CITATION: R. v. Minassian, 2019 ONSC 4455
COURT FILE NO.: CR-18-40000612-0000
DATE: 20190816

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN (Responding Party)	)	*Joseph Callaghan and Cynthia Valarezo*, for the Crown
	)	
– and –	)	
	)	*Boris Bytensky and Brittany Smith*, for the
ALEK MINASSIAN	)	Applicant/Defendant
	)	
(Applicant/Defendant)	)	*Leo Adler*, for the Minassian family
	)	
	)	*Brendan Hughes*, for Postmedia Network Inc., The Canadian Broadcasting Corporation, Toronto Star Newspapers Limited, Corus Entertainment Inc., CTV News, a division of Bell Media Inc., the Globe and Mail Inc. and Canadian Press Enterprises Inc.
	)	
	)	**HEARD:** July 11, 2019

MOLLOY J.

REASONS FOR DECISION #2 - REDACTED
(Application for Publication Ban and Sealing Order)

A. THE APPLICATION

[1] The defence applies for a ban on publication of any material filed on the pre-trial applications in this case, to continue until the conclusion of the trial. The main focus of the defence is on the lengthy video-recorded statement given by Mr. Minassian to the police following his arrest. The video and transcript of this statement were included in the materials filed by the Crown on a previous application. The defence is concerned that disclosure of this information in the press could taint the testimony of defence witnesses to be called at trial. The Crown agrees that there should be a publication ban with respect to this material, but only up to the commencement of trial.

[2] The defence also applies for a sealing order with respect to some aspects of the material filed by the Crown on the previous application. That material refers to some content found on electronic devices which the police seized when searching Mr. Minassian's home pursuant to a

search warrant. The same relief is sought by members of Mr. Minassian's immediate family, who resided at the premises subject to the search. The Crown opposes the sealing order.

[3] The media was served with notice of these applications. Several media organizations retained one common counsel, Mr. Hughes, who appeared on the applications. The media is opposed to the non-publication and sealing orders.

[4] At the conclusion of submissions, I reserved my decision and adjourned the matter to August 16, 2019, with the existing sealing and non-publication orders to remain in place until August 17, 2019, or until further order of the Court.

[5] For the reasons set out below, both applications are dismissed. The non-publication and sealing orders currently in place will continue until September 16, 2019, at which point they are rescinded, subject to any further order to the contrary. In the absence of any such order, all material filed on any of the pre-trial applications, and the full text of any decisions I have issued, will be available to the public as of September 16, 2019.

B. BACKGROUND INFORMATION

[6] Alek Minassian is charged with 10 counts of first degree murder and 16 counts of attempted murder, all in relation to an incident involving a van being driven into pedestrians on a sidewalk on Yonge Street in Toronto on April 23, 2018 ("the Toronto van attack"). Immediately after the attack, Mr. Minassian was arrested near the scene and has been in custody ever since.

[7] A preliminary hearing was waived. Upon the matter reaching this Court, I was appointed to hear all pre-trial applications.

[8] The first pre-trial application argued before me was a defence application for disclosure of the material stored on three electronic devices seized by the police at the time of Mr. Minassian's arrest and during a subsequent search of his residence pursuant to a valid search warrant. The Crown objected to disclosing this material on the basis that it was encrypted and could not be viewed or vetted by the Crown. Other material that was not encrypted had already been disclosed to the defence. The disclosure application was argued on May 27 and 28, 2019, following which I reserved my decision. I adjourned the matter to June 19, 2019, when other applications were scheduled to be argued. At the time of this first pre-trial application on May 28, 2019, I ordered a publication ban in relation to the materials filed on that application until the conclusion of the trial. I considered this to be a standard order in relation to motions heard in the absence of the jury, in accordance with s. 648(1) of the *Criminal Code*, R.S.C., 1985, c. C-46. The defence and Crown had agreed that a sealing order should also issue for aspects of the Crown's materials referring to some information that had been found during the search warrant execution. This information related to possible criminal conduct unrelated to the Toronto van attack. In relation to this information, the parties sought a complete sealing order, not merely a temporary non-publication order. I ruled that this could only be done on proper notice to the media, and the matter was adjourned to the next appearance date on June 19, 2019, to permit the notices to be served. I issued a temporary sealing order until the matter could be argued.

[9] On June 19, 2019, there were two issues to be heard: (1) whether the location of the trial should be moved from Toronto to some other location in Ontario, based on the defence argument that it would be impossible to empanel an impartial jury in Toronto; and (2) whether the sealing order should be made permanent or rescinded.

[10] In court before me on June 19, the Crown advised that the Attorney General was consenting to the trial proceeding before me, sitting without a jury. The defence also chose to proceed before a judge without a jury. The defence application for a change of venue was therefore rendered moot. The trial will proceed before me in Toronto in February 2020.

[11] With respect to the sealing order, counsel for various media outlets appeared, stated that the sealing order would be opposed by the media, and requested further time to prepare. I adjourned the matter to July 11, 2019, for the argument of that issue. An issue then arose as to the status of the non-publication order relating to the material filed on the disclosure application, which order had been based on the fact that the trial would be proceeding before a jury; a fundamental premise that had now changed. I directed that further notice be given to the media on that issue and that both issues should proceed to be heard before me on July 11, 2019.

[12] On June 28, 2019, I released to counsel my unredacted Reasons for Decision[1] on the disclosure application, directing that the Crown was required to disclose the material sought by the defence, subject to finalizing the wording of undertakings to be given. Those Reasons were not publicly released at that time, and still have not been, because there are references in them to some of the information for which a sealing order was sought. At the return date on July 11, 2019, my unredacted Reasons for Decision were placed in the court file but sealed pending further order.

C. THE POSITIONS OF THE PARTIES

[13] On the previous occasions when the publication issue was raised, there were three areas of concern: (1) Mr. Minassian's statement to the police; (2) an ongoing investigation arising from information found on electronic devices seized pursuant to the search warrant at Mr. Minassian's home relating to ***; and (3) information about a man who was facing charges in London relating to a potential threatened attack there, possibly inspired by the Toronto van attack.

[14] Initially, the defence sought a non-publication order with respect to the materials filed on the disclosure motions and a sealing order with respect to *** and the investigation into the possible threats made in London. Initially, the Crown supported the publication ban in relation to the content of Mr. Minassian's statement to the police and also supported a sealing order with respect to references to the other two criminal matters. With respect to these latter two matters, the Crown's initial position was based on the fact that both were the subject of ongoing police investigations. The Crown's position on the sealing orders has since changed. The Crown now opposes any sealing order.

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[1] *R. v. Minassian #1,* 2019 ONSC 3976.

