Court 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

FACTUM OF THE APPELLANTS

(Pursuant to Rules 35 and 42 of the *Rules of the Supreme Court of Canada)*

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This appeal addresses conflicting judicial interpretations of the publication ban in s. 648 of the *Criminal Code*, and specifically the consistent misinterpretation in British Columbia, holding that the ban applies both before and after a jury is empanelled. This misinterpretation, including in the decision under appeal, is despite the clear limiting language of the section:

> 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. (emphasis added)

2. The issue arose with the 1985 enactment of s. 645(5), permitting judges to hold hearings prior to empanelling a jury which would "ordinarily or necessarily be dealt with in the absence of the jury"[1]. Such pre-empanelment hearings today sometimes span many months, and the misinterpretation appealed from places a ban on them all. The decision under appeal, ***R. v Coban***, 2022 BCSC 880 (CanLII)[2] meant over a year of hearings, including a successful *Charter* challenge to a *Criminal Code* provision, having no bearing on evidence or guilt in the criminal charges, were all banned from publication.

3. The interpretation of s. 648 is in conflict across Canada. In Alberta, the interpretation has been consistently that the ban does not arise until a jury is empanelled. In Nova Scotia, Manitoba and Saskatchewan the courts have adopted same interpretation as in British Columbia. In Ontario and Quebec, there are internally clashing lines of authority on the issue. The openness of pre-jury hearings is starkly different depending on which line of authority governs.

4. The decisions holding that s. 648 ban applies before a jury is selected, including the decision under appeal, have done so on a "purposive" approach. That approach has erroneously assumed what Parliament intended, despite the availability of discretionary bans and despite the protections which arise in the jury selection, judicial direction to jurors and jurors' oaths.

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[1] S.C. 1985 c. 19 (33-34 Eliz. II), amending then s. 589 of the Criminal Code by adding the with the provision that today is 645(5).

[2] Appellants' Appeal Record ("AAR"), p. 1

5. Given the severe consequence on the ability of the media to report on, and of the Canadian public to receive, information about the proceedings and proper functioning of the courts, this matter requires the intervention of this Court to unify the interpretation of s. 648 across Canada, in line with proper interpretation principles and a presumption of openness.

6. The Appellants are a consortium of most major media outlets across Canada. They do not challenge the constitutionality of s. 648. Rather, the appeal is limited to principles of statutory interpretation.

B. Statement of Facts

7. The underlying proceeding where s. 648 arose is ***R. v. Aydin Coban***, in which the accused was charged with extortion (*Criminal Code, s. 302*), importing child pornography (163.1(3)), possession of child pornography (163.1(4)), luring (172.1) and criminal harassment (264).

8. The victim of these alleged crimes was Amanda Todd, whose tragedy became a prominent matter of national and international conversation when, shortly before committing suicide, she posted a YouTube video of herself, revealing the online torment she had suffered.[3]

9. Pretrial proceedings before the appointed trial judge occurred over 15 months, from February 2021 through May 2022 before jury was selected in June, 2022. The pre-jury hearings included case management conferences and motions. A journalist who attended some of the pre-jury hearings deposed that those hearings included discussion of expected testimony regarding internet communications, international witnesses, a motion regarding Facebook records, and discussions about challenges in picking a jury.[4]

10. The journalist, Rumina Daya, deposed, among other things:

> I wish to gather and publish and inform the public about these interesting proceedings, as they illustrate the nature of the case and challenges of catching and prosecuting alleged

---

[3] Descriptions of the YouTube video and extent of publicity: 2022 BCSC 14, paras 8 and 12, AAR pp. 23-24

[4] Affidavit #2 of Rumina Daya, AAR p. 19, para. 4

cyber predators.[5]

11. No evidence was advanced on the application below indicating that any of the pretrial proceedings prior to jury selection involved matters which would prejudice the jury.

12. One of these pretrial motions was a successful *Charter* challenge to *Criminal Code* section 486.5(3). That section would otherwise have absurdly prevented publishing Amanda Todd's identity, despite the vast knowledge and notoriety of her name. It created an automatic, irreversible ban on the identity of those depicted in alleged child pornography.

13. That *Charter* challenge was brought by these appellants and Amanda Todd's mother. Detailed material was filed, and it was heard on November 2 and 3, 2021, with Reasons for Judgment striking down s. 486.5(3) with immediate effect issued January 10, 2022.[6]

14. Despite the fact that this *Charter* challenge had no bearing on trial evidence or the guilt of the accused, all filings, hearings and Reasons were banned from publication under the judge's interpretation of the s. 648 ban below, although the judge allowed publication of the outcome. Many months later, after the trial had ended and the ban expired, those Reasons were made public: ***R. v Coban***, 2022 BCSC 14 (CanLII)

15. The appellants brought a second motion prior to jury selection in ***R. v Coban***, also banned from publication under the trial judge's interpretation of s. 648. This was the application which led to the decision under appeal in this court. The motion, filed on May 5, 2022 and heard on May 18, 2022, sought a clarification or declaration that s. 648 does not apply to proceedings which occur prior to the selection of the jury.[7] On May 26, 2022, the Honourable Justice gave Reasons dismissing that motion[8] on the basis that prior jurisprudence in British Columbia was binding. This is the decision appealed from in the present appeal.

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[5] Ibid

[6] Reasons striking down 486.5(3) at Appeal Record, p. 20, Daya Affidavit #2, Exhibit A

[7] Notice of Application regarding interpretation of s 648, AAR p. 10

[8] Reasons dismissing application, 2022 BCSC 880, at AAR. p. 1

16. The motion regarding s. 648, the material filed, the hearing and Reasons for Judgment were all banned under the judge's interpretation of s. 648, despite having no bearing on trial evidence or the guilt. Months later, after the trial ended, those Reasons were made public: ***R. v Coban***, 2022 BCSC 880 (CanLII). Also after trial ended, some Reasons on pre-jury motions were made public, although not any oral rulings or hearings. The Reasons which were released include some evidentiary matters, though few would have justified more than a partial ban on a *Dagenais/Mentuck* test, and much is of public interest and non-prejudicial. For example:

a. Reasons on a substantially uncontested motion to admit evidence of a witness who recognized the accused in photographs: *R. v Coban*, 2022 BCSC 263 (CanLII),

b. Reasons on an application to limit some geolocation evidence from an expert on IP protocols: *R. v Coban*, 2022 BCSC 961 (CanLII),

c. Reasons on an application for Crown to disclose Amanda Todd's social media and related communications, which described the type and volume, but not the contents of any such messages: *R. v Coban*, 2022 BCSC 66 (CanLII),

d. Reasons denying an application to cross examine a Facebook representative on the reliability of Facebook records, which do not refer to the content of any such records: *R. v Coban*, 2021 BCSC 2303 (CanLII).

