APPLICANTS' MEMORANDUM OF ARGUMENT
(Suitable for Posting)

OF THE APPLICANTS, 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

PART I: POSITION AND FACTS STATEMENT

OVERVIEW

1. The present proposed appeal centres on the impairment of Canadian media to report on pre-trial proceedings in criminal matters, which this Court has previously found is one of their critical roles in a free and democratic society. This impairment arises under an incorrect interpretation of s. 648 of the *Criminal Code* that seeks to prohibit publication of these matters irrespective of whether a jury has been empanelled, despite the clear and unambiguous language of the statute that indicates the ban applies only after a jury has been selected. Given the severe consequence this interpretation has on the ability of the media to report on, and of the Canadian public to receive information about the proper functioning of the courts, this matter requires the intervention of this Court.

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

3. In the case appealed from, the Court applied an impermissible and incorrect interpretation of s. 648 of the *Criminal Code* which bans publication of some 15 months of pretrial proceedings, including a successful stand-alone application striking down a provision of the *Criminal Code*, despite the fact a jury had not yet been selected.

4. The interpretation below followed earlier British Columbia decisions on the same point which effectively amounted to judicial amendment of s. 648. However, it, clashes with the clear and unambiguous words enacted by Parliament:

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

5. Several decisions in Canada have held that the s. 648 ban, properly interpreted, does not apply until a jury is empanelled, and any bans on prior proceedings must be sought and obtained under the normal *Dagenais/Mentuck* test: ***R. v. Twitchell***, 2010 ABQB 692; ***R v. Bebawi***, 2019 QSSC 594; ***R.* v. *Wright***, 2020 ONSC 7049.

6. The decision appealed from is the latest in a conflicting line of authority in British Columbia which has interpreted s. 648 as imposing a ban both before and after a jury is empaneled. That line began twenty years ago in ***R. v. Malik***, 2002 BCSC 80. Similar decisions have been made in Ontario and Quebec: ***Millard and Smich***, 2015 ONSC 6583; in ***LaPresse v Silva***, 2022 QCCS 406.

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

> … The application of s. 648(1) to pre-trial proceedings such as these, where no jury has yet been struck, is the subject of conflicting decisions in trial courts (see, for example, *R. v. Cheung* (2000), 2000 ABQB 905 (CanLII), 150 C.C.C. (3d) 192 (Alta. Q.B.); *R. v. Trang* (2001), 2001 ABQB 437 (CanLII), 201 D.L.R. (4th) 160 (Alta. Q.B.); *R. v. Sandham* (2008), 2008 CanLII 83941 (ON SC), 248 C.C.C. (3d) 543 (Ont. S.C.J.); *R. v. Stobbe* (2011), 2011 MBQB 293 (CanLII), 284 C.C.C. (3d) 123 (Man. Q.B.); *Canadian Broadcasting Corp. v. Millard* (2015), 2015 ONSC 6583 (CanLII), 338 C.C.C. (3d) 227 (Ont. S.C.J.); *R. v. Stanley*, 2018 SKQB 27).

8. The direct clash in jurisprudence on a matter affecting the proper understanding of matters before the courts cries out for this Court's guidance. There is no appellate authority on the issue. Whereas the Court below has ordered that s. 648 be applied to the trial before her, the proper interpretation of the section cannot be appealed to the provincial Court of Appeal. The only route of appeal is under s. 40 of the *Supreme Court Act.*

9. There is currently an application for leave to appeal to this court on the same issue, arising from the ***LaPresse v Silva***, 2022 QCCS 406 decision above. No docket number was yet assigned as of the time of this Application. That application illustrates that this issue is a matter of pressing national importance causing jurisprudential clashes in multiple provinces.

A. THE FACTS

10. The respondent Aydin Coban is charged with Extortion (*Criminal Code, s. 302*), Importing child pornography (163.1(3)), possession of child pornography (163.1(4)), luring (172.1) and criminal harassment (264). He faces a jury trial.

11. Pretrial proceedings have been occurring since February 2021, including case management conferences, motions and a constitutional challenge brought by these same applicants and Carol Todd to an automatic ban on the victim's identity under s. 486.4(3) of the *Criminal Code* on the basis of its *Charter* infringement. That challenge was heard on November 2 and 3, 2021 and resulted in Reasons for Judgment issued January 10, 2022, striking down s. 486.4(3) of the *Criminal Code*.

12. Throughout the proceedings which preceded jury selection, no ban was sought or granted on any part of the proceedings to date on the basis that is necessary to prevent a real risk to the administration of justice.

