials, at the same time and are to be heard consecutively.

[59] With this in mind, I turn to the alternative relief sought by the applicants, namely an extension or continuation of the delay of the statutory ban of publication over the pre-trial motions heard in this case.

[60] On rare occasions, Superior Courts have ordered certain matters banned from publication to protect future juries. In *R. v. Sandham*, [2007] O.J. No. 5310, (S.C.), a case involving the high-profile murders of eight members of the Bandidos Motorcycle Club that had significant media coverage, McDermid J. imposed a partial publication ban on only those facts "likely to create an indelible and prejudicial impression in the minds of members of the public that is unlikely to be dispelled by judicial instruction". He permitted the publication of the majority of matters contained in the agreed statement of facts to support the guilty plea of one of the six accused.

[61] Similarly, in *R v. McClintic* 2010 ONSC 2944, (S.C.) a high profile murder case involving the death of a young girl, (the Tori Stafford case), one accused had pleaded guilty while her co-accused was awaiting trial.

Justice McDermid imposed a partial publication ban on only those matters that "in my opinion are likely to create an indelible and prejudicial impression in the minds of members of the public that is unlikely to be dispelled by judicial instruction or alternative measures". In exercising the appropriate balancing, McDermid J. allowed an edited agreed statement of facts, victim impact statements and an edited portion of McClintic's statement to be published.

[62] A key difference in both *McClintic* and *Sandham* was that there were publication bans concerning the same trial and the evidence to be adduced. In this application, the concern is for a different charge and trial with the same accused persons, albeit with some overlapping pre-trial evidence along with an unidentified separation in time between the cases.

[63] As mentioned, the key issue is whether a fair jury can be empanelled for the future trials of the accused. The law does not require twelve ignorant or oblivious jurors to be selected. A cornerstone of the justice system is that jurors obey their oath. As Lamer C.J. stated in *Dagenais* at para 87, "jurors are capable of following instructions from trial judges and ignoring information not presented to them in the course of criminal proceedings". The strength of the entire jury system in Canada relies on the assumption that jurors will follow their oath seriously and decide the case before them only on the evidence presented at trial, the submissions of counsel and instructions from the trial judge.

[64] The *Dagenais/Mentuck* test requires that if s. 2(b) *Charter* rights are to be infringed; any ban must be as narrowly circumscribed as possible. It must be specifically directed to address the demonstrated concern and the court must be satisfied there is no other effective means to achieve its objectives. In *Dagenais,* at para. 90, the majority of the Supreme Court

was explicit that a court must consider whether reasonable alternative measures (e.g. change of venue, adjournment, challenges for cause and strong judicial direction to jurors) are available that may guard against the risk of the trial being unfair, without having to circumscribe the expressive rights of third parties, such as the media. *Vancouver Sun*, at para. 29.

[65] While the applicants have failed to demonstrate a serious risk to trial fairness with respect to the publication of evidence during the trial proper, there is a valid concern that prospective jurors in the subsequent Babcock trial will be exposed to powerful prejudicial information from these pre-trial motions. This predicament is dissimilar to the fact situation found in *Haevischer,* referenced at para. 20 of that decision.

[66] It is reasonable to suggest that there is a greater likelihood that a potential juror in the applicants' subsequent trial on the charges related to Babcock's death, may become aware of the evidence arising out of the pre-trial applications in this case if reported by the media following the sequestration of the jury. Indeed, there was much evidence advanced during the numerous pre-trial motions including records or information regarding post-offence conduct, the quashing of various search warrants at several locations with emphasis on cellular devices and computers seized from the applicants; examination of these electronic devices, as well as extensive evidence surrounding the Eliminator. A good deal of this evidence will not be heard by the jury in this case. The Crown's application for the introduction of evidence of other discreditable conduct is particularly noteworthy for its potential prejudicial impact at future judicial proceedings.

[67] There is a direct correlation to the evidence ruled inadmissible in this case with their surrounding details and its potential application to the Babcock matter. I agree with the applicants that it is more than likely that similar

issues and related evidence will form the basis for future pre-trial applications and will be subject to extensive review as to its potential admissibility.