17. The jury was selected and trial of began on June 6, 2022. The jury retired to consider its verdict on August 5, 2022 and returned a guilty verdict on August 6, 2022. He was sentenced on October 14, 2022 to 13 years in prison.

18. The s. 648 ban on its wording expired when the "jury retire[d] to consider its verdict" on August 5, 2022. The likelihood of this occurring was raised by the appellants in their leave application to this Court filed June 9, 2022. Few if any motions on the interpretation of s. 648 could make it to a hearing before this court without becoming moot, yet the issue is recurring and is the subject of conflicting decisions across Canada.

PART II – QUESTIONS IN ISSUE

19. Does the publication ban in section 648 of the *Criminal Code of Canada* apply to proceedings prior to jury selection?

PART III – STATEMENT OF ARGUMENT

A. THE DECISION BELOW

20. On the application below, the court considered itself bound by ***R. v. Malik***, 2002 BCSC 80 and the subsequent British Columbia decisions that have followed ***Malik***.

21. In ***Malik***, where the s. 648 ban arose in the context of a prosecution of the accused in the Air India tragedy, the judge acknowledged jurisprudence from Alberta holding that s. 648 does not arise until a jury has been empanelled, but disagreed, saying:

> [20] The purpose of the mandatory publication deferral contained in s. 648(1) is to safeguard both the rights of the accused and the Crown to a fair trial in the context of a jury trial.
>
> [21] Following the proclamation of the ***Charter***, the volume and scope of pre-trial applications grew, becoming more complex and time consuming. Empanelling a jury and then sending them home while weeks or more of pre-trial applications were addressed was impractical and served no purpose in most instances. Section 645(5) was enacted in 1985 in an effort to address that concern. The section provides the trial judge with the discretion to conduct pre-trial matters prior to the empanelling of the jury.
>
> [22] I accept the submission of the respondents that, in order to protect the right to a fair trial, Parliament did not intend to derogate from the mandatory deferral of publication of information concerning pre-trial matters. Accordingly, I find that s. 648(1) applies to proceedings which take place pursuant to s. 645(5) of the ***Code***.

22. In the decision under appeal (2022 BCSC 880), the judge referred to ***Malik*** and a number of British Columbia cases that have taken the same approach[9] and said:

> [16] In summary, *Malik* is binding on me unless one of the *Spruce Mills* criteria, as refined by *Sullivan*, authorizes me to depart from it. Having found that none of these criteria are met, I am satisfied that *stare decisis* binds me to follow *Malik*.

B. JURISPRUDENTIAL CONFLICT ACROSS CANADA

23. Both Ontario and Quebec have internally conflicting lines of authority on the interpretation of s. 648. Decisions and interpreting s. 648 as applying prior to jury selection include ***Canadian Broadcasting Corp. v. Millard*** (2015), 2015 ONSC 6583 (CanLII), 338 C.C.C. (3d) 227 (Ont. S.C.J.) and ***LaPresse v Silva***, 2022 QCCS 406. This court has granted

[9] *R. v. Coban*, 2022 BCSC 880, para. 12

leave to appeal in the latter case, ***Silva*** (SCC file no. 40175), which is being heard sequentially with the present appeal.

24. In Ontario, the contrary view, namely that the ban does not arise until a jury is empanelled, is represented most recently by ***R.* v. *Wright***, 2020 ONSC 7049. In Quebec, that view is represented most recently by ***R v. Bebawi***, 2019 QSSC 594 which closely examined the history of s. 648 and concluded that s. 648 does not arise until a jury has been selected.

25. The Alberta approach has been consistently that s. 648 ban does not arise until a jury is selected. The Alberta law was reviewed in ***R. v. Twitchell***, 2010 ABQB 692:

> 13… Both Binder J. in ***R. v. Cheung*** (2000), 2000 ABQB 905 (CanLII), 150 CCC (3d) 192 (QB) and Watson J., as he then was, in ***R. v. Trang*** (2001), 2001 ABQB 437 (CanLII), 295 A.R. 250 (QB) concluded that pre-trial applications are not captured by s. 648 and therefore any restriction on public access to or publication of the proceedings is subject to the ***Dagenais*** principles. However, the rest of the country has adopted a different approach.

26. The view that s. 648 does not apply to pre-jury hearings is also expressed in **Criminal Pleadings & Practice in Canada**, 3rd Edition:

> § 17:53. Restriction on publication (s. 648)
> "No information" may be *published* regarding "any portion of the trial when the jury is *not* present". 1 Read literally, this prohibition applies only "after permission to separate is given to members of the jury". Thus, it may *not* apply to publications made *before* the jury is permitted to separate about rulings made *before* the jury is empanelled under s. 645(5). Consequently, a court may use its "inherent jurisdiction" to make a "non-publication ban" at the time of the pre-trial rulings.[10]

27. Section 647 of the *Criminal Code* explains "permission to separate", and its language contemplates an actual jury being in place, who must be kept in the charge of the sheriff when such permission is not given:

> **647 (1)** The judge may, at any time before the jury retires to consider its verdict, permit the members of the jury to separate.

---

[10] At para. § 17:51 of *Criminal Pleadings & Practice in Canada*, 3rd Edition, the author explains "permission to separate", noting:

> At common law, jurors, once sworn, had to be "kept together" *without* meat, drink, fire or candle *until* they rendered their verdict. 1 The trial judge now may *permit* the jury to *separate, i.e.*, to come and go when *not* hearing evidence, at any time *before* it retires to consider its verdict…

> **(2)** Where permission to separate under subsection (1) cannot be given or is not given, the jury shall be kept under the charge of an officer of the court as the judge directs, and that officer shall prevent the jurors from communicating with anyone other than himself or another member of the jury without leave of the judge.

28. In Nova Scotia, courts have held that the s. 648 ban applies both before and after the jury is empanelled: ***R. v. Lalo***, 2002 NSSC 21. In Manitoba and Saskatchewan, the courts have also ruled that the s. 648 ban applies both before and after the jury is selected: ***R v Stobbe***, 2011 MBQB 293; ***R v Stanley***, 2018 SKQB 27.