13. The Applicants then brought an application. [redacted]

14. Like all other pretrial proceedings, the Reasons below and arguments cannot be reported or published due to the court's interpretation of the s. 648 ban.

15. The Application below was supported by [redacted]

B. THE BRITISH COLUMBIA SUPREME COURT'S DECISION

16. [Redacted] bound by ***R. v. Malik***, 2002 BCSC 80 and the British Columbia cases over the years that have followed *Malik*.

17. In ***Malik***, while acknowledging contrary jurisprudence from Alberta, the judge said:

> [20] The purpose of the mandatory publication deferral contained in s. 648(1) is to safeguard both the rights of the accused and the Crown to a fair trial in the context of a jury trial.
>
> [21] Following the proclamation of the ***Charter***, the volume and scope of pre-trial applications grew, becoming more complex and time consuming. Empanelling a jury and then sending them home while weeks or more of pre-trial applications were addressed was impractical and served no purpose in most instances. Section 645(5) was enacted in

> 1985 in an effort to address that concern. The section provides the trial judge with the discretion to conduct pre-trial matters prior to the empanelling of the jury.
>
> [22] I accept the submission of the respondents that, in order to protect the right to a fair trial, Parliament did not intend to derogate from the mandatory deferral of publication of information concerning pre-trial matters. Accordingly, I find that s. 648(1) applies to proceedings which take place pursuant to s. 645(5) of the ***Code***.

18. In the case at bar, the judge said : [redacted]

PART II: ISSUES

19. The matter of national interest or public importance raised on this proposed appeal is whether the s. 648 ban apply before the selection of the jury?

PART III: STATEMENT OF ARGUMENTS

A. JURISPRUDENTIAL CONFLICT ACROSS CANADA

20. Section 648 of the *Criminal Code* is quoted above; it is clear and unambiguous.

21. The jurisprudence on whether the ban applies before a jury is selected is directly in conflict: one side is represented by the decision from which leave is sought which engages in an improper and incorrect exercise of statutory interpretation; And the other side of the jurisprudence is represented most recently by ***R.* v. *Wright***, 2020 ONSC 7049, which held that the opening limiting words of section 648, "After permission to separate is given to members of a jury…" cannot be ignored as the cases in the other line of authority have done.

22. The court in *Wright* said:

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

permissible judicial statutory interpretation to impermissible judicial legislative gap-filling.

23. As pointed out in ***Wright***, there actually are more than just two lines of authority. In the line holding that the ban applies before the jury is selected, there is one subgroup that also holds the words "no information" in s. 648 must be interpreted to ban only *prejudicial* information, such that the court can hear applications on what may be published. The other subgroup holds that there is no such exception. This illustrates further clashes in the jurisprudence needing resolution by this court.

24. Both Ontario and Quebec have internally clashing lines of jurisprudence. In Ontario, **Wright** quoted above is in direct clash with ***Millard and Smich***, 2015 ONSC 6583. In Quebec, ***LaPresse***, which adopted ***Millard***, is in direct clash with the earlier decision of ***R v. Bebawi***, 2019 QSSC 594, which had closely examined the jurisprudence and history of s. 648, agreeing with the Alberta authorities such as ***R. v. Trang*** (2001), 2001 ABQB 437 (CanLII) that the ban does not apply before the jury is selected.

25. In Nova Scotia, a ruling has held that the s. 648 ban applies both before and after the jury is empanelled, but that "no information" means that non-prejudicial information may be excluded from the ban: ***R. v. Lalo***, 2002 NSSC 21.

26. In Manitoba and Saskatchewan, the courts have ruled that the s. 648 ban applies both before and after the jury is selected: ***R v Stobbe***, 2011 MBQB 293; ***R v Stanley***, 2018 SKQB 27.

27. Plainly there are clashing lines of authority and the inconsistency across Canada, and even within Ontario and Quebec will continue to create both uncertainty and a varying range of infringements of expressive rights. The decision from which leave is sought is on the side of those decisions which have greatly expanded the infringing effect of the s. 648 ban. This is a nationally and publicly important issue for which this court should grant leave.

B. MERITS TO BE ARGUED IF LEAVE IS GRANTED

28. If leave is granted, the Applicants will submit that the line of authority exemplified by ***Wright*** and ***Bebawi*** are superior reasoning both as to statutory interpretation and principle.

29. First, the interpretation below engages in an exercise of statutory interpretation where no such exercise is required: the wording of the statute is not ambiguous. In any event, while interpretations of existing language to comply with the overall intent and purpose of legislation are acceptable, "reading out" words of a statute is in a different category of judicial legislation. As said in ***Wright***, doing so crosses a line into the role of Parliament.

