SCC File No. 37360

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

THE CANADIAN BROADCASTING CORPORATION

APPELLANT
(Respondent)

-AND-

HER MAJESTY THE QUEEN

RESPONDENT
(Appellant)

FACTUM OF THE APPELLANT, THE CANADIAN BROADCASTING CORPORATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW AND STATEMENT OF FACTS

I. Overview

[1] This appeal is about whether, prior to any finding of wrong-doing, a media outlet can be forced to "unpublish" internet news articles merely on the Attorney General's ("AG") allegation that those articles contravene a publication ban granted after the articles were published. Can the Alberta Court of Appeal circumvent the criminal trial process and use a civil injunction remedy to order a result that should only arise in the event of a conviction for criminal contempt? Reaching back to restrain and effectively unpublish lawfully published information about court proceedings fundamentally infringes the media's s 2(b) *Charter* rights to freedom of expression and freedom of the press in an unjustifiable fashion.[1] In addition, the *Charter* rights of all accused persons charged with an offense are at the heart of this appeal.

[2] The Canadian Broadcasting Corporation ("CBC") was charged with criminal contempt for allowing identifying information lawfully posted before the date of a publication ban to remain on its website. The CBC's position is that these historical articles are not caught in a ban which speaks only to material published after the date of the publication ban. In contrast, the AG contends that retaining these historical articles on the website constitutes a new publication which is subject to the ban. To enforce its view, the AG commenced criminal proceedings for criminal contempt against the CBC, and within the same proceeding, applied for an injunction requiring the CBC to remove from the articles information covered by the ban. The chambers judge dismissed the application.

[3] In reviewing the chambers judge's dismissal of the injunction application, the majority of the Alberta Court of Appeal invented a new test which effectively imposed a criminal sanction, using a civil burden of proof. Instead of meeting the tripartite test for an injunction to restrain an alleged criminal contempt, the majority found that the AG could instead apply for a mandatory order requiring the CBC to remove identifying material from its website to achieve its desired objective.

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[4] The majority's approach to injunctive relief is ill-suited to the criminal law. It is problematic in any circumstance where an injunction is sought to restrain *alleged* but not *proven* criminal conduct. But in this case, at the time of the AG's application, the terms forming the basis of the publication ban order, "publish" and "transmit", were ambiguous, and not defined in either the *Criminal Code* or in the case law. How can the CBC be enjoined from committing an alleged criminal contempt where it is not clear that the order even applies to its conduct? The CBC submits that this result should be impossible without determining the scope of the ban at issue.

[5] The detrimental impact that the majority decision has on the CBC's rights to freedom of expression protected by s 2(b) of the *Charter* cannot be ignored. The majority's approach has the effect of diminishing the media's right to free speech despite decades of case law confirming that those constitutionally protected rights extend to the media and recognizing the media's vital role in Canadian society.

[6] The majority's decision requires the CBC to remove the articles from its website, despite the fact that there had been no finding of guilt nor had there been any consideration of the CBC's right to freedom of expression. As the publication ban was imposed after the date the articles were published, if this Court does not overturn the majority decision, the CBC will be required to remove the articles in spite of the fact that it has since been acquitted of criminal contempt.

II. Statement of Facts

[7] On March 4, 2016 the body of a 14-year old girl was discovered in an apartment building in the small Alberta town of Edson, Alberta. The RCMP commenced an investigation into her death. The CBC wrote two articles that were published on its website on March 5, 2016 and March 8, 2016 which described the investigation, and shared some information about the victim posted by the community to Facebook (the "Articles").

[8] Both Articles identified the victim by name and photograph. The March 8, 2016 article identified the accused charged in relation to her death. At the time the Articles were posted to the CBC website, the identity of the victim was not subject to any ban on publication.

[9] The accused made his first appearance in the Provincial Court at Hinton on March 15, 2016. The AG applied for, and the Provincial Court judge granted, a publication ban order under s 486.4(2.2) of the *Criminal Code*[2], without notice to the CBC (the "Publication Ban").[3]

[10] Since the date of the Publication Ban, the CBC has not posted any articles identifying the victim.

[11] On March 18, 2016 the Attorney General ("AG") filed an originating notice requesting that the CBC be cited in criminal contempt and that the CBC be ordered to remove the Articles from its website that could identify the victim in that case ("Originating Notice").[4]

[12] The AG does not contend that the CBC is in breach of the Publication Ban with respect to any content published after March 15, 2016. Therefore, the publications subject to the Originating Notice are the two Articles which were posted prior to March 15, 2016.

[13] On March 22, 2016, the CBC filed an application for judicial review of the Publication Ban and a notice of constitutional challenge with respect to s 486.4(2.2).[5] The judicial review is scheduled to be heard on October 13, 2017.

A. The Chambers Judge's Decision

[14] The AG's request for injunctive relief proceeded by way of a special chambers application before the Honourable Justice Peter Michalyshyn of the Alberta Court of Queen's Bench (the "Chambers Judge") on March 31, 2016 (the "Application").

[15] The AG argued that the appropriate test was the tripartite test for a mandatory injunction articulated in *RJR-MacDonald Inc. v Canada (Attorney General)*[6] requiring the AG to prove a strong *prima facie* case for criminal contempt, that it would suffer irreparable harm if the injunction

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[2] RSC 1985, c C-46.
[3] Order Restricting Access or Publication granted on March 15, 2016 (Appellants Record [AR] 38) [Publication Ban].
[4] Originating Notice filed on March 18, 2016 (AR at 39) [Originating Notice].
[5] Applicant's Memorandum of Argument at para 10, Tab C to the Applicant's Application for Leave to Appeal. See also, *R v Canadian Broadcasting Corporation*, 2016 ABCA 326 at para 12, [2017] 3 WWR 413 (AR at 14) [Court of Appeal Reasons].
[6] [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR-MacDonald*].

was not granted, and that the balance of convenience favoured granting the injunction. The Chambers Judge applied that test and found that the AG failed to meet its burden on each of the three requirements.[7]

[16] First, with respect to a strong *prima facie* case, the Chambers Judge found that the AG did not prove that it had a "very strong probability" of proving the elements of criminal contempt at trial.[8] Applying the test for criminal contempt established by this Court in *United Nurses of Alberta v Alberta (Attorney General)*,[9] the Chambers Judge found that the AG did not prove, beyond a reasonable doubt that "the CBC defied or disobeyed a court order in a public way with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court."[10]

[17] The Chambers Judge noted that the term "publish" is not defined for the purposes of s 486.4(2.2) of the *Criminal Code*, and that the case law in Canada concerning the meaning of "publish" is unsettled. The Chambers Judge rejected the AG's call for a "broad interpretation" of the terms "publish" and transmit" in considering whether there was a strong probability that the CBC intended to violate the Publication Ban and instead applied the "restrained approach" suggested by the authorities.[11]

[18] The AG argued that there would be irreparable harm to the administration of justice if the injunction was not granted. Specifically, that the existence of the young victim's identity on the CBC website would discourage other young victims from reporting crime.

[19] A judge must grant a publication ban under s 486.4(2.2) of the *Criminal Code* on the application of either the AG or the victim, where the victim is under the age of 18 years. Proof of harm to the victim or to the administration of justice is not required. However, the Chambers Judge found that in the context of an injunction application, it is appropriate to consider whether the

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[7] *R v Canadian Broadcasting Corporation*, 2016 ABQB 204, [2016] WWR 613 (AR at 1) [Application Reasons].
[8] *Ibid* at para 34.
[9] [1992] 1 SCR 901 at 933, 89 DLR (4th) 609 [*United Nurses*].
[10] Application Reasons, *supra* note 7 at para 31.
[11] *Ibid* at paras 26, 33.

administration of justice would suffer irreparable harm if the injunction was not granted. In the absence of any evidence whatsoever of specific harm to other young victims, and having concluded that the Attorney General could not establish that the CBC was acting in clear defiance of a court order, the Chambers Judge declined to find irreparable harm to the administration of justice.