29. The authorities holding that the ban applies even before jury selection divide into at least two subsets. One subset holds that the word "information" is to be interpreted to refer to prejudicial information, e.g. ***Malik*** and ***R. v. Brown***, 1998 CanLII 14946 (ON SC), or evidentiary information ordinarily heard in the absence of the jury after it is empanelled, e.g. ***R. v. Bernardo,*** [1995] O.J. No. 247 (OCJ), ***R v Stobbe***, 2011 MBQB 293, and ***Lalo***, leaving room for the court to permit publication of information or summaries it deems non-prejudicial.

30. Some of these decisions have found support for their approach in the language of s. 645(5), under which pre-jury hearings may be held (e.g. paras. 26 and 43 of ***Stobbe***):

> In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn. (emphasis added).

31. Another subset of authorities holds that the s. 648 ban applies to all pretrial hearings before the designated trial judge in the absence of the jury, both before and after jury selection, and there are no exceptions. This is the approach of ***Canadian Broadcasting Corp. v. Millard***, *supra* (paras. 26, 63-65).

32. This court noted the conflict in jurisprudence in ***R. v. Brassington***, 2018 SCC 37 (CanLII), [2018] 2 SCR 617, at footnote 1:

> … The application of s. 648(1) to pre-trial proceedings such as these, where no jury has yet been struck, is the subject of conflicting decisions in trial courts (see, for example, *R. v. Cheung* (2000), 2000 ABQB 905 (CanLII), 150 C.C.C. (3d) 192 (Alta. Q.B.); *R. v. Trang* (2001), 2001 ABQB 437 (CanLII), 201 D.L.R. (4th) 160 (Alta. Q.B.); *R. v.*

Sandham (2008), [2008 CanLII 83941 (ON SC)], 248 C.C.C. (3d) 543 (Ont. S.C.J.); *R. v. Stobbe* (2011), [2011 MBQB 293 (CanLII)], 284 C.C.C. (3d) 123 (Man. Q.B.); *Canadian Broadcasting Corp. v. Millard* (2015), [2015 ONSC 6583 (CanLII)], 338 C.C.C. (3d) 227 (Ont. S.C.J.); *R. v. Stanley*, [2018 SKQB 27]).

C. LEGISLATIVE HISTORY AND PURPOSE

33. ***White*** describes the genesis of sections 648 and 645(5) as follows:

> [25] There is no dispute in the caselaw about the purpose of the provisions at issue. Section 648(1) was enacted by Parliament in 1972. Its purpose is clear: to ensure that the jury decides the case based only on the evidence heard in the courtroom. Section 645(5) was enacted years later, in 1985. Its purpose is also clear: to avoid the problem of juries being chosen and then sent home for weeks or even months while the trial judge deals with issues relating to the admissibility of evidence at trial: *R. v. Curtis*, 1991 CarswellOnt 738 (Ont. Ct. (Gen. Div.)), at para. 4.

34. In the decision cited above, ***R. v. Curtis***, also at [CanLII 11732] (ON SC), Ewaschuk, J. explained that "at common law, a trial judge sitting with a jury could not make evidentiary rulings until after a jury had been selected and the accused had been placed in their charge" (C.C.C. p 157), and s. 645(5) relieved that difficulty. The court in ***Curtis*** made clear that the jurisdiction granted by s. 645(5) is for evidentiary hearings (p. 158), and that a judge doing so is thereby seized of the trial (p. 159).

35. The line of authorities holding that s. 648 applies before jury selection rely on a purposive approach: see for example ***Millard*** paras. 8 and 25; ***Malik*** paras. 20 and 22. Their reasoning is that Parliament's concern was to protect jurors from certain information, and that information might arise in hearings both before and after jury selection.

36. This view of Parliament's "purpose" in enacting s, 645(5) and its impact on s. 648 is supposition and fails to account for multiple considerations Parliament had to balance. It assumes Parliament perceived no distinction between the potential for prejudice in the pre-jury and jury phase of proceedings; that it did not have in mind the many protections which arise in the jury selection and directions to the jury.

37. This view of the purpose of the provisions is simplistic. It assumes Parliament had little regard for openness of the many hearings which might occur before a jury is empanelled, and

that Parliament was prepared to create a blanket ban on all pretrial hearings spanning months or even over a year in major cases, despite the availability of discretionary bans where justified.

38. Legislative history is relevant to interpreting the purpose or evolution of the purpose of a statutory provision. In Sullivan, *The Construction of Statutes*, (7th ed 2022) the author notes at s. 9.03[8] at p. 278:

> **[8] Purpose inferred from tracing legislative evolution.**
>
> Another way of establishing legislative purpose is to trace the evolution of legislation from its inception, through successive amendments, to its current formulation." Tracing may reveal past decisions by the legislature to adopt a new policy or strike out in a new direction; it may reveal a gradual trend or evolution in legislative policy; or it may reveal the original purpose of legislation and show that this purpose has remained constant through successive amendments to the present. [footnotes omitted]

39. The legislative history shows that not only did Parliament leave in place the limiting language of s. 648 ("after permission to separate is given to members of a jury") when enacting s. 645(5) in 1985, but it also explicitly considered and rejected a mandatory ban in the pre-jury stage in a 1994 proposed amendment.

40. The consideration in 1994 occurred when Parliament was presented with *Criminal Code* amendments, Bill C-42, which included an explicit proposed provision that the s. 648 ban would apply to the pre-jury stage. In light of openness concerns, that amendment was abandoned. This history was detailed in ***R. v. Cheung*** (2000), 2000 ABQB 905 (CanLII) at paras 34-40, which were quoted in ***Twitchell*** at para. 18:

> [35] The Media referred to ***Bill C-42 (An Act to amend the Criminal Code and other Acts (miscellaneous matters))***, introduced by Parliament in the House of Commons on June 15, 1994. ***Bill C-42*** contained the following amendment:
>
> > 62. Subsection 648(1) of the Act is replaced by the following:
> >
> > Restriction on publication
> >
> > 648(1) Information regarding any portion of a trial shall not be published in any newspaper or broadcast

> (a) in respect of any matter dealt with by a judge before any juror is sworn, until the jury that is eventually sworn retires to consider its verdict; and
>
> (b) in respect of any matter dealt with after the jury is sworn but when the jury is not present and permission to separate is given to members of the jury, until the jury retires to consider its verdict.

[36] At the time of the second reading of ***Bill C-42*** on October 4, 1994, Ms. Sue Barnes stated (Record of Hansard Proceedings, p. 6521):

> There are proposals aimed at removing obsolete provisions or filling gaps created by changing circumstances. Gaps which presently exist with respect to publicity for certain pretrial proceedings would be closed.
>
> It is important that the rights of accused persons to a fair trial before an impartial jury not be compromised by premature publicity of information which may or may not be relevant in admissible evidence.

