SCC File No. 40223

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

BETWEEN:

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

APPELLANTS

AND:

AYDIN COBAN and HIS MAJESTY THE KING

RESPONDENTS

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENER

FACTUM OF THE RESPONDENT HIS MAJESTY THE KING

(Pursuant to Rules 36 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. There are "situations where openness conflicts with the proper administration of justice"[1] and the open court principle must be temporarily restricted in order to preserve other legitimate interests. Jury trials are one such instance.

2. The importance of the open court principle, which ensures justice is done openly and transparently, is one of the hallmarks of a democratic society. However, it is not unassailable and may be limited where countervailing values are engaged. The preservation of an accused's constitutional rights to a jury trial, a fair trial, and a trial without unreasonable delay are just such countervailing values. Moreover, "the accused, the Crown and the public at large all have the right to be sure that the jury is impartial and the trial fair".[2] Parliament has enacted a triumvirate of measures (ss. 517, 539 and 648 of the *Criminal Code*) to ensure these rights are protected by mandating a time-limited deferral of publication of information from bail hearings, preliminary inquiries, and pre-trial applications until after the trial has ended (ss. 517 and 539) or the jury has retired (s. 648).

3. Courts in British Columbia have correctly interpreted s. 648(1) to defer publication of all information heard by a judge in the absence of a jury, whether before or after empanelment. The correct approach to interpreting s. 648(1) requires consideration of not only its text, but also its context and its purpose. Sections 517, 539 and 648 operate to protect the rights to a fair trial, a trial by jury, and a trial within a reasonable time through mandatory or automatic publication deferral, where publication of information could result in jury tainting. Parliament determined that the protection of these rights justified the imposition of time-limited constraints on the open court principle in relation to proceedings heard in the absence of the jury, where information will generally not have been tested on a criminal standard.

4. Properly interpreted, ss. 645(5) and 648(1) operate in conjunction to provide for an automatic statutory publication deferral that applies to all pre-trial proceedings that occur prior to

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[1] *Canadian Broadcasting Corp. v. New Brunswick (A.G.),* [1996] 3 S.C.R. 480, para. 46.
[2] *R. v. Barrow*, [1987] 2 S.C.R. 694, at 710.

the empaneling of a jury, including pre-trial conferences. This interpretation is consistent with the evolution of criminal procedure; that is, when s. 648(1) was originally enacted, pre-trial applications were generally heard *after* the jury was selected, but now criminal pre-trial applications are generally heard and decided by both case management and trial judges *before* the jury is empanelled.

5. This interpretation of ss. 645(5) and 648(1) is the only interpretation which operates harmoniously within the protective scheme of publication deferrals in the *Code* and gives effect to Parliament's purpose. The narrow reading of s. 648(1) proposed by the appellants fails to give effect to Parliament's intention and undermines the protections afforded by its companion provisions, ss. 517 and 539.

B. Statement of Facts

6. The respondent agrees generally with the appellants' statement of facts, subject to the following clarifications and additions.

7. The pre-trial applications started on December 17, 2019, with *ex parte* Crown applications relating to the temporary surrender of Mr. Coban from the Netherlands. There were 12 pre-trial conferences which took place after Mr. Coban's arrival in Canada on December 7, 2019. These pre-trial conferences took place before, during, and after the formal pre-trial applications. The first pre-trial conference took place on March 12, 2021 and the last on June 3, 2022. There were periodic case management conferences after the trial commenced on June 7, 2022, during which matters including the content of the jury charge and admissibility of contested evidence were canvassed.

8. On February 12, 2021, the parties appeared before the assigned trial judge and jointly applied to have a s. 648 ban imposed. Justice Devlin imposed a s. 648 ban on that date.[3]

9. The formal pre-trial applications are summarized in the table attached at Appendix A. Formal pre-trial applications were heard intermittently between April 12, 2021 and June 1, 2022.

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[3] Although the s. 648 publication ban is automatic and no application is required, it is common practice in British Columbia for counsel to confirm on the record that the ban is in effect and applies to pre-trial applications and pre-trial case management conferences.

A review of the table reveals that there were 20 pre-trial applications in total. Applications 1-13 and 15 were heard and decided before the jury was empanelled on May 28, 2022. Application 14 was heard before the jury was empanelled but decided after empanelment. Applications 16 to 20 occurred after the jury was empanelled.

10. Ten of the 20 pre-trial applications dealt with the admissibility of evidence. Numerous applications involved evidence that was either ruled inadmissible or otherwise not led at trial. Many applications proceeded at least in part based on a documentary record or submissions of counsel, so the evidence was untested. For example, in one application (2021 BCSC 1855), the Crown applied to lead ten discrete categories of discreditable conduct, including evidence about sextortions of three adult males and one teenage girl. The application was based on "anticipated evidence" (which was comprised of a documentary record and submissions of counsel).[4] This evidence was entirely untested on the application. Almost all of the evidence on that application, including the evidence of the sextortions, was ruled inadmissible.

11. In another application (2021 BCSC 2297), the Crown applied to lead 51 *ante mortem* statements it alleged were made by the deceased victim, Amanda Todd, for the truth of their contents. Most of these statements were contained in Facebook records the Crown intended to introduce at trial. The trial judge heard no evidence and relied on background facts set out in the Crown's submissions.[5] In assessing the threshold reliability of the *ante mortem* statements, the trial judge commented on the credibility and reliability of the deceased victim. In relation to one *ante mortem* statement, the trial judge found there was "no basis to question A.T.'s truthfulness or accuracy".[6] The trial judge also described in her reasons two messages which she ruled inadmissible.[7] At the time the reasons for judgment were issued, there was an outstanding application relating to the admissibility of Facebook records. The ruling on the admissibility of the *ante mortem* statements was therefore in part contingent on the outcome of the subsequent application.

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[4] *R. v. Coban*, 2021 BCSC 1855, para. 80.
[5] *R. v. Coban,* 2021 BCSC 2297, para. 4.
[6] *R. v. Coban,* 2021 BCSC 2297, para. 67.
[7] *R. v. Coban,* 2021 BCSC 2297, paras. 113, 121.

12. The appellants assert that "[n]o 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".[8] However, evidence of prejudice was irrelevant to the adjudication of the appellants' application. As acknowledged by the appellants,[9] the application that they filed in the court below was an application to seek directions with respect to the scope of the s. 648 publication ban – they were not seeking a ruling with respect to a specific application or decision.[10] The sole issue on the application was whether the trial judge was bound, on principles of comity, to follow previous B.C. jurisprudence on the scope of s. 648 publication bans. Both Crown and the defence took the position that the principles of *stare decisis* applied.[11] The trial judge agreed.[12]

PART II: RESPONDENT'S POSITION ON QUESTIONS IN ISSUE

13. The respondent submits that s. 648(1) of the *Criminal Code* applies to proceedings prior to jury selection.

PART III: STATEMENT OF ARGUMENT

A. Overview

14. The appellants rely on the plain meaning of s. 648(1). However, "plain meaning alone is not determinative and a statutory interpretation analysis is incomplete without considering the context, purpose and relevant legal norms".[13] In accordance with s. 12 of the *Interpretation Act*, "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".[14] Statutory interpretation requires attention to text, context and purpose.[15]

15. The "[p]rinciples of statutory interpretation require that the text of provisions must be read as a whole and harmoniously. It is presumed that provisions are intended to work together as parts

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[8] *Appellants' Factum*, para. 11
[9] *Appellants' Factum,* para. 15.
[10] See also *Appellants' Notice of Application* (Appellants' Record, p. 10).
[11] *R. v. Coban*, 2022 BCSC 880, para. 3 (Appellant's Record, p. 2).
[12] *R. v. Coban*, 2022 BCSC 880, paras. 16-17 (Appellants' Record, p. 6).
[13] *R. v. Alex,* 2017 SCC 37, para. 31.
[14] *Interpretation Act*, R.S.C. 1985, c. I-21.
[15] *R. v. Downes*, 2023 SCC 6, para. 24; *R. v. Sillars*, 2022 ONCA 510, para. 43.

of a functioning whole to form a rational, internally consistent framework".[16] This is known as the presumption of coherence. As R. Sullivan explains in *The Construction of Statutes*, 7th Edition at §11.01:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.[17]

16. An assertion of ambiguity "cannot reside in the mere fact that several courts -- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision".[18] As Iacobucci J. explained in *Bell ExpressVu*:

> [30] …. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, *supra*, at pp. 4-5).[19]

17. An "ambiguity must be 'real' …. The words of the provision must be 'reasonably capable of more than one meaning'…. By necessity, however, one must consider the 'entire context' of a provision before one can determine if it is reasonably capable of multiple interpretations".[20] It is only when there is genuine ambiguity that a court can turn to external interpretative aids or other principles of interpretation.[21]

18. Section 648(1) must be interpreted in the context of the *Criminal Code* as a whole, and in particular, as part of a broader scheme of publication deferrals that protect the rights to a jury trial, a fair trial, and a trial without unreasonable delay. It must also be interpreted in the context of

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[16] *R. v. Kirkpatrick*, 2022 SCC 33, para. 46. See also *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, para. 27.
[17] R. Sullivan, *The Construction of Statutes,* 7th Ed. (Markham: Lexis Nexis Canada, 2022), p. 323.
[18] *Bell ExpressVu*, para. 30.
[19] *Bell ExpressVu*, para. 30 (emphasis in original).
[20] *Bell ExpressVu*, para. 29.
[21] *Bell ExpressVu*, para. 29.

s. 645(5) of the *Code*, which permits a judge to hear applications that would ordinarily occur after jury empanelment, *before* the jury is empanelled. The respondent will turn to that relevant context now.