[20] Finally, in assessing balance of convenience, the Chambers Judge considered that the reach of the Publication Ban undeniably "compromises the CBC's freedom of expression, and the public's interest in that expression."[12] Infringement of the CBC's freedom of expression outweighed any alleged harm to the administration of justice, which the Chambers Judge found to be "slight, if it exists at all."[13]

[21] Because the AG failed to meet its burden on all three branches of the tripartite test, its Application was dismissed.[14]

B. The Court of Appeal Decision

[22] The AG appealed to the Court of Appeal of Alberta. The Court of Appeal was divided on the issue of whether the Attorney General was entitled to a mandatory interim injunction. The majority, Slatter J.A. and McDonald J.A. (the "Majority"), reversed the decision of the Chambers Judge and granted a mandatory interim injunction.[15] Greckol J.A. dissented. She disagreed with the Majority's legal approach to determining the entitlement to injunctive relief in the criminal context and would have dismissed the appeal on the basis that the Chambers Judge applied the correct legal principles.[16]

1. The Majority

[23] The Majority disagreed that the AG had to demonstrate a "strong *prima facie* case … of criminal contempt of court."[17] Instead, the Majority characterized the nature of the Application as an "application for a permanent injunction" in the civil portion of a "hybrid" process, "requiring

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[12] *Ibid* at para 59.
[13] *Ibid* at para 60.
[14] *Ibid* at para 67.
[15] Court of Appeal Reasons, *supra* note 5 at para 13.
[16] *Ibid* at paras 41, 62.
[17] *Ibid* at para 4.

the removal of the information from the website" rather than an application for an interim injunction in the criminal contempt proceeding.[18]

[24] This new characterization called for a lower standard of proof, and required the AG to merely demonstrate a "strong *prima facie* case entitling it to a mandatory order directing removal of the identifying material from the website,"[19] vitiating the need to prove *mens rea* for criminal contempt, beyond a reasonable doubt in accordance with *United Nurses*.

[25] The Majority noted that "in the end, the case will come down to the meaning of the phrase "published in any document or broadcast or transmitted in any way" found in s 486.4(1) of the *Criminal Code*."[20] The central question is whether publishing is a continuous state of affairs that occurs each day the content in question remains on the website, or whether publication occurs once at the time the content is initially posted to the website. The Majority found that "either position is arguable".

[26] Despite finding that there existed a live issue as to whether the CBC was in breach of the Publication Ban, the Majority found that the AG had established a strong *prima facie* case.[21]

[27] With respect to irreparable harm, the Majority found that as a publication ban is mandatory under s 486.4(2.2) and does not require proof of harm, interim measures to enforce that ban can be ordered without the AG ever demonstrating proof of harm.

[28] In considering balance of convenience, the Majority declined to consider any limitation on the CBC's freedom of expression as a relevant factor.

[29] The order of the Court of Appeal has the effect of creating a "free standing" injunction that is not tied to the criminal contempt proceedings. Thus, despite that the Articles have since been found to be lawfully published, and notwithstanding that the CBC has been acquitted of criminal

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[18] *Ibid* at para 5.
[19] *Ibid* at para 7.
[20] *Ibid* at para 8.
[21] *Ibid* at para 9.

contempt,[22] the CBC is still liable to penal consequences for breach of the injunction order issued by the Court of Appeal.

2. The Dissent

[30] Greckol J.A. disagreed with the Majority's characterization of the application, and instead found that the AG's "application for an interim injunction is an interim measure within the criminal contempt proceeding."[23] She found that to satisfy the first branch of the tripartite test, the AG must prove a strong *prima facie* case for criminal contempt, which requires consideration of the *mens rea* element and must be proven beyond a reasonable doubt.[24]

[31] Greckol J.A. noted that the test as characterized by the Majority was not argued or contemplated by the AG before the Chambers Judge, or before the Court of Appeal. The AG had always proceeded on the basis that it was applying for an interim injunction in the contempt proceedings, and it was required to prove a strong *prima facie* case for criminal contempt."[25] She found it inappropriate to "re-cast the argument in a fashion that the applicant Crown failed to do" and preferred the parties' characterization of the application as an application for an interim injunction in a proceeding for criminal contempt, requiring the AG to meet a strong *prima facie* case on the *United Nurses* standard.[26]

[32] As the meaning of "publish" and "transmit" are capable of two arguable interpretations, Greckol J.A. found that the basis for the Publication Ban was vague, and therefore the CBC could not predict in advance whether its conduct is caught by the terms of that order.[27] Therefore, on the *United Nurses* standard, AG had not proven a strong *prima facie* case.

[33] With respect to irreparable harm, Greckol J.A. agreed that open and clear defiance of a court order may be harmful to the administration of justice in some circumstances.[28] But as the

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[22] *R v The Canadian Broadcasting Corporation*, 2017 ABQB 329 [Trial Decision].
[23] Court of Appeal Reasons, *supra* note 5 at para 23.
[24] *Ibid* at para 21.
[25] *Ibid* at paras 25-26.
[26] *Ibid* at para 27.
[27] *Ibid* at para 44.
[28] *Ibid* at para 51.

terms of the Publication Ban were vague, it was not clear whether the CBC has clearly violated that order. She preferred to resolve any ambiguity in favour of the accused.[29]

[34] Finally, Greckol J.A. found it was appropriate for the Chambers Judge to consider the CBC's freedom of expression as a factor in the balance of convenience test.[30]

[35] Greckol J.A. would have dismissed the appeal, holding that the issuance of a mandatory interim injunction is a discretionary matter and is entitled to deference on appeal.[31]

C. The Stay

[36] Immediately following the decision of the Court of Appeal granting the injunction, CBC sought a stay of that order pursuant to s 65.1(2) of the *Supreme Court Act*[32] pending the outcome of CBC's application for leave to appeal to this Court. Berger J.A. held that the nature of the order was in fact permanent since CBC would not be allowed to re-publish the Articles and the order of the Majority would apply regardless of an acquittal at trial on the merits.[33] Further, he agreed that without the stay, an appeal to this Court would be nugatory.[34]

D. Trial on the Merits

[37] Since filing this appeal, Clackson J. of the Court of Queen's Bench (the "Trial Judge") has acquitted CBC of the offence of criminal contempt, and declined to find CBC in civil contempt.[35] The Trial Judge considered contextual and societal evidence provided by an expert in on-line journalism, and concluded that the definition of "publish, broadcast, or transmit in any way" does not require the media to remove previously posted materials from its web archives.

PART II – QUESTIONS IN ISSUE

[38] This appeal raises the following questions:

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[29] *Ibid* at para 52.
[30] *Ibid* at para 58.
[31] *Ibid* at para 62.
[32] RSC 1985, c S-26.
[33] *R v Canadian Broadcasting Corporation,* 2016 ABCA 372 at para 7.
[34] *Ibid*.
[35] Trial Decision, *supra* note 22.

a. What is the proper approach that a court must follow in considering whether injunctive relief is appropriate to enjoin conduct subject to the criminal law?

b. If injunctive relief is appropriate, how should the proper test be applied in circumstances where the AG seeks injunctive relief against an accused person in a prosecution for criminal contempt and where free speech is at issue?

PART III – STATEMENT OF ARGUMENT

I. The Majority's "hybrid" test is inappropriate in criminal law

[39] The Majority have created a modified "hybrid" test: the only requirement for an injunction to issue in a prosecution for criminal contempt arising from an alleged violation of a publication ban is the simple allegation by the AG that a publication of the banned information has occurred. This amounts to an effective final determination of guilt without a trial on the criminal contempt charge. The bifurcated process also engages the possibility that the AG could apply for an injunction to remove allegedly unlawful publications without having to prosecute the publisher with contempt for breach of a publication ban.

[40] In the event that CBC is unsuccessful on this appeal, despite the Trial Judge's finding that the Articles are lawful, the CBC is nonetheless required to remove the Articles from its website as the Majority's injunction order still stands.[36]

[41] The extremely low threshold created by the Majority has never been adopted in Canadian law and should be rejected. Instead, the proper approach to the matters in issue on this appeal is: 1) to determine the scope of the underlying offence as a matter of law; 2) determine whether injunctive relief is appropriate to enforce the underlying offence; 3) determine the appropriate test to be applied; and 4) apply that test to the facts in issue. The Majority erred in not following this approach. Had it done so, it is submitted that the Majority would not have ordered the injunction.

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[36] See also *R v Consolidated Fastfrate Transport Inc*,1995 CanLII 1527, 1995 CarswellOnt 993 at paras 13-14 (Ont CA) [*Consolidated Fastfrate*] where the Ont CA held that an injunction granted in a civil proceeding for the purpose of assisting the criminal law amounts to a final order.

II. Injunctive relief should not be ordered against an accused person where there is an ambiguity in the underlying offense

[42] Canadian courts have warned against the use of injunctive power in the criminal law context. That is because the *Criminal Code* already provides an offence and an appropriate penalty.[37] An applicant is thus requesting the Court to restrain conduct that the Parliament of Canada has already restrained.[38] The use of injunctive relief is particularly troubling where the alleged conduct is subject to the *Criminal Code* and it is sought in advance of trial where the accused has not been convicted of the underlying offence.

[43] This proposition is made clear by the Ontario Court of Appeal in *Consolidated Fastfrate* in which the court noted that the situation was different from the usual procedure in civil matters because "the person against whom the order is sought is presumed by law to not be found guilty of the offense with which it is charged."[39] Indeed in *Morgentaler*, the court noted that consideration of the tripartite test on an application for an injunction would necessarily require assumptions about the probable guilt of the defendant, which cannot be made in advance of trial.[40]

[44] In the result, the Court of Appeal in *Consolidated Fastfrate* modified the test for injunctive relief to a require proof "that the accused person will likely be convicted of the offense with which it is charged."[41]

[45] In contrast to the holding in *Consolidated Fastfrate*, the Majority's ruling in the present case granted injunctive relief simply on the AG's allegation that the Articles were being "published" in contravention of the Publication Ban. Where there is any doubt as to the applicability of the court order alleged to be breached, it is impossible to determine whether the accused is likely to be convicted of the offense.