The London Criminal Charge

[15] In relation to the third matter, the defence no longer seeks a sealing order and the Crown agrees that no sealing order should be made. That matter is no longer the subject of an ongoing investigation. Police in London, Ontario have charged Alex Penkala with threatening to cause death to unknown persons. That charge is currently before the courts in London. I am told that there are non-publication orders issued by the court in that proceeding, and any person seeking to publish information about that matter will be governed by those orders. However, there is no basis for me to make a sealing order for that matter within this case.

The *** Issue

[16] In its materials filed in response to the defence motion for disclosure, the Crown expressed concerns about permitting Mr. Minassian to have access to material on three encrypted electronic devices which the police, and experts retained by them, were unable to open. In particular, the Crown was concerned that the devices might contain ***. To demonstrate that this concern was more than mere speculation, the supporting affidavit filed by the Crown provided the following information:

(a) one of the laptop computers seized at the Minassian home (a Lenovo laptop) contained two hard drives, both of which revealed ***;

(b) on that same laptop there was evidence of Skype Media chats between ***;

(c) the identity of the person using the device within the Minassian home could not be ascertained, but there were a number of personal documents on the same hard drives that were directly related to Alek Minassian;

(d) Alek Minassian told the police in his statement that he used the Lenovo laptop and that it was stored on a shelf in his bedroom closet;

(e) also located on the Lenovo computer were several internet related searches and ***;

(f) the *** located within the United States;

(g) an investigation into the matter was ongoing with *** Toronto Police Service; and,

(h) American police authorities were also in the process of investigating the matter.

[17] The Crown did not file additional affidavit material on the publication ban and sealing order application now before me. However, in its factum the Crown stated that:

(a) Constable Davey *** of the Toronto Police Service "has concluded and closed her investigation" into the *** related issues and no charges are being laid;

(b) it "does not appear to [Constable Davey] that the authorities in the United States will be laying charges either;" and,

(c) the "focus of Constable Davey's investigation" with respect to the *** "was not Alek Minassian."

[18] Given that the investigation is closed and no charges were laid, and given that Alek Minassian was not the focus of the investigation in any event, the Crown now takes the position that there is no basis for a sealing order and that publication of this information would not affect Mr. Minassian's right to a fair trial.

[19] The defence maintains that a sealing order should issue with respect to all references to the ***, either permanently or until charges are laid in relation to that matter. The defence points to the fact that these allegations are unrelated to Mr. Minassian but are prejudicial and inflammatory and may taint the views of lay witnesses the defence intends to call at trial. The defence also argues that this is particularly unfair to Mr. Minassian given that there are no charges laid and he will never have an opportunity to defend the allegations made against him.

[20] The members of the Minassian family who resided at the same residence with Mr. Minassian are separately represented by counsel. They also support an order permanently sealing those portions of the materials referring to the *** issue. Mr. Adler, for the family, points to the fact that there is no affidavit evidence supporting the Crown's position that no charges will be laid, particularly with respect to the investigation in the United States. He argues that the information that is disclosed amounts to nothing more than suspicion and innuendo and constitutes a serious invasion of the privacy rights of the family members, who are innocent third parties.

[21] Mr. Hughes, on behalf of the press, points to the absence of an evidentiary record to support the necessity of a sealing order. He argues that there are already safeguards (defamation laws and ethical standards) that would prevent the press from making wild and unfounded allegations against any individuals and that there are legitimate public interest issues involved, such as why the police are not proceeding further with an investigation and/or criminal charges.

The Publication Ban

[22] The defence argues that an order should issue to prevent any publication of what was said by Mr. Minassian in his police statement until the conclusion of the trial. The central issue at trial will be Mr. Minassian's state of mind at the relevant times. The defence intends to call a number of lay witnesses who know (or have known) Mr. Minassian personally. The defence contends that publication of Mr. Minassian's statement could taint or influence the witnesses' evidence at trial. Alternatively, the defence seeks an order banning publication of the statement until the evidence is heard at trial.

[23] The Crown supports a publication ban until the evidence is introduced at trial, for the same reasons advanced by the defence.

[24] The media opposes any publication ban. Mr. Hughes argues that there is no evidence to support the necessity of such a ban and, further, that the suggestion that potential witnesses would be affected by reading media reports about the statement, is nothing more than speculation.

D. THE TEST TO BE APPLIED

[25] The test to be applied in determining whether a sealing order or non-publication order should be made is well-established and accepted by all the parties before me. There is no dispute as to the general principles to be applied. The only issue is how the test should be applied in the particular context of the facts in this case.

[26] Based on what is often referred to as the *Dagenais/Mentuck* test (an amalgam of the two leading Supreme Court of Canada cases on this issue),[2] I must apply the following principles:

(1) Court proceedings, including any materials filed in such proceedings, are presumptively "open" to the public.

(2) The party seeking to impose any limit on the public's access to court proceedings bears the burden of establishing that the test for limiting access has been met.[3]

(3) Full public access can only be barred where the judge, in the exercise of her discretion, "concludes that disclosure would subvert the ends of justice or unduly impair its proper administration."[4]

(4) A non-publication or sealing order can only be made when two conditions are satisfied:

   (i) such an order is necessary to prevent a serious risk to the administration of justice because reasonable alternative measures will not prevent the risk; and

   (ii) the salutary effects of the order 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.[5]

(5) The "risk" in the first prong of the test must be "real, substantial, and well-grounded in the evidence." It is a "serious danger sought to be avoided, not a substantial benefit or advantage to the administration of justice sought to be obtained."[6]

(6) The balancing of interests involved in the second part of the test only arises if the first part of the test has been met.[7]

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[2] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 [*Mentuck*].
[3] *Nova Scotia (Attorney General) v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 189 [*MacIntyre*].
[4] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at para. 4 [*Toronto Star Newspapers*].
[5] *Ibid* at para. 26.
[6] *Ibid* at para. 27; *Mentuck*, *supra* note 2 at para. 34.
[7] *Mentuck*, *supra* note 2 at para. 48.

[27] The *Dagenais/Mentuck* test applies in any situation where the judge is considering whether to order an exception to the presumption that all aspects of a proceeding are open to the public. The test applies equally to pre-trial proceedings and to the trial itself.[8]

E. ANALYSIS: PUBLICATION BAN ON MINASSIAN STATEMENT

Exercise of discretion in absence of applicable statutory ban

[28] Apart from the references to the *** issue (which I will deal with in the next section of these Reasons), the only part of the court record for which the defence seeks any restriction on publication is Mr. Minassian's statement to the police on the night of his arrest. The Crown's responding materials on the disclosure application included both a digital copy of the video recording of that statement and a transcript of it. There are also numerous references to the content of the statement throughout the materials, particularly in the factums. It is common ground between the parties that the Crown will be tendering the statement as part of its evidence at trial. Although not specifically conceded by the defence, no challenge has been brought to suggest the statement was not voluntary or that it was obtained in breach of any of Mr. Minassian's rights under the *Canadian Charter of Rights and Freedoms*. The underlying assumption in the course of argument was that the statement would be admissible at trial, and I am treating it as such.

