SCC File No. 40223

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA)

BETWEEN:

CANADIAN BROADCASTING CORPORATION, GLOBAL NEWS (A DIVISION OF CORUS TELEVISION LIMITED PARTNERSHIP), POSTMEDIA NETWORK INC., CTV NEWS (A DIVISION OF BELL MEDIA INC.), GLACIER MEDIA INC., CITYNEWS/NEWS1130 (DIVISIONS OF ROGERS MEDIA INC.), THE GLOBE AND MAIL INC. and TORSTAR CORPORATION

Appellants

and

AYDIN COBAN and HIS MAJESTY THE KING

Respondents

and

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Intervener

FACTUM OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Rule 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I. OVERVIEW & PART II. POSITION

1. This appeal will determine the scope of the mandatory publication ban in s. 648(1) of the *Criminal Code*:

> **648(1)** *After permission to separate is given to members of a jury under subsection 647(1),* no *information* regarding any portion of the trial at which the jury is not present shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.[1]

2. The parties disagree about (i) whether s. 648(1) applies to proceedings before a jury is empaneled and (ii) whether s. 648(1) applies to all "information" or only prejudicial information.

3. The British Columbia Civil Liberties Association (the "**BCCLA**") makes two submissions.

4. First, while the parties and the decision below (among other judgments on s. 648(1)) focus on a purported tension between the open court principle and the right to a fair trial, there is no zero-sum trade-off. The open court principle often promotes the right to a fair trial. In some cases publication bans can impair the right to a fair trial—or have no effect on the right to a fair trial. Although the open court principle must yield to the right to a fair trial on occasion, a broad blanket application of s. 648(1) will, in some cases, impair the open court principle without protecting the right to a fair trial. This Court should consider these potential effects of s. 648(1) when interpreting it. Decisions or arguments suggesting that s. 648 is always necessary to secure the right to a fair trial should not be followed.

5. Second, s. 648 is penal legislation. Section 648(2) creates an offence for a breach of s. 648(1). If this Court finds that s. 648(1) is ambiguous—as the many divergent lower court decisions suggest it is—then this Court should construe s. 648(1) strictly and in favour of potential accused persons. Section 648(1) does not apply only to large media organizations like the Appellants. It applies to anyone who seeks to transmit information, including individuals with a personal interest in a case. As this case demonstrates, there are many reasons why interested persons may want to comment on similarly notorious proceedings. There should be no doubt about whether that would attract criminal liability.

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[1] *Criminal Code*, R.S.C., 1985, c. C-46, s. 648(1), emphasis added.

6. The BCCLA takes no position on the facts and relies on the facts set out in the parties' factums.

PART III. STATEMENT OF ARGUMENT

A. The open court principle often promotes the right to a fair trial

7. Submissions and judgments on the scope of s. 648(1) often address a purported trade-off between the open court principle and the right to a fair trial, with s. 648(1)'s blanket publication ban limiting openness to promote fairness:

a. The decision below followed *Malik*, where the court held that s. 648(1)'s purpose "is to safeguard both the rights of the accused and the Crown to a fair trial" but interpreted s. 648(1)'s scope by balancing the right to a fair trial against the right of freedom of expression.[2]

b. Here, the Appellants submit that (i) Parliament "had to balance between trial fairness concerns and openness" when amending s. 648(1) and (ii) restrictive interpretations of s. 648(1) significantly infringe openness.[3]

c. Both Respondents emphasize trial fairness at the expense of the open court principle. The Crown submits that s. 648(1) is part of a statutory scheme designed "to protect an accused's constitutional right to a trial by an impartial jury" within a reasonable time.[4] Mr. Coban agrees.[5]

d. The Crown also argues that only a broad reading of s. 648(1)—that applies to non-prejudicial information and prejudicial information alike—maintains trial fairness.[6]

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[2] *R. v. Malik, Bagri and Reyat*, 2002 BCSC 80 at paras. 20 and 24-27.
[3] Appellants' Factum at paras. 47 and 49.
[4] The Crown's Factum at paras. 36 and 39.
[5] Mr. Coban's Factum at para. 21.
[6] The Crown's Factum at paras. 86-90.

e. All of the parties rely on s. 648(1)'s effects on openness, trial fairness, or both, to support their interpretation of s. 648(1).[7]

8. There is no zero-sum trade off between the open court principle and the right to a fair trial. To the contrary, the open court principle often promotes the right to a fair trial and blanket publication bans can impair the right to a fair trial, at least in some cases. Thus, when interpreting s. 648(1), this Court should recognize that an interpretation that results in a blanket publication ban may in some cases impair both the open court principle and the right to a fair trial.

