

CANADA / JUDGMENT

R. v. Minassian

2026 ONCA 150

COURT

Court of Appeal for Ontario

DECIDED

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COA-23-CR-1304, M56489

Judges

Fairburn, J. Michal; Miller, Bradley; Trotter, Gary T.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Minassian, 2026 ONCA 150

DATE: 20260226

DOCKET: M56489 (COA-23-CR-1304)

Fairburn A.C.J.O., Miller and Trotter JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Alek Minassian

Appellant/Applicant

Erin Dann and Michael Davies, for the appellant/applicant

Jamie Klukach and Jacob Millns, for the respondent

Heard: February 13, 2026

Fairburn A.C.J.O.:

A. overview [1] Alek Minassian brings a motion for production of documents. He seeks disclosure of a Crown communication that was made after Dr. Scott Woodside, the Crown's expert at trial, was criticized in two unrelated dangerous offender cases: *R. v. Nettleton*, 2023 ONSC 3390; *R. v. Hason*, 2024 ONCA 369, 171 O.R. (3d) 225. The applicant also seeks a list of cases involving Dr. Woodside that the Ministry of the Attorney General is said to have reviewed post-Hason and the reason the Crown identified those particular cases for consideration.

[2] In this case, Dr. Woodside testified at trial that, in his opinion, the applicant was criminally responsible when he killed 10 people and attempted to kill 16 others by running them down with a van in April 2018.

[3] For the reasons that follow, I would dismiss the production application.

B. Background 1. The trial [4] The applicant was charged with 10 counts of murder and 16 counts of attempted murder. The matter proceeded in a judge-alone trial.

[5] The only issue at trial was whether the applicant had met his onus of showing that he was not criminally responsible on account of mental disorder ("NCRMD"). There was no real dispute that he lives with autism spectrum disorder which, all experts agreed, could qualify as a mental disorder for purposes of an NCRMD finding. The Crown and defence experts also agreed that the applicant appreciated the nature and quality of his actions, knew he was committing murder, and knew it was legally wrong to do so. Therefore, the outcome of the trial hinged on a single question rooted in the final prong of an NCRMD inquiry: did he know that his actions were morally wrong?

[6] The trial judge answered that question with a "yes". In coming to that conclusion, she had the benefit of three expert opinions, one from the Crown and two from the defence.

- [7] Dr. Scott Woodside was called by the Crown. In his opinion, the applicant appreciated the moral wrongfulness of his actions and was criminally responsible. As noted by the trial judge, Dr. Woodside was cross-examined vigorously as to his lack of experience treating or assessing individuals with autism spectrum disorder and the “absence” of any notes of his interview with the applicant. The trial judge noted that Dr. Woodside had followed the same methodology “for many years”.
- [8] Dr. John Bradford was called by the defence. He testified that he shared Dr. Woodside’s opinion that the applicant appreciated the moral wrongfulness of his actions and was criminally responsible.
- [9] Dr. Alexander Westphal, who works in the United States, reached a different opinion. In his view, the applicant was NCRMD largely through the lens of what the trial judge found was an uninformed understanding of the Canadian NCRMD test.
- [10] The trial judge gave detailed reasons for accepting the shared opinion of Dr. Bradford and Dr. Woodside that the NCRMD defence was not available to the applicant and for rejecting the opinion of Dr. Westphal. The applicant was convicted of all 26 counts on the indictment.
2. Post-trial judicial treatment of Dr. Woodside’s expert evidence [11] Dr. Woodside has been a forensic psychiatrist for many years. He has been described as an “extremely knowledgeable and experienced” expert witness: *Nettleton*, at para. 9. This court has on numerous occasions dealt with cases where his evidence was accepted: see e.g., *R. v. Bharwani*, 2023 ONCA 203, 166 O.R. (3d) 1 (“*Bharwani (ONCA)*”), *aff’d* 2025 SCC 26 (“*Bharwani (SCC)*”); *R. v. Arnaout*, 2022 ONCA 751; *R. v. Alexander*, 2014 ONCA 22, 315 O.A.C. 49; *R. v. M.A.W.*, 2008 ONCA 555, 237 C.C.C. (3d) 560; *R. v. Wong*, 2023 ONCA 118, leave to appeal refused, [2023] S.C.C.A. No. 302; *R. v. Smith*, 2023 ONCA 575; *R. v. Drake*, 2024 ONCA 4; *R. v. Kuneman*, 2010 ONCA 842; and *R. v. Simon*, 2008 ONCA 578, 269 O.A.C. 259.
- [12] In 2023, he was the subject of serious criticism for his work in *Nettleton*, a dangerous offender proceeding where the accused was self-represented. The Crown notified the amicus curiae about a number of errors in Dr. Woodside’s report. Amicus noticed even more. Dr. Woodside was cross-examined on the obvious errors in his report and, according to the trial judge, “presumed his opinions were correct” rather than critically reviewing his own work after realizing it contained several mistakes. In the end, the trial judge found that Dr. Woodside had shown “professional credibility bias” and declined to accept his evidence. Even so, she made clear that her findings were “restricted to the unique facts of this case”: *Nettleton*, at para. 9.
- [13] Subsequently, this court heard an appeal in *Hason*. At the time *Hason* was argued, *Nettleton* was not raised even though it had already been decided. In the end, *Hason* was dismissed from the bench in the fall of 2023 with reasons to follow.