[29] The previous publication ban covered all of the pre-trial application materials and I issued it under s. 648(1) of the *Criminal Code*. That section applies to prohibit the publication of evidence heard in the absence of the jury, until such time as the jury retires to consider its verdict. There will be no jury in this case. Therefore, s. 648(1) no longer applies.

[30] The Crown also referred me to s. 542(2) of the *Criminal Code*, which states:

> Every one who publishes in any document, or broadcasts or transmits in any way, a report that any admission or confession was tendered in evidence at a preliminary inquiry or a report of the nature of such admission or confession so tendered in evidence unless
>
> (a) the accused has been discharged, or
>
> (b) if the accused has been ordered to stand trial, the trial has ended,
>
> is guilty of an offence punishable on summary conviction.

[31] That section also does not apply, as it refers only to a confession or admission given in evidence at the preliminary hearing. There was no preliminary hearing in this case. The Crown recognizes that s. 542(2) does not strictly apply, but argues that I should apply it by way of analogy. I disagree. In the absence of a directly applicable statutory provision, any restriction on publication I might order would be an exercise of my inherent discretion to control the court process. The

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[8] *Toronto Star Newspapers*, *supra* note 4 at para. 29; *Vancouver Sun, Re*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-27.

Supreme Court of Canada has been clear that the *Dagenais/Mentuck* test applies whenever a judge, in the exercise of her discretion, is considering some restriction on the openness of the court proceeding. The rights protected by this test are of fundamental importance to our democratic process and the integrity of our judicial system. In the absence of clear statutory authority to the contrary, I see no basis for issuing a publication ban, temporary or otherwise, unless the *Dagenais/Mentuck* test is met.

Step One: Necessity

[32] At the first stage of the test I must consider whether it is "necessary" to impose a publication ban of some nature to prevent a serious risk to the administration of justice. If there are other reasonable alternative measures to prevent that risk, a publication ban cannot be justified.

[33] Mr. Minassian asserts that publication of his statement to the police constitutes a serious risk to the administration of justice because it interferes with his right to a fair trial and his ability to make full answer and defence. The specific risk alleged is that individuals who the defence intends to call as witnesses at trial would be so affected by knowing the content of the statement that their evidence would be irreparably tainted. The type of evidence to be given by those witnesses is described in paragraph 10 of the Applicant's factum as follows:

> A number of civilian witnesses are expected to give evidence at the trial, many of whom know (or have known) the Applicant personally. For many of these witnesses, the focus of their evidence will relate to events far removed from the allegations giving rise to the present charges. For example, witnesses are expected to testify about the Applicant's upbringing, his personality, his behavior at various stages of his life, his education, his personal characteristics and circumstances and so on. Expert evidence is expected to be led that is based, at least in part, on the testimony of these witnesses.

[34] In the course of argument, Mr. Bytensky also advised that he anticipates at least one member of Mr. Minassian's family will be called to give evidence about such matters.

[35] The defence did not file any evidence in support of this application. The risk that the planned witnesses would be tainted or affected in some way by what Mr. Minassian said to the police is simply asserted in the Applicant's factum. Mr. Bytensky pointed out in oral argument that there could not be any evidence of how a particular witness would be affected without telling the witness what Mr. Minassian said and asking how they would be affected, which would defeat the whole purpose. He argued that an analogy can be drawn between this situation and the standard order at the commencement of trial excluding prospective witnesses from the courtroom while other witnesses are testifying and cautioning them against discussing their evidence with any other witness. Such orders are routinely made, without any requirement of an evidentiary foundation, in order to prevent the evidence of a witness from being tainted by the evidence of others.

[36] In *Mentuck,* the Crown sought a publication ban with respect to the details of a type of police undercover operation, which has come to be known as a "Mr. Big." There was affidavit evidence before the court stating that the identity of undercover officers in the field could be

compromised if these techniques were to become known to the public and that the overall efficacy of Mr. Big operations in the future would be jeopardized. The trial judge discounted these concerns and refused to order a ban on publishing the details of the operation, although he did order a time-limited ban on publishing any identifying particulars of the officers involved. The Supreme Court of Canada upheld the trial judge's decision. In dealing with the first branch of the test (necessity), the Supreme Court specifically ruled that necessity must be demonstrated by evidence, stating as follows:

> . . . The first branch of the test contains several important elements that can be collapsed in the concept of "necessity", but that are worth pausing to enumerate. One required element is that the risk in question be a serious one, or, as Lamer C.J. put it at p. 878 in *Dagenais*, a "real and substantial" risk. That is, it must be a risk the reality of which is well-grounded in the evidence.[9]

[37] Elsewhere in its *Mentuck* decision, the Supreme Court of Canada referred to the need for a "convincing evidentiary basis" to underscore the presumption against censorship of court proceedings.[10] This point was relied upon by the Ontario Court of Appeal in the *Toronto Star Newspapers* decision, in which there was an ongoing investigation related to Aylmer Meat Packers Inc. Search warrants had been executed for charges related to alleged violations in the slaughter of cattle as well as fraudulent business practices. The Crown had obtained sealing orders with respect to all of the materials filed, based on affidavit evidence that the material could identify a confidential informant and that it could interfere with the ongoing investigation. In particular, the police officer who swore the affidavit stated a concern that potential witnesses could be tainted by press coverage about what other witnesses had said. Doherty J.A. held:

> I reject the first argument advanced in support of the sealing order. The necessity standard described in *Mentuck* is a high one. The Crown must demonstrate, based on evidence, viewed through the lens of judicial experience, that absent a sealing order there is a serious risk to the proper administration of justice. No doubt, in a given case, early disclosure of material contained in an information to obtain a search warrant may significantly impair the ability of the police to obtain accurate statements from potential witnesses. Again, in a given case, that impairment may be such as to result in a serious risk to the proper administration of justice. The Crown must, however, demonstrate the risk in a particular case. It is not enough to rely on the general proposition that pre-trial publication of the details of a police investigation risks the tainting of statements taken from potential witnesses. If that general proposition was enough to obtain a sealing order, the presumptive rule would favour secrecy and not openness prior to trial. A general assertion that public disclosure may distract from the ability of the police to get at the truth by tainting a potential witness's statement is no more valid than the equally general and

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[9] *Mentuck, supra* note 2 at para. 34.
[10] *Ibid* at paras. 38-39.