B. Section 648(1) must be interpreted in the context of the publication deferral scheme as a whole

19. Before turning to the textual interpretation of s. 648(1), it is important to identify how the provision operates within the context of the scheme of pre-trial publication deferrals that Parliament has enacted to protect the rights to a jury trial, a fair trial and a trial without unreasonable delay. It is necessary to examine s. 648(1) in this broader context to understand the part it "plays within the broader scheme".[22]

(i) Section 648 is part of a broader publication scheme in the *Criminal Code*

20. As a criminal file moves through the system, there are several publication deferrals available to protect the accused's right to a fair trial, a jury trial and a trial without unreasonable delay.

21. At the judicial interim release or bail hearing, s. 517(1) of the *Code* prohibits publication of evidence, information, submissions, and reasons on a bail hearing until an accused is either discharged after a preliminary inquiry or, if ordered to stand trial, their trial has ended. This prohibition is mandatory on application by the accused and discretionary on application by the Crown.

22. In *Toronto Star Newspapers Ltd. v. Canada*, this Court held that while the s. 517(1) ban violated s. 2(b) of the *Charter*, the violation was saved under s. 1. Deschamps J., writing for the majority, held that the purpose of the ban was not limited to the narrow interest in "averting jury bias by banning pre-trial publicity".[23] Rather, "[t]rial fairness has also been understood as encompassing all measures whose purpose it is to protect the fundamental rights of the accused".[24] Deschamps J. endorsed a broader conception of trial fairness that also included preventing

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[22] *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21, para. 21.
[23] *Toronto Star,* para. 22.
[24] *Toronto Star,* para. 22.

diversion of an accused's scarce resources to fight opposition to a publication ban and preventing delay of the bail hearing.[25]

23. Deschamps J. ultimately held that the purpose of s. 517(1) was (1) to safeguard the right to a fair trial; and (2) to ensure expeditious bail hearings.[26] She emphasized that "[a] discretionary ban would entail additional issues and adjournments, and would result in longer hearings".[27] Deschamps J. also noted the temporary nature of the ban and the fact that "the information it covers can eventually be made public once more complete information produced in accordance with the standards applicable to criminal trials is available".[28]

24. As in this case, the media appellants in *Toronto Star* suggested that any risk to a fair trial could be addressed by procedures such as challenges for cause, changes of venue and sequestration. However, Deschamps J. held that those alternatives were "unsatisfactory. All of them relate solely to the need to avert bias. They do not address the other considerations which favour a publication ban, namely the need to ensure an expeditious bail hearing and an early release of the accused".[29]

25. Section 539, which defers publication of information from preliminary inquiries, has a similar purpose to s. 517. [30] In *Toronto Star,* Deschamps J. drew an analogy between the mandatory s. 517 publication ban and the s. 539(1) publication ban, which prohibits publication of evidence from a preliminary inquiry until an accused is either discharged or, if ordered to stand trial, their trial has ended.[31] The s. 539(1) publication ban is also mandatory on application by the accused. Deschamps J. noted that the purpose of the s. 539(1) ban also went "beyond averting jury bias" and "address[ed] the broader goal of protecting the right to a fair trial".[32] Section 539(1) is

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[25] *Toronto Star,* paras. 22, 35, 55.
[26] *Toronto Star,* para. 23.
[27] *Toronto Star*, para. 55.
[28] *Toronto Star,* para. 39.
[29] *Toronto Star,* para. 41.
[30] The constitutionality of this provision was upheld in *R. v. Banville* (1983), 45 N.B.R. (2d) 134, 1983 CarswellNB 19 (N.B.Q.B.).
[31] *Toronto Star*, para. 32.
[32] *Toronto Star*, para. 31.

"intended to merely defer the public's right to know the evidence taken at the preliminary inquiry, so as to protect the independence and impartiality of the trier of fact at the subsequent trial".[33]

26. In addition to s. 539(1), s. 542(2) prohibits publication of "any admission, confession, or statement" of the accused tendered at a preliminary inquiry unless the accused has been discharged or, if ordered to stand trial, the trial has ended.[34] This provision applies automatically.

27. It is logical that ss. 517(1) and 539(1) are mandatory on application of the accused, while s. 648(1) is automatic, as the question of election may not be settled at a bail hearing or preliminary inquiry, and the accused is best placed to predict this. However, by the time s. 648(1) takes effect, the mode of trial will have been determined.

28. Information received by the court at bail hearings, preliminary inquiries and during pre-trial proceedings often shares similar characteristics.

29. At a bail hearing "… [t]here are practically no prohibitions as regards the evidence the prosecution can lead to show cause why the detention of the accused in custody is justified".[35] Pursuant to s. 518(1)(e) of the *Code,* the Crown can lead:

> …. any evidence that is 'credible or trustworthy', which might include evidence of a confession that has not been tested for voluntariness or consistency with the *Charter*, bad character, information obtained by wiretap, hearsay statements, ambiguous post-offence conduct, untested similar facts, prior convictions, untried charges, or personal information on living and social habits….[36]

30. Section 540(7) of the *Code* similarly affords the preliminary inquiry judge discretion to "receive as evidence any information that would not otherwise be admissible but that the justice considers credible or trustworthy in the circumstances". Evidentiary rulings made by the

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[33] *The British Columbia College of Teachers v. British Columbia (Attorney General)*, 2010 BCSC 847, para. 22.

[34] The constitutionality of this provision was upheld in *Southam Inc. c. Canada (Procureur général)*, 1992 CarswellQue 1054 (Que. S.C.).

[35] *Toronto Star*, para. 28.

[36] *Toronto Star*, para. 28.

preliminary inquiry judge do not bind the trial judge, so evidence that is admissible at a preliminary inquiry may be inadmissible at the trial.[37]

31. Finally, in pre-trial applications, counsel and judges are encouraged to conduct hearings on a documentary record, where possible.[38] In "many cases it is therefore not only common, but preferable in the interests of efficiency, to conduct admissibility *voir dires* based on information that would not be admissible during the trial proper", including statements of counsel and filed documents, summaries of evidence, preliminary inquiry records, and summaries of proposed hearsay.[39] Testing the ultimate reliability of evidence is usually not a feature of these applications. The purpose of many pre-trial applications is to determine admissibility of contested evidence. On these applications, evidence that is prejudicial to the accused, and often inadmissible at trial, will be heard.

32. As will be explored in further detail below, given the multitude of ways in which pre-trial proceedings may be conducted, there can be no bright-line rules about whether a certain type of information or application is "prejudicial" or not.

33. Section 648 is part of a broader publication deferral scheme which protects the right to a fair trial, a trial within a reasonable time, and a jury trial, from the bail hearing to the end of trial. Section 648 works harmoniously with the other provisions within this scheme only if its scope includes pre-trial conferences and pre-trial applications.

34. On the appellants' interpretation of the provisions, if an accused's statement is referred to at a bail hearing, preliminary inquiry or during a statement *voir dire* after jury empanelment, it would be subject to a publication deferral (assuming the defence sought the mandatory ss. 517 ban at the bail hearing). However, if it is referred to or introduced at a pre-trial *voir dire* heard before jury empanelment, it would not be subject to the s. 648(1) publication deferral, even if it was ruled inadmissible. In that scenario, the question of publication would turn entirely on the trial judge's

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[37] *R. v. Hynes*, 2001 SCC 82, para. 48.
[38] *R. v. Cody*, 2017 SCC 31, para. 39.
[39] *R. v. Aragon*, 2022 ONCA 244, para. 37.

exercise of discretion with respect to the timing of the statement *voir dire*. This interpretation of s. 648 is completely inconsistent with Parliament's purpose in enacting a cohesive scheme.

(ii) The purpose of the publication deferral scheme is to protect the right to an impartial jury trial within a reasonable time

(a) *The publication deferral scheme protects the impartiality of the jury and the accused's right to choose trial by jury*

35. Jury trials perform an essential role in protecting the integrity of the Canadian criminal justice system and fostering the public's confidence. The fundamental importance of juries was outlined by McLachlin C.J. and Cromwell J., writing in dissent, in *R. v. Kokopenace*:

> [220] In the Anglo-Canadian tradition of criminal justice, the jury is seen as a "bulwark of individual liberty" of accused persons and as a "vehicle of public education . . . lending the weight of community standards to trial verdicts": *R. v. Turpin*, [1989] 1 S.C.R. 1296, at pp. 1309-10; *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828, at para. 30. The jury functions as a fact-finder, as the conscience of the community, as the ultimate protection against oppressive laws and oppressive law enforcement and as an educative institution through which members of the public directly participate in an important judicial process: Law Reform Commission of Canada, Working Paper 27, *The Jury in Criminal Trials* (1980), at pp. 5-14. The jury system is intended and ought to enhance the legitimacy of the criminal justice system in the eyes of the public. It puts real power in the hands of the people, giving members of the public both authority and responsibility for how the criminal law is applied in individual cases.
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> [221] To fulfill these important functions, a jury must be — and be perceived to be — representative of the community, competent in relation to its tasks, impartial and independent. [40]

36. Sections 517(1), 539(1), 542(2) and 648(1) work together to protect an accused's constitutional right to a trial by an impartial jury which is guaranteed by ss. 11(d) and 11(f) of the *Charter*.[41] These publication deferral provisions ensure that information that is untested, and may be irrelevant, prejudicial or otherwise inadmissible at trial is not published until the jury has been sequestered. Such protections ensure an accused's right to a jury trial does not become illusory. If an accused lacks confidence they can have a trial before an impartial jury because of publicized pre-trial applications or is confronted by the prospect of lengthy and resource-intensive media applications, they may elect a trial by judge alone.

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[40] *R. v. Kokopenace*, 2015 SCC 28, paras. 220-221.
[41] *Kokopenace*, paras. 39-58; *R. v. Sherratt*, [1991] 1 S.C.R. 509, at 525-526.