9. This Court has left no doubt that the open court principle is an essential feature of our democracy, and that reporting on court proceedings is "inseparable from the principle of open justice".[8] Public access to proceedings is necessary to maintain the independence and impartiality of courts. As this Court has confirmed, openness "is necessary to maintain the independence and impartiality of courts [and] a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts."[9]

10. Simply, openness "helps make the justice system fair and accountable."[10] Or, in the words of Cory J.:

> If court proceedings, and particularly the criminal process, are to be accepted, they must be completely open so as to enable members of the public to assess both the procedure followed and the final result obtained. Without public acceptance, the criminal law is itself at risk.[11]

11. There is also no doubt that the open-court principle applies to pre-trial proceedings, including in criminal cases.[12]

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[7] See, *e.g.*, Appellants' Factum at paras. 49-60; The Crown's Factum at paras. 81-90; Mr. Coban's Factum at paras. 41-70.

[8] *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 30; see also *Vancouver Sun (Re)*, 2004 SCC 43 at para. 26.

[9] *Vancouver Sun (Re)*, 2004 SCC 43 at para. 25.

[10] *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 1.

[11] *Vickery v. Nova Scotia Supreme Court (Prothonotary)*, [1991] 1 S.C.R. 671 at 687, per Cory J., dissenting (but not on this point).

[12] *Vancouver Sun (Re)*, 2004 SCC 43 at para. 27.

12. Consistent with the value and importance of openness, this Court has recognized that there are myriad benefits to refusing publication bans. Some of those benefits promote the right to a fair trial. For example, this Court has held that not imposing a publication ban (i) maximizes the chances of individuals coming forward with new information relevant to a case, (ii) reduces the risk of perjury, and (iii) prevents state and/or court wrongdoing by placing the criminal justice process under public scrutiny.[13]

13. Indeed, this Court has confirmed that public scrutiny—including through media reporting—ensures fair trials.[14] Even the *Charter* expressly links fairness with a public hearing—s. 11(d) requires "a fair and public hearing".[15] Or, as this Court has confirmed:

> …it is not the case that freedom of expression and the accused's right to a fair trial are always in conflict. Sometimes publicity serves important interests in the fair trial process. For example, in the context of publication bans connected to criminal proceedings, these interests include the accused's interest in public scrutiny of the court process, and all of the participants in the court process.[16]

14. Lower courts have also recognized that publication bans can impair the right to a fair trial and, in some cases, refusing a ban promotes the right to a fair trial.

15. For example, *R. v. Kossyrine & Vorobiov*, 2011 ONSC 6081, concerned three individuals charged with murder. A week before jury selection, one pled guilty. The other two sought a publication ban over the guilty plea until their trial completed because knowledge of the plea could influence prospective jurors. The court held that a publication ban might be counterproductive. Publication of the plea before trial could improve trial fairness through the jury selection process:

> It seems inevitable that at some point in time the jury will learn of Mr. Ross' guilty plea. Indeed, there is every prospect that Mr. Ross will be called as a witness at the trial by the Crown. If the jurors only learn at that point of the plea, there will be no opportunity to examine whether that information causes any juror to immediately reach a conclusion of guilt regarding the applicants that is incapable of being set aside. On the other hand, if the plea becomes known to the prospective jurors

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[13] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 883.

[14] *R. v. Mentuck*, 2001 SCC 76 at para. 53.

[15] See *R. v. Mentuck*, 2001 SCC 76 at para. 52.

[16] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 882.

> before the selection process, the impact of that information can be examined through the challenge process.[17]

16. Similarly, in *R. v. Sipes*, 2011 BCSC 1329, the court held that a publication ban over the identities of witnesses "will usually adversely affect an accused's right to a fair and public hearing. The extent to which a ban will do so will vary with the circumstances of the case and the particular witness for whom the ban is sought."[18]

17. The parties have identified myriad applications that may be heard before jury empanelment. This case alone involved an *ex parte* application under the *Extradition Act*, an application to challenge jurors for cause, a variety of applications about the admissibility of a variety of evidence, a challenge to the constitutionality of s. 486.3(3) of the *Criminal Code*, an application to cross-examine an affiant, a disclosure application, applications about publication bans, and an application for an anonymity order.[19] Other cases will involve applications for a stay under s. 11(b) of the *Charter* because of excessive delay, applications for government-funded counsel, applications for intervener status, applications for particulars, severance applications, applications for a change of venue, interlocutory appeals, and so on.[20]

18. These applications will involve a variety of evidence and a variety of submissions about a variety of topics. Publication of that information could affect trial fairness in a variety of ways—or not at all. If s. 648(1) imposes a blanket publication ban on all information at all pre-empanelment applications—as the Crown and Mr. Coban submit[21]—then, in at least some cases, s. 648(1) may reduce trial fairness or simply have no effect on trial fairness.