> contrary assertion that public disclosure enhances the ability of the police to get at the truth by causing concerned citizens to come forward with valuable information.
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> Detective Sergeant Clelland offers no specific basis for his concern that potential witnesses will be tainted if the contents of the information are revealed. He points to no specific information and to no specific individual. He very candidly acknowledges that disclosure would do no more than "make it more difficult for the Ontario Provincial Police to gather the best evidence in respect of the investigation". I can accept that the police might have an advantage in questioning some individuals if those individuals were unaware of the details of the police investigation. Fundamental freedoms, like the freedom of expression and freedom of the press, cannot, however, be sacrificed to give the police a "leg up" on an investigation. As Iacobucci J. observed in *R. v. Mentuck*, *supra*, at para. 34, access to court documents cannot be denied solely because maintaining the secrecy of those proceedings would give the police an advantage in the conduct of their investigation.[11]
>
> [Emphasis added]

[38] In upholding the Court of Appeal's decision, the Supreme Court of Canada specifically endorsed and adopted the reasoning of Doherty J.A. on this point.[12] The Supreme Court held that a "general assertion" that publicity would compromise the ability to get untainted evidence from witnesses was not sufficient to overcome the presumption that all proceedings and evidence before the court are available to the public.

[39] I note that in both *Mentuck* and *Toronto Star Newspapers*, there was at least some evidence before the court as to the need for a publication ban, even though, in each case, the Supreme Court found that the evidence was insufficient to overcome the presumption of openness because it amounted to general assertions. In the case before me, there is no evidence at all – merely general assertions. A similar situation arose in a Manitoba case, *R. v. Hogg* [*re CTV Television Inc*].[13] The accused was charged with aggravated assault and while in custody gave a statement to the police which was videotaped. The videotape of the statement was an exhibit at the preliminary hearing. After the preliminary hearing, Mr. Hogg pleaded guilty. At sentencing, the transcript of his statement was filed. The trial judge sentenced him to a conditional sentence, which was subsequently reversed by the Manitoba Court of Appeal as being demonstrably unfit. CTV sought to access, copy, and broadcast the videotaped statement as part of a television program on the use of conditional sentences. The trial judge permitted the release of the transcript, but not the videotape, reasoning that it is "highly desirable" for the police to videotape statements and that accused persons would likely refuse to agree to it if warned that they could be broadcast on television. He found this to be a serious risk to the administration of justice. The Manitoba Court of Appeal reversed that decision, holding that the trial judge "did not have before him an

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[11] *Toronto Star Newspapers, supra* note 4 at paras. 26-27.
[12] *Toronto Star Newspapers, supra* note 4 at paras. 36-42.
[13] *R. v. Hogg* [*re CTV Television Inc.*], 2006 MBCA 132, 214 C.C.C. (3d) 70.

underlying factual matrix on which to base his conclusion."[14] The Court of Appeal further held that the trial judge "erred when he based his conclusion on common sense and logic alone, without the benefit of real and substantial evidence,"[15] distinguishing cases relied upon by the trial judge on the basis that they were based on social science evidence in addition to logic and judicial experience. Ultimately, the Court held:

> A court in and of its own, without anything further, should not be relying on simple common sense and logic when the effect of a decision is to limit a *Charter* right. The analysis that the judge conducted with respect to the difficulty in having videotaped statements presented in court cannot be the justification for the conclusion that the judge arrives at absent some evidence. That requires a speculative leap of faith that cannot be countenanced.
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> To a certain degree, the judge could be said to have taken judicial notice of facts he found central to the resolution of the controversy, and in doing so, he erred. This is even more so since the decision of the Supreme Court of Canada in *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, a case dealing with the racial makeup of juries.
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> In *Spence*, Binnie J. proceeds to an all-encompassing review of the application of the concept of judicial notice. In his analysis he goes back to the work of Professor James Thayer, who in 1890 laid down a broad approach to judicial notice ("Judicial Notice and the Law of Evidence" (1889-1890), 3 Harv. L. Rev. 285). The analysis encompasses the 2001 Supreme Court decision in *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, which adopted a stricter approach to the reliance on judicial notice. This approach, according to Binnie J. is based on the writings of Professor Edmund M. Morgan, "Judicial Notice" (1943-44), 57 Harv. L. Rev. 269.
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> The criteria as relied upon in *Find* are set out in that decision in these terms (at para. 48):
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> > ...Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R. v. Potts* (1982), 6 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055.[16]
>
> [Emphasis added]

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[14] *Ibid* at para. 30.
[15] *Ibid* at paras. 32-33.
[16] *Ibid* at paras. 36-39.

[40] The fundamental premise relied upon by the defence is that individuals who have known Mr. Minassian personally, and who would be called to testify about their personal experiences with him in the past, would have their views of him coloured if they knew what he told the police or watched his statement to the police. I do not see this to be the same situation as witnesses who might be called upon to testify as to an event they have seen. Those witnesses might well be affected by some other witness' impressions of things such as the speed of a car, the colour of a robber's jacket, or the height of an assailant. It would be important to get the recollection of each individual witness so as to be sure there is independent corroboration of details, as opposed to collaboration between witnesses or acquiescence to the views of another.

[41] However, it is less clear that an individual's memory of a person they have known at a point in time in their lives would be changed, not because of what others said of him, but by what he himself said at a later time and how he said it. I do not consider this to be such a notorious or generally accepted premise that I can take judicial notice of it. It is hard to imagine a witness being called who will not already know that Mr. Minassian drove a van down a Toronto sidewalk killing and injuring many people. I would find it surprising that a person who knew Mr. Minassian well enough in the past to be called as a witness, would have changed their perception of him unchanged because of what he did, but then later have that perception tainted by what he said to the police about what he did. Having seen the videotape of Mr. Minassian's statement and reviewed the transcript multiple times, I do not see anything so shocking or surprising that it would alter somebody's memory of their past experience with Mr. Minassian, even more so when that person already knows what Mr. Minassian did. That is, of course, my layperson's assessment. There might well be expert opinions to the contrary, but no such evidence was before me, one way or the other. The burden of proof is on the party seeking to limit public access, which in this instance is the defence. Suffice to say that it the hypothesis presented by the defence is not obvious to me and I cannot take judicial notice of it. In this context, an evidentiary foundation is crucial to justify the ban sought.

[42] Another reason that the exclusion of witnesses order is not an apt analogy is that such an order does not infringe any constitutionally protected right, such as freedom of speech or public access to court proceedings. It is only the individual witnesses who are affected by such an order. Therefore, the same considerations do not come into play. The fact that no evidence is required before making an order excluding witnesses does not assist in the situation before me, where constitutionally protected values would clearly be circumscribed by the order sought.