[37] On December 6, 1994, representatives of the Canadian Daily Newspaper Association appeared before the Standing Senate Committee on Legal and Constitutional Affairs arguing that the proposed s. 648 amendment was overbroad, in effect throwing a "blanket of secrecy" over events which take place in open court and which would not affect the ability of an accused to receive a fair trial (pp. 17:4 - 17:8).

[38] ***Dagenais*** was released on December 8, 1994. Four days later, the Committee Report to the Senate recommended that s. 62 of ***Bill C-42*** be dropped. Chairman Senator Gérald Beaudoin stated (p. 1096):

> In light of the recent decision of the Supreme Court of Canada regarding "The Boys of St. Vincent's" in which the Supreme Court indicated that one must strike a fair balance between the right of the accused to a fair trial and the public's right to know, the committee feels it is preferable to drop this clause from Bill C-42. If the Minister of Justice is of the opinion that the clause is necessary, he will have to revise the wording to bring it into line with the recent decision of the Supreme Court of Canada and the rights and freedoms protected by the Canadian Charter of Rights and Freedoms.

[39] Although not brought to the attention of this Court by the Media, a review of Hansard further reveals that on December 13, 1994, Allan Rock moved that amendments made by the Senate to ***Bill C-42*** be concurred in, stating (p. 9010):

> It was pointed out by the committee of the Senate which considered this clause that the language which the government used to achieve that purpose might be overbroad. It might be mandatory where permissive language might be preferable. In any event the provision, however worded, should permit the publication of matters other than those which might sway a jury if they were made public before the panel was sworn in.
>
> We are happy to have that clause removed as well. We will consider it and try to meet the legitimate concerns that have been expressed. We will try to improve it and bring it forward at another time.

[40] The Media argued that it is clear from this legislative history that Parliament never understood nor intended s. 648(1) to apply to pre-jury proceedings. Furthermore, ***Dagenais*** was issued four days prior to the Senate Committee's vote to delete the amendments to s. 648 from ***Bill C-42,*** and was clearly taken into account in the Senate Committee's deliberations. The court should not do that which Parliament has refused to do, particularly where the refusal was as a result of a constitutional concern.

41. The explanation given by the Justice Minister Rock to the House of Commons on December 13, 1994, partially quoted above, also included an explanation that illustrates the intention was to address hearings with prejudicial information, rather than all pre-jury hearings:

> It was the intention of the government in putting this clause in the bill to fill a gap which has existed for some time and to provide for orders banning publication in those cases in which pretrial motions concerning the admissibility of certain evidence were heard in courtrooms before the jury was actually sworn in.
>
> The publication of such pretrial motions, particularly as they relate to evidence that might eventually be heard, might contaminate members of a prospective jury panel, might give them impressions or information about the evidence which would make it more difficult or impossible for them to serve impartially.[11]

---

[11] The entire statement of Minister Rock, including these passages and those quoted in *Cheung*, appear at Hansard, Dec. 13, 1994, p. 9010

42. The Senate Committee that recommended deletion of the amendment to s. 648 (which was clause 62 of Bill C-42) met on December 12, 1994. The following relevant statements were made in the proceedings:[12] The references to clause 61 was an unrelated provision.

> p. 19:6-7, per Mr. Yvan Roy, Senior General Counsel, Criminal Law Policy, Department of Justice
> …
> Mr. Chairman, following the decision of the Supreme Court of Canada of last Thursday, a decision rendered by a majority of 7-2 I think that the bottom line is that the common law has changed as of last Thursday.
>
> …
> In a nutshell, the balance, which in the past was clearly in favour of ensuring a fair trial, has been shifted slightly. In those circumstances where there may be competing interests, that balance now is for the judges to make sure that one interest does not necessarily outweigh the other.
> In those circumstances, it may be required by Parliament to take a second look at clause 62, to which you have referred earlier in your comments, and which has been the subject of much debate, both before honourable senators here and also in the media, generally speaking. The Minister of Justice has indicated that he would be supportive of whatever course of action honourable senators choose to follow in the circumstances. It is a difficult issue.
> …
> P 19:11 (following discussion of other issues)
>
> The Chairman: Are you suggesting that we delete both clauses 61 and 62?
> Senator Doyle: Yes.
> Senator Gigantes: Senator Neiman was making the same suggestion.
> The Chairman: Senator Neiman, are you saying that clauses 61 and 62 should be deleted?
> Senator Neiman: Yes. That is what I should have said.
> …
> P 19:25
> Chairman:Shall clause 62 carry?
> Some Hon. Senators: Yes.
> Some Hon. Senators: No.
> The Chairman: All those in favour? One.
> Senator Gigantes: I like the clause.
> The Chairman: All those opposed?
> The vote is 8 to 1. Clause 62 will be deleted

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[12] Hansard, Senate 9th Report, proceedings of Dec 12, 1994

43. In sum, Parliament was aware of the important issue of whether s. 648 should create a mandatory ban on pre-jury proceedings and in 1994 considered language which would have created such a ban. Parliament chose not to proceed with it in light of openness concerns and the then very recent decision in ***Dagenais v. Canadian Broadcasting Corp*.,** 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, understanding that the alternate position was that pre-jury matters would be subject to discretionary bans where appropriate.

44. The intention as revealed in the 1994 Parliamentary proceedings regarding Bill C-42 was not referred to in the original British Columbia decision on s. 648, ***Malik***. The above legislative history makes clear that the judge in ***Malik*** and similar cases which generalize about Parliament's intent did not give effect to the fact that Parliament had considered the important difference between the pre-jury phase and the phase after jury selection, and the important difference between permissive as opposed to mandatory bans and their impact on openness.

45. The overly simplified view of Parliament's purpose is apparent in this passage from ***Malik***:

> [22] I accept the submission of the respondents that, in order to protect the right to a fair trial, Parliament did not intend to derogate from the mandatory deferral of publication of information concerning pre-trial matters. Accordingly, I find that s. 648(1) applies to proceedings which take place pursuant to s. 645(5) of the ***Code***.

46. Parliament again addressed s. 648 in 2005, when a collection of amendments in **S.C. 2005, c. 32**, included clause 21, changing the word "newspaper" in s. 648 to "document". By that time there was a live judicial conflict over whether s. 848 applied to pre-jury hearings, but Parliament did not enact any language to alter the limiting language, "after permission to separate has been given to a jury".

