MARTLAND &SAULNIER

Brock Martland, QC* Joseph Saulnier* Trevor Martin Elliot Holzman

August 18, 2022

VIA EMAIL

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

Dear Registrar Charbonneau:

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

We are counsel for the respondent Aydin Coban, and we submit this letter as his response to the application for leave to appeal in this matter.

The application for leave to appeal should be dismissed. The questions raised by the applicants do not warrant a decision from this Court. It is true that there are conflicting trial level decisions on whether s. 648(1) applies to proceedings before a jury has been struck, as noted by Abella J., writing on behalf of the Court, at footnote 1 in *R. v. Brassington*, 2018 SCC 37. But this does not necessarily mean that this Court must step in to resolve the issue.

Like the respondent, Her Majesty the Queen, we take the position that the line of authorities in British Columbia holding that s. 648(1) applies to proceedings carried out under s. 645(5), before a jury is empanelled, is correct. More importantly, for present purposes, this line of authorities in British Columbia forms part of a larger preponderance of jurisprudence on this point, in which s. 648(1) is interpreted correctly. Notably, this includes *La Presse Inc. c. Silva*, 2022 QCCS 881, the other case for which leave to appeal is being sought on this same issue, in S.C.C. File No. 40175.

In *CBC v. Millard and Smich*, 2015 ONSC 6583, at para. 36, Goodman J. concluded that the "majority of jurists" agreed that s. 648(1) applies to "pre-trial motions decided before jury selection pursuant to s. 645(5)", notwithstanding that "several trial courts in Alberta and elsewhere have held otherwise".

The weight of the authorities supports the decision from which leave to appeal is sought in this case. Accordingly, it is unnecessary for this Court to grant leave.

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The applicants and the Crown respondent have addressed the issue of mootness in their materials. It is clear that the proposed appeal is moot, since the jury has not only retired to deliberate, but has now rendered its verdicts. Anticipating this eventuality, the applicants submit that the Court should nevertheless entertain the appeal, which they say concerns 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" (*Applicants' Memorandum of Argument*, para. 37).

As many of the authorities have recognized, s. 648(1), when properly interpreted and applied, serves to protect the fair trial rights and interests of the accused, the Crown, and the public in jury trials: see for example *R. v. Brown*, (1998) 126 C.C.C. (3d) 187 (ONSC), at para. 34; *R. v. Malik*, 2002 BCSC 80, at para. 20; and *CBC v. Millard and Smich*, 2015 ONSC 6583, at para. 25.

It is worth noting that s. 648(1) provides for a temporary restriction on the publication of certain information. It is not an absolute ban. The media can now report on the proceedings to which s. 648(1) was held to apply in this case. The urgency and importance the applicants ascribe to the proposed issue on appeal are overstated.

For these reasons, the Court should dismiss the application for leave to appeal in this matter.

Mr. Coban does not seek costs and asks that no costs be awarded against him.

Your truly,

MARTLAND & SAULNIER

JOSEPH SAULNIER & TREVOR MARTIN
COUNSEL FOR AYDIN COBAN

CC: Daniel Burnett, Q.C., counsel for the applicants
Lesley Ruzicka, Q.C., counsel for the respondent, Her Majesty the Queen
Louise Kenworthy, Crown Counsel, B.C. Prosecution Service