37. While we trust juries to follow instructions, this trust depends on the existing framework of safeguards designed to ensure that jurors are impartial. Still, there are limits. For example, while s. 647 permits separation and sequestration of the jury, s. 647(4) also provides that "[w]here the fact that there has been a failure to comply with this section or section 648 is discovered before the verdict of the jury is returned", the trial judge may discharge the jury and empanel a new jury if they conclude "that the failure to comply might lead to a miscarriage of justice".[42] Moreover, a mistrial may be declared at any time to prevent a miscarriage of justice "where inadmissible evidence is adduced during trial which might influence a jury".[43]

(b) *The automatic or mandatory publication deferral scheme promotes certainty*

38. The mandatory or automatic nature of time-limited deferrals on publication of information from bail hearings, preliminary inquiries and pre-trial proceedings is central to the proper functioning of this protective scheme. The certainty associated with mandatory and automatic orders means an accused does not need to make strategic choices about whether and in what manner to apply for bail, request a preliminary inquiry or make pre-trial applications.[44]

(c) *The mandatory or automatic publication deferral scheme promotes efficiency and expeditious trials*

39. Sections 517(1), 539(1), 542(2) and 648(1) also work together to ensure trials take place within a reasonable time. If it was necessary for the Crown or the defence to apply for a discretionary publication ban on each pre-trial proceeding before the jury is empanelled and then revisit the issue each time a ruling on a pre-trial application is released, this would have significant delay and resource implications at a time when an accused and counsel should be devoting their resources and energy to pre-trial proceedings.

40. On an application for a discretionary publication ban, the onus is on the party seeking to displace the general rule of openness. The applicant must satisfy the *Sherman Estate* test and establish a serious risk to an important public interest.[45] The risk in question must be real,

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[42] *Criminal Code,* s. 647(4) (emphasis added).
[43] *R. v. Burke*, 2002 SCC 55, para. 74.
[44] *Toronto Star,* paras. 42 and 43. See also *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, at 132; *CBC v. Millard and Smich*, 2015 ONSC 6583, para. 65; *R. v. Stanley*, 2018 SKQB 27, para. 24.
[45] *Sherman Estate v. Donovan*, 2021 SCC 25, para. 38.

substantial, and well-grounded in evidence. The applicant needs to adduce "convincing evidence",[46] or there must be a basis for an inference of objectively discernible harm.[47] In addition to the parties, the court may hear from one or more interveners. By virtue of the persuasive burden and the interests at play, applications for a discretionary publication require resources and time, an issue that Deschamps J. noted as a relevant consideration in the constitutional analysis in *Toronto Star*.[48]

41. Moreover, the applicant would be required to give notice of each application. While the question of whether and when notice should be given to the media and third parties is ultimately a matter within the discretion of the court,[49] many courts have specific rules with respect to notice. For example, in the Supreme Court of British Columbia, PD-56 "Notification of Publication Ban Applications" provides that the applicant must provide at least two clear days' notice to the media of any application for a discretionary publication ban. As Binder J. observed in *Canada (Attorney General) v. Cheung,* when he imposed "a publication ban equivalent to s. 648(1) on all *voir dires* relating to the admissibility of evidence", "[t]he alternative of notifying the media on each *voir dire* where an inordinate number of *voir dires* are anticipated, would bring the trial to a standstill".[50]

42. As noted above, pre-trial proceedings routinely involve untested evidence which will be inadmissible or irrelevant at trial. Requiring the parties to seek discretionary bans on publication at each step of pre-trial proceedings, where information will be introduced which is likely to impact the right to a trial before an impartial jury, would add procedural complexity.

43. The appellants list four of the pre-trial applications heard in this case and assert that few would have justified more than a partial ban.[51] However, even if this was assumed to be true for the sake of argument (which the respondent disputes), there are a number of practical issues that would arise if there was no automatic publication deferral on those hearings.

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[46] *Canadian Broadcasting Corp. v. R.*, 2010 ONCA 726, para. 20.
[47] *Sherman Estate*, para. 97.
[48] *Toronto Star*, para. 43.
[49] *Canadian Broadcasting Corporation v. Manitoba*, 2021 SCC 33, paras. 51-52.
[50] *Canada (Attorney General) v. Cheung*, 2000 ABQB 905, para. 80.
[51] *Appellants' Factum,* para. 16.

44. As indicated on the reasons for judgment, three of the four applications listed by the appellants were multi-day hearings. One of those applications (Application #5) was an application to cross-examine Shannon Chance on an affidavit filed in the application regarding the admissibility of Facebook records.[52] The Facebook admissibility application included *viva voce* evidence from an expert.[53] The recognition evidence *voir dire* (Application # 4)[54] included *viva voce* testimony from a police officer, and reference to evidence of a witness who ended up being unavailable for trial. Once the police officer testified and was cross-examined, Mr. Coban conceded that the threshold for admission was met, but at the outset this was a contested application.

45. If s. 648 did not apply automatically to such applications, would the Crown or defence make the application for a discretionary ban? For it to happen in advance, would the defence or the Crown have to tip their hand in relation to cross-examination of witnesses? Is it reasonable to expect the parties to know the precise scope of the evidence that will be heard on an application and whether it will be prejudicial? If the application for a discretionary publication ban is made after the substantive application has ended and reasons given, is there a temporary ban in the interim? What happens if the application judge needs to delay giving a ruling? How would parties make strategic decisions at a time when they do not know with certainty whether certain witnesses will testify at trial and whether their evidence will come out in the same way? Would a discretionary ban cover evidence that the parties did not anticipate would be led at trial? What if the parties were unsure? Would the judge be required to prepare a set of reasons that complied with the ban, and then a separate set of full reasons following the sequestration of the jury (assuming that is when the discretionary ban ended)?

46. The time and resources required to deal with discretionary publication bans on pre-trial applications would be significant. For a variety of reasons, it would also be hard for the parties to gauge with precision what should and should not be covered by such a ban. As Fairburn A.C.J.O. and George J.A. recently observed in *R. v. King,* albeit in a different context, "[t]he criminal law

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[52] *R. v. Coban*, 2021 BCSC 2303.
[53] *R. v. Coban*, 2021 BCSC 2428, para. 41.
[54] *R. v. Coban*, 2022 BCSC 263.

is not calling for more complexity. If anything, it is calling out for simplicity and, most importantly, quality justice delivered with efficiency".[55]

47. In *Jordan*, this Court urged Parliament to take "a fresh look at rules, procedures, and other areas of the criminal law to ensure that they are more conducive to timely justice and that the criminal process focusses on what is truly necessary to a fair trial".[56] Section 648 is an existing provision which already does just that. As with ss. 517 and 539, Parliament determined that the appropriate balance was struck between the open court principle and the countervailing values of the accused and society in a fair and timely jury trial, by imposing an automatic ban on all information from pre-trial proceedings,

48. This is the purpose which s. 648(1) serves. Sections 517(1), 539(1) and 542(2) are "provisions ... aimed at preserving the presumption of innocence and the right to a fair trial by ensuring that prospective jurors have no preconceived notions about guilt prior to trial".[57] Section 648(1) must be viewed as an essential pillar of the cohesive scheme of pre-trial publication deferrals enacted by Parliament.

49. The respondent will next address, in turn, the interplay between s. 648(1) and two additional sections – s. 645(5) and s. 551.1 - before turning to the textual interpretation of the phrases "any portion of the trial" and "no information".

C. Section 648(1) must be read in conjunction with s. 645(5)

50. Section 648(1) was originally enacted in 1972.[58] Then s. 576(1) provided:

> Restriction on publication
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> Where permission to separate is given to members of a jury under subsection 576(1), no information regarding any portion of the trial at which the jury is not present shall be

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[55] *R. v. King,* 2022 ONCA 665, para. 183.
[56] *R. v. Jordan,* 2016 SCC 27, para. 140.
[57] *R. v. White*, 2006 ABCA 65, para. 29, aff'd *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21.
[58] *Criminal Law Amendment Act*, S.C. 1972, c. 13, s. 49; Canada, *Standing Senate Committee on Legal and Constitutional Affairs*, 28th Parl., 4th Sess. (1 June 1972), at 8:17 to 8:18. See also the legislative history in Gary P. Rodrigues, ed., *Crankshaw's Criminal Code of Canada R.S.C. 1985*, 8th Ed. (Toronto: Thomson Reuters Canada, 1993) (Online Westlaw Canada Release 2022-6), s. 648.

> published, after the permission is granted, in any newspaper or broadcast before the jury retires to consider its verdict.

51. In 1985, s. 576.1 was re-enacted unchanged as s. 648.[59] Then, in 2005, s. 648(1) was replaced by the following:

> 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.[60]

52. The appellants place significant weight on the phrase "[a]fter permission to separate is given to members of a jury" in s. 648(1). However, to correctly interpret that phrase and the circumstances it encompasses, s. 648(1) must be read in conjunction with s. 645(5) of the *Code,* which is also included in Part XX, "Procedure in jury trials and general provisions". Section 645(5) permits a trial judge to "deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn" *before* the jury has been empanelled.

53. Prior to the enactment of s. 645(5), "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".[61] However, "[f]ollowing 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".[62]

54. In 1985, Parliament enacted s. 645(5) to address this concern.[63] As Minister of Justice John Crosbie explained to the House of Commons Standing Committee on Justice and Legal Affairs, the amendment was part of a group of amendments:

> …designed to improve the administration of justice…The proposed amendment would allow a judge to consider issues that are normally decided in the absence of a jury, such as admissibility of evidence say on a confession or whatever. The purpose here would be to expedite the judicial process before the jury is empanelled so that the jury does not have to

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[59] *Criminal Code*, R.S.C. 1985, c. C-46.
[60] *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, s. 21.
[61] *R. v. Curtis* (1991), 66 C.C.C. (3d) 156 (Ont. Ct. – Gen. Div.), at 157.
[62] *R. v. Malik, Bagri and Reyat*, 2002 BCSC 80, para. 21.
[63] *Crankshaw's Criminal Code of Canada*, s. 645(5) legislative history.