47. In each consideration, Parliament had to balance between trial fairness concerns and openness. It is not constitutionally sound to place purported fair trial rights of accused over the equally *Charter*-protected rights of journalists reporting on the courts and citizens relying on those reports. It is evident from the Hansard quotations of Justice Minister Rock earlier in this factum, that this need for balance motivated the deletion of the 1994 proposed amendment.

48. As to the protections which arise during and following jury selection, this court has repeatedly expressed confidence in these measures to ensure fair trials even where juries have been exposed to prior information. In ***Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)***, 1995 CanLII 86 (SCC), [1995] 2 SCR 97, at paras. 161, 132-134, where the Supreme Court rejected an application for a publication ban on a public inquiry occurring before a criminal trial, the concurring reasons of Cory, J. made these observations

> 132 The objective of finding 12 jurors who know nothing of the facts of a highly-publicized case is, today, patently unrealistic. Just as clearly, impartiality cannot be equated with ignorance of all the facts of the case. A definition of an impartial juror today must take into account not only all our present methods of communication and news reporting techniques, but also the heightened protection of individual rights which has existed in this country since the introduction of the *Charter* in 1982. It comes down to this: in order to hold a fair trial it must be possible to find jurors who, although familiar with the case, are able to discard any previously formed opinions and to embark upon their duties armed with both an assumption that the accused is innocent until proven otherwise, and a willingness to determine liability based solely on the evidence presented at trial.
>
> 133 I am of the view that this objective is readily attainable in the vast majority of criminal trials even in the face of a great deal of publicity. … The confidence in the ability of jurors to accomplish their tasks has been put in this way in *R. v. W. (D.)*, 1991 CanLII 93 (SCC), [1991] 1 S.C.R. 742, at p. 761:
>
>> Today's jurors are intelligent and conscientious, anxious to perform their duties as jurors in the best possible manner. They are not likely to be forgetful of instructions.
>
> 134 The solemnity of the juror's oath, the existence of procedures such as change of venue and challenge for cause, and the careful attention which jurors pay to the instructions of a judge all help to ensure that jurors will carry out their duties impartially…

D. THE IMPACT ON OPENNESS

49. An interpretation that results in a blanket, mandatory ban on all pre-jury hearings creates a significant infringement on openness. In complex cases, this effectively blindfolds the public to dozens of hearings. Since there is no jury empanelled at that stage, the jury is *always* absent, meaning the ban is always in place, unlike its selective application during the trial proper, where the ban only arises when the judge determines the jury should be absent for specific portions.

50. The subset of authorities holding that certain non-prejudicial matters might be ordered publishable does little to ameliorate the infringement in practise, as it requires a media

application, along with its cost and delay, to interrupt the trial. Many judges in the midst of a jury trial defer these until the end of trial, when the reporting of the matter is far from contemporaneous. Decisions permitting limited publication are few and far between.

51. Where statutes can be interpreted in either a constitutional or unconstitutional manner, courts are to strive for the constitutional interpretation. This was enunciated by this court in ***R. v. Sharpe***, 2001 SCC 2, at para. 33.

> 33 Much has been written about the interpretation of legislation (see, e.g., R. Sullivan, *Statutory Interpretation* (1997); R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994); P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000)). However, E. A. Driedger in *Construction of Statutes* (2nd ed. 1983) best captures the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, Driedger states: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." [citations omitted] … Supplementing this approach is the presumption that Parliament intended to enact legislation in conformity with the *Charter*: see Sullivan, *Driedger on the Construction of Statutes*, *supra*, at pp. 322-27. If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted (citations omitted, emphasis added)

52. In the case of s. 648, the interpretation that imposes automatic bans on all pre-jury hearings clashes with this approach, preventing reporting of months of hearings, regardless of their content or whether they affect a fair trial. This infringement is at its worst in the most major criminal cases, where pretrial proceedings are numerous and span great periods of time.

53. An interpretation founded on the view that Parliament intended an automatic, as opposed to discretionary, ban on months or years of court hearings, without any consideration as to the nature or content of those hearings, flies in the face of the presumption of openness that has been emphasized time and time again by this court. A few of the many examples of this Court's decisions will suffice.

54. ***Edmonton Journal v. Alberta (Attorney General),*** 1989 CanLII 20 (SCC), [1989] 2 SCR 1326, per Cory J, for the majority:

> … As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public.

> The importance of the concept that justice be done openly has been known to our law for centuries.
>
> …
>
> … It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.
>
> … freedom of expression "protects listeners as well as speakers". That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts. Here the press plays a fundamentally important role.

55. In ***MacIntyre v. A.G.N.S.***, 1982 CanLII 14 (SCC), [1982] 1 SCR 175, Chief Justice Dickson for the majority, at pp. 183-184, emphasized:

> ...... a strong public policy in favour of "openness" in respect of judicial acts. The rationale of this last-mentioned consideration has been eloquently expressed by Bentham in these terms:
>
> > In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.

56. In ***Dagenais***[13]***,*** Chief Justice Lamer wrote for the majority:

> 877: …It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(*d*) over those protected by s. 2(*b*). 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.
>
> 885… this Court has strongly endorsed the ability of a jury to follow the explicit instructions of a judge. This endorsement surely applies as much to the instruction to ignore all information not presented in the course of the criminal proceedings as it applies to the instruction to use evidence of prior convictions for one purpose and not another. I am comforted in my extension of *Corbett* to the case at bar by *R. v. Vermette*, 1988 CanLII 87 (SCC), [1988] 1 S.C.R. 985, at pp. 993-94, in which La Forest J. wrote in the

[13] ***Dagenais v. Canadian Broadcasting Corp*.,** 1994 CanLII 39 (SCC), [1994] 3 SCR 835,

> context of the impact of publicity that "[t]his Court has recently had occasion to underline the confidence that may be had in the ability of a jury to disabuse itself of information that it is not entitled to consider; see *R. v. Corbett*".

57. In ***Toronto Star Newspapers v. Ontario*** [2005] 2 S.C.R. 188 Fish, J. for the court, held at para. 8 that the *Dagenais/Mentuck* test, is applicable at every stage of the judicial process, and was from the outset meant to be applied in a flexible and contextual manner. The openness principle underlying it was powerfully stated in the opening words of the Reasons:

> 1 In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
>
> 2. That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(*b*) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest. What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.