[43] I appreciate, as pointed out by Mr. Bytensky, that it might be difficult to marshal any evidence to establish this evidence-tainting effect without actually tainting the evidence. Further, once that prospective witness' memory is corrupted, the damage is done. They cannot be simply excused as can be done with prospective jurors who find themselves unable to decide impartially because of things they have read in the press. However, that does not give me license to infringe important *Charter* values based on vague notions of what might happen. At the very least, some sort of social science evidence would have been useful.

[44] If all that is required to obtain a non-publication order is the mere assertion that prospective witnesses would be tainted by obtaining other information about an accused, a non-publication order would be available in virtually every trial before the courts. The result would be to

effectively switch the presumption of an open court to a presumption of secrecy. That is inconsistent with the overwhelming weight of binding case authority on this issue.

[45] It may well be preferable for the prospective witnesses to testify in this case without having seen or read Mr. Minassian's statement to the police. However, as noted by Nordheimer J. (as he then was) in *R. v. Kossyrine*,[17] expressions such as "the safer route," "erring on the side of caution," or "out of an abundance of caution" cannot be used to justify the imposition of a publication ban.

[46] I am not aware of, and counsel have not cited to me, any case in which a non-publication order was issued in a case to be tried without a jury. In those instances where limited publication bans were issued, the concern was the potential tainting of the jury pool. Mr. Hughes, for the media parties, referred to a decision of the Northwest Territories Supreme Court in *R. v. Cloughley*[18] where the issue of witness tainting was raised as a basis for a publication ban in a judge alone trial. However, the trial judge in that case refused to issue the ban. The accused was a teacher charged with 22 counts of sexual assault against former students. The trial was to be conducted in Iqaluit over the course of approximately four to five weeks and the Crown intended to call 65 witnesses, many of whom were being brought in from other communities to testify. There was considerable media and public interest in the trial. The Crown sought an order prohibiting media coverage of the evidence at trial until the conclusion of the Crown's case so as to prevent witnesses from being tainted by the testimony of other witnesses, thereby nullifying the effect of any exclusion of witnesses order. The trial judge held that the publication ban was not "necessary" within the meaning of *Dagenais,* stating as follows:

> It is preferable, in my view, and sufficient, for the prosecution to instruct its proposed witnesses not to listen to or read any broadcast or publication concerning this trial or to speak to other Crown witnesses about the subject matter of the trial until after the particular witness has testified.
>
> If a given Crown witness purposely or inadvertently gains knowledge of previous testimony of other witnesses via the media or otherwise, then that fact or knowledge can be dealt with by competent counsel for Crown and defence in such appropriate manner as counsel sees fit in the ongoing dynamics of the trial.[19]

[47] I am not satisfied that the defence has met its burden of establishing that publication of Mr. Minassian's statement represents a "serious risk to the proper administration of justice," because I am not convinced that the evidence of prospective defence witnesses would be irreparably tainted if they saw or read Mr. Minassian's statement before testifying.

[48] Further, even if I thought there was a serious risk of such tainting, I am not satisfied that the publication ban would be "necessary" to prevent it. In my view there is a reasonably available alternative. The defence should surely know by now who those prospective witnesses will be. No doubt a final decision has yet to be made as to which witnesses will actually be called to testify,

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[17] *R. v. Kossyrine*, 2011 ONSC 6081, 249 C.R.R. (2d) 17, at para. 16.
[18] *R. v. Cloughley*, [1996] N.W.T.R. 238 (S.C.).
[19] *Ibid* at paras. 19-20.

but the pool of potential witnesses will not be so vast as to preclude identifying who they are and arranging to interview them. At least, there is no evidence before me from which I could conclude that this would be impossible, or even impractical. As I have noted, those witnesses must already know what Mr. Minassian did. They may also know something about his apparent motivation, as there has been considerable media coverage already about his involvement with the "Incel" (involuntary celibate) movement and his postings on social media sites. It is open to the defence to interview those prospective witnesses and either record or take extensive notes of what they say. If they are later called as witnesses and say something different at trial, having heard or read about Mr. Minassian's statement in the meantime, they can be cross-examined about any differences. The defence can be protected in that way from any changes in the witnesses' recollections as to Mr. Minassian's past. At the time of interviewing the prospective witnesses, defence counsel can also caution them against reading or watching any press coverage about the case prior to trial, just as they would typically caution them against discussing their evidence with any other prospective witnesses. Failure to follow that instruction can also be raised at trial if the witness changes his or her testimony. In my view, this is an alternative measure that addresses the risk satisfactorily and the publication ban is therefore not "necessary" within the meaning of the first stage of the *Dagenais/Mentuck* test.

Step Two: Proportionality

[49] Having determined that the first stage of the *Dagenais/Mentuck* test is not met, it is not necessary to engage in the balancing of interests that is the focus of the second part of the test. However, in the event I have erred with respect to the first aspect of the test, I will also set out my analysis as to the second stage. As suggested in *Mentuck*, the balancing exercise at the second stage can serve to bolster a conclusion reached at the first stage that the ban is not necessary.[20] Indeed, my analysis on this point reinforces my view that a publication ban is not appropriate in this case.

[50] The second branch of the test requires an analysis of whether the salutary effects of the ban outweigh the deleterious effects on the rights of the parties and the public. *Mentuck* does not limit the range of salutary or deleterious effects to be considered, but does stipulate that this includes "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."

[51] The only salutary effect of the proposed publication ban is to insulate prospective witnesses for the defence from any knowledge of what Mr. Minassian told the police and his demeanour at the time of that interview. There are certainly some things about the statement that might not be generally known. However, in the particular circumstances of this case, and given the nature of the evidence these witnesses would be providing, the impact of obtaining this information would not, in my view, be significant.

[52] This situation would be different, for example, if there was a real issue as to the identity of the person driving the van and Mr. Minassian had confessed to being the driver in his statement to

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[20] *Mentuck, supra* note 2 at para. 48.

the police. Such a confession might have more of an impact in that situation than it would on the actual facts of this case. In fact, Mr. Minassian did confess to being the driver of the van, but this will not be a controversial issue at trial. Mr. Minassian's arrest beside the van he had been driving was broadcast on television moments after it happened and was viewed by thousands of people, likely including those prospective witnesses who knew him, as it was available on the internet for all to see. Mr. Minassian's postings on social media have also been widely publicized. The prospective witnesses will be testifying about events in the past, not the events of that day, and will already have some knowledge of what happened. In that context, the prospect of them also seeing or hearing about Mr. Minassian's statement before testifying, or before being interviewed by defence counsel, has more limited impact.