> wait for hours while the questions are argued or a *voir dire* is held. We believe the proposals will ensure that the rights and freedoms of the accused remain fully protected.[64]

55. Thus, like the s. 517 publication ban, ss. 645(5) and 648(1) together fulfill two purposes: (1) to avert jury bias; and (2) improve the efficiency of the trial process.

56. Following the enactment of s. 645(5), when a judge makes an evidentiary ruling "he or she acts as the trial judge and, consequently is necessarily seised with the trial. In fact, s. 645 immediately follows the heading 'Trial' which … is confirmatory that an evidentiary hearing conducted pursuant to s. 645(5) is deemed to constitute part of a jury trial".[65]

57. When considered in conjunction with s. 645(5), s. 648(1) "ensures the smooth operation of the jury trial itself, with a minimum of disruptions, by fully enabling the parties to a prosecution to fully litigate all matters that should occur outside the jury's presence, before the jury is empanelled".[66] In order to protect an accused's "right to a fair trial, Parliament did not intend to derogate from the mandatory deferral of publication of information concerning pre-trial matters".[67] As MacDonald J. explained in *R. v. Regan*:

> …. When put in its historical context, there is nothing in s. 645(5) that should in any way diminish or qualify the safeguard provided in s. 648(1). There would be no logical purpose for Parliament to jeopardize the "648 safeguard" when it enacted s. 654(5). It simply attempted to alter the timing of *voir dires*. The fact that they can now be held earlier should not be seen as allaying Parliament's concerns. Parliament has already expressed its concern about pre-indictment publicity when it imposed statutory bans on bail hearings and preliminary inquiries.[68]

58. The appellants appear to submit that s. 648(1) should be frozen in time and its purpose assessed solely as of the date of its enactment. However, when legislation is enacted to regulate an ongoing activity over an indefinite period it should be interpretated dynamically. In *R. v. 974649*

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[64] Canada, *House of Commons Standing Committee on Justice and Legal Affairs*, 33rd Parl., 1st Session (22 January 1985), at p. 5:9, 1550. See also Canada, *Senate Standing Committee on Legal and Constitutional Affairs,* 33rd Parl., 1st Sess. (30 May 1985), at 12:8 and *White*, para. 29.
[65] *Curtis*, at 159 (emphasis added).
[66] *Millard and Smich*, para. 25.
[67] *Malik*, para. 22.
[68] *R. v. Regan* (1997), 124 C.C.C. (3d) 77 (N.S.S.C.), at 84-85. This quote is reproduced from the C.C.C. as the online reporters contain errors.

Ontario Inc., McLachlin C.J. concluded that the Ontario legislature intended to authorize a provincial offences court to order remedies under s. 24 of the *Charter* even though that court was established before the *Charter* came into force.[69] She concluded that:

> [38] …The intention of Parliament or the legislatures is not frozen for all time at the moment of a statute's enactment, such that a court interpreting the statute is forever confined to the meanings and circumstances that governed on that day. Such an approach risks frustrating the very purpose of the legislation by rendering it incapable of responding to the inevitability of changing circumstances. Instead, we recognize that the law speaks continually once adopted: *Tataryn v. Tartaryn Estate*, [1994] 2 S.C.R. 807, at p. 814; see also *Interpretation Act,* R.S.O. 1990, c. I.11, s. 4. Preserving the original intention of Parliament or the legislatures frequently requires a dynamic approach to interpreting their enactments, sensitive to evolving social and material realities. While the courts strive ultimately to give effect to legislative intention, the will of the legislature must be interpreted in light of prevailing, rather than historical circumstances: see for example, *Symes v. Canada,* [1993] 4 S.C.R. 695, at pp. 727-29 (*per* Iacobucci J.), and pp. 793-94 (*per* L'Heureux-Dubé J., dissenting); *Tataryn, supra*, at pp. 814-15.[70]

59. Chief Justice McLachlin's comments have equal application here. The principles of statutory interpretation "are flexible enough to achieve the intent of the legislature in the context of evolving realities".[71] The purpose of ss. 645(5) and 648 must be viewed in the context of the changing complexity of criminal prosecutions. Specifically:

(a) The pre-trial application phase of trials has become longer because of (i) the passage of the *Charter*; (ii) the judicial reform of evidence law; and (iii) the addition of many complex statutory provisions in the *Code* and other related statutes.[72] As noted in *Jordan*, "[m]any of [these reforms] put a premium on fairness, reasonableness, and a fact-specific analysis. They take time. They also take up judges, courtrooms and other resources".[73]

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[69] *R. v. 974649 Ontario Inc.*, 2001 SCC 81.
[70] *974649 Ontario Inc.*, para. 38 (emphasis added).
[71] *John v. Ballingall*, 2017 ONCA 579, para. 23, leave to appeal refused, [2017] S.C.C.A. No. 377.
[72] Patrick J. LeSage and Michael Code. *Report of the Review of Large and Complex Criminal Case Procedures* (Toronto: Ontario Ministry of the Attorney General, 2008) at p. 7. See also *Jordan,* para. 42.
[73] *Jordan*, para. 42. The new presumptive ceilings in *Jordan* took into account the increased complexity of criminal cases since *R. v. Morin*, [1992] 1 S.C.R. 771 was decided in 1992: *Jordan*, paras. 38, 53, 107.

(b) Parliament has responded to these complications by introducing mechanisms to promote fair and expeditious trials: (i) mandatory pre-trial hearings for jury trials were introduced (s. 625.1(2)), which, in B.C., are conducted "informally but on the record";[74] (ii) s. 645(5) was enacted to give trial judges jurisdiction to hear matters that would ordinarily be heard in the absence of the jury prior to empanelment because "sending [the jury] home while weeks or more of pre-trial applications were addressed was impractical";[75] and (iii) as outlined below, Part XVIII.1 of the *Code* was enacted to authorize a case management judge to hear pre-trial applications "as a trial judge".

60. If s. 648 is interpreted to apply only to pre-trial applications heard by the trial judge *after* the jury is empanelled, it would defeat Parliament's purpose: Sullivan at §10.03. As Fuerst, Sanderson and Firestone note in *Ontario Courtroom Procedure*, 5th Ed., s. 648 must apply "to what takes place before the selection of the jury because otherwise the purpose of dealing with the issue in the absence of the jury would be defeated".[76]

D. Section 648 must also be read in conjunction with Part XVIII.1 of the *Code*

61. In addition to s. 645(5), s. 648 must also be read in conjunction with Part XVIII.1 of the *Code*, which authorizes a case management judge to hear pre-trial applications "as a trial judge".

62. In 2011, Parliament enacted an entirely new Part XVIII.1 of the *Code*, "Case Management Judge". Section 551.1 authorizes the Chief Justice or the Chief Judge or their designate to appoint a case management judge if they are of the opinion that it is necessary for the proper administration of justice. Parliament's purpose was to strengthen the judicial management of long, complex cases, particularly with respect to the preliminary stages of a trial, to ensure that they proceed more efficiently and effectively. The role of a case management judge is to "promote a fair and efficient trial including by ensuring that the evidence on the merits is presented, to the extent possible, without interruption".[77] The case management judge "as a trial judge, exercises the powers that a trial judge has before that stage in order to assist in promoting a fair and efficient trial".[78]

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[74] *R. v. Russell,* 2011 BCSC 611 [unreported], para. 96.
[75] *Malik*, para. 21.
[76] M. Fuerst, M.A. Sanderson and S. Firestone. *Ontario Courtroom Procedure,* 5th Ed. (Toronto: LexisNexis, 2020), at p. 707 (§32.B.1) (emphasis added).
[77] *Criminal Code*, s. 551.2.
[78] *Criminal Code*, s. 551.3(1) (emphasis added).

Moreover, when the case management judge exercises the power to adjudicate pre-trial motions, "he or she is doing so at trial".[79]

63. In *R. v. Khiar*, Code J. reviewed the impact of Part XVIII.1 and held that the intent of the amendments "was to make the pre-trial Motions part of 'the trial'" within the meaning of s. 475 of the *Code* ("absconds during the course of … trial"):

> [19] …. That power to appoint a "case management judge" was enacted in 2011, as part of an entirely new Part XVIII.1 of the *Criminal Code*. The provisions of this new Part repeatedly refer to the role of the "case management judge" as "promoting a fair and efficient trial" at an early stage, "before the stage of the presentation of the evidence on the merits," and state that when ruling at the pre-trial stage "he or she is doing so at trial." These provisions make it clear that the "case management judge" can continue and become "the judge who hears the evidence on the merits" and that the "case management judge, as a trial judge, exercises the powers that a trial judge has before that stage in order to assist in promoting a fair and efficient trial." These provisions also make it clear that when a "case management judge" hears pre-trial Motions, without hearing the evidence on the merits, "the trial … shall proceed continuously" [emphasis added]. I am satisfied that the legislative intent was to make the pre-rial Motions part of "the trial." See: LeSage and Code, *Report of the Review of Large and Complex Criminal Case Procedures*, Queen's Printer for Ontario 2008, at pp. 58-67….[80]

64. In *La Presse inc. c. Silva,* David J. was assigned as the case management judge pursuant to s. 551.1. He held that s. 648(1) applied to the *voir dires* over which he presided in his capacity as case management judge.[81] David J. noted that when s. 648 was enacted, pre-trial applications almost always happened after the jury was empanelled and that s. 551.1 changed things such that the majority of pre-trial applications now take place before the jury is empanelled.[82] He concluded that the purpose of s. 648 is to ensure trial fairness is not compromised by information which has not been tested on a criminal standard.[83]

65. The respondent will now address, in turn, the textual interpretation of the phrases "any portion of the trial" and "no information".