58. ***Sherman Estate v. Donovan***, 2021 SCC 25 re-emphasized *Dagenais/Mentuck.* Rather than a sweeping ban on all matters whether prejudicial or not, leaving the public blindfolded to many hearings, a discretionary approach to what must be banned strikes a balance more in line with the openness principles this court has emphasized.

59. The line of authorities interpreting s. 648 as applying both before and after jury selection results in many banned hearings which would not justify a discretionary ban. A concrete example is the *Charter* challenge below to the *Criminal Code* section banning Amanda Todd's identity. That hearing, along with its material and resulting Reasons, were swept under the s. 648 ban on the interpretation below, despite the absence of any potential prejudice.

60. Other typical pre-jury hearings having little or no bearing on the evidence might include motions to dismiss cases for excessive delay (a "*Jordan*" application) or a disclosure issue (a "*Stinchcombe*" application) or for state funding (a "*Rowbotham*" application) or an application for intervener status. These are matters of significant public interest which should be reported to the extent possible and contemporaneously, not months or years later when the trial is over.

E. PRINCIPLES OF STATUTORY INTERPRETATION

61. The decision appealed from considered ***Malik***[14] binding. ***Malik*** and those authorities which have also held s. 648 applies to pre-jury proceedings have done so on the basis of the "purposive" approach to statutory interpretation. ***Malik*** at para. 17 cited ***R. v. Tapaquon*** (1993), 1993 CanLII 52 (SCC), 87 C.C.C. (3d) 1 (S.C.C.) for the principle enunciated by Justice Sopinka at p. 22 as follows:

> It is a fundamental rule of statutory construction that the provisions of a statute should not be interpreted in isolation but by reference to the statute as a whole. An interpretation should be adopted that as far as possible harmonizes the provisions that bear on the same subject matter.

62. The supposition that Parliament had a sole purpose was addressed earlier. Even assuming a primary purpose to protect juries from prejudicial evidence, the purposive approach is not to be used ignore words Parliament enacted. Section 648 of the *Criminal Code*, quoted above specifies that the ban only arises "[a]fter permission to separate is given to members of a jury". It is clear and unambiguous, not open to different interpretations. The authorities holding that the ban arises even before there is a jury amount to judicial repealing of those words.

63. As this court said in ***Bastien Estate v. Canada***, 2011 SCC 38 (CanLII), [2011] 2 SCR 710,:

> 25… a purposive approach to the application of the exemption provisions must be rooted in the statutory text and does not give the court "license to ignore the words of the Act ... or otherwise [circumvent] the intention of the legislature" which that text expresses: *University of British Columbia v. Berg*, 1993 CanLII 89 (SCC), [1993] 2 S.C.R. 353, at p. 371. …

64. Interpretations might in some cases be necessarily strained to avoid absurdity or to ensure a legislative scheme is not defeated by an unintended consequence, but courts must tread carefully when straining words of an enactment. The words must be able to reasonably bear the meaning. Courts are limited to meanings the words can fairly bear. Sullivan states[15]:

> **[6] Expansive interpretation**

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[14] ***R. v. Malik***, 2002 BCSC 80

[15] Sullivan, The Construction of Statutes, 7th ed, 2022 at 9.04[6], pp. 287-288

> Purposive analysis is also used to justify rejecting the ordinary meaning of language in favour of a plausible but more expansive reading. As Locke J. wrote in *Canadian Fishing Co. v. Smith*:
>
> > Where the usual meaning of the language falls short of the whole object of the legislature, a more extended meaning may be attributed to the words if they are fairly susceptible of it. (emphasis added)

65. Here, words which create a plain triggering event before bans can arise cannot plausibly or fairly be interpreted to mean the opposite - that there is no such triggering event. That interpretation turns the legislative words on their head.

66. There is no reason for strained interpretation: there is nothing absurd or self-defeating about the wording which limits automatic bans to the period after jury selection, and leaves the prior stage to be subject to discretionary bans where appropriate.

67. Parliament is assumed to have intended what is written, and assumed not to have made a drafting mistake.[16] Even if the opening words of s. 648 had been a mistake, they are clear words and it is not the court's role to redraft them.[17]

68. Another basis offered for the interpretation below is gap-filling. In ***R. v. Wright***, 2020 ONSC 7049, the court observed that the line of authorities interpreting s.648 as applying before jury selection despite its language are based on a perceived gap in the legislation. As noted in ***Malik*** at para. 21 quoted earlier, s. 645(5) was added to the legislative scheme in 1985 to address the growing volume and scope of pretrial applications. At that time Parliament did not enact language clarifying how that affected the s. 648 ban.

69. Both the House of Commons[18] and Senate debates[19] of the 1985 enactment of now s. 645(5) refer to the benefit of permitting judges to deal with points of law or admissibility of

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[16] Sullivan, supra, 12.01, p. 363

[17] Sullivan, supra, 12.01[4] p. 369

[18] Hansard, House of Commons, Dec. 20, 1984, p. 1391 (Hon. John Crosbie, Minister of Justice, moving second reading)

[19] Hansard, Senate debate April 30 1985, 2nd Reading Criminal Law Amendment Act

evidence prior to empanelling the jury, rather than sending jurors away for long periods, but the none of the debates refer to the s. 648 ban or any resulting alteration of it.

70. It is submitted that silence on the point does not necessarily equate to a gap. The language of s. 648 creates a clear condition which must exist before the ban is triggered. Jurors must be given permission to separate. By necessary implication, there must be a jury selected for the jurors to be given such permission. The absence of explicit language from Parliament making that even more explicit does not mean there is a gap. The existing words answer the question.

71. If there is a gap, the authorities which apply the s. 648 ban to the pre-jury stage encroaching on the function of legislators. They exceed the very limited criteria for judicial gap-filling, which arises only in narrow circumstances where necessary to ensure Parliament's legislative scheme is not crippled by the gap.

72. The line of authority holding that s. 648 applies to the pre-jury stage constitutes "impermissible judicial legislative gap-filling" as explained in ***Wright***[20]:

> [28] … Section 648(1) specifically limits the applicability of the section temporally. It is not possible to merely strain the meaning of those words to make the section applicable to a period of time before the jury is chosen. In order to interpret the section in the way it has been interpreted in the Ontario cases, these words must be ignored. I believe that crosses a line. …
>
> [55] I am unable to agree with those cases that hold that s. 648(1) of the *Code* applies to pretrial applications heard before a jury is chosen under s. 645(5). In my respectful opinion, it is not possible to interpret s.648(1) that way without crossing the line from permissible judicial statutory interpretation to impermissible judicial legislative gap-filling.