19. But every application of s. 648(1) impairs the open court principle and the right of freedom of expression. Thus, in some cases, s. 648(1) may impair the open court principle and the right of freedom of expression for no benefit. Sometimes the application of s. 648(1) may even be counterproductive. This Court should recognize these effects of s. 648(1) when interpreting it and

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[17] *R. v. Kossyrine & Vorobiov*, 2011 ONSC 6081 at para. 12.
[18] *R. v. Sipes*, 2011 BCSC 1329 at para. 185.
[19] The Crown's Factum at para. 9 and Appendix A.
[20] Appellants' Factum at para. 60.
[21] The Crown's Factum at para. 3; Mr. Coban's Factum at para. 21.

reject any zero-sum trade-off between the open court principle and trial fairness. Section 648(1) is not always necessary to promote trial fairness.

20. Lower courts have recognized that applying s. 648(1) sometimes serves no purpose. For example, in this case the lower court permitted publication of the result of the successful challenge to the constitutionality of s. 486.4(3) of the *Criminal Code* despite s. 648(1).[22] In *Canada (Attorney General) v. Cheung*, 2000 ABQB 905, the court went further and held that a blanket application of s. 648(1) would capture information that was not prejudicial and even some information favourable to an accused.[23]

21. Similarly, in *R. v. Valentine*, 2009 CanLII 46172 (ON SC) the court found that s. 648(1)'s "blanket ban fails the proportionality [part of the *Oakes*] test in so far as it mandates a prohibition of information which poses no substantial risk to the rights of an accused to a fair trial".[24] The court read down s. 648(1) to permit a judge to grant leave to publish information that would not impair the right of an accused to a fair trial.[25]

22. Further, to the extent this Court considers the practical effects of different interpretations of s. 648(1)—as the parties raise to various extents—social media complicates the analysis.

23. Section 648(1) prevents information from being "published in any document or broadcast or transmitted in any way".[26] Enforcing a prohibition that broad against media organizations like the Appellants is one thing. Trying to enforce it against individuals with an interest in pre-empanelment proceedings in a notorious case—like the one below—is another.

24. Courts have recognized that publication bans without sealing orders (and s. 648(1) imposes no sealing order) can be ineffective in controlling social media:

> All that would happen is the mainstream media would be prevented from disseminating information while versions of that same information would get into everyone's hands in any event. While I appreciate that a publication ban could

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[22] Appellants' Factum at para. 14.

[23] *Canada (Attorney General) v. Cheung*, 2000 ABQB 905 at para. 69.

[24] *R. v. Valentine*, 2009 CanLII 46172 (ON SC) at para. 12.

[25] *R. v. Valentine*, 2009 CanLII 46172 (ON SC) at para. 15.

[26] *Criminal Code*, R.S.C. 1985, c. C-46, s. 648(1).

> include social media, such attempt to dictate the tides of internet discourse would be the administration of justice setting itself up for failure. Responsible stewardship of the rule of law should include accepting its limits.[27]

25. The BCCLA recognizes the importance of the right to a fair trial. Protecting the right to a fair trial is part of the BCCLA's mandate. Juries must decide cases based on what they hear in court, not on what they read in the media. But there is not a zero-sum trade-off between openness and fairness. Openness often promotes fairness. A blanket publication ban will not always promote the right to a fair trial. Sometimes a blanket publication ban will have no effect on the right to a fair trial. And in some circumstances a blanket publication ban risks impairing the right to a fair trial. And even if s. 648(1) is interpreted narrowly, discretionary publication bans will still be available where trial fairness is at risk. Those effects should inform this Court's interpretation of s. 648(1).