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[79] *Criminal Code*, s. 551.3(4).
[80] *R. v. Khiar*, 2021 ONSC 4677, para. 19 (emphasis in original).
[81] *La Presse inc. c. Silva*, 2022 QCCS 881, paras. 3-5, application for leave to appeal granted (S.C.C. No. 40175).
[82] *La Presse*, paras. 28, 33.
[83] *La Presse*, para. 31.

E. "Any portion of the trial" includes proceedings before the jury is selected

66. Section s. 648(1) refers to "any portion of the trial at which the jury is not present". Historically, a jury trial commenced when the accused was placed in charge of the jury.[84] However, ss. 645(5) and 551.1 have changed that analysis.

67. As noted above, s. 645 is found in Part XX of the *Code*, "Procedure in jury trials and general provisions". This Court addressed the impact of s. 645(5) in *R. v. Litchfield*,[85] where Iacobucci J. reconsidered this Court's earlier decision in *R. v. Chabot*[86] in light of s. 645(5). In *Chabot*, this Court held that only the trial judge could hear a severance application and that a severance application could not be heard prior to trial. The preferral of the indictment occurred and the trial began when the accused was called upon to plead "before a trial court constituted to dispose of the case" (i.e., when the court was ready to empanel the jury). However, in *Litchfield,* Iacobucci J. held that the enactment of s. 645(5) modified this procedure. He held that once a trial judge has been assigned, the indictment can be preferred against the accused by lodging it with the trial judge and a severance application can be heard as a pre-trial motion pursuant to s. 645(5).[87] In the circumstances of that case (where the severance order was not made by the trial judge but by an application judge), the severance order did not form part of the trial. However, both Iacobucci J. and McLachlin J. (as she then was, in concurring reasons), held that if the order had been made by the trial judge, it would have formed part of the trial and would have been subject to appellate review along with the verdict.[88]

68. The factual situation in *Litchfield* has been cured by the subsequent enactment of ss. 551.1 to 551.3, which now authorize a case management judge to exercise the powers of a trial judge. As a result, there should be no dispute that pre-trial proceedings conducted pursuant to ss. 551.1 to 551.3 and 645(5) are "deemed to constitute part of a jury trial".[89]

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[84] See discussion in *Basarabas & Spek v. The* Queen, [1982] 2 S.C.R. 730, at 734 to 740.
[85] *R. v. Litchfield*, [1993] 4 S.C.R. 333
[86] *R. v. Chabot*, [1980] 2 S.C.R. 985.
[87] *Litchfield*, at 352.
[88] *Litchfield*, at 349-350 and 365.
[89] *Curtis,* at 159. See also *R. v. Lee* (2002), 170 C.C.C. (3d) 225 (Ont. C.A.), paras. 19-21.

69. This Court has also held that the time of commencement of a jury trial will vary according to the circumstances and the language of the *Code* section being applied.[90] The question of when the "trial" begins requires a court to consider (1) the purpose of the specific section in issue; and (2) whether the accused's vital interests are impacted. Cases which have considered when a trial begins for the purposes of s. 475 ("absconds during the course of … trial") and s. 650(1) ("present in court during the whole of … trial") support an expansive interpretation of the phrase "any portion of the trial" in s. 648(1).

70. In the context of s. 650(1), "trial" carries a broad meaning.[91] In 1982, prior to the enactment of what is now s. 645(5), Martin J.A. held that then s. 577(1) (now s. 650(1)) is triggered whenever a decision bears on the "substantive conduct of the trial or the issue of guilt or innocence".[92] He also held that the "trial" includes *voir dires*, rulings on evidence, and any proceedings which are part of the normal trial process:

> …."[t]rial" for the purpose of the principle that an accused is entitled to be present at his trial clearly includes proceedings which are part of the normal trial process for determining the guilt or innocence of the accused such as arraignment and plea, the empanelling of the jury, the reception of evidence (including *voir dire* proceedings with respect to the admissibility of evidence), rulings on evidence, arguments of counsel, addresses of counsel to the jury, the judge's charge, including requests by the jury for further instructions, the reception of the verdict and the imposition of sentence if the accused is found guilty.[93]

71. This Court cited Martin J.A.'s definition with approval in *Vézina and Côté v. The Queen*, a case which also addressed whether an accused was present in court during "the whole of his trial" pursuant to then s. 577(1) (now s. 650(1)).[94] Lamer J., as he then was, held that a "trial" was not limited to the presentation of the case against the accused or to matters that directly affected the decision as to guilt or innocence. An accused must be present if the "vital interests of the accused" are in issue.[95]

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[90] *Basarabas & Spek*, at 740; *Barrow*, at 704.
[91] *R. v. Sinclair*, 2013 ONCA 64, para. 15.
[92] *R. v. Hertrich, Stewart and Skinner* (1982), 67 C.C.C. (2d) 510 (Ont. C.A.), at 529 (emphasis added).
[93] *Hertrich*, at 527 (emphasis added).
[94] *Vézina and Côté v. The Queen* , [1986] 1 S.C.R. 2, at 9-10. See also *Barrow*, at 706-708.
[95] *Vézina*, at 11-13.

72. More recently, courts have held that s. 650(1) of the *Code* should be given "an expansive meaning".[96] Whether s. 650 is infringed "will depend on whether the context and contents of the discussion involved or affected the vital interests of the accused or whether any decision made bore on 'the substantive conduct of the trial'".[97] Pre-trial applications and "in chambers" discussions are considered part of the "trial".[98]

73. A similar approach has been taken with respect to s. 475 of the *Code* (abscond from trial). In that context, courts have held that the trial had begun when the trial or case management judge started to hear pre-trial applications.[99]

74. To ensure interpretative consistency among related sections, a similar approach should be applied when interpreting "any portion of the trial" in s. 648(1).

F. "No information" should be given its ordinary meaning

75. Section 648(1) provides that "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".

76. The appellants assert that "[a]n interpretation that results in a blanket, mandatory ban on all pre-jury hearings creates a significant infringement on openness".[100] They also submit that the word "information" is "an over-inclusive word" and should be read narrowly as "prejudicial information" because "there is no justification to infringe on openness, and the courts should strive for a non-infringing or minimally infringing interpretation".[101]

77. However, in the absence of a constitutional challenge, *Charter* values "only play a role if there is genuine ambiguity as to the meaning of a provision…. If the statute is unambiguous, the court must give effect to the clearly expressed legislative intent".[102] If "the meaning of the

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[96] *R. v. L.W.T.*, 2008 SKCA 17, para. 24.
[97] *R. v. Poulos*, 2015 ONCA 182, para. 18. See also *R. v. Simon*, 2010 ONCA 754, para. 116, leave to appeal refused, [2010] S.C.C.A. No. 459; *R. v. S.M.*, 2022 ONCA 765, para. 35.
[98] See, for example, *R. v. Edwardsen*, 2019 BCCA 259, para. 9, leave to appeal refused, [2019] B.C.C.A. No. 337; *Simon*, para. 117; *S.M.*, paras. 35-36.
[99] See, for example, *Khiar*, paras. 18-19.
[100] *Appellants' Factum*, para. 49.
[101] *Appellants' Factum*, para. 80-82.
[102] *R. v. Clarke*, 2014 SCC 28, para. 12; see also paras. 13-15.

provision is clear on the basis of conventional principles of statutory interpretation", it is "neither appropriate nor necessary to have recourse to the presumption that the legislation conforms" to the *Charter*.[103]

78. The respondent submits that the word "information" does not result in any ambiguity. The phrase "no information" should be given its plain and ordinary meaning as it is clear and unqualified. The phrase is "so clear it affords no range of meanings".[104] The "provision, as written, is not vague and … reflects Parliament's clear intention".[105]

79. The appellants advocate for "information" to be read as "prejudicial information". That argument has been rejected in a number of s. 648(1) cases.[106] Similarly, in *R. v. Daly*, the trial judge rejected the media's submission that "reasons" in s. 517(1) should be read to exclude non-prejudicial information.[107] Sigurdson J. held that such an interpretation would defeat the purpose of s. 517(1) and Parliament's intent.[108]

80. Parliament selected a broader phrase in s. 648(1) than used in other publication deferral sections. Section 648(1) should be contrasted with s. 517, where the publication ban is imposed on "the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice". It can also be contrasted with s. 539, where the publication ban is imposed on "the evidence taken at the [preliminary] inquiry". The phrase "no information regarding any portion of the trial" in s. 648(1) is qualitatively different and must be given effect.

81. The appellants also ask this Court to distinguish between "prejudicial" and "non-prejudicial" applications. However, even what could be perceived as "innocuous" "housekeeping matters" may "[involve] matters which, if known to the jury, could be prejudicial. Parliament has chosen to draw a clear line. There is a sound policy for that. It avoids the risks to a fair trial inherent

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[103] *R. v. Summers*, 2014 SCC 26, para. 35.
[104] *Millard and Smich*, para. 30.
[105] *Millard and Smich*, para. 30.
[106] *Millard and Smich*, paras. 30-32. See also *Russell,* paras. 82, 99-100; *R. v. Ahmad*, [2009] O.J. No. 6150 (S.C.), paras. 12-13.
[107] *R. v. Daly*, 2003 BCSC 1143, paras. 12, 24, 29, aff'd 2005 BCCA 389 (although the Court held it was not necessary to resolve this issue on appeal).
[108] *R. v. Daly* (BCSC), paras. 68-69.

in permitting each reporter to draw his or her own line as to what is and what is not a portion of the trial".[109]

82. At the outset of an application or a series of pre-trial applications, it is not possible to assess what evidence or information is likely to be prejudicial. In many cases, pre-trial applications sequentially build on one another and have a domino effect. As a result, their true impact cannot be measured until the end of pre-trial proceedings. The publication ban applies at a stage when neither the trial judge nor the parties can foresee what information will be prejudicial to an accused's right to a fair trial. Moreover, as a number of courts have recognized, "prejudice to fair trial interests can flow from procedural motions, as well as from evidential motions".[110]