- [14] Before the reasons in Hason were released, this court learned of Nettleton and sought input from the parties as to the implications, if any, of Nettleton on the appeal. In both Hason and Nettleton, Dr. Woodside was the Crown expert providing an opinion in the context of a dangerous offender proceeding. In Hason, an indeterminate sentence had been imposed.
- [15] The parties took the position that the concerns raised in Nettleton were not operative in Hason. Even so, the court reopened the Hason appeal and admitted as fresh evidence Dr. Woodside's testimony in Nettleton along with the judicial findings concerning that testimony. The court allowed the appeal in part, setting aside the indeterminate sentence and ordering a new sentencing hearing: Hason, at paras. 2-5, 84-129.
- [16] Following Hason, the Supreme Court of Canada heard an appeal in Bharwani (SCC), a first degree murder case. Mr. Bharwani brought a motion to the Supreme Court seeking the admission, as new evidence, of judicial findings made in this case and in Nettleton concerning Dr. Woodside's testimony, along with the relevant transcripts. In Bharwani, Dr. Woodside was one of three experts and the only one who testified that Mr. Bharwani was not NCRMD at the time of the murder. Mr. Bharwani argued that the proposed new evidence demonstrated that Dr. Woodside's evidence could not be relied upon and that the verdict was therefore unsafe.
- [17] The majority of the Supreme Court of Canada dismissed Mr. Bharwani's new evidence motion and appeal. Assuming, without deciding, that judicial findings of fact can amount to admissible evidence, the court found that the proposed evidence lacked cogency. As for Nettleton, the court noted that "there was an entirely different kind of report at issue ... dealing with an entirely different subject matter": at para. 126. It was "unclear ... how the judicial findings of fact in Nettleton would have been relevant, except to impeach Dr. Woodside's general reliability at a level so far removed from the circumstances of this case that it would lack any real probative value": at para. 127. The majority in Bharwani also declined to admit new evidence from the trial in this case, as it would not provide anything that was not already before the jury in Mr. Bharwani's trial.

C. The production motion [18] The production motion is brought in the context of the applicant's conviction appeal. One of the grounds of appeal is that "the note taking practices of the Crown expert psychiatrist, Dr. Woodside, were incompatible with the duties of an expert in a serious criminal matter." Further, the trial judge is said to have "erred by finding that Dr. Woodside was able to fulfil his duty as an expert forensic psychiatrist, erred by finding his evidence admissible and further erred by giving any weight to his evidence and opinion."

- [19] The applicant says that he will bring a fresh evidence motion on appeal to adduce the testimony of Dr. Woodside in other matters involving adverse judicial findings or concerns about Dr. Woodside. That evidence is said to be directly relevant to his central ground of appeal – that the trial judge erred by finding that Dr. Woodside was able to fulfil his duty as an expert forensic psychiatrist. The proposed fresh evidence will include the transcript of Dr. Woodside's Nettleton testimony and the judicial findings concerning that testimony,

which have already been provided to the applicant. This production motion is brought in aid of the upcoming fresh evidence motion.