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[37] Jeffrey Berryman, *The Law of Equitable Remedies* (Toronto: Irwin Law Inc, 2013) at 236 [Berryman Text].
[38] *League for Life in Manitoba Inc v Morgentaler*, 19 DLR (4th) 703, 1985 CanLII 3090 at para 49 (Man QB) [*Morgentaler*].
[39] *Consolidated Fastfrate, supra* note 37 at para 32.
[40] *Morgentaler, supra* note 39 at para 63.
[41] *Consolidated Fastfrate, supra* note 37 at para 55.

[46] CBC argued that it was not in breach of the Publication Ban as the articles were not "published" or "transmitted" after the date of the Publication Ban and therefore the Publication Ban was inapplicable to the Articles. The Majority found that this position is "arguable". Thus, had the majority applied the correct legal test for issuing an injunction in advance of a conviction in accordance with *Consolidated Fastfrate*, it would have been impossible for the Majority to conclude that CBC was likely to be convicted of an offense.

A. The meaning of "publish" and "transmit" is unclear

[47] The Publication Ban was ordered pursuant to s 486.4(2.2) of the *Criminal Code* which requires the presiding judge or justice, on the application of the AG or the victim, to make an order directing that any information that could identify a youth victim of crime shall not be published in any document or broadcast or transmitted in any way.

[48] Throughout these proceedings, the AG has not argued that CBC was "broadcasting" the impugned material, and instead relies on the definitions of "publish" and "transmit". To determine whether the CBC has breached the Publication Ban the Court must consider whether, by leaving the information on its website, the CBC continues to publish the Articles, or transmit the Articles in any way.

[49] On its Application, the AG urged the Chambers Judge to consider a broad interpretation of the meaning of the words "publish" and "transmit". He declined to do so, and noted the ambiguity in s 486.4(1).

[50] Prior to reversing the Chambers Judge's decision, it was incumbent on the Majority to determine the scope of the Publication Ban, including the meaning of the words "publish" and "transmit", to determine whether CBC would likely be convicted at trial, in accordance with *Consolidated Fastfrate*. Its failure to do constitutes reversible error, and the injunction should be overturned.

[51] There are many compelling reasons why a narrow interpretation of "publish" and "transit" should be preferred.

1. The traditional approach to publication bans should apply to the internet

[52] Publication bans, both at common law and in the *Criminal Code* have always been used as a tool to restrain the media from distributing information to a large audience. In traditional media, this restraint applied to television or radio broadcasts that were watched or listened to by thousands of people, or print publications which delivered newspapers to thousands of readers every morning. Now, publication bans also apply to internet publications. Publication bans should be applied in the same manner to all sources of media.

[53] This Court has noted that the interpretation of the *Criminal Code* "should not be dictated by the technology used to transmit such communications" but what was intended to be captured under the *Criminal Code*.[42] In *Telus*, the issue before this Court was whether Telus' transmission system constituted "intercepting a private communication", contrary to individual privacy rights. This Court held that the *Criminal Code* must apply equally irrespective of technological platforms. Consistent with that finding, there is no reason why print and internet publications should be treated any differently in the context of a publication ban.

2. Permitting "access" to the articles is not "publishing" or "transmitting"

[54] The AG argued that CBC is in violation of the Publication Ban simply by permitting the information to be accessed or shared by members of the public. This logic is flawed and cannot be supported where breach of a publication ban order gives rise to criminal charges for contempt.

[55] An individual who is seeking information which is subject to a publication ban has always had, and continues to have, the ability to seek out that information. An individual can attend at the courthouse to view or request copies of the court file. They could also attend in court any time the matter is being heard. The CBC should not be subject to criminal liability because of the actions of a third party "accessing" content.

[56] Publication bans have never prohibited the public from being able to access legally published information that subsequently becomes subject to a non-publication order. If an

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[42] *R v Telus Communications Co*, 2013 SCC 16 at para 4, [2013] SCR 3 [*Telus*].

individual takes steps to seek out that information by using online search tools such as Google, that is no different than an individual seeking out previously published stories from a library archive or the court file. In either case, the party that published the original story has not taken any action which could be interpreted as "publishing" or "transmitting" the information.

[57] CBC submits that as the legislator does not intend for publication bans to restrict access to court records for viewing, searching and copying for private use, then certainly the legislator does not seek to punish media organizations that legally disseminated that same information that is simply "accessible" to the public.

[58] Any other interpretation is inappropriate in the context of criminal law, as it would expose an innocent actor to criminal liability arising from the actions of a third party. As the Trial Judge stated, "getting hold of the material or 'accessing' it would not be broadcasting or transmitting".[43] Something more must be done. Similarly, allowing access is not enough to amount to broadcasting or transmitting. Consequently, the words "publish or transmit" in the criminal context must only capture publications that constitute criminal actions at the time they are first communicated to the public.

[59] The possibility of acts outside the control of the publisher resulting in criminality supports a strict interpretation of "publish" as a broad interpretation would offend the principles of vagueness and fair notice of the criminal law. These principles have been well established by this Court in *Marcotte v Deputy Attorney General for Canada*,[44] and followed in *R v McIntosh* where Lamer C.J. stated:

> Under s 19 of the *Criminal Code,* ignorance of the law is no excuse to criminal liability. Our criminal justice system presumes that everyone knows the law. Yet we can hardly sustain such a presumption if courts adopt interpretations of penal provisions which rely on the reading-in of words which do not appear on the face of the provisions. How can a citizen possibly know the law in such a circumstance?
>
> The *Criminal Code* is not a contract or a labour agreement. For that matter, it is qualitatively different from most other legislative enactments because of its direct and potentially profound impact on the personal liberty of citizens. The special nature of the

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[43] Trial Decision, *supra* note 22 at para 41.
[44] [1976] 1 SCR 108 at 115, 51 DLR (3d) 259.

> *Criminal Code* requires an interpretative approach which is sensitive to liberty interests. Therefore, an ambiguous penal provision must be interpreted in the manner most favourable to accused persons, and in the manner most likely to provide clarity and certainty in the criminal law.[45]

[60] This is precisely the issue with the AG's argument urging the Court to apply a broad interpretation of the term publish with reference to the audience. Such a finding would grossly extend the ambit of s 486.4.

[61] The AG suggests that each time a person accesses material, publication occurs. According to the AG, criminal liability depends on the actions of another individual, and could arise in circumstances where the accused person has taken no positive steps and may not be aware that those actions are criminal. "Publish" must instead be interpreted with reference to the actions of the publisher at the time the information is initially communicated to the public.

[62] Further, a publisher who has lawfully posted material that is not subject to a ban may be subject to prosecution if a ban is subsequently ordered without the publisher's knowledge, giving rise to a further layer of uncertainty.

[63] If this argument is accepted, the publisher would have a positive obligation to constantly scour court filings across the country to ensure retroactive compliance with a publication ban. Any person posting information on the internet, or anyone responsible for hard copy archives, would have a perpetual and continuing duty to constantly monitor the factual matrix of every story it has ever published to ensure the information posted or printed has not suddenly been made criminal. Such an onerous obligation is, in any practical sense, impossible given the sheer volume of news stories regarding court proceedings published in this country on a daily basis.

3. A broad interpretation will have a chilling effect on the media

[64] Imposing that arduous process on publishers could have a chilling effect on the media's vital role of reporting on criminal investigations and court proceedings to the public. This Court has expressed the importance of that role in *Canadian Broadcasting Corp. v New Brunswick (Attorney General)*:

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[45] [1995] 1 SCR 686 at paras 38-39, 21 OR (3d) 797.

> Discussion of court cases and constructive criticism of court proceedings is dependent upon the receipt by the public of information as to what transpired in court. Practically speaking, this information can only be obtained from the newspapers or other media.
>
> That the right of the public to information relating to court proceedings, and the corollary right to put forward opinions pertaining to the courts, depend on the freedom of the press to transmit this information is fundamental to an understanding of the importance of that freedom.[46]

[65] Maintaining public confidence in the justice system requires that the media react quickly in conveying vital information to the public. The public undoubtedly has in interest in knowing that police are taking immediate steps to investigate crimes in the community.

[66] If the AG's position is accepted, the media may suppress information of significant public concern (like the identity of a missing person) out of fear of being eventually prosecuted for contempt. In many cases, the authorities depend on the assistance of the public in identifying and apprehending potential suspects. Extending the ambit of publication bans to include material posted prior to the date the ban was issued could significantly hinder police investigations and would have a detrimental effect on the ultimate prosecution of an accused.