83. The appellants assert that "typical pre-jury" applications such as a s. 11(b) post-charge delay application, a disclosure application, or an application for state-funded counsel will have "little or no bearing on the evidence".[111] However, there is no such thing as a "typical" pre-trial application and a review of a representative sample of those types of applications reveals that a wide range of potentially prejudicial information is contained in those decisions including strategic decisions with respect to conduct of the defence and untested, prejudicial evidence.[112] Moreover, as Goodman J. observed in *Millard and Smich*, "to permit publication of some or all pretrial motions presented for adjudication, would, in my opinion, wreak havoc with the intended process".[113] He rejected the submission that certain kinds of motions which are not directly related to the admissibility of evidence at trial (such as applications for change of venue, particulars, abuse

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[109] *R. v. CHBC Television, a division of WIC Television Ltd.*, 1999 BCCA 72, para. 44.
[110] *Ahmad*, para. 12. See also *Regan,* at 85.
[111] *Appellants' Factum*, para. 60.
[112] For example, in *Regan*, MacDonald J. noted that "the upcoming disclosure application will deal with allegations against the accused that are outside the scope of the indictment. Publication of these facts could be more prejudicial than publication of preliminary inquiry evidence" (at 85).
[113] *Millard and Smich*, para. 57.

of process, s. 11(b) delay, challenge for cause, severance, or even where an accused may sit at trial) could be published, in whole or in part.[114]

84. Several judges have expressed reservations about the two-tiered approach suggested by the appellants. As Pardu J. (as she then was) explained in *R. v. Valentine*, it is not feasible to distinguish between prejudicial and non-prejudicial information at this stage of the proceedings:

> [8] The difficulty with this approach is that it may be difficult to identify the "prejudicial aspects" of pre-trial motions which are governed by a mandatory ban. Some motions for example for a stay or *Charter* relief other than exclusion of evidence may contain material which would never be heard at trial, and which might be seriously prejudicial to the fair trial interests of an accused. A jury trial is almost always imminent when these pre-trial motions are heard. Breach of a mandatory statutory ban is a serious matter; publishers may be unaware of all the issues associated with a criminal proceeding, and it may be difficult for them to make judgment calls as to what will or will not violate the ban.[115]

85. Similarly, in *Millard and Smich*, Goodman J. held that s. 648 "was broadly framed for legitimate reasons". Requiring a ruling-by-ruling approach "would inject significant uncertainty where none should exist". Moreover, splitting pre-trial motions into two categories would "increase the burden on litigants and make the proceedings more complex and drawn out than they need to be. I query whether as trial judge, in cases involving multiple pretrial motions, it would be a useful exercise of judicial resources to review all of the applications and rulings to select what potential segmented information could be released to the public".[116] This is consistent with Deschamps J.'s approach in *Toronto Star*.

86. A discretionary approach which requires trial judges to distinguish on a case-by-case basis between prejudicial and non-prejudicial information while in the midst of pre-trial proceedings would not advance Parliament's objectives of protecting an accused's right to a fair trial (s. 648(1))

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[114] *Millard and Smich*, paras. 33, 63. With respect to change of venue applications, Goodman J. noted that media coverage about a failed change of venue application has, in some cases, been used by trial judges as a basis to grant a subsequent change of venue application (para. 57). See also, for example, *R. v. J.H.T.*, 2016 BCSC 2382, paras. 25-36 and *Ontario Courtroom Procedure*, at pp. 424-426 (§19.C.5(b)).

[115] *R. v. Valentine*, [2009] O.J. No. 5954 (Ont. S.C.J.), para. 8 (emphasis added).

[116] *Millard and Smich*, para. 65.

or ensuring efficient pre-trial processes (s. 645(5)). As Deschamps J. observed in *Toronto Star*, in the context of addressing the s. 517 publication ban imposed on bail hearings, it is not acceptable to impose additional constraints on the parties and the trial judge at this stage of the proceedings. She quoted with approval from Rosenberg J.A., who wrote the dissenting reasons in the Ontario case:

> The interest in a fair trial embraces not simply the narrow interest of preventing potential jurors from being influenced by prejudicial material that might be disclosed at a bail hearing, but other interests intended to safeguard the accused's and society's interest in a fair trial. Those interests include preventing diversion of the accused's scarce resources to fight opposition to a publication ban and preventing delay of the bail hearing.[117]

87. Later in her decision, Deschamps J. continued:

> [45] For similar reasons, I am also of the opinion that to hold that the ban is discretionary solely with respect to the justice's reasons would not serve the objectives of the provision. Even if it could be argued that the justice could expeditiously give reasons that would not unduly risk jury bias or otherwise feed dangerous pre-trial publicity, to impose such constraints on the justice at this time would be unacceptable. This would inevitably invite the parties to present arguments on the discretionary ban and on the content of the reasons likely to be published. Preparing arguments takes time and resources. Moreover, one should not underestimate the complexity of crafting meaningful reasons without disclosing potentially determinative untested evidence at a stage at which neither the justice nor the accused can foresee what information will be prejudicial to the right of the accused to a fair trial.[118]

88. The same principles, with necessary modification, apply to pre-trial proceedings.

89. If evidence is ruled inadmissible, "then publication of it might expose the jury to evidence that they will not and should not ever hear during the trial".[119] Moreover, even if the evidence is admitted, publication may still impact the fair trial rights of the accused. As Heeney J. explained in *R. v. Canadian Broadcasting Corporation*:

> [23] …. First, it would be obvious to anyone reading that the accused sought, unsuccessfully, to exclude admissible evidence that was damaging to him, thereby casting him in a negative light. In addition, evidence heard on a *voir dire* is often significantly

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[117] *Toronto Star*, para. 22, quoting from *Toronto Star Newspapers Ltd. v. Canada*, 2009 ONCA 59, para. 38.
[118] *Toronto Star,* para. 45 (emphasis added).
[119] *R. v. Canadian Broadcasting Corporation* (2008), 248 C.C.C. (3d) 543, 2008 CanLII 83941 (Ont. S.C.J.), para. 23.

> different during its second telling in the trial proper. Finally, evidence that is ruled admissible on a *voir dire* might never be heard at trial at all, either because of a tactical decision of counsel or the sudden unavailability of a witness.
> …
> [33] Banning publication of "all information" includes publication of the fact of the motion or application itself. In all or most of these evidentiary motions, disclosure of the fact that the motion has been made is just as prejudicial to a fair trial as disclosure of the evidence itself. For example, disclosing that a motion has been brought to exclude a statement by an accused is prejudicial because it indirectly discloses that a statement exists; disclosure of the fact of a Corbett application is prejudicial, because it indirectly discloses that a criminal record exists.[120]

90. A broad interpretation of the word "information" is logical at this stage in the proceedings as neither the justice nor counsel can definitively foresee what information will be prejudicial to the accused's right to a fair trial.

G. Section 648(1) also applies to mandatory pre-trial conferences

91. The reasoning outlined above has equal application to mandatory pre-trial conferences for jury trials which are mandated by s. 625.1(2) of the *Code*.[121] The purpose of the pre-trial conference is "to consider any matters that would promote a fair and expeditious trial"[122] and "to ensure that the trial will proceed as efficiently and effectively as possible".[123]

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[120] *Canadian Broadcasting Corporation*, para. 23.

[121] Pre-trial conferences are conducted pursuant to the rules of court enacted under ss. 482 and 482.1 of the *Code*. In B.C., for example, Rule 5 of the *Criminal Rules of the Supreme Court of British Columbia,* SI/97-140, provides that pre-trial conferences are mandatory. Counsel must disclose to the trial judge the "nature and particulars of any preliminary motion that counsel intend to make" (Rule 5(11)) and "the nature and particulars of any matter that may arise in the course of the trial that would ordinarily be dealt with in the absence of the jury after it has been sworn" (Rule 5(13)).

[122] *Criminal Code*, s. 625.1(2).

[123] *R. v. Mastop*, 2010 BCSC 1961, para. 4; see also *Russell*, para. 78.

92. A number of B.C. courts have held that s. 648(1) extends to pre-trial conferences.[124] For example, in *Russell*, Stromberg-Stein J. (as she then was) noted that mandatory pre-trial conferences are conducted in the absence of the jury in order to foster full, frank and uninhibited discussions with the court about the orderly conduct of the trial. A variety of issues may be discussed, including disclosure issues, funding issues and the scheduling of pretrial applications (which requires a discussion of the substance of the applications).[125] She held that the purpose of pre-trial conferences "is to assist the court and thus the administration of justice in ensuring matters are heard as expeditiously as possible".[126] The discussions "consider matters that would otherwise be dealt with in the absence of the jury".[127] The cooperation of counsel "is compelled" and "counsel are expected to fully and freely engage with the court and each other in candid discussions about issues and matters that might streamline the trial or might arise at trial".[128]

93. Stromberg-Stein J.'s analysis is consistent with the approach taken under s. 650(1) of the *Code* discussed above: at a pre-trial conference "the context and contents of the discussion [involve or affect] the vital interests of the accused" and decisions at a pre-trial conference bear on "the substantive conduct of the trial".[129]

94. Judicial pre-trial conferences are held without prejudice.[130] The "very purpose of a pre-trial conference is inconsistent with a public dissemination of its content".[131] The "proper and intended function of the pre-trial conference would be greatly diminished if the topics and the

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[124] *Russell*; *Mastop; R. v. Pickton*, 2005 BCSC 836. In contrast, in Quebec, s. 40 of the *Rules of Practice of the Superior Court of the Province of Québec, Criminal Division, 2002*, SI/2002-46 provides for a mandatory publication ban on mandatory s. 625.1 pre-trial conferences.