- [20] The applicant first made a request for disclosure in August 2024, after his counsel learned that a “communication” had been sent to all Crown counsel in Ontario following this court’s decision in Hason. The applicant sought confirmation that a communication was sent to Crown counsel that included a direction not to retain Dr. Woodside for future criminal cases and requested a copy of that communication and all “related or supporting documents”. Counsel to the applicant also referenced his understanding that a similar request had been made to the Supreme Court of Canada in the Bharwani appeal.
- [21] The applicant’s request was met with a confirmation that a communication existed but a refusal to disclose its contents on the basis of privilege. The Crown also noted that the motion in Bharwani had been abandoned.
- [22] The applicant then made a more formal request for production in aid of this anticipated motion. The applicant sought production of the “post-Hason communication”, along with related materials. For instance, the applicant asked for “[a]ny materials provided by Crown prosecutors in response to the post-Hason communication as to any concerns the Crown prosecutors have or have had arising out of Dr. Woodside’s participation in any criminal prosecution or sentencing proceeding”; “[c]opies of all adverse judicial findings or commentary about Dr. Woodside and all concerns of prosecutors about Dr. Woodside reported to a Crown Attorney and/or the Assistant Deputy Attorney General – Criminal Law Division” in accordance with the Crown Prosecution Manual or “any other manner; and copies of the “outcome of any reviews or investigations conducted by the Crown’s office in relation to Dr. Woodside” following the decisions in Hason and Nettleton.
- [23] The Crown’s position, in response, was that each case has to be assessed on its own evidence and that Hason does not stand for the proposition that it is unsafe to rely on Dr. Woodside in all cases. The Crown added that “any internal communications and/or work product ... are both privileged and irrelevant in this case”, whether they were made in the context of a communication to all Crowns, the Crown Prosecution Manual or an internal review. As for judicial commentary, the Crown said it does not fall within the Crown’s disclosure obligations and was also irrelevant. As a courtesy, the Crown provided what he described as a non-exhaustive list of cases in which Dr. Woodside testified as an expert.
- [24] The applicant responded that he was not looking for an exhaustive list of all cases that Dr. Woodside had or would be testifying in, but a list of cases involving commentary reported to a superior in accordance with Chapter D. 12 of the Crown Prosecution Manual, in response to a “Crown-wide communication, or by any other manner.” The applicant then set out the parameters of the production motion he intended to bring.
- [25] The Crown then confirmed that “the Ministry did conduct a review of certain cases in which Dr. Woodside was involved” but the Crown’s position was that the “details and results of that review are both privileged and irrelevant” in this case. The Crown also confirmed that

outside of the context of the review, “no other materials were provided, nor concerns reported to the [Assistant Deputy Attorney General, Criminal Law Division], either in response to the post-Hason communications or in accordance with Chapter D. 12 of the Crown Prosecution Manual.”

[26] Chapter D. 12 of the Crown Prosecution Manual states that a Crown counsel “must report to her Crown Attorney adverse judicial findings or comments about an expert or her own concerns about an expert’s participation in the criminal justice system” and that reports must then be sent to the Assistant Deputy Attorney General.

[27] Following the Crown’s response to his request for disclosure, the application for production was filed, seeking a wide range of information. There is no need to review that request as it was substantially narrowed during oral submissions. The narrowing of the motion arose from the clarification in the Crown’s responding motion materials that “no other concerns regarding Dr. Woodside (from the judiciary or prosecution service)” had come to the attention of Assistant Deputy Attorney General as a result of the “reviews conducted”. Indeed, the Crown’s factum states that “from the circumstances and evidentiary record” in this case, this court should draw the “reasonable inference” that “no additional concerns regarding Dr. Woodside, beyond those raised in Nettleton, are referred to in the materials sought.”

[28] The applicant accepts that no additional concerns have been raised by Crown prosecutors. However, the applicant does not accept that means he would not have concerns of his own. He would like the opportunity to conduct his own investigation and still seeks:

(a)... the post-Hason communication sent to all Crown counsel, redacted to protect any information protected by solicitor-client privilege; and

(b)... a list of the cases that the Crown reviewed, along with an explanation as to why they were chosen for review.

[29] The respondent maintains that all of this information is irrelevant, inadmissible and privileged.

D. analysis 1. The test for production on appeal [30] Section 683(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46, provides the court with jurisdiction to order production on appeal.

[31] Although the Crown’s disclosure obligations continue through the appellate process, the analytical framework on appeal is different than the one applicable at trial: *R. v. Trotta* (2004), 119 C.R. (6th) 261 (Ont. C.A.), at para. 23. It involves a two-step test.

[32] First, the applicant must demonstrate that there exists a reasonable possibility that the production of the sought-after material could assist on the motion to adduce fresh evidence. Second, the applicant must demonstrate that there exists a reasonable possibility that the sought-after material may be received as fresh evidence on appeal: *Trotta*, at para. 25; *R. v. Jaser*, 2023 ONCA 24, at para. 16. Both steps must be met if production is to be ordered.