[67] Furthermore, there are significant practical issues in removing content from the internet. The Trial Judge accepted as fact that at least one foreign news aggregator had republished the Articles, which is still available to Canadians who choose to find the information.[47] An attempt to enforce a publication ban by charging one news entity with contempt would create an enormous burden without obtaining the desired outcome.

[68] The Court of Appeal in Alberta has previously recognized the harm to the media outweighs the benefit to granting a discretionary publication ban over information that is already in the public domain:

> Additionally, the evidence produced by the applicants establishes that much of the material that the provisional ban was intended to protect has already been in the public domain for

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[46] [1996] 3 SCR 480 at para 23, 139 DLR (4th) 385 [*New Brunswick*] [emphasis in original] quoting *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1340, 64 DLR (4th) 577 [*Edmonton Journal*].

[47] Trial Decision, *supra* note 22 at para 7.

some time. The salutary effects do not, therefore, outweigh the deleterious effects to the free expression of those affected by the ban.[48]

4. Narrow interpretation is consistent with plain and ordinary meaning

[69] The parties agree that the word "publish" in the context of s 486.4(1) should be given its plain and ordinary meaning, which is "to make generally known, and to disseminate to the public".[49] For its part, "disseminate" means "to disperse throughout".[50]

[70] CBC submits that each term implies a wide distribution of information ("*generally* known", "disperse *throughout*") shows Parliament intends to capture conduct that attempts to share the banned information with as wide an audience as possible, such as a newspaper delivered to thousands of homes simultaneously, or publishing the material on the masthead web-site of a media organization that may be read by thousands of people daily.

[71] Print publications cannot be recalled from circulation in order to erase information from the public domain subsequent to a publication ban being ordered in any practicable way. However, under a broad interpretation of "publish", such publications would nonetheless attract criminal liability since they continue to make the information accessible to the general public simply by continuing to exist. Such a finding would be inconsistent with court policies which expressly state that publication bans do not seek to limit access for personal use.[51]

[72] Before the Chambers Judge and the Court of Appeal, the AG argued that the definition of "publication" contained in the *Youth Criminal Justice Act* is instructive, as it includes the term "making [the banned information] accessible to the general public through any means".[52] This argument should be rejected. The *Criminal* Code publication ban is manifestly different than a

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[48] *R v McClenaghan,* 2008 ABCA 141 at para 7, 429 AR 76.
[49] Merriam-Webster, *sub verbo* "publish", online: <https://www.merriam-webster.com/dictionary/publish>.
[50] Merriam-Webster, *sub verbo* "disseminate", online: <https://www.merriam-webster.com/dictionary/disseminate>.
[51] Alberta Court of Appeal, *Public and Media Access Guide* (1 August 2013), online: <https://albertacourts.ca/docs/default-source/Court-of-Appeal/public_and_media_access_guide.pdf?sfvrsn=2>
[52] SC 2002, c 1, s 2(1) [*YCJA*].

publication ban which is automatically triggered on the occurrence of a particular event, such as a publication ban under section 110 of the *YCJA*:

> 110(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.[53]

[73] The *YCJA* arises automatically by operation of the law because the accused is a minor. It is in the nature of an 'automatic' publication ban. If the young person is subject to the *YCJA*, anyone ought to know that the publication ban will be in effect over the young person's identity at the time of publication. The same cannot be said about the *Criminal Code* s 486.4(2.2) publication ban as it is uncertain if it will arise. A publication ban in relation to an offense committed against a young victim that requires an application by the AG or the victim should be treated differently than a publication ban which arises automatically by operation of law because the accused is a minor, as under the *YCJA*. Fair interpretation of a publication ban under s 486.4(2.2) must mean only any publications which come into existence after the date that the publication ban is ordered.

5. Narrow construction is consistent with *Charter* values

[74] A ban on publication restricts the publisher's s 2(b) *Charter* right to freedom of expression. This right must "only be restricted in the clearest of circumstances".[54] Where the scope of an order that has the effect of limiting *Charter* rights is at issue, *Charter* values must be used as an interpretive technique to resolve that ambiguity:

> More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator. In this regard, although it is sometimes suggested that "it is appropriate for courts to prefer interpretations that tend to promote those [*Charter*] principles and values over interpretations that do not", it must be stressed that, to the extent this Court has recognized a "*Charter* values" interpretive principle, such principle can only receive application in circumstances of genuine ambiguity, i.e., where a statutory provision is subject to differing, but equally plausible, interpretations.[55]

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[53] *Ibid.*
[54] *Edmonton Journal*, *supra* note 47 at 1336.
[55] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 62, [2002] 2 SCR 559 [emphasis in original].

[75] There is no question that there is a genuine ambiguity concerning the scope of the Publication Ban at issue. That fact has been expressed by both the Chambers Judge and the Majority where the Court noted that "either position is arguable" in relation to whether publication occurs once or is ongoing.

[76] The CBC has a constitutionally protected right to freedom of expression as guaranteed by s 2(b) of the *Charter*. This Court has repeatedly addressed the importance of freedom of the press and other media of communication, and has stressed the dangers of placing certain rights above the protected rights of expression and the press enjoyed by them:

> A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.[56]

[77] While the Court in *Dagenais* was focused primarily on discretionary publication bans, CBC submits the balance it seeks to achieve also applies to the scope of statutory bans in the absence of clear and express language to achieve the spirit of the right to free expression.

6. Narrow construction is consistent with criminal law

[78] At the time of the Application, the question of whether an article is published each day it remains accessible online or merely a single time when first posted was unresolved in Canada, and constituted a critical ambiguity in s 486.4(2.2) of the *Criminal Code*. This Court has emphasized that any ambiguity in the meaning of a penal provision must be resolved in favour of the accused.[57]

[79] The meaning of "publish" or "transmit in any way" in relation to the Articles clearly constitutes an ambiguity, and is one that was recognized by both the Chambers Judge and the Majority. Such an equivocal position must be applied in favour of the CBC.

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[56] *Dagenais v Canadian Broadcasting Corp,* [1994] 3 SCR 835 at 877, 120 DLR (4th) 12 [*Dagenais*].
[57] See para 59 of this factum. See also *R v SAC,* 2008 SCC 47 at para 30, [2008] 2 SCR 675.

III. Injunctive relief is not appropriate in this case

A. An injunction should not be granted where the accused has not been convicted of a criminal offense

[80] The strongest authorities on the appropriateness of using civil injunctions to enjoin conduct ordinarily subject to the criminal law are found in the House of Lords decision of *Gouriet v Union of Post Office Workers*[58] and *Robinson v Adams; Patzalek v Adams; Canadian Multiphone Co v Adams,*[59] which both specifically reject the notion. Viscount Dilhorne in *Gouriet* stressed that "[g]reat difficulties may arise if 'enforcement' of the criminal law by injunction became a regular practice."[60]

[81] Commentators and courts agree that it is generally inappropriate to grant injunctive relief to enjoin conduct ordinarily subject to the criminal law, except in exceptional circumstances.[61] In her dissent, Greckol J.A. confirmed this position: "only in very exceptional cases where, by reason of lack of time or otherwise, no other suitable remedy is available should an injunction be granted to prevent the commission of a crime."[62]

[82] There are a limited number of circumstances in which injunctive relief has been ordered to restrain *quasi*-criminal law. Those include preventing continual flouting of the law, where the statutory provision is inadequate to deter, where the statute provides no penalty for violation, or where there is a serious threat to public safety.[63]

[83] Where restraint of a *Criminal Code* offense is sought in a "flouting" case, the circumstances must involve an inadequate fixed penalty, and an injunction order is the only way to avoid multiplicity of prosecutions.[64] This case does not present one of those circumstances.

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[58] [1977] UKHL 5, [1978] AC 435 [*Gouriet*].
[59] [1925] 1 DLR 359, 1924 CanLII 406 (Ont CA) [*Adams*].
[60] *Gouriet*, *supra* note 59 at 490.
[61] *Alberta (Attorney General) v Plantation Indoor Plants Ltd*, 1982 ABCA 1 at paras 12, 21, 133 DLR (3d) 741 [*Plantation Indoor Plants*]. See also *Gouriet*, *ibid* at 481, 490-91;
[62] Court of Appeal Reasons, *supra* note 5 at para 31 citing *Nova Scotia (Attorney General) v Beaver*, 18 DLR (4th) 287, 1985 CanLII 3084 at para 35 (NS SC (AD)).
[63] Berryman Text, *supra* note 38 at 233.
[64] *Ibid* at 236.

