BRITISH COLUMBIA
Prosecution Service

August 8, 2022

via email

Chantal Charbonneau, Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

Dear Registrar Charbonneau:

Re: *Canadian Broadcasting Corporation et al. v. Coban and HMTQ*, S.C.C. File No. 40223
Respondent HMTQ's Response to the Application for Leave to Appeal

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I am counsel for the respondent, Her Majesty the Queen. Please accept this letter as the Respondent's Response to the Application for Leave to Appeal.

The respondent submits that leave to appeal should not be granted.

First, the appeal is now moot. The jury retired to consider its verdict on August 5, 2022 and the s. 648(1) publication ban is now spent. Further, the timing of the applicants' application in the court below is a relevant consideration in determining whether there could have been an application for leave to appeal before the s. 648(1) publication ban expired. The constitutional ruling was released on January 10, 2022 (2022 BCSC 14, *Affidavit of Rumina Daya*, Exhibit A) and the question of whether s. 648(1) applied to the constitutional ruling was addressed in court after the trial judge ruled on the application (*Applicants' Memorandum of Argument*, para. 12). However, the applicants did not contact the court to request an appearance to address the scope of the s. 648 publication ban until March 25, 2022. A draft Notice of Application to vacate or vary the s. 648(1) publication ban was provided to the parties and the trial judge on April 7, 2022 and the Notice of Application was filed on May 5, 2022 (*Applicants' Application for Leave to Appeal*, p. 20) following a case management conference on April 25, 2022. Although decided in a different context, this Court has held that the timeliness of a motion by the media may be a relevant consideration: *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, paras. 8, 48-49.

Second, the analysis contained in the B.C. line of authorities on s. 648(1) publication bans is correct. The trial judge did not err in her application of the *Hansard Spruce Mills* criteria or in following the B.C. line of authorities.

Section 648(1) of the *Criminal Code* provides that "[a]fter 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). It must be read in conjunction

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with s. 645(5), which provides that a trial judge can "deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn". This latter section permits the trial judge to deal with any matter that would ordinarily be dealt with after the jury has been sworn *before the jury has been empaneled*.

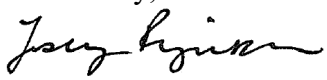
The B.C. authorities have adopted a liberal and purposive approach to s. 648(1) to protect fair trial interests for a limited period of time until the jury retires: see, for example, *R. v. Malik, Bagri and Reyat*, 2002 BCSC 80; *R. v. Pickton*, 2005 BCSC 836 and 2006 BCSC 645; *R. v. Mastop*, 2010 BCSC 1961; *R. v. Russell*, 2011 BCSC 611 (unreported); *R. v. Haevischer*, 2012 BCSC 1678, paras. 12-19. The trial judges in these cases have held that ss. 645(5) and 648(1) operate to provide for an automatic statutory publication ban that applies to pre-trial proceedings and *voir dires* that occur prior to 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 *before* the jury is empaneled: see, for example, *Malik*, paras. 20-22.

The respondent submits that the B.C. decisions have correctly applied the modern approach to statutory interpretation: the words of s. 648(1) have been read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Code*, the object of the *Code*, and the intention of Parliament. A similar approach has been adopted in other cases: see, for example, *CBC v. Millard and Smich*, 2015 ONSC 6583; and *La Presse Inc. v. Silva*, 2022 QCCS 881, application for leave to appeal pending (S.C.C. No. 40174). As a result, it is not necessary to grant leave in this case.

However, the respondent acknowledges, as outlined by the applicants, that: (1) there is a body of conflicting jurisprudence on the interpretation and scope of s. 648(1) publication bans; and (2) there is another pending application for leave to appeal in *Silva* that raises the same issue (although the respondent understands that mootness has also been raised in *Silva*). In those circumstances, it may be open to this Court to conclude that the proposed appeal raises an issue of national interest or public importance.

The respondent does not seek costs and asks that no costs be awarded against it.

Yours truly,



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