[53] Mr. Minassian's statement to the police will certainly be part of the Crown's evidence at trial. Indeed, it will likely be a central component of the Crown's case. The Crown will need to prove that Mr. Minassian had the requisite state of mind for murder and attempted murder. His demeanour and words at the time of, and not long after, his arrest will be relevant evidence on those issues. This evidence will be presented at trial before any of the defence witnesses testify. If the publication ban is to have the effect desired by the defence, it would ideally need to remain in place until the conclusion of the trial, which is the primary position taken by the defence. If the statement is publicized upon being shown in court, it is highly likely that prospective witnesses will have either watched it, or at least heard about it, before giving their evidence. Therefore, unless the publication ban is continued until the close of all of the evidence, any limited salutary effect it might have would be greatly diluted.

[54] It can be expected that any defence witnesses will likely be cross-examined about aspects of Mr. Minassian's statement and how those details might fit with their evidence about him. The Crown confirms that this is likely, which is one of the reasons the Crown supports the publication ban, so that if there are inconsistent bits of information in Mr. Minassian's statement, these can be "sprung" on the witness without prior opportunity over a period of months to prepare a response. I am not convinced that a witness' gut reaction response without time to reflect is necessarily a better way to get at the truth. On the contrary, particularly in this context, it seems to me that reflection and thoughtfulness would enhance, rather than detract from, the usefulness of a witness' testimony. Further, as the Supreme Court of Canada held in *Toronto Star Newspapers,* providing a "leg up" to the Crown in the form of an advantage in cross-examination cannot be a basis for sacrificing fundamental freedoms such as the freedom of expression and freedom of the press.[21]

[55] It is highly unlikely that any of these defence witnesses will complete their testimony at trial without any knowledge of Mr. Minassian's statement. The real issue is when they will find out about it: months before the trial (if there is no publication ban); weeks or days before they testify (if the ban only continues up to the date of the trial); or during the course of their testimony (if a publication ban continues until the end of the trial and is not breached or if they heed instructions from defence counsel not to watch media coverage prior to the trial).

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[21] *Toronto Star Newspapers, supra*, note 4, at para. 27.

[56] As is clear from the excerpts of media coverage filed on this motion and on the motion for a change of venue, the Toronto van attack is an incident in Toronto's history that has had a deep impact on many of its residents. It is expected that media coverage of, and public interest in, the trial will be intense. The people of Toronto are entitled to know what evidence is being presented at trial, and they are entitled to acquire that knowledge while the trial is happening, not weeks or months after the fact. This is a matter that goes beyond prurient interest or idle curiosity. This was a tragedy with a wide and devastating impact within the Toronto community and beyond. People want to know why it happened. They are entitled to know what is happening at the trial devoted to finding the answer to that question. Obviously, not every interested person is able to be present in the courtroom. The members of the media, therefore, play a pivotal role as the representatives of the broader public. Their role encompasses not only their actual presence at the trial, and their personal knowledge of the evidence presented in the courtroom; it also encompasses their right to report that information in a responsible way to the public. That is the role of the press in our society, and it is a role deserving of the highest level of constitutional protection, a protection provided in this country for many, many years.

[57] Mr. Minassian's statement will be a key piece of evidence for the Crown. Every witness who testifies about matters related to Mr. Minassian's state of mind or level of intent is likely to be asked questions about that statement. It will be a significant aspect of the trial. Prohibiting publication of any reference to the content of Mr. Minassian's statement would result in a significant proportion of the evidence at trial being withheld from the public. It is difficult to countenance a trial with this magnitude of public interest being conducted in secret. In my view, that would be the perception if such significant aspects of the evidence at trial were banned from publication.

[58] A trial-long ban would be a colossal affront to the concept of the openness of our judicial system. Public respect for the administration of justice in this country cannot be enhanced by secrecy; it can only be damaged by it. Hiding important evidence from public disclosure in a trial of this nature can only serve to undermine public confidence in the integrity of the system, and public confidence in the ultimate verdict, whether it be guilty or not guilty. When balancing the salutary effects of a publication ban against the deleterious effects of a publication ban relating to the contents of the Minassian statement for the whole duration of the trial, I come unhesitatingly to the conclusion that the deleterious effects far outweigh any benefit to be derived from a ban.

[59] I am also concerned that at the time the evidence is given at trial, it would be virtually impossible to prevent it from leaking out to the public. I have no doubt that the reputable members of media organizations who are parties to this application would be bound by any order I might make. However, we live in a technological age in which the traditional news media are not the only source of information for the public. It would only take one irresponsible person in the courtroom to post the evidence online through one of a myriad of means for the information to be available to the world. Furthermore, those people who would release the information in this manner would not likely be the most ethical and responsible of journalists, nor are they most likely to provide a balanced view. If the responsible mainstream media is muzzled, there would be no credible voice to the contrary. Trying to correct any misinformation after the fact would be merely damage control. The harm to the integrity of the system would already have been done.

[60] Therefore, even if the first aspect of the *Dagenais/Mentuck* test had been met, I would not order a publication ban for the entire duration of the trial.

[61] During the course of argument, Crown counsel agreed that any publication ban should only extend to the point where the statement was presented in evidence at trial. That is not the principal position taken by the defence, but is an alternative argument the defence would accept as at least some measure of protection if a full publication ban is not ordered. I have considered whether I would come to the same result if the publication ban continued only to the point of the commencement of trial. I am not persuaded that the situation is sufficiently different to warrant that.

[62] For one thing, the salutary effect of the publication ban is weakened if the evidence is reported at the time of trial. Therefore, the balance already tilts somewhat in the other direction.

[63] Secondly, the case authority is clear that delayed reporting of court proceedings is still an infringement of free expression and the general principle that all court proceedings should be open to the public. The defence argues that there is no particular reason why the press needs to report this information today, as opposed to months from now when the trial starts. That is true. But, the openness of the court process is not based on timing. It is by its very nature, always open.

[64] I also agree with the point made by Mr. Hughes, for the media parties, that the public interest issue raised by the statement given by Mr. Minassian to the police goes beyond the interests that will be raised at trial. The public has an important and legitimate interest in how our police forces conduct themselves. As such, the manner in which Mr. Minassian was treated post-arrest is an issue worthy of scrutiny, quite apart from any impact the statement itself would have at trial. In that sense, the pre-trial disclosure of and public discussion of the police procedures and tactics involved is an important factor favouring openness throughout, rather than merely at the point of trial. This was a central feature in *Mentuck*, in which the Court held:

> The deleterious effects, however, would be quite substantial. In the first place, the freedom of the press would be seriously curtailed in respect of an issue that may merit widespread public debate. A fundamental belief pervades our political and legal system that the police should remain under civilian control and supervision by our democratically elected officials; our country is not a police state. The tactics used by police, along with other aspects of their operations, is a matter that is presumptively of public concern. Restricting the freedom of the press to report on the details of undercover operations that utilize deception, and that encourage the suspect to confess to specific crimes with the prospect of financial and other rewards, prevents the public from being informed critics of what may be controversial police actions.[22]

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[22] *Mentuck*, *supra* note 2 at para. 50.