[84] Courts have expressed caution regarding granting injunctive relief in criminal law proper. One of these reasons is that Parliament has already created an offense and provided a penalty. Yet violating an injunction order leaves open the possibility that the respondent will be charged with criminal contempt. The penalty for criminal contempt for violating a court order could attract unlimited sanctions, which Parliament did not intend when setting the penalty for the underlying offense.[65]

[85] Another concern with conflating civil and criminal remedies is described in *Ducks Unlimited:*

> … a party accused of having committed an offense has a "constitutional right to have his guilt established by reference to the criminal standard of proof" – Lord Diplock in *Gouriet* (at p 98). This is particularly true where, as here, the respondent denies having committed any offense under the Act. To grant an injunction would be tantamount to a decision, based on a civil standard of proof, that the respondent has committed an offence under the Act. As Mr. Sharpe points out in his text at p. 278:
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> > The differences between civil proceedings for an injunction and criminal proceedings are obvious. Procedural safeguards available in criminal or even *quasi*-criminal proceedings will not be available in a civil action for an injunction. Differences are especially marked for indictable offenses triable by jury. However, even for summary offences, important protections – the right to silence and the criminal burden of proof – are lost in a civil action for injunction.[66]

[86] The authorities suggest that injunctive relief should only be used to enjoin criminal conduct in the clearest of cases. This threshold is particularly important where the alleged conduct is subject to the *Criminal Code* and the accused has not been convicted of any *Criminal Code* offense.[67]

[87] Subjecting an accused person to civil proceedings involving the same issues as the criminal jeopardy he or she is facing offends the principle that an accused person has the right to remain silent as protected by ss. 7 and 11(c) of the *Charter*.[68] In this case, the remedy the AG sought would have resulted in the permanent removal of legally published materials from CBC's web-

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[65] *Manitoba Naturalists Society Inc v Ducks Unlimited Canada*, 86 DLR (4th) 709, 1991 CanLII 8197 at paras 24-25 (Man QB)[*Ducks Unlimited*]. See also Robert Sharpe, *Injunctions and Specific Performance*, looseleaf, (Aurora, Ont: Canada Law Book, 1992) at 3-19, 3-20 [Sharpe].
[66] *Ducks Unlimited, supra* note 66 at para 26.
[67] Sharpe, *supra* note 66 at 3-24.
[68] *Ibid* at 3-22.

site, and a significant infringement on its rights. CBC could not have simply invoked its right to remain silent until the matter was heard at trial. In responding to the Application, CBC was required to reveal its defense strategy to the AG in advance of trial.

[88] Because of these concerns, some courts have held that "something more than an infringement of the criminal law must be shown before jurisdiction to grant an injunction can be exercised."[69] Courts have rejected the suggestion that any breach of a court order entitles the AG to injunctive relief. In *Ontario (Attorney General) v Ontario Teachers' Federation*, the court found that even though the teachers had engaged in an unlawful strike, the motion was premature, irreparable harm had not been established, and the balance of convenience did not favor granting the injunction.[70]

[89] Similarly, in *Plantation Indoor Plants*, the court found that "the history of the matter must clearly demonstrate … an open and continuous disregard of an imperative public statute and its usual sanctions which is unlikely to be thwarted without the intervention of the court."[71]

[90] CBC argues that the conduct complained of must be flagrantly in breach of an existing court order before the court can exercise its jurisdiction to enjoin an alleged criminal contempt. It cannot be said that the CBC was in open and flagrant disregard of a court order. The terms of that order are undoubtedly uncertain as "publish" and "transmit" are capable of at least two meanings, a finding which is supported by the Chambers Judge and the Court of Appeal.

[91] CBC has not published any articles which identify the victim following the date of the Publication Ban. Therefore, the conduct the AG seeks to enjoin in its Application is precisely the conduct that is at issue in the criminal contempt trial. The CBC was not guilty of any criminal offense, yet the Court of Appeal decision requires CBC take positive steps in the absence of any finding of wrong doing.

[92] Instead of upholding the constitutional rights afforded to all accused persons charged with an offense, the Majority effectively side-stepped the accused's *Charter* rights by re-characterizing

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[69] *Consolidated Fastfrate*, *supra* note 37 at para 8.
[70] 36 OR (3d) 367, 1997 CanLII 12182 (Ct (Gen Div)), [*OTF*].
[71] *Supra* note 62 at para 12 citing *AG Alta v Lees*, [1932] 3 WWR 533, 1932 CarswellAlta 59 (CA).

the AG's application as a "hybrid" civil application within a criminal contempt proceeding. This approach is inconsistent with all of the authorities above.

B. An injunction should not be granted to remove legally published material

[93] Another significant issue arises where a mandatory injunction has the potential to impose a positive obligation on an accused who has not been convicted of an offence. A positive obligation on the accused to act in spite of its acquittal is at the heart of this case.

[94] Even though CBC has been acquitted of the underlying charge, and the Articles were deemed not to violate the Publication Ban, the injunction granted renders the Trial Decision moot. The injunctive relief ordered essentially usurps the jurisdiction of the criminal court to determine the CBC's guilt or innocence on the charges of criminal contempt, and determines the issue before a trial.

[95] Injunctive relief cannot be used to circumvent the criminal trial process to achieve a quick result using a civil remedy.[72] Further, it is manifestly unfair to enjoin conduct prior to determination of the issues in circumstances where granting injunctive relief effectively prevents the accused from restoring itself to its lawful position after an acquittal at trial on the merits.

[96] In the absence of a conviction for criminal contempt it is not appropriate for this Court to uphold the Court of Appeal's imposition of a mandatory injunction. This is not an exceptional case warranting the use of injunctive relief to restrain alleged criminal conduct.

IV. If the court does exercise its jurisdiction to grant injunctive relief, the traditional tripartite test is not appropriate in this case

A. The test for injunctive relief is not a rigid test

[97] The modern test for an interlocutory injunction is well established in Canadian case law. The test was originally developed by the House of Lords in *American Cyanamid Co. v Ethicon Ltd.*[73] and was largely approved by this Court in *Manitoba (AB) v Metropolitan Stores Ltd*.[74]

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[72] Berryman Text, *supra* note 38 at 233.
[73] [1975] UKHL 1, [1975] AC 396 [*American Cyanamid*].
[74] [1987] 1 SCR 110 at 127-29, 38 DLR (4th) 321 [*Metropolitan Stores*].

[98] The three-branch test was ultimately refined in *RJR-MacDonald*:

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.[75]

[99] Where the applicant seeks a mandatory injunction, one that requires the respondent to perform some positive act rather than merely restraining the defendant from doing some act, the first test proceeds on a heightened standard, requiring a strong *prima facie* case.

[100] Canadian case law is relatively consistent in holding that *RJR-MacDonald* is the leading decision on the subject matter. However, the strict adherence to the traditional formulation of the test has been rejected by this Court.[76] As Lord Diplock stated in *American Cyanamid*:

> I would reiterate that, in addition to those to which I have referred, there may be other special factors to be taken into consideration in the particular circumstances of individual cases. The instant appeal affords one example of this.[77]

[101] The finding in *RJR-MacDonald* was developed in response to an alleged breach of the applicant's freedom of expression caused by legislation which required the applicant to adhere to certain packaging requirements on its tobacco products. In that case, the public interest centered largely on the AG's interest in warning the public about hazardous substances contained in tobacco products. The focus of the alleged *Charter* breach was on restraint of "commercial speech", and did not involve a public interest component.

[102] The *RJR-MacDonald* test is inadequate for interlocutory relief sought in every constitutional case. Undoubtedly, that is what this Court recognized in *Canada (Human Rights Commission) v Canadian Liberty Net*, holding that an extremely stringent test governs the granting of an interlocutory injunction to restrain speech outside of the commercial context.[78]

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[75] *RJR-MacDonald, supra* note 6 at p 334.
[76] *Metropolitan Stores*, *supra* note 75 at 128.
[77] *American Cyanamid*, *supra* note 74 at 5.
[78] [1998] 1 SCR 626, 157 DLR (4th) 385 [*Canadian Liberty Net*].