- [33] Under step one, there are two ways that materials can assist with a motion to adduce fresh evidence. The first is that the materials are, in and of themselves, admissible. The second is that the production will assist the applicant in developing or locating additional material that will in turn be admissible. Mere speculation is not enough. When appropriate, the court will account for the applicant's limited knowledge of the contents of the materials. That said, there must be some evidence that supports the assertion that the material meets one of these thresholds: Trotta, at paras. 25-26.
- [34] Under step two of the test for production on appeal, the court must consider the Palmer criteria for admission of fresh evidence: *R. v. Palmer*, [1980] 1 S.C.R. 759, at p. 760. The Palmer test hinges on the admissibility of the evidence, its cogency and the explanation for its lateness: *Bharwani* (ONCA), at para. 194; *Palmer*, at p. 760. In assessing cogency, the court will consider whether the evidence touches on a decisive or potentially decisive issue, whether it is credible and whether it is sufficiently probative that, when taken with the rest of the evidence at trial, it would be reasonably expected to have affected the result. The question at this stage is not whether the sought-after production is in fact admissible, but whether there exists a reasonable possibility that it could be admitted as fresh evidence: Trotta, at paras. 28-29; Jaser, at para. 23.
2. No basis to order disclosure of requested materials [35] It is important to underscore that "[a]ppellate review is case-specific and issue-specific" such that, despite this court's criticism of Dr. Woodside in *Hason*, "the result may well be different" in other cases: *Hason*, at para. 127. In other words, as recognized in *Bharwani*, just because concerns were raised about Dr. Woodside in one context does not mean that those same concerns are necessarily operative in other contexts.
- a. List of cases reviewed and reason they were selected
- [36] The applicant argues that there is a reasonable possibility that the list of cases reviewed by the Crown, and the reason for their selection, will assist him in obtaining material relevant to Dr. Woodside's ability to fulfil his duty as an expert forensic psychiatrist. Although the applicant accepts that the Crown sees no concerns in the cases reviewed, he would like the opportunity to conduct his own review of those cases to determine any shortcomings that may exist when it comes to Dr. Woodside's work.
- [37] Respectfully, it is speculative that the list of cases may lead to anything relevant to Dr. Woodside's ability to fulfil his role as an expert in this case. The Crown has made clear that it has not uncovered any concerns beyond those raised in *Nettleton*. In these circumstances, there is no reasonable possibility that the list will assist the applicant on his motion to adduce fresh evidence.
- [38] Assuming for the sake of argument that the reason for selecting certain cases can be separated from the list of cases, there is no reasonable possibility that the reason for selection, on its own, would assist the applicant in developing and obtaining material that will be admissible as fresh evidence. In any event, I agree that the details of the Crown's

internal review, including how it was tailored, are protected by solicitor-client privilege. That privilege extends to internal government legal advice, reviews and communications: see e.g. *R. v. Shirose*, [1999] 1 S.C.R. 565, at paras. 49-50; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809, at para. 36; *Whitley v. United States of America* (1994), 119 D.L.R. (4th) 693 (Ont. C.A.), at p. 707, *aff'd* [1996] 1 S.C.R. 467; and *Blank v. Canada (Justice)*, 2016 FCA 189, 7 Admin. L.R. (6th) 30, at paras. 38-56, leave to appeal refused, [2016] S.C.C.A. No. 403.

[39] Accordingly, I would deny the request for the disclosure of the list and the reason for selecting the cases.

b. The post-Hason Crown communication

[40] The applicant acknowledges that, to the extent the post-Hason Crown communication includes legal advice, that legal advice is privileged. The applicant therefore has narrowed his request to the “direction” in the communication, with the reason for the “direction” redacted.

[41] The applicant is not aware of any post-Hason cases in which Dr. Woodside has been retained by the Crown and, given the concerns expressed in Hason, surmises that the post-Hason communication directs Crown attorneys not to retain Dr. Woodside in any new cases.

[42] The applicant contends that any such direction is relevant to Dr. Woodside’s ability to fulfil his duties as an expert. The applicant also argues that this direction would not be caught by solicitor-client privilege because it is akin to a policy or mandatory direction, as distinct from legal advice. Finally, he submits that the direction is relevant and could have swayed things because, in accepting Dr. Woodside’s opinion, the trial judge was influenced by what she saw as Dr. Woodside’s unblemished record as an expert.

[43] Assuming for the sake of argument that Crown counsel were, in fact, instructed not to retain Dr. Woodside going forward, it is difficult to see how such an instruction would satisfy the Trotta test.

[44] The “direction”, divorced from its justification, lacks relevance. There could be a whole host of reasons for such a direction. As the Crown points out, one reason could be a concern about efficiency and litigation strategy. After all, regardless of the strength of the opinion advanced, the production of Dr. Woodside as a Crown witness at this stage might well visit a host of distractions on any prosecution.

[45] The applicant argues that a Crown direction could be based on a concern regarding Dr. Woodside’s ability and willingness to fulfil his duties as an expert. But the direction itself, even if it exists and even if it is disclosed, would provide no support for this theory. Leaving aside the issue of solicitor-client privilege, in my view, this matter is resolved on the first prong of the Trotta test. There is no reasonable possibility that the direction alone could assist on the motion to adduce fresh evidence, which is aimed at showing that there are additional concerns with Dr. Woodside’s expert evidence.

E. conclusion [46] I would dismiss the motion.

Released: February 26, 2026 “J.M.F.”

“Fairburn A.C.J.O.”

“I agree. B.W. Miller J.A.”

“I agree. Gary Trotter J.A.”

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