B. If there is any ambiguity in s. 648(1), this Court should consider penal consequences

26. Publication bans curtail civil liberties. Every publication ban overrides the open court principle, limits freedom of expression, and creates a risk of penal consequences. This Court has confirmed those severe downsides mean publication bans are justifiable only if they are necessary—and even then only the narrowest effective publication ban is permissible.[28]

27. The Appellants address why the *Charter* supports a narrower interpretation of s. 648(1), at least if s. 648(1) is ambiguous.[29]

28. The penal consequences for a breach of s. 648(1) also justify a narrow interpretation of s. 648(1), at least if it is ambiguous.

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[27] *The Globe and Mail Inc. v. R.*, 2017 ONSC 2407 at para. 38.

[28] *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38 (discretionary publication bans) and *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21 at paras. 18-19 (statutory publication bans).

[29] Appellants' Factum at paras. 51.

29. Section 648(2) creates an offence punishable on summary conviction for any breach of s. 648(1).[30] If ambiguous, penal legislation like s. 648(1) should be construed strictly—*i.e.*, in favour of accused persons and against the Crown.[31]

30. While the Crown[32] and Mr. Coban[33] submit that s. 648(1) is unambiguous, the many divergent lower court judgments on s. 648(1)'s scope—including within the Ontario Superior Court of Justice alone—suggest otherwise.[34]

31. Further, in *R. v. Brown*, 1997 CanLII 12360 (ON SC), the court accepted that it could construe s. 648(1) narrowly because of its penal consequences, but gave effect to other considerations instead.[35] *Brown* originally involved the prosecution of four accused. After a ruling that certain testimony was inadmissible, the Crown (i) stayed proceedings against one accused and (ii) sought a publication ban over information relating to the prosecution of that accused until the jury retired to consider its verdict in the trial of the remaining three accused. The court held that information related to the stay was protected by s. 648(1) but a judicial summary of the prosecution, evidentiary ruling, and stay against the relevant accused could be published—any impact on trial fairness could be addressed.[36]

32. Penal consequences for breaches of mandatory publication bans are more than hypothetical. Five years ago, the Crown sought an order citing CBC in criminal contempt for the alleged contravention of a different mandatory publication ban imposed by the *Criminal Code*.[37]

33. And the consequences for violating s. 648(1) are relevant for all persons, not just large media organizations like the Appellants. Indeed, there are potentially significant consequences for individuals.

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[30] *Criminal Code*, R.S.C., 1985, c. C-46, s. 648.
[31] *Bell ExpressVu v. Rex et al*, 2002 SCC 42 at para. 28.
[32] The Crown's Factum at para. 104.
[33] Mr. Coban's Factum at para. 21(f).
[34] *See, e.g., R. v. Wright*, 2020 ONSC 7049.
[35] *R. v. Brown*, 1997 CanLII 12360 (ON SC) at paras. 13-15.
[36] *R. v. Brown*, 1998 CanLII 14946 (ON SC).
[37] *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5.

34. Below, the Appellants and others brought a successful *Charter* challenge to s. 486.4(3) of the *Criminal Code*, which otherwise would have effectively prohibited the publication of information that could identify the victim in this case. The court below declared s. 486.4(3) to be of no force or effect. That declaration took immediate and prospective effect when made on January 10, 2022.[38]

35. Yet the challenge to s. 486.4(3) was subject to the publication ban in s. 648(1), which remained in effect for months after the declaration of invalidity. While the outcome of the *Charter* challenge was disclosed, the reasons for it were not.[39]

36. The now-public decision striking down s. 486.4(3) demonstrates some of the many reasons why victims and their relatives may want to comment publicly on the course of a criminal proceeding, including before jury selection.[40]

37. Some interpretations of s. 648(1) could arguably criminalize those communications (subject to a further *Charter* challenge). Canadians interested in the criminal justice system should know with certainty when s. 648(1) applies and what "information" it applies to. Any ambiguity should be resolved in their favour.

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[38] *R. v. Coban*, 2022 BCSC 14.

[39] Appellants' Record, pg. 19.

[40] *R. v. Coban*, 2022 BCSC 14 at paras. 9-10 and 25-26.

PART IV. SUBMISSIONS CONCERNING COSTS

38. The BCCLA requests that no costs be awarded for or against it.

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ALL OF WHICH IS RESPECTFULLY SUBMITTED

PATRICK WILLIAMS
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Counsel for the Intervener,
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DATED at Vancouver, British Columbia on April 28, 2023.

PART VII. TABLE OF AUTHORITIES

Authority	Paragraph(s) Referenced in Factum
Jurisprudence	
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