B. Prior restraint of free speech can only be ordered in the "rarest and clearest of cases"

[103] In reviewing the appropriate test for the granting of injunctive relief where the guarantee of freedom of expression in s 2(b) of the *Charter* is at issue, Bastarache J, writing for the majority, noted in following:

> 47 In my view, the *Cyanamid* test, even with these slight modifications, is inappropriate to the circumstances presented here. The main reason for this is the *Cyanamid*, as well as the two other cases mentioned above, involved the commercial context in which the criteria of "balance of convenience" and "irreparable harm" had some measurable meaning and which varied from case to case. Moreover, where expression is unmixed with some other commercial purpose or activity, it is virtually impossible to use the second and third criterial without grievously undermining the right to freedom of expression contained in 2*(b)* of the *Charter*. The reason for this is that the speaker usually has no tangible or measurable interest *other than the expression itself*, whereas the party seeking the injunction will almost always have such an interest. This test developed in the commercial context stacks the cards against the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself.
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> 48 The inappropriateness of the *Cyanamid* test is confirmed by the jurisprudence relating to injunctions against allegedly defamatory statements, in both England and Canada. In both countries, the *Cyanamid* test has been rejected for injunctions against dissemination of defamatory statements. Although defamation does not possess precisely the same characteristics as discriminatory hate speech, it is a much closer analogy than restraining a commercial activity, even where that commercial activity includes a speech element. Defamation typically involves damage to only one person's reputation and not an entire group. On the other hand, given the widespread circulation of many defamatory statements in the press and the crystallized damage which a defamatory statement may have, compared with the slow, insidious effect of a relatively isolated bigoted commentary, the two are not necessarily substantially different in terms of the "urgency" requirement. Certainly from the point of view of the rights of the speaker, bigotry and defamation cases both represent potentially low-or no-value speech and are in that sense, extremely similar. It is therefore helpful to look at the approach to injunctions in cases of defamatory speech to determine how "urgency" should be defined in the context of s. 13(1) of the *Human Rights Act*.[79]

[104] This Court has consistently warned against restricting the s 2(b) right except in the clearest of circumstances. Cory J's comments in *Edmonton Journal* lend further support to CBC's

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[79] *Ibid* at paras 47-48 [emphasis in original].

argument that the first branch of the tripartite test should be elevated to the "rarest and clearest of cases" threshold where freedom of the press is at issue:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(*b*) in absolute terms which distinguishes it, for example, from s. 8 of the Charter, which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(*b*) should therefore only be restricted in the clearest of circumstances.[80]

[105] In *Canadian Liberty Net,* Bastarache J went on to review the case law that attempted to define the test for granting an injunction in the context of defamation. In *Rapp v McClelland v Stewart Ltd.*, the Ontario High Court found that "an injunction should only issue where the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal."[81] Similarly, in *Champagne v Collège d'enseignement général et professionnel (CEGEP) de Jonquière*, the Quebec Court of Appeal suggested that "interlocutory injunctions should only be granted to restrain in advance written or spoken words in the rarest and clearest of cases – where the words are so manifestly defamatory and impossible to justify that an action in defamation would almost certainly succeed."[82]

[106] In summary, Bastarache J noted:

> These cases indicate quite clearly that the *Cyanamid* test is not applicable in cases of pure speech and, therefore, the appellants are misguided in presuming that the test does apply. As Griffiths L.J. points out in *Herbage v Pressdram, supra,* such a test would seldom, if ever, protect controversial speech. Nor do I believe that the modifications suggested by the appellants sufficiently relieve that problem. The same tests discussed here with respect to restraining potentially defamatory speech should be applied in cases of restraint of potential hate-speech, subject to modification which may prove necessary given the particular nature of bigotry as opposed to defamation. As the question now before us is moot, and as the parties

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[80] *Edmonton Journal*, *supra* note 47 at 1336.
[81] 34 OR (2d) 452 at 455-56, 1981 CanLII 1696 (H Ct J) quoted in *Canadian Liberty Net, supra* note 79 at para 49.
[82] [1997] RJQ 2395 at 2403, 1997 CanLII 10001 (Q CA) [emphasis added], quoted in *Canadian Liberty Net, ibid*

> did not address themselves to the appropriate tests, it would be inappropriate to speculate here as to how such distinctions might affect the analysis, if at all.[83]

V. Where free speech is at issue, the appropriate test is the one annunciated in *Canadian Liberty Net*

[107] CBC submits that on an application for an injunction, the appropriate threshold where a media organization's right to freedom of expression is at stake is the *Canadian Liberty Net* standard. The circumstances must present a rare and clear case where the conduct complained of would be impossible defend.[84] An elevated standard is necessary to ensure that the constitutionally protected right to freedom of expression and freedom of the press are upheld to protect both the media's and the public's interest in that expression.

[108] *Canadian Liberty Net* clearly contemplates that the test is the only threshold that can protect non-commercial speech on an injunction application.

[109] In this case, the expression that the CBC is seeking to protect is entirely dissimilar to the commercial nature of the speech in *RJR-MacDonald* which centered on the sale of tobacco products. This case is about the rights of the media to freedom of the press, and its obligation to report on matters of significant public interest. The conduct the AG seeks to enjoin directly impacts upon CBC's rights to freedom of expression.

[110] This Court has recognized the vital role that the media plays in disseminating information to the public on many occasions. In *Edmonton Journal* LaForest J opined:

> In all of this, I recognize as well the critical role of the press and other media in the broad dissemination of information and ideas in a complex modern society. The Charter indeed expressly includes "freedom of the press and other media of communication" in its guarantee of freedom of expression.[85]

[111] In *New Brunswick,* LaForest J once noted that s 2(b) protects the freedom of the press to comment on the courts, which is an essential aspect of our democratic society.[86] He cited the

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[83] *Canadian Liberty Net, ibid*.
[84] *Ibid*.
[85] *Edmonton Journal*, *supra* note 47 at 1373.
[86] *New Brunswick, supra* note 47 at para 26.

following passage from *Canadian Broadcasting Corp. v New Brunswick (Attorney General)* with approval at para 25:

> The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being.[87]

[112] The AG is attempting to retroactively stifle the media's expression at a time when that expression was not only lawful, but constitutionally guaranteed. The Trial Judge noted that "CBC had both a right, and in my view, a corresponding duty to report the news."[88] As a result, CBC submits that any application to enjoin that right and obligation must be evaluated on the highest of standards.

[113] Given that Bastarache J was prepared to adopt the "rarest and clearest of cases" approach in relation to potential hate-speech and defamation, which he characterized as "potentially low-or no-value speech",[89] surely the heightened threshold is at least as applicable, if not more applicable, where an injunction is sought restraining freedom of the press to report on court proceedings and criminal investigations.

A. This case is not a rare and clear case

[114] In the context of the AG's Application, the first question should be whether the CBC has indicated an intention to defend the criminal contempt charges brought against it for an alleged breach of the Publication Ban. If the CBC intends to defend the contempt application, it is up to the AG to prove that the defense is impossible to make out.

[115] The CBC's defense to criminal contempt has been pled throughout these proceedings. It is predicated on the CBC's submission that the Publication Ban does not capture articles posted to the CBC website prior to the date of the Publication Ban, therefore the CBC is not in violation of the order. In the end, after a full hearing of all the evidence, this position was accepted by the trial judge giving support to the argument that the injunction should never have issued.

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[87] [1991] 3 SCR 459 at 475, 85 DLR (4th) 57.
[88] Trial Decision, *supra* note 22 at para 36.
[89] *Canadian Liberty Net*, *supra* note 79 at para 48.

[116] Due to the ambiguity in the terms "publish" and "transmit", it should have been clear to the Majority that CBC does not possess the necessary *mens rea* for a conviction when the majority concluded that "either position is arguable". [90]

[117] At the time of the application and on appeal, CBC had undoubtedly established a possible defense to criminal contempt. Had the majority applied the correct test for an injunction in this circumstance, it would have been impossible to find that the AG demonstrated a "rare and clear case" sufficient to restrain CBC's right to freedom of speech and freedom of the press.

VI. In the alternative, the AG cannot meet the test in *RJR-MacDonald*

A. The AG must prove a strong *prima facie* case in relation to the underlying offense

[118] CBC submits that if the *Canadian Liberty Net* standard is not a stand-alone test, the AG is required nonetheless to demonstrate that CBC has no possible defense to the charges of criminal contempt. In other words, CBC argues that the AG must meet a strong *prima face* case of all the elements of criminal contempt on a *United Nurses* standard.

[119] The law of criminal contempt is clear: contempt of court is *strictissimi juris* and quasi penal in nature, given the possible consequences.[91] All elements of contempt must be proved by the party alleging contempt beyond a reasonable doubt.[92]

[120] The AG had the burden to demonstrate that it would likely succeed in proving beyond a reasonable doubt, that CBC defied or disobeyed a court order in a public way with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court.

[121] The civil test adopted by the Majority reversed the burden of proof by considering whether the AG had demonstrated "a strong *prima facie* case entitling it to a mandatory order directing

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[90] Court of Appeal Reasons, *supra* note 5 at para 10.
[91] Court of Appeal Reasons, *ibid* at para 21 citing *Continuing Care Employers' Bargaining Association v AUPE,* 2002 ABCA 148 at paras 146-48, 303 AR 137 and *Vidéotron Ltée v Industries Microlec Produits Électriques Inc*., [1992] 2 SCR 1065 at 1078, 96 DLR (4th) 376 [*Videotron*].
[92] Court of Appeal Reasons, *ibid*.

removal of the Articles from the website".[93] This "hybrid" approach has the effect of replacing the criminal standard of proof and the need to prove *mens rea* with a civil standard of proof in the context of restraining criminal conduct. Consequently, this approach deprives the accused of constitutional safeguards afforded to all persons charged with an offense.