[65] Even a publication ban that would cease at the commencement of trial constitutes a significant infringement of the right to freedom of expression and the open court concept. In my view, there is also a significant deleterious effect on the public perception of our system of justice. These deleterious effects outweigh the salutary effects, regardless of the timing of the ban.

[66] Accordingly, even if I found there to be a serious risk to the accused's right to a fair trial (which I do not), and even if I found that a publication ban was necessary to protect against that risk (which I do not), and even if I were to consider a ban that only extended to the commencement of trial, I am of the view that the harmful effects of such a ban outweigh any advantage it would provide.

Public Policy Grounds

[67] Mr. Bytensky also advanced a public policy reason for a publication ban in this situation. He noted that the publication ban would follow as a matter of course if this was a jury trial. He submitted that defence counsel in the future might be more likely to stick with a jury based on the advantage of an "automatic" publication ban, which would result in longer and more unwieldy trials at considerable cost to the judicial system in terms of time and money. This is similar to the argument advanced in *R. v. Hogg* about the unwillingness of accused persons to permit videotaping of their statements if they knew the press could ultimately have access to the tape. It is merely speculation that important decisions about whether a case should be tried by a judge or a jury would be made based on assumptions about publication bans. As was the case in *Hogg*, there is no evidentiary basis for the assertion that it would benefit the administration of justice to have publication bans in place at least up until the start of trial.

[68] In my view, this argument fails both stages of the *Dagenais/Mentuck* test. It is not shown to be necessary to avoid a risk of harm. Further, while it may have some bearing on the salutary aspects vs. deleterious effects analysis, the impact is negligible and does not affect the result.

Conclusion: No Publication Ban

[69] Accordingly, I am rescinding the publication ban I previously ordered. The public, which includes the press, is entitled to access the evidence filed, and to publish it if so minded, subject to the implementation terms set out below.

G. SEALING ORDER

[70] The sealing order sought relates to information about possible *** discovered by police as a result of the execution of search warrants at Mr. Minassian's home. The order sought is for a complete sealing order, so that none of this information ever becomes public. It is unlikely that any of this information will form part of the evidence at trial as its subject matter appears to be completely unrelated. Further, based on the current information from the Crown, Mr. Minassian was not the target of the criminal investigations undertaken both here and in the United States. Moreover, the investigations that were initiated have been discontinued and it does not appear that there will be charges laid against anyone in relation to any *** related issues. Granted, the

evidence is somewhat vague on this point, but there is certainly no information that criminal charges will be laid or, if so, who would be the likely target of those charges.

[71] From the perspective of the accused, Alek Minassian, the disclosure of this material has no impact on his fair trial rights. The material is simply irrelevant to his trial. There is no jury, and no concern about possible tainting in that regard. I discount the argument based on the tainting of potential defence witnesses for the same reasons I stated in relation to the publication ban. Further, there is no longer even an allegation that he was involved in ***. Mr. Minassian's sole remaining interest in having the material suppressed is a privacy interest related to a concern about the innuendo and stigmatizing effect that could result if the information was made public. I recognize that because he has not been charged, and is unlikely ever to be charged, he may never have an opportunity to defend himself.

[72] From the perspective of the Minassian family, the same principles apply. Although perhaps one of them was a target of suspicion, it appears that no charges are being laid. There would appear to be no current ongoing investigation, whether here or in the United States, although as I have said already the evidence on this point is extremely vague, if it can be said to exist at all. Again, there is no jeopardy to fair trial rights, but there is a privacy right asserted.

[73] The applicable law is well-settled. Clearly, I have a discretion as to whether to seal these aspects of the court records.[23] Equally clearly, the presumption is in favour of public access, with the burden on the party seeking to have the records sealed to rebut that presumption.[24] Finally, it is clear that the *Dagenais/Mentuck* test applies.

[74] It is quite normal, indeed routine, that materials filed in support of obtaining a search warrant are sealed prior to the execution of the warrant. That is necessary in order for the search warrant to be of any use and is therefore required for the proper administration of justice. However, the rationale for secrecy disappears once the search warrant is executed. On the contrary, it is very much in the interests of justice that things undertaken by the police, with the approval of the court, without public disclosure should be subject to scrutiny once the reason for secrecy is gone. Such disclosure permits the public to know that there has been no abuse of police or judicial authority, and that both the search and subsequent steps by the police were undertaken appropriately and in the public interest. That is not to say that the public's right to know is untrammeled and cannot be resisted in appropriate cases. However, to justify violating the rights of free expression and the open courts rule, the test in *Dagenais*, as modified in *Mentuck*, must be met. Justice Dickson dealt with this point in *MacIntyre*:

> Although the rule is that of "open court" the rule admits of the exception referred to in *Halsbury,* namely, that in exceptional cases, where the administration of justice would be rendered impracticable by the presence of the public, the court may sit *in camera.* The issuance of a search warrant is such a case.

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[23] *MacIntyre*, *supra* note 3 at p. 194.
[24] *Ibid.*

> In my opinion, however, the force of the 'administration of justice' argument abates once the warrant has been executed, *i.e.* after entry and search. There is thereafter a "diminished interest in confidentiality" as the purposes of the policy of secrecy are largely, if not entirely, accomplished. The need for continued concealment virtually disappears.[25]

[75] In *MacIntyre*, the Supreme Court of Canada recognized that one basis for overriding the right to public accessibility was the rights of the innocent to privacy. In this case, no charges have been laid. All members of the Minassian family are presumed to be innocent of any criminal conduct in relation to the information discovered by the police in the execution of the search warrant. Justice Dickson wrote in *MacIntyre*:

> In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.
>
> Many search warrants are issued and executed, and nothing is found. In these circumstances, does the interest served by giving access to the public outweigh that served in protecting those persons whose premises have been searched and nothing has been found? Must they endure the stigmatization to name and reputation which would follow publication of the search? Protection of the innocent from unnecessary harm is a valid and important policy consideration. In my view that consideration overrides the public access interest in those cases where a search is made and nothing is found. The public right to know must yield to the protection of the innocent. If the warrant is executed and something is seized, other considerations come to bear.[26]
>
> [Emphasis added]

[76] The Supreme Court recognized in *MacIntyre* that the privacy interests of the innocent and the danger that they will be stigmatized if there is public disclosure of search warrant materials can be a legitimate basis for exercising a discretion to prohibit publication of such material. However, the Court considered that exception to apply to circumstances where nothing was found as a result of the execution of the search warrant. Different considerations arise where there was evidence seized, even when charges are not laid. The Court held:

> At every stage the rule should be one of public accessibility and concomitant judicial accountability; all with a view to ensuring there is no abuse in the issue of search warrants, that once issued they are executed according to law, and finally that any evidence seized is dealt with according to law. A decision by the Crown not to prosecute, notwithstanding the finding of evidence appearing to establish the

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[25] *MacIntyre*, *supra* note 3 at p. 188.
[26] *MacIntyre*, *supra* note 3 at pp. 186-187.