73. ***Wright*** at para. 28 cited the following passage from *Sullivan on the Construction of Statutes* (6th edition at 12.16)[21]:

> When language is over-inclusive, it applies not only to circumstances within the mischief the legislature sought to cure, but also to circumstances outside that mischief and

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[20] ***R.* v. *Wright***, 2020 ONSC 7049

[21] the same passage appears in the recent 7th edition, at 12.02[2] at pp. 371-372

therefore outside the intended scope of the legislation. Over-inclusion is cured by adding words of qualification which limit the legislation to applications that are appropriate given the legislature's intent. When legislation is under-inclusive, it fails to apply to circumstances which need to be covered or to address a matter that must be dealt with to achieve the intended goals. That is what is meant by a gap in the legislative scheme. Although under-inclusion could also be cured by the courts, they are generally unwilling to do so. As explained elsewhere, reading down to cure over inclusion is considered interpretation, provided it can be justified, whereas reading in to cure under-inclusion is considered amendment and must be left to the legislature. This point is made in a telling way by J.A. Corry in his seminal article on the interpretation of statutes. He wrote:

> [I]n many of these cases where the judges refuse to extend the operation of the legislation, the particular expressions used are not at all capable of the extended meaning which is sought and nothing short of the common-law technique of inducing a general principle from the particulars would suffice. Therefore, one who holds that words do impose limits cannot quarrel with many of these decisions.

As Corry points out, the words used in legislative text impose an outer limit on meaning, and normally there is only limited room for expansion between the ordinary meaning of a provision and the outer limit fixed by its words. If a court wishes to go beyond that limit, it must add new words to the text to cover the overlooked circumstance, replace the specific words with more general words or strike out words of qualification. These are considered types of amendment rather than interpretation. (emphasis added in ***Wright***)

74. Appellate decisions on the limited circumstances where judicial legislative gap-filling is appropriate have also limited the occasions where that is appropriate by strict criteria. In ***R. v. Yelle***, 2006 ABCA 276 the Alberta Court of Appeal said:

(d) Statutory Gap-Filling

[34] This is a task which should usually be left to Parliament. Judicial recourse to this option, especially with the result of enhancing the authority of the court of appeal to dispose of appeals, should be rare indeed.

…

[37] In ***Public Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*** (1988), 1988 CanLII 204 (NWT CA), 53 D.L.R. (4th) 530, aff'd on other grounds, 1990 CanLII 72 (SCC), [1990] 2 S.C.R. 367, Kerans J.A., speaking for the Northwest Territories Court of Appeal, held at 535-36 that judicial gap filling should only be contemplated if the following criteria are established beyond doubt:

> (i) the problem arose only by reason of legislative oversight;

> (ii) the change is that which the legislature would have made had it addressed the issue, which almost always means that it is a straight- forward alteration;
>
> (iii) no harm is done by the proposed change to the legal rights created by the legislation; and
>
> (iv) harm will be done to the legal rights created by the statute if the change is not made.

75. Here, there was no oversight. It was perfectly legitimate to let discretion govern bans in the pre-jury stage. As to whether Parliament would have made the change, we know from the 1994 legislative proceedings that Parliament did *not* opt to do so. As to harm, a mandatory ban harms rather than enhances legal rights of openness. In contrast, there is no harm that will be done without the change, given the availability of ordinary discretionary bans.

76. This court's decision in ***Canada (Human Rights Commission) v. Canadian Liberty Net***, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626, while allowing that there are times gap-filling is necessary to carry out the legislative scheme, is similarly cautionary in its language:

> 17… Subject to what I have to say below about the operation of s. 44, this decision also indicates that "gaps" within federal legislation may only be filled where such a power is a necessary incident to the discharge of the scheme of the Act as constituted.
>
> 18 The scheme of the *Human Rights Act* does not come close to that. It is not a necessary incident to any of the Tribunal's functions or powers that there be an injunctive power to restrain violations of s. 13(1). The existence of a "gap" in the range of remedies available in the Act itself does not mean that Parliament intended the Federal Court to have the power to issue an injunction. The Act could just as easily be read to mean that Parliament intended the "gap" to exist. Under these circumstances, it is inappropriate to engage in an extensive analysis of what is desirable to carry out the aims of the Act. The threshold test was precisely stated by Stone J.A. in *New Brunswick Electric Power*, *supra*, at p. 27:
>
> > These observations bring into focus the absurdity that could result if, pending an appeal, operation of the order appealed from rendered it nugatory. Our appellate mandate would then become futile and be reduced to mere words lacking in practical substance. . . . The appeal process would be stifled. It would not, as it should, hold out the possibility of redress to a party invoking it. This Court could not, as was intended, render an effective result.
>
> It cannot be said that the other remedies contained in the *Human Rights Act* would be rendered "nugatory" in the absence of an injunctive power in the Federal Court. Failing that, no such power can be implied into the scheme of the Act.

77. Another way of looking at the interpretation issue is whether a court is justified in striking words of limitation from a statutory provision. Here, the words stating that s. 648 bans do not arise until after a jury has been given permission to separate are limiting words and interpretations holding the ban to apply without that limitation amount to a striking of them. As Sullivan states:[22]

> If words in a provision have the effect of expanding its scope, then striking them narrows the scope of the provision, as in reading down. Conversely, if the words restrict the scope of a provision, then striking them expands the scope of the provision, as in reading in. Striking words from a text is harder to justify than adding words, because the court cannot rely on implicit meaning. In effect, the court must conclude that the words to be struck perform no meaningful function in the text, contrary to the presumption against tautology; their presence is simply a mistake.

78. To conclude that the limiting words in s. 648 were a mistake, one would have to believe that Parliament could not possibly have intended to leave the pre-jury phase to be dealt with by discretionary bans and could not possibly have wanted a presumption of openness to apply at that stage.

79. In fact, Parliament chose limiting words in 1972; did not alter them when enacting s. 645(5) in 1985; considered and rejected an amendment in 1994 to impose an automatic ban on the pre-jury stage; considered the section again in 2005 when amending the word "newspaper" to "document" and made no change to the limiting language. These all point to a consistent legislative intention to leave the limitation in place, and not to impose automatic bans before the jury is empanelled. That intention is entirely in line with the principle that governs both Parliament and the courts: that openness is the rule, and exceptions are limited.