[122] Both this Court and the Alberta Court of Appeal have warned against conflating "the distinct civil and criminal jurisdictions" thus creating an "unpredictable mish-mash" of civil and criminal proceedings.[94] A similar mish-mash is on display in the case at bar where a civil law concept has interfered unduly with what should properly be regarded as a criminal law matter.

[123] The Majority's ruling engages the possibility that the AG can meet a strong *prima facie* case by simply laying charges against an accused. As penal consequences are an available sanction for criminal contempt, s 7 of the *Charter* requires proof of the *mens rea* element of "intent, knowledge or recklessness as to the fact that public disobedience will tend to depreciate the authority of the court."[95]

[124] The most tragic result of the "hybrid" approach is that it offends one of the hallmarks of the Canadian criminal justice system – that the accused will receive the benefit of any doubt. A person charged with criminal contempt is "a person charged with an offense within the meaning of s 11 of the *Charter*."[96] This characterization should not change whether the AG seeks to enjoin conduct subject to the criminal law in a civil proceeding for injunctive relief or in the context of the criminal prosecution. As this Court has stated:

> Rules specific to contempt have been developed by the courts to supplement the exceptional rules created by the *Code of Civil Procedure* itself. The best known and most important of these rules is undoubtedly the requirement that contempt of court be proved beyond a reasonable doubt, an exceptional burden in civil law (*Imperial Oil Ltd. v Tanguay*, [1971] CA 109, followed in subsequent judgments). In cases of failure to obey an order, when there is doubt as to the legal effect of the order which has allegedly been violated,

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[93] *Ibid* at para 7.
[94] *Alberta (Attorney General) v. Malin*, 2016 ABCA 396 at para 21, citing *Kourtessis v MNR*, [1993] 2 SCR 53 at 80, 102 DLR (4th) 456.
[95] *United Nurses, supra* note 9 at 903.
[96] *Videotron, supra* note 92 at 1071.

> the respondent is to be given the benefit of that doubt (*Toupin v Longchamps*, C.A. Montreal, …).[97]

[125] Where there is any doubt as to the appropriate test to be applied and whether it must be proved on a civil or criminal standard, that doubt should be resolved in favour of the accused.[98]

1. The AG cannot establish a strong *prima facie* case for contempt beyond a reasonable doubt

[126] CBC submits that had the Majority properly interpreted the scope of the underlying offence, it would have determined, as the Trial Judge correctly did, that the articles in question were not in fact being "published" at all.[99] In the alternative, the Majority's acknowledgement that CBC's position in the scope of the offence was at "at least arguable" meant it had raised a reasonable doubt as to whether it was in fact committing an offence.

[127] Furthermore, the AG was obligated to establish a strong *prima facie* case of both the *actus reus* and the *mens rea* to satisfy the test in *United Nurses*.

[128] With respect to *mens rea, United Nurses* requires that the accused must be able to "predict in advance whether his or her conduct will constitute a crime". This is impossible given the ambiguity of the meaning of the terms "publish" and "transmit" combined with the contingent nature of publication bans under s 486.4(2).

[129] In considering a publication that deals with an offense involving a minor victim and is issued without notice to the media, there is no way a publisher could know in advance whether the act of publication will constitute a crime at some later point in the future. This is precisely the requirement that the Supreme Court emphasized in *United Nurses*.[100]

[130] It cannot be said that CBC's refusal to remove the Articles from its website constitutes "a public act of defiance of the court in circumstances where it knew, intended or was reckless as to

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[97] *Ibid* at 1077.
[98] Court of Appeal Reasons, *supra* note 5 at para 43.
[99] See paragraphs 47-79 of this Factum.
[100] *United Nurses*, *supra* note 9 at 903.

the fact that its act (or failure to act) would publicly bring the court into contempt."[101] The Majority acknowledged CBC was acting in good faith, and that its interpretation of the law was reasonable. Certainly, there was no finding that CBC intended in any way to undermine the authority of the courts.

[131] The fact that the CBC sought to challenge the Publication Ban does not constitute a "public act of defiance". CBC was not acting intentionally nor recklessly with an aim to depreciate the authority of the Court, but rather in good faith that it had properly complied with the publication ban as it understood it based on its previous experience, and a lack of judicial guidance on the issue. CBC's conduct throughout these proceedings is "not a challenge to the Court's authority, but a challenge to the Crown's interpretation of the Court's order."[102]

[132] As noted in *United Nurses*, "if the circumstances leave a reasonable doubt as to whether the breach was or should be expected to have this public quality, then the necessary *mens rea* would not be present and the accused would be acquitted, even if the matter in fact became public."

[133] Consequently, the AG failed to prove the required intention to support a strong *prima facie* case and the decision of the Chambers Judge should be restored.

B. The AG failed to prove irreparable harm

[134] The AG essentially argues two heads of irreparable harm to the administration of justice. The first is harm that is caused to the administration of justice when a court order is disobeyed, thereby depreciating the authority of the court. The second is harm caused to the administration of justice "in the sense that other young people might be deterred from reporting crimes against them if the CBC's posting remains."[103]

[135] In regard to the first alleged harm, the AG argued that the Chambers Judge erred in failing to consider the impact of the act of disobedience on the administration of justice, stating that this decision amounts to a finding that it is not necessarily harmful to defy a court order. This position

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[101] Application Reasons, *supra* note 7 at para 34.
[102] Trial Decision, *supra* note 22 at para 55.
[103] Court of Appeal Reasons, *supra* note 5 at para 49.

is a complete overreach and would deny CBC of the ability to challenge the AG's interpretation of an ambiguous court order that it is subjected to, a right which the Trial Judge recognized and encouraged.[104]

[136] With respect, the Majority erred in accepting that "allowing an ongoing breach of a no-publication order (assuming that is what is occurring) is harmful to the integrity of the administration of justice,"[105] where no breach had been proven.

[137] Firstly, at the time of the AG's application for an injunction, it was by no means established that the CBC had disobeyed any court order. CBC disagreed with the AG's interpretation of the scope of the Publication Ban and the only option available to seek clarification was to engage in a process resulting in a judicial determination.

[138] Secondly, where the AG alleges that flouting a court order is contemptuous and gives rise to harm to the administration of justice, the AG must prove that a breach of that order is actually occurring and not just alleged that it is occurring. In other words, the Court must be satisfied that the accused is guilty of an offense, or that illegal conduct has occurred.[106]

[139] Greckol J recognized this point in her dissent. She found that open defiance, based on a clear violation of the order, could not be shown because "the ambit of the prohibitory *Criminal Code* provision and the consequent terms of the non-publication order, as well as whether it applies to the activities of the CBC, is an unanswered question."[107]

[140] Greckol J is not the only judge who has expressed concern regarding the absence of clear direction in the Publication Ban. In his Reasons for Decision, the Trial Judge noted the following:

> Rather, this is a case where the challenge is not to the Court's authority but a challenge to the Crown's interpretation of the Court's order. That kind of challenge is to be expected and even encouraged in a free and democratic society. The scope or reach of a law or a Court's order can surely be challenged and questioned instead of being blindly adhered to. The development of our law has depended on just that kind of debate. Surely, a difference

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[104] Trial Decision, *supra* note 22 at para 55.
[105] Court of Appeal Reasons, *supra* note 5 at para 11.
[106] *Morgentaler*, *supra* note 39 at para 59.
[107] Court of Appeal Reasons, *supra* note 5 at para 52.

> of opinion is not criminal. And certainly, a reasonable position taken against the weight of authority does not become a criminal act because it is taken.[108]

[141] The Trial Judge's comments also speak to the fact that a challenge to a court order does not disparage the authority of the court, but instead upholds the integrity of the administration of justice in our free and democratic society as a whole. It is difficult to see how challenging the scope of the Publication Ban, while adhering to the conditions of the ban after the date it was imposed, could be harmful to the administration of justice in such a flagrant way that the AG suggests.

1. Evidence of irreparable harm is required

[142] CBC also disagrees with the Majority's finding that the AG does not have to prove harm because a publication ban under s 486.4(2.2) must be granted without proof of harm. Setting aside the issue that the AG could not even prove a likelihood that the CBC was breach of the Publication Ban, the law on injunctive relief is clear that proof of harm is always required. The applicant seeking an injunction must prove the type of harm that is irreparable, and evidence that the harm has been incurred.[109] This requirement does not change where the granting of the underlying order is mandatory without proof of harm.