> commission of a crime may, in some circumstances, raise issues of public importance.[27]
>
> [Emphasis added]

[77] The defence relies on *R. v. Vice Media Canada Inc.*,[28] in which the Ontario Court of Appeal upheld a time-limited publication ban on information obtained as a result of the execution of a production order. However, in that case, there were charges against the accused, even though the accused was out of the country and had not yet been arrested. A non-publication order was made until the charges against the accused had been terminated, subject to a reassessment of the continuing need for a ban if the accused had not been arrested within two years. The justification for the ban that was imposed was that the portions of the material to be redacted would interfere with the fair trial rights of the accused.

[78] I would distinguish *Vice Media* on the basis that it involved a situation in which charges had been laid and an investigation was ongoing. No charges are laid in relation to the *** issue in the matter before me, and there is no indication that charges will be laid.

[79] The first stage of the *Dagenais/Mentuck* test requires the applicant to demonstrate that there is a serious risk to the administration of justice. There is no risk to the administration of justice in this case. There is a legitimate interest for the press to inquire into the evidence uncovered from the search and why no charges will be laid. Apart from a desire by the applicants to avoid publicity, there is nothing to rebut the presumption that information obtained from a search should be publicly available once that search is executed.

[80] I do recognize that there will likely be damage to the privacy interests of the Minassians, or some of them, if the *** issue is publicized. I do not give any weight to the argument advanced by the media that there are sufficient safeguards in place (in the form of defamation laws and ethical standard of journalists) to allay those concerns. While the mainstream press, including those represented here by Mr. Hughes, can be trusted to adhere to ethical principles of journalism, they will not be the only ones with access to the material and access to public platforms (including the internet) to broadcast their views. The right to sue civilly for damages for libel provides little protection. Such litigation is expensive to mount, time-consuming, and often results in rebroadcasting the libel even more extensively. The damage to reputation will have already been done. Even if successful at trial, there is a real risk that the plaintiffs would achieve no more than a pyrrhic victory.

[81] That said, when balancing the impact on those privacy interests against the larger public interest and the constitutional values underlying freedom of expression, freedom of the press and the openness of the courts, I find that the deleterious effects of the sealing order for the broader public interest outweighs the advantage to the Minassians in maintaining their privacy. While I have considerable sympathy for the difficult circumstances being faced by the Minassian family and the media frenzy that has besieged them, their discomfort with the public nature of court

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[27] *MacIntyre*, *supra* note 3 at p. 186.
[28] 2017 ONCA 231, 137 O.R. (3d) 263, 412 D.L.R. (4th) 531, 352 C.C.C. (3d) 355; aff'd 2018 SCC 53.

proceedings does not overcome the important presumption that such proceedings are required to be public, absent a pressing reason to the contrary. This was the result in *MacIntyre* (where the complainants in a sexual assault trial were uncomfortable about having the details of the assaults perpetrated against them made public), and in *Toronto Star Newspapers* (where information from the search warrant execution into allegations against a meat packing company was released even while the investigation was ongoing), and in *Canadian Broadcasting Corp. v. Canada*[29] (where information received from a wiretap authorization against an accused person was relevant to ongoing controversy related to then Toronto Mayor Rob Ford).

[82] Again, I rely on *MacIntyre,* which was in turn affirmed in *Toronto Star Newspapers.* Justice Dickson wrote in *MacIntyre*:

> . . . The appellant concedes that at this point individuals who are directly 'interested' in the warrant have a right to inspect it. To that extent at least it enters the public domain. The appellant must, however, in some manner, justify granting access to the individuals directly concerned, while denying access to the public in general. I can find no compelling reason for distinguishing between the occupier of the premises searched and the public. The curtailment of the traditionally uninhibited accessibility of the public to the working of the courts should be undertaken with the greatest reluctance.[30]
>
> [Emphasis added]

[83] For the foregoing reasons, I find that the test for a sealing order has not been met. The application is dismissed. Publication is permitted subject to the terms of implementation set out below.

H. CONCLUSION AND TIMING OF IMPLEMENTATION

[84] I have found no basis for continuing either the publication ban or sealing orders previously made. Those orders will be rescinded, but not immediately.

[85] This is an issue of some importance. Once the information is made public and reported in the media, the damage feared by the moving parties will have been done. It will not be possible to undo that damage once it has occurred. Accordingly, in my view, it is important to delay implementation of my order for two reasons: (1) to give the affected parties time to pursue an appeal, if they are so inclined; and (2) to give the defence an opportunity to locate and interview prospective witnesses before Mr. Minassian's statement and the *** become the subject of press coverage. Accordingly, I am extending the publication ban and sealing orders until September 27, 2019, or until further court order. Absent any order to the contrary, the information may be broadcast effective September 27, 2019.

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[29] *Canadian Broadcasting Corp. v. Canada*, 2013 ONSC 7309.
[30] *MacIntyre*, *supra* note 3 at pp. 188-189.

[86] The unredacted reasons for decision are being provided to all counsel on the same terms as the previous undertakings given by them that the material will not be disclosed except as necessary to receive instructions from clients. The unredacted version of this decision will be sealed until September 27, 2019. After that date, it will be released publicly, unless there is a further court order to the contrary. Likewise, my previous order dated July 11, 2019 will be unsealed and publicly available as of September 27, 2019.

[87] A redacted version of this decision will be issued. The nature of the decision itself and anything in the redacted version of my reasons may be publicly disclosed, with immediate effect.

MOLLOY J.

Released: August 16, 2019

CITATION: R. v. Minassian, 2019 ONSC 4455
COURT FILE NO.: CR-18-40000612-0000
DATE: 20190816

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

(Responding Party)

– and –

ALEK MINASSIAN

(Applicant/Defendant)

REASONS FOR DECISION #2 - REDACTED
(Application for Publication Ban and Sealing Order)

Molloy J.

Released: August 16, 2019