[125] *Russell*, para. 96.
[126] *Russell*, para. 78.
[127] *Russell*, paras. 78; see also para. 96.
[128] *Russell*, para. 78.
[129] *Poulos*, para. 18.
[130] Rule 5(7) of the *Criminal Rules of the Supreme Court of British Columbia,* SI/97-140; *Russell,* para. 78; *R. v. Zakuti,* 2021 BCSC 2155, para. 38; *R. v. Llacuna*, 2016 ONSC 6174, para. 38.
[131] *Mastop*, para. 4.

details of the discussion at the pre-trial conference were subject to publication before the completion of the trial that the conference is intended to manage".[132]

H. The withdrawn 1994 amendment does not impact the analysis

95. The appellants point to the withdrawn 1994 amendment as evidence that Parliament did not intend for the s. 648 publication ban to apply to pre-trial proceedings before the jury was empanelled.[133] However, the respondent submits that no weight should be given to the withdrawn 1994 amendment.

96. This Court's jurisprudence is not clear on the effect of a failed legislative amendment. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, LeBel and Cromwell JJ., writing for the Court, held that while unenacted provisions "may shed light on the purpose of the legislation …. great care must be taken in deciding how much, if any, weight" should be given to proposed but unenacted provisions.[134] In reaching that conclusion, the majority cited with approval from the concurring opinion of Bastarache J. in *M. v. H.*.[135] However, it is important to note that Bastarache's J.'s approach was rejected by the majority in that case.

97. In *M. v. H.,* Cory and Iacobucci JJ. wrote for the majority. They penned a joint introduction and overview,[136] and then each wrote separate reasons in support of specific issues.[137] In addressing the "pressing and substantive objective" prong of the s. 1 analysis, Iacobucci J. expressly rejected Bastarache J.'s approach with respect to the failed legislative amendment:

> [105] Finally, I note that Bastarache J. accepts that the rejection of the *Equality Rights Statute Law Amendment Act, 1994* by the Ontario legislature can provide evidence regarding the objective of s. 29 of the *FLA*. In particular, he argues, at para. 349: "It can therefore be inferred that the legislature's purpose was also to exclude all types of relationships not typically characterized by the state of economic dependency apparent in traditional family relationships." **With respect, I cannot agree that a failed amendment can provide evidence as to the objective of the legislation that was to have been amended. Section 17 of the *Interpretation Act*, R.S.O. 1990, c. I.11, provides: "The repeal or amendment**

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[132] *Mastop*, para. 8.
[133] *Appellants' Factum*, paras. 39-44, 75.
[134] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, para. 44.
[135] *M. v. H.*, [1999] 2 S.C.R. 3, paras. 348-49.
[136] *M. v. H.*, paras. 1-6.
[137] *M. v. H.*, para. 6.

> **of an Act shall be deemed not to be or involve any declaration as to the previous state of the law." If the amendment of an Act may not be used to interpret the meaning of the Act prior to the amendment, then I do not see how a failed amendment may be used in this manner.**[138]

98. The respondent submits that Iacobucci J.'s approach in *M. v. H.* is more consistent with s. 45(3) of the federal *Interpretation Act*,[139] and this Court's previous jurisprudence.

99. Section 45(3) provides that "[t]he repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law". That section was cited with approval by Cory and Iacobucci JJ., writing for the majority in *United States v. Dynar*.[140] In that case, the majority rejected the submission that a pending bill, which would amend the legislation in issue, was of relevance in determining the purpose of the impugned provisions.[141] Cory and Iacobucci JJ. held that "subsequent legislative history" is not relevant in determining the intention of the enacting Parliament or Legislature. Moreover, they stressed that it is for the courts to determine what the intention of the enacting Parliament was:

> 45 As further support for the view that knowledge implies truth, the respondent points to a bill (Bill C-17) that Parliament has introduced to amend the money-laundering provisions to replace the word "knowing" with the words "knowing or believing". This might be taken to suggest that, in the judgment of Parliament, the present money-laundering provisions do not contemplate punishment of one who merely believes that he is converting the proceeds of crime. But in our view this argument is misconceived. What legal commentators call "subsequent legislative history" can cast no light on the intention of the enacting Parliament or Legislature. At most, subsequent enactments reveal the interpretation that the present Parliament places upon the work of a predecessor. And, in matters of legal interpretation, it is the judgment of the courts and not the lawmakers that matters. It is for judges to determine what the intention of the enacting Parliament was.
>
> 46 Parliament itself recognized as much, when, in the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 45(3), it declared:
>
> > The repeal or amendment of an enactment in whole or in part shall not be deemed to be or to involve any declaration as to the previous state of the law.

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[138] *M. v. H.*, para. 105 (underlined emphasis in original, bolded emphasis added).
[139] *Interpretation Act,* R.S.C. 1985 c. I-21.
[140] *United States v. Dynar, (sub. nom. United States of America v. Dynar)*, [1997] 2 S.C.R. 462.
[141] *Dynar*, para. 45.

> Moreover, to consult "subsequent legislative history" as an aid to the interpretation of prior enactments would be to give the subsequent enactments retroactive effect; and, as this Court has often observed, statutes are not to be given retroactive effect except in the clearest of cases….[142]

100. Even if some weight were to be given to the withdrawn 1994 amendment, the most that could possibly be said is that while it may not have been necessary for Parliament to attempt to amend s. 648(1), Parliament was attempting to achieve certainty in the law. However, regardless of the reasons why the 1994 amendment was withdrawn, the purpose of s. 648(1) must be interpreted dynamically, in the context of the current scheme in the *Code*.

101. Courts and commentators have also shared the view that the withdrawn 1994 amendment did not substantially change the law.

102. For example, while the media opposed the 1994 amendment in Senate hearings,[143] the Standing Committee on Criminal Law of the Barreau du Québec supported the amendment.[144] Guy Cournoyer (now Cournoyer J.A.) testified that "Clause 62 does not fundamentally change current practice in criminal procedure" and simply strengthens "the practice that has long existed of not permitting information to be published for so long as there is the potential to influence the jurors in the trial or potential jurors".[145] This view was shared by LeSage, A.C.J.O.C. (as he then was) in *R. v. Bernardo*, after the 1994 amendment had been withdrawn. He held that the proposed amendment to s. 648 was much broader than simply clarifying that s. 648(1) applies to pre-trial applications heard before the jury was empanelled. LeSage, A.C.J.O.C. observed:

> [23] …. It appears to me that the proposed amendments were structured in a broad manner so as to apply to all "in-trial" and "pre-trial" proceedings which occur in the presence of "a judge" as opposed to "the trial judge" during "in-trial" proceedings, which includes evidentiary rulings made by the trial judge prior to the empanelling of the jury. The rejection of the proposed amendments by the Senate does not cause me to change my opinion that

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[142] *Dynar*, paras. 45-46 (emphasis added).
[143] Canada, *Standing Senate Committee on Legal and Constitutional Affairs*, 35th Parl., 1st Sess. (6 December 1994).
[144] Canada, *Standing Senate Committee on Legal and Constitutional Affairs*, 35th Parl., 1st Sess. (8 December 1994), at pp. 18:36-18:37, 18:41-18:47.
[145] Canada, *Standing Senate Committee on Legal and Constitutional Affairs*, 35th Parl., 1st Sess. (8 December 1994), pp. 18:37, 18:46

present s. 648(1) is intended to apply to all "in-trial" proceedings which occur before me as the trial judge in the absence of the jury.[146]

103. The withdrawn 1994 amendment should have no impact on this Court's analysis.

I. Principle of strict construction does not apply

104. The principle of interpretation relating to the strict construction of penal statutes only applies where there is ambiguity as to the meaning of a provision.[147] As noted above, the respondent submits that there is no ambiguity and, as a result, it is not necessary to resort to this principle in the Court's interpretative analysis.

J. Conclusion

105. The appellants have invited this Court to interpret s. 648(1) literally and narrowly, thus ignoring its context and purpose. However, this approach fails to give effect to s. 648's essential function as part of a cohesive scheme to protect the rights to a fair trial, a trial with an impartial jury and a trial within a reasonable time. It also undermines the protection afforded to these rights by the other related parts of the *Code* discussed above.

106. Section 648 is a safeguard against a potential miscarriage of justice.[148] The section promotes "public confidence in the judicial system, by enabling the public to be confident that the pretrial proceedings do not contaminate the fairness of the later trial, through prejudicial publicity".[149] The right to a fair trial must be "considered from the perspectives of the accused, the complainant, the community and the criminal justice system at large".[150]

107. An application of the modern principles of interpretation, which includes consideration of text, context and purpose, leaves no doubt that s. 648(1) operates to protect these important values by deferring publication of all portions of the trial heard in the absence of the jury, including pre-trial applications and pre-trial conferences.

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[146] *R. v. Bernardo,* [1995] O.J. No. 247 (Ont. Ct. Gen. Div.), para. 23 (emphasis added).
[147] *Bell ExpressVu*, para. 28.
[148] *Criminal Code*, s. 647(4).
[149] *Millard and Smich*, para. 25.
[150] *R. v. J.J.,* 2022 SCC 28, para. 121.

K. Transitional impact of this Court's decision

108. The respondent agrees with the appellants[151] that if this Court ultimately allows the appeal and concludes that s. 648(1) does not apply to pre-trial proceedings, the decision could have a significant impact on ongoing jury trials across the country (at both the pre and post-empanelment stages) in cases where s. 648(1) has been applied to pre-trial conferences and pre-trial applications. If this occurs, the respondent submits that the operation of the decision should be stayed for a period of 90 days or such other period that this Court determines is appropriate.