F. INTERPRETATION OF "INFORMATION"

80. If this Court holds that the s. 648 ban applies before a jury is selected, the question arises of whether "information" is interpreted in a limited fashion. The same question arises in the post-jury stage. Does the s. 648 ban apply to hearings which are non evidentiary and non prejudicial in nature? A number the authorities holding that s. 648 applies to the pre-jury stage

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[22] Sullivan, The Construction of Statutes, 7th ed. S. 12.03[1] at p. 383

concluded that "information" should be purposively read refer to prejudicial hearings, or put as some cases have, evidentiary hearings ordinarily dealt with after the jury is empanelled and in the absence of the jury. As detailed earlier, ***Malik*** is an example (see paragraphs 26-27), as is ***R. v. Regan***, [1997 CanLII 14380](https://canlii.ca) (NS SC).

81. This has the potential to somewhat ameliorate the impairment on openness, although in practise, it has resulted in little if any publishable information in the pre-jury stage, and means the delay and expense of motions brought by media to publish invariably often very limited information. One of the few examples of a publishable judicial summary appears at para. 45 and following in ***R. v. Brown***, 1998 CanLII 14946 (ON SC).

82. A purposive interpretation above supports a narrow reading of "information". Its purpose as enunciated in many of the authorities such as ***Malik***, is to protect the jury from prejudice. Beyond that, there is no justification to infringe on openness, and the courts should strive for a non-infringing or minimally infringing interpretation. "Information" is an over-inclusive word to capture the mischief s. 648 is designed to prevent. The words of Sullivan[23] on over inclusive language bear repeating in part:

> When language is over-inclusive, it applies not only to circumstances within the mischief the legislature sought to cure, but also to circumstances outside that mischief and therefore outside the intended scope of the legislation. Over-inclusion is cured by adding words of qualification which limit the legislation.

83. The obvious purpose of banning information heard in the absence of the jury where it has been given permission to separate is to prevent the jury from hearing about matters such as admissibility hearings from outside sources. The reading down of an overly general provision is more common and permissible than a reading which expands application beyond the statutory words. As Sullivan states at p. 283:

> A striking feature of the law of statutory interpretation is its tendency to facilitate a narrow reading of legislation, one that excludes possible applications (often referred to as reading down), while resisting efforts to expand the application of legislation (often referred to as reading in).

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[23] Sullivan, The Construction of Statutes, 7th edition, at 12.02[2] at pp. 371-372

84. The author goes on to observe, that although courts refer to large and liberal interpretations, the achievement of Parliament's purpose often requires applying a purposive narrowing of language that tends to be overly broad. At p. 284, the author says:

> In practice, however, legislative purpose is just as likely to be promoted by a narrow or restrictive interpretation. This is because much modem legislation is drafted in broad terms. Rules are formulated in general language and the facts to which they apply are described in terms of general categories, classes and types. This results in a style that is often vague and tends to be over- rather than under-inclusive. When the ordinary meaning of legislation is too broad, the effect of purposive analysis is to narrow its scope by excluding applications that are not rationally related to the purpose.

85. This observation is apropos, as "no information regarding any portion of the trial at which the jury is not present" is very broad language, compared to the more specific mischief s. 648 was targeting, namely information that would affect a fair trial.

G. Possibility of Mootness

86. This case has not made it to a hearing and decision by this court before the s. 648 ban expired, which occurred when (quoting the ban expiry language of the section "…the jury retire[d] to consider its verdict", which occurred on August 5, 2022.

87. This mootness will be the result in all or nearly all such cases. There is insufficient time to conduct pretrial proceedings; to bring an application as to s. 648 in respect of them; to hear and decide the application; to then bring a leave to appeal process; and if leave is granted, to get to a hearing before this court and decision before the trial ends and the ban expires. It is nevertheless a recurring issue which has led to a patchwork of unresolved conflicting interpretations across the country.

88. The likelihood of mootness was raised in the leave to appeal application and leave was granted. This court has acknowledged that it will hear cases despite mootness where the matter is of national importance and likely to recur. As this court said in ***Divito v. Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 47 (CanLII), [2013] 3 SCR 157

> [51] The Court nonetheless retains a residual discretion to decide the merits of a moot appeal if the issues raised are of public importance: *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342; *R. v. McNeil*, 2009 SCC

> 3, [2009] 1 S.C.R. 66, at para. 2. In my view, this is such a case. The issues are likely to recur in the future and there is some uncertainty resulting from conflicting decisions in the Federal Court.

89. The criteria for dealing with a case even where the specific controversy has become moot were laid out in the ***Borowski*** decision cited above. They are (1) whether there is a sufficient adversarial relationship to ensure the issue is fully canvassed; (2) whether the objective of judicial economy favours deciding the appeal; and (3) whether deciding the appeal fits within the court's appropriate law-making function.

90. Here, the parties are fully engaged in the adversarial presentation of both sides of argument. The recurring nature of the issue, or in the words of *Borowski*, "of a recurring nature but brief duration" indicates that a decision of this court will resolve and avoid future disputes, in benefit to judicial economy. As to the appropriateness of deciding the case, the conflicting authorities across Canada cry out for resolution.

H. TRANSITION

91. If this court allows the appeal and rules that s. 648 does not apply until a jury is empanelled, there may be ongoing cases in the pre-jury stage where a discretionary ban would be sought, but in a jurisdiction where the governing interpretation made such applications unnecessary. This Court may consider it appropriate to make an order which allows time for such applications.

I. SUMMARY

92. The opening words of s. 648 creates, in plain language, a condition precedent before automatic bans under the section arise. Reading the legislation any other way does violence to its wording, to openness and to its legislative history. It does so unnecessarily, given the protections in the jury system and the availability of other bans where appropriate. It is time for over two decades of conflicting jurisprudence across Canada to be set straight.

PART IV: SUBMISSIONS ON COSTS

93. In light of the issues of national and public importance at stake in this Appeal, the appellants do not seek the costs of these Appeals. Correspondingly, the appellants ask that no order of costs be made against the appellants, regardless of the outcome.

PART V: ORDER SOUGHT

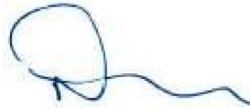
94. The appellants seek orders allowing the appeal and clarifying or declaring that the publication ban on “any portion of the trial at which the jury is not present” within s. 648 of the Criminal Code is only applicable after a jury has been empanelled.

PART VI: SUBMISSIONS ON CONFIDENTIALITY

95. The appellants submit that there are no orders in place which would restrict this Honourable Court in its publication of its decision.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of January 2023.

SIGNED:



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PART VII: TABLE OF AUTHORITIES

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