[143] The threshold favored in Canada regarding proof of harm requires the applicant to prove its claim of irreparable harm with "clear and non-speculative" evidence.[110] This approach has been applied in Ontario, British Columbia, Alberta and Manitoba and by the Federal Court of Appeal.[111] Furthermore, the Federal Court of Appeal has recently heightened this standard in *Janssen Inc. v AbbVie Corp*.:

> On the irreparable harm branch of the test, the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm – not hypothetical and

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[108] Trial Decision, *supra* note 22 at para 55.
[109] Jeffrey Berryman, "The Centrality of Irreparable Harm in Interlocutory Injunctions" (2015) 17 IPJ 299 at 313 [Berryman Article].
[110] *Ibid* at 314.
[111] *Ibid* at 313. See also *Imperial Chemical Industries PLC v Apotex Inc* (1989), [1990] 1 FC 221, 1989 CarswellNat 545 at para 12 (CA); *Optilinx Systems Inc v Fiberco Solutions Inc,* 2014 ONSC 6944 at para 11, 123 OR (3d) 602; *RBC Dominion Securities Inc v MacDonald*, 2013 BCSC 992 at para 26; *Khadr v Bowden Institution,* 2015 ABCA 159 at para 25 [*Khadr*].

> speculative harm – that cannot be repaired later … [i]t would be strange if vague assumptions and bald assertions, rather than detailed and specific evidence, could support the granting of such relief.[112]

[144] Where the AG alleges that the public interest will suffer irreparable harm, the AG must lead evidence that is sufficiently clear and non-speculative to establish that there is a real risk that it will arise.[113] Evidence that some public interest "may or is likely" to suffer irreparable harm is not enough.[114]

[145] According to Berryman, "clear and non-speculative" relates to "(i) the existence of actual evidence, (ii) its sufficiency, and (iii) its probative value or credibility."[115]

[146] The AG failed to prove any harm to the administration of justice, or that there is a non-speculative *risk* of harm to the administration of justice. It has not led any evidence of harm at all.

[147] The only evidence on the record that could remotely relate to a potential risk to the administration of justice due to disobeying a court order is the evidence of the investigating detective alleging that CBC had breached a publication ban.[116] If a definite breach of a court order does not necessarily give rise to irreparable harm to the administration of justice, then evidence of an *alleged* breach surely cannot rise to the level of "clear and non-speculative" risk.[117]

[148] With respect to the second head of alleged irreparable harm to the administration of justice, the AG has led absolutely no evidence that other young people have been deterred from reporting crimes against them because the Articles remain posted to the CBC website. Instead, this potential harm seems to have been inferred by the majority given Parliament's enactment of s 486.4(2.2). This finding was made despite the Chambers Judge's finding that he was "unable to accept the proposition, without evidence, that young victims of any offence, or even some category of them,

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[112] 2014 FCA 112 at 24, 120 CPR (4th) 385.
[113] *Khadr, supra* note 112 at para 31.
[114] *Ibid* at para 25.
[115] Berryman Article, *supra* note 110 at 317.
[116] Affidavit of Detective Shelby Cech, (AR at 45).
[117] Court of Appeal Reasons, *supra* note 5 at para 51.

will be deterred from coming forward if the identity of a young murdered victim is not protected."[118]

[149] The Chambers Judge had the full evidentiary record before him and was in the best position to determine whether the AG had proven, through sufficient evidence, the risk of irreparable harm to the administration of justice. He found that it did not. This finding is entitled to deference, and it was an error of law for the Majority to substitute its own findings.

C. The media's right to freedom of expression is a relevant factor to consider on the balance of convenience

[150] The Chambers Judge found that if ordered to comply with the Publication Ban, the harm to the CBC's freedom of expression outweighed the harm, if any, to the administration of justice.[119] These are findings of fact and are entitled to deference on appeal.

[151] The AG urged the Court of Appeal to reject CBC's argument that its s 2(b) *Charter* rights to freedom of expression were relevant on the balance of convenience test as this argument amounted to a collateral attack on the contempt proceedings. In other words, the Attorney General's position is that CBC's s 2(b) rights are only relevant in a challenge to the constitutionality of s 486.4(2.2). This is simply incorrect.

[152] Regardless of the constitutionality of s 486.4(2.2), it was still necessary for the Chambers Judge to consider any impact on CBC's right to freedom of expression at the balance of convenience stage of the analysis. In fact, the Chambers Judge concluded that "even if one concedes as valid the reach of the March 15, 2016 publication ban to the earlier articles, undeniably that reach compromises the CBC's freedom of expression, and the public's interest in that expression."

[153] The Majority erred in its legal analysis of CBC's right to freedom of expression in relation to the balance of convenience test, stating at para 12:

> The relevant provisions of the *Criminal Code* must be presumed at this stage to be constitutional, notwithstanding the respondent's declared intention to challenge them. To

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[118] Application Reasons, *supra* note 7 at para 54.
[119] *Ibid* at para 66.

> the extent that they limit freedom of expression, it must be presumed (at this stage of the litigation) that those provisions are justified in a free and democratic society: *Canadian Newspapers Co. v Canada (Attorney General)*, [1988] 2 SCR 122; *Toronto Star Newspapers Ltd. v Canada*, 2010 SCC 21, [2010] 1 SCR 721. Any limit of freedom of expression would not be a defence to the contempt charges, and the respondent cannot argue that it is "inconvenient" for it to obey the law.[120]

[154] CBC did not assert its *Charter* rights as a defence to the contempt charges, but rather as a factor to be weighed on the balance of convenience test. This point was recognized by Greckol J in her dissent.[121] In *RJR-MacDonald* and *Metropolitan Stores*, this Court made it clear that constitutional rights are relevant as one of the "many other special factors to be taken into consideration in the particular circumstances of individual cases" on an application for interlocutory relief.[122]

[155] Further, the Majority's analysis is predicated on the assumption that CBC is in breach of the Publication Ban. The Chambers Judge refused to make that finding, and the Majority concluded that CBC's position with respect to the impact of the Publication Ban on the Articles was "arguable". Therefore, there can be no basis for ignoring the CBC's constitutionally guaranteed right in determining whether the AG is entitled to an exceptional interlocutory remedy prior to the criminal trial.

[156] Whether the court should exercise its discretion to issue an injunction is a separate and distinct legal issue from whether s 486.4(2.2) of the *Criminal Code* is constitutional. While CBC's right to freedom of expression is clearly relevant in the latter proceedings, it also must undeniably be a factor in determining the former.

[157] The fact that publication bans restrict the media's right to freedom of expression is well established in almost 30 years of Canadian case law. In this Court's seminal decision on publication bans, *R v Dagenais*, Lamer CJC emphasized this point:

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[120] Court of Appeal Reasons, *supra* note 5.
[121] *Ibid* at para 56-58.
[122] *Supra* note 6 at 343; *supra* note 75 at para 37 (both quoting *American Cyanamid*, *supra* note 74 at 5.

> As I said, for the Court, in *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, at p. 129:
>
> > Freedom of the press is indeed an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom.[123]

[158] The Majority also erred in failing to consider the public's interest in the media's s 2(b) right to freedom of expression. In *RJR-MacDonald*, Sopinka and Cory JJ made it clear that it is not only the AG that can assert harm to the public interest:

> Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores* . A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives* , 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:
>
> > While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.
>
> It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.[124]

[159] While *RJR-MacDonald* suggests that a private party (i.e. a non-government entity) alleging harm to the public interest must demonstrate through evidence that the harm exists, CBC submits that is not necessary in this case. The public's interest in the media's freedom of expression is trite

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[123] *Dagenais, supra* note 57 at 876.
[124] *RJR-MacDonald*, *supra* note 6 at 343-44.

law, and is a constitutionally protected right. Therefore, any infringement on that right is *de facto* harmful.

[160] The only "factor" that the Attorney General has advanced is its alleged irreparable harm to the administration of justice discussed in relation to second branch of the tripartite test. The Chambers Judge noted this harm was slight, if it exists at all. However, the Chambers Judge found that both the CBC's constitutionally protected right to freedom of expression and the public's interest in that expression would be impaired if the injunction were granted, therefore the balance must weigh in favor of dismissing the injunction application.

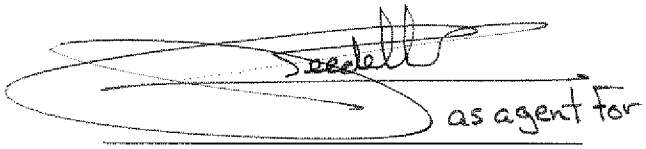
PART IV – SUBMISSIONS AS TO COSTS

[161] The CBC does not seek costs and respectfully asks that costs not be awarded against it.

PART V – NATURE OF THE ORDER SOUGHT

[162] The CBC requests that the order of the Court of Appeal be quashed and the judgment of the Court of Queen's Bench of Alberta be affirmed.

All of which is respectfully submitted this 5th day of June, 2017.



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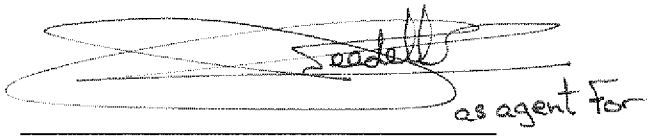

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PART VI – TABLE OF AUTHORITIES

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