109. The possibility of a prospective judgment in a non-constitutional context was referenced by this Court in *Canada (Attorney General) v. Hislop*.[152] LeBel and Rothstein JJ., writing for the majority, noted that while judicial decisions are "*generally* retroactive … [w]hen the law changes through judicial intervention, courts operate outside of the Blackstonian paradigm. In those situations, it may be appropriate for the court to issue a prospective remedy rather than a retroactive remedy. The question then becomes what kind of change and which conditions will justify the crafting of judicial prospective remedies".[153]

110. This Court has previously delayed the impact of criminal decisions, albeit in the context of *Charter*-related cases. For example, in *R. v. Brydges*, this Court imposed a 30-day transition period to allow police across the country to give effect to the new s. 10(b) warnings mandated by the ruling.[154] A similar transition order was made in *R. v. Feeney*, where this Court held that a warrant was required to effect an arrest in a dwelling house. After the decision was released, the respondent applied for a suspension of judgment. This Court held that there should be a "transition period" and stayed that aspect of the judgment for a period of six months.[155] The stay of the judgment was

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[151] *Appellants' Factum*, para. 91.

[152] *Canada (Attorney General) v. Hislop*, 2007 SCC 10.

[153] *Hislop*, para. 86 (emphasis in original). See also *Edward v. Edward* (1997), 57 Sask R. 67, 1987 CanLII 982 (S.K.C.A.); *Stewart v. Stewart* (1997), 90 B.C.A.C. 119, 1997 CanLII 3913 (B.C.C.A).

[154] *R. v. Brydges*, [1990] 1 S.C.R. 190, at 217. It appears that a similar post-judgment order was also made in *R. v. Cobhman*, [1994] 3 S.C.R. 360 on October 20, 1994: see the references in *R. v. Latimer*, [1997] 1 S.C.R. 217, para. 40 and *R. v. Feeney*, [1997] 2 S.C.R. 13, para. 188.

[155] *R. v. Feeney*, [1997] 2 S.C.R. 13 (substantive decision) and [1997] 2 S.C.R. 117 (1st application).

later extended until December 19, 1997 or, in the alternative, the day Bill C-16 received Royal Assent if that occurred prior to December 19, 1997.[156] Finally, in *Jordan*, the majority cited *Hislop* in support of the creation of the transitional exceptional circumstance.[157]

111. If this Court concludes that s. 648(1) does not apply to pre-trial proceedings, that decision would constitute a substantial change in the law in some jurisdictions. At this stage, it is virtually impossible to determine with any certainty how many jury cases currently in the system (at both the pre and post-empanelment stages) would be impacted. In each case, the parties will need to: determine whether a discretionary common law publication ban is required; prepare an application(s) and an evidentiary record; schedule court time; and provide notice to the media and other interested third parties. Depending on the stage of proceedings, the applications may then have to be adjourned to ensure that they do not derail previously scheduled pre-trial application and trial dates and, in those circumstances, it may be necessary for trial judges to impose interim common law discretionary publication bans until such time as the application(s) can be heard. Given the procedural complexity that will arise, the respondent submits that a minimum transition period of 90 days would be appropriate.

PART IV: SUBMISSIONS CONCERNING COSTS

112. The respondent does not seek costs and asks that no costs be ordered against it. This appeal is criminal in nature and "the prevailing convention" that costs are generally not awarded in criminal matters applies.[158]

PART V: ORDER SOUGHT

113. The respondent submits that the appeal should be dismissed.

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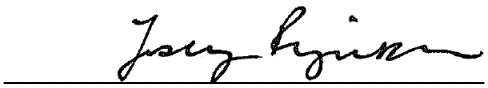
[156] *R. v. Feeney*, [1997] 3 S.C.R. 1008, para. 1 (2nd application).
[157] *Jordan*, para. 93.
[158] *R. v M.(C.A.)*, [1996] 1 S.C.R. 500 at 569.

PART VI: SUBMISSIONS ON CONFIDENTIAL INFORMATION

114. There are no orders in place in relation to the s. 648(1) publication ban issue which would impact this Court's reasons.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



Lesley Ruzicka, K.C.
Louise Kenworthy
Counsel for the Respondent HMTK

Dated this 17th day of March, 2023
at Victoria, British Columbia

Appendix A: List of pre-trial applications

	Application	**Ruling**
1.	Crown (e*x parte)* application for the temporary surrender of Aydin Coban pursuant to s. 82 of the *Extradition Act*	Oral Ruling
2.	(a) Crown (e*x parte)* application for a common law/inherent jurisdiction publication ban prohibiting publication of representations made and Reasons for Judgment on the application for temporary surrender; (b) Crown application (e*x parte)* for an order prohibiting access to the materials filed in support of the application for temporary surrender to anyone other than Crown Counsel, Mr. Coban and his counsel.	Oral Ruling
3.	Defence application to challenge jurors for cause pursuant to s. 638 of the *Code*	2021 BCSC 2154
4.	Crown application to admit *ante mortem* statements of Amanda Todd	2021 BCSC 2297
5.	Crown application to admit discreditable conduct of Aydin Coban	2021 BCSC 1855
6.	Crown application for witnesses to give evidence outside of Canada by videoconference pursuant to s. 714.2 of the *Code*	Oral Ruling
7.	Application re admissibility of Facebook records	2021 BCSC 2428
8.	Challenge to constitutionality of publication ban in s. 486.3(3) of the *Code* filed by the media and Amanda's mother, Carol Todd	2022 BCSC 14
9.	Defence application to cross-examine Shannon Chance (affiant on the application re admissibility of Facebook records) pursuant to ss. 30(9) or 31(6) of the *Canada Evidence Act*	2021 BCSC 2303
10.	Defence application for disclosure of other extortions of Amanda Todd	2022 BCSC 66
11.	Crown application to admit recognition evidence	2022 BCSC 263
12.	Crown application for an anonymity order and publication ban in relation to Dakota Maxson pursuant to ss. 486.31 and 486.5 of the *Code*	2022 BCSC 94

13.	Media application re. the scope of the s. 648 *Criminal Code* publication ban	2022 BCSC 880
14.	Defence application to limit the scope of expert evidence provided by Warren Bulmer	2022 BCSC 961
15.	Crown application to call nine experts at trial pursuant to s. 7 of the *Canada Evidence Act*	Oral Ruling
16.	Crown application re use of demonstrative aids in Crown opening address	2022 BCSC 884
17.	Crown application to mark the expert report of Det. Cst. Robin Shook as an exhibit	Oral Ruling
18.	Crown application to mark expert materials of Warren Bulmer as an exhibit	Oral Ruling
19.	Crown application to mark expert materials of Sgt. Keith Hack as an exhibit	Oral Ruling
20.	Application re court's jurisdiction to try Aydin Coban on counts 2 and 3 on the Indictment (possession of child pornography and possession of child pornography for the purpose of distribution or sale)	2022 BCSC 1441

PART VII: TABLE OF AUTHORITIES AND LEGISLATION

CASES

STATUTORY PROVISIONS

An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32, s. 21	
Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. ss. 2(b), 10(b), 11(b), 11(d), 11(f), 24	*Charte canadienne des droits et libertés, partie 1 de la Loi constitutionnelle de 1982*, constituant l'annexe B de la loi canadienne de 1982 (UK), 1982, c 11. ss. 2(b), 10(b), 11(b), 11(d), 11(f), 24
Criminal Code, R.S.C., 1985, c. C-46 ss. 475, 482, 482.1, 517, 517(1), 518(1)(e), 539, 539(1), 540(7), 542(2), 551.1, 551.2, 551.3(1), 551.3(4), 625.1(2), 645(5), 647, 647(1), 647(4), 648, 648(1), 650, 650(1)	*Code criminal*, L.R.C. (1985), ch. C-46 ss. 475, 482, 482.1, 517, 517(1), 518(1)(e), 539, 539(1), 540(7), 542(2), 551.1, 551.2, 551.3(1), 551.3(4), 625.1(2), 645(5), 647, 647(1), 647(4), 648, 648(1), 650, 650(1)
Criminal Law Amendment Act, S.C. 1972, c. 13 s. 49.	
Criminal Rules of the Supreme Court of British Columbia, SI/97-140, Rule 5(11); Rule 5(13)	
Interpretation Act, R.S.C. 1985, c. I-21 ss. 12, 45(3)	*Loi d'interprétation*, L.R.C. (1985), ch. I-21 ss. 12, 45(3)
Rules of Practice of the Superior Court of the Province of Québec, Criminal Division, 2002, SI/2002-46	*Règles de procédure de la Cour supérieure du Québec, chambre criminelle (2002) TR/2002-46*

s. 40	s. 40
Supreme Court of British Columbia, PD-56 "Notification of Publication Ban Applications"	

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Patrick J. LeSage and Michael Code. *Report of the Review of Large and Complex Criminal Case Procedures* (Toronto: Ontario Ministry of the Attorney General, 2008)	59, 63
Gary P. Rodrigues, ed., *Crankshaw's Criminal Code of Canada R.S.C. 1985*, 8th Ed. (Toronto: Thomson Reuters Canada, 1993) (Online Westlaw Canada Release 2022-6), ss. 645(5), 648	50, 54
R. Sullivan, *The Construction of Statutes*, 7th Ed. (Markham: Lexis Nexis Canada, 2022), §10.03, §11.01	15, 60

LEGISLATIVE HISTORY (in chronological order)

Criminal Law Amendment Act, S.C. 1972, c. 13, s. 49; Canada, *Standing Senate Committee on Legal and Constitutional Affairs*, 28th Parl., 4th Sess. (1 June 1972), at 8:17 to 8:18	50
Canada, *House of Commons Standing Committee on Justice and Legal Affairs*, 33rd Parl., 1st Sess. (22 January 1985)	54
Canada, *Senate Standing Committee on Legal and Constitutional Affairs,* 33rd Parl., 1st Sess. (30 May 1985)	54
Canada, *Standing Senate Committee on Legal and Constitutional Affairs*, 35th Parl., 1st Sess. (6 December 1994).	102

Canada, *Standing Senate Committee on Legal and Constitutional Affairs*, 35th Parl., 1st Sess. (8 December 1994)	102