[68] It seems to me to be incongruent to permit the publication of evidence that has been ruled inadmissible in this trial along with my rulings with respect to such evidence, and yet have the applicants raise the same issues and evidence before another judge in a subsequent trial with their full knowledge and understanding that these matters are omnipresent in the public domain. Of course, the jury in the Babcock trial will be appropriately cautioned. However, if such information is published at the conclusion of this trial, in my opinion, this tends to defeat the purpose of evidence being ruled inadmissible during these pre-trial motions that is inextricably linked to the allegations in the Babcock case, and subsequently form a foundation for its inadmissibility in that proceeding.

[69] I can reasonably conclude that a high degree of prejudice exists from the nature of the pretrial motions and a potential juror's deleterious impression from this evidence will be substantial. In my view, it cannot be dispelled by other reasonable means as outlined in *Dagenais.* A narrowly circumscribed remedy over pre-trial motions will meet the salutary objectives as provided in the jurisprudence. In this regard, the mere fact that there may be significant and potentially potent overlapping and prejudicial evidence between these pre-trial motions and the Babcock trial supports a delay of publication with respect of the ban already in effect by operation of s. 648 of the *Criminal Code.*

Conclusion:

[70] The applicants have failed to meet their onus in addressing the *Dagenais/Mentuck* test with respect to this trial proceeding.

[71] In balancing the interests of the parties, a delay or ban of publication of the proceedings before the jury in this case would offend s. 2 of the *Charter* and would be unprecedented in Canadian jurisprudence.

[72] Moreover, the order sought by the applicants' to delay the publication of the trial evidence before the jury in this case would significantly undermine the open courts principle, a constitutionally-protected right. The public have a right to know what is occurring and why, during the timely presentation of evidence that will be adduced before a jury at this trial. With proper jury safeguards in place, and a robust challenge for cause likely to result in the other cases, the applicants' fair trial rights can and will be met both here and in future trials.

[73] In my opinion, the salutary objectives of a protracted publication delay or ban are outweighed by the deleterious effects on the rights and interests of the parties, the media and the public, including the right to free expression and the efficacy of the administration of justice.

[74] For all of the aforementioned reasons, the applicants request for a delay or ban on publication of the Bosma trial is denied.

[75] With respect to the pre-trial applications (currently subject to a publication ban), I am satisfied that the applicants have demonstrated the necessity to extend such a ban, at least to the conclusion of the Babcock trial. Therefore, an order will issue extending the s. 648 *Criminal Code* publication ban on all pre-trial applications to the conclusion of the Babcock trial, at the point when the jury in that case has reached their verdict. This ban shall include all evidence, submissions, exhibits and rulings made during the course of the pre-trial applications in this case.

[76] Finally, the applicants have requested a delay or ban on publication of all matters that may not be heard by the jury during the course of this trial. It is axiomatic that evidence not properly presented or considered by the jury is not to be published or transmitted by the media or by anyone else until the jury is sequestered. Such information may arise during the course of a *voir dire* with respect to evidential rulings, substantive or procedural issues and may include counsels' submissions, or any other matter that may surface during the course of the trial in the absence of the jury.

[77] At this juncture, I am disinclined to render a blanket order imposing or extending a prohibition over the publication of such information. Upon the conclusion of the evidence to be adduced in this trial and prior to the jury being sequestered, I will entertain further submissions as to what, if any, evidence or other matters ought to fall under a delayed publication ban.

[78] The application is therefore, granted in part.

A. J. GOODMAN, J.

Released: December 16, 2015

CITATION: R. v. Millard and Smich, 2015 ONSC 7561
COURT FILE NO.: 14-4348
DATE: 2015/12/16

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DELLEN MILLARD

and MARK SMICH

Applicants

- and -

CANADIAN BROADCASTING CORPORATION, POSTMEDIA NETWORK INC., SUN MEDIA CORPORATION, CTV, A DIVISION OF BELL MEDIA INC., THE GLOBE AND MAIL INC., HAMILTON SPECTATOR, CHCH-TV, TORONTO STAR

– and –

HER MAJESTY THE QUEEN

Respondents

RULING ON APPLICATION TO PROHIBIT THE PUBLICATION OF TRIAL EVIDENCE

A. J. GOODMAN, J.

Released: December 16, 2015