30. Second, the interpretations which have held that the "purpose" to protect fair trials means the ban extends to the time before the jury is selected fail to recognize the significant differences which come into play at the moment a jury is selected. The jurors may be challenged for cause to ensure jurors who have been influenced by prior knowledge are weeded out. The jury is also put on oath and warned to decide the case only on the evidence presented to it at trial.

31. This court has repeatedly expressed confidence in these measures to ensure fair trials even where juries have been exposed to prior information. See for example, *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, 1995 CanLII 86 (SCC), [1995] 2 SCR 97, at paras. 161, 132-134, where Cory, J. said:

> 134 The solemnity of the juror's oath, the existence of procedures such as change of venue and challenge for cause, and the careful attention which jurors pay to the instructions of a judge all help to ensure that jurors will carry out their duties impartially. In rare cases, sufficient proof that these safeguards are not likely to prevent juror bias may warrant some form of relief being granted under s. 24(1) of the *Charter*. The relief may take many forms. It may be the enjoining of hearings at a public inquiry, a publication ban on some of the evidence given at the inquiry, a staying of the criminal charges, or the imposition of additional protections for the defence at the stage of jury selection: see, as an early example, *R. v. Kray* (1969), 53 Cr. App. R. 412, referred to with approval in *R. v. Hubbert* (1975), 1975 CanLII 53 (ON CA), 29 C.C.C. (2d) 279, aff'd 1977 CanLII 15 (SCC), [1977] 2 S.C.R. 267. …

32. Third, the cases which hold that trial fairness demands extending the s. 648 ban to proceedings before the jury is selected ignore or unduly downplay the important role of applications for bans under the traditional *Dagenais/Mentuck* test where justified. Rather than a sweeping ban on all matters whether prejudicial or not, leaving the public blindfolded as to many matters occurring in our courts, a selective approach to what must be banned strikes a balance more in line openness principles as mandated by this court and most recently explained in ***Sherman Estate v. Donovan***, 2021 SCC 25.

33. The decision below and its line of authority clashes with the presumption of openness and access, and the principle that at every stage of the judicial process, the constitution requires the highest level of transparency.

C. POSSIBILITY OF MOOTNESS

34. This case, like all or nearly all such cases, is unlikely to get to a hearing and decision by this court before the s. 648 ban expires. The section provides that the ban expires when "…the jury retires to consider its verdict".

35. Given that the time between the commencement of pretrial proceedings before the trial judge and the close of trial is normally well under 18 months as it is in the present case, there is insufficient time to conduct pretrial proceedings; to bring an application as to s. 648 in respect of them; to hear and decide the application; to then bring a leave to appeal process; and if leave is granted, to get to a hearing before this court and decision.

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

> [51] The Court nonetheless retains a residual discretion to decide the merits of a moot appeal if the issues raised are of public importance: *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66, at para. 2. In my view, this is such a case. The issues are likely to recur in the future and there is some uncertainty resulting from conflicting decisions in the Federal Court.

37. In the present case, the issue has been recurring and the jurisprudence has been in conflict for over 20 years on a matter of constitutional proportions, namely, whether the plain infringement of expressive rights by s. 648 is amplified to extend to all pretrial hearings before a jury is empanelled. The jurisprudential conflict and its importance cries out for guidance from this court.

D. SUMMARY

38. This is a matter which can only be appealed by direct appeal to this court under s. 40 of the *Supreme Court Act*. Despite the fact that this case and nearly all others in its category could never get to this court before becoming moot, it is of national importance and likely to recur, as it

has for some 20 years. The directly clashing lines of jurisprudence will continue to create uncertainty and conflicting results, significantly affecting openness and expressive rights, will continue without the guidance of this court.

PART IV: COSTS

39. The Applicants do not seek an award of costs if this application for leave is granted.

40. Correspondingly, the Applicants ask that no costs be ordered against them if this application for leave is dismissed.

PART V: THE ORDERS SOUGHT

41. The Applicants ask the Court to grant leave to appeal the decision of the British Columbia Supreme Court below, *R. v. Coban*, 2022 BCSC 880.

42. On the merits, The Applicants will ask this court to order and declare that the publication ban under s. 648 of the *Criminal Code* only applies after a jury is empanelled.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of June 2022.

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PART VI: TABLE OF SOURCES

Cases	**Paras**
Divito v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 47 (CanLII), [2013] 3 SCR 157	36
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