File Number: 37360

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

THE CANADIAN BROADCASTING CORPORATION

Appellant (on appeal)
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

FACTUM OF THE RESPONDENT
ATTORNEY GENERAL OF ALBERTA

RULES 36 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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PART I – OVERVIEW AND FACTS

Overview

1. The issue to be decided by this Court is whether the Attorney General can apply to a court of inherent jurisdiction for immediate relief to prevent the persistent and ongoing breach of a court order.

2. A 14-year-old girl was murdered in Edson, Alberta, on March 4, 2016. The next day, 21 year old Tyrell Perron was charged with her murder, and with interfering with her remains. The CBC reported on the murder immediately and included the victim's name and photograph in two articles, which were posted on its website. Ten days later, when Tyrell Perron made his first court appearance, the presiding judge ordered a publication ban on the identifying information of the victim. It was the Crown's earliest opportunity to request a publication ban.

3. Following the court appearance, a CBC producer contacted Alberta Justice to ask whether a ban had been put in place. On three separate occasions, Alberta Justice and the Edmonton Police informed CBC that a publication ban was in effect, and asked it to remove the identifying information from its website. The CBC declined to do so. The Attorney General for Alberta filed an originating notice in the Court of Queen's Bench, seeking to have the CBC cited for contempt of court, an order directing it to remove the information from their website, and an interim injunction.

4. The application for an interim injunction was heard, and dismissed, by the Honourable Justice Michalyshun. The Court of Appeal overturned Justice Michalyshun's decision, finding that the tri-partite test for a civil interim injunction had been met, and granted the Crown's request.

5. The CBC appeals to this Court, arguing that the test employed by the Court of Appeal created too low a threshold. It argues that it is not enough to show a strong, *prima facie* case of a court order being breached on a daily basis; that more is required before a Court can rely on its

equitable jurisdiction to make the breach stop. The CBC argues that a test with more stringent requirements should be employed, because the relief sought intrudes upon its fundamental right to freedom of expression, and upon the vital role it plays in disseminating news to the public. At the same time, the CBC claims that it is not publishing or transmitting the impugned information to anyone.

6. The Majority of the Court of Appeal's pragmatic approach focused primarily on the following question: Does the evidence establish a strong *prima facie* case that the court order is being breached? They found it did. Having made that finding, they issued an order that was just and equitable in the circumstances; they ordered the CBC to edit their web articles.

7. The Respondent submits that the Majority of the Court of Appeal is correct and respectfully requests that this appeal be dismissed.

Statement of Facts

8. On March 5, 2016, Tyrell Perron was charged with the first degree murder of a 14-year-old girl. His first appearance in Provincial Court was in Edson on March 15, 2016, at which time the Crown requested a publication ban in relation to the identity of the victim. Judge Higgerty granted the ban under s 486.4(2.2) of the *Criminal Code*, which provides that on request of the Crown, the presiding judge shall make an order prohibiting the publication, broadcast, or transmission in any way of any information that could identify the victim.[1]

9. On March 15, 2016, Kelly Banks, an Assignment Producer from CBC Edmonton, contacted Michelle Davio, who is the Assistant Director and Issues Manager for Alberta Justice and Solicitor General Communications. Ms. Banks asked Ms. Davio if a publication ban had been put into place in the Perron case. That same day, Ms. Davio confirmed with Ms. Banks that a ban had indeed been put into place respecting the identity of the victim.[2]

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[1] ***R v Canadian Broadcasting Corp***, 2016 ABQB 204 at para 2 ["*Court of Queen's Bench Decision*"] – Applicants Record ["AR"] at pp 1-2; Information dated March 5, 2016 - Respondents Record ["RR"] at p1; Endorsements dated March 5 and 15, 2016 – RR a pp 2-3; Order Restricting Access – AR at p 38

[2] Affidavit of Michelle Davio sworn March 23, 2016 - RR at pp 5-9

10. On March 16, 2016, Ms. Davio conducted a Google search and discovered that the CBC's website contained two articles which identified the victim by name, and by photograph. The articles were dated March 5, 2016, and March 8, 2016. Ms. Davio contacted Ms. Banks to let her know that the website still contained the identifying information. Ms. Davio also referred the matter to the Edmonton Police Service.[3]

11. On March 16, 2016, Detective Cech spoke with Ashely Geddes, who is a senior digital producer with the CBC. Mr. Geddes advised Detective Cech that no future stories would contain the victim's name, or other information that could identify her. On March 18th, 2016, Detective Cech observed that the website still contained the same information that identified the victim.[4]

12. On March 18th, 2016, the Attorney General filed an originating notice of motion asking the Court of Queen's Bench to:

i. cite the CBC for being in criminal contempt of court for breaching the March 15 publication ban; and

ii. impose an interim injunction, requiring the CBC to remove the content in question from their website.[5]

Alberta Court of Queen's Bench

13. The interim injunction application was argued on March 31, 2016. On April 7, 2016, the Application Judge held that none of the three requirements of an interim injunction had been established.

14. With respect to the first branch of the test, the Application Judge held that the Crown had not established a strong and clear *prima facie* case for criminal contempt**.** The Application Judge felt that the definition of the term "publish" is not established. He further held that a narrow interpretation of that term is favoured because contempt powers are to be exercised sparingly, suggesting that the correct interpretation of section 486.4(2.2) of the *Criminal Code* is somehow

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[3] *Court of Queen's Bench Decision* at paras 3-5 - AR at p 2; Affidavit of Michelle Davio sworn March 23, 2016 – RR at pp 5-9

[4] *Court of Queen's Bench Decision* at paras 3-5 - AR at p 2; Affidavit of Det. Cech - AR at pp 45-49

[5] *Court of Queen's Bench Decision* at para 7 - AR at p 2; Originating Notice filed March 18, 2016 – AR at pp 39-41

dependent on the law of contempt. As a result, the Application Judge was not convinced that the CBC was "publishing" the identifying material in defiance of the court order.[6]

15. With respect to the second branch of the test, the Application Judge held that the Crown would not suffer irreparable harm if the interim injunction were not granted**.** The Application Judge was not satisfied that failing to protect the victim's identity would affect other young victims, for instance by discouraging them from coming forward. He implied that there would be no harm caused to the administration of justice by the future behaviour of victims. He did not consider the effect on the administration of justice caused directly by the defiance of a court order.[7]

16. With respect to the final branch of the test, the Application Judge held that the balance of convenience did not require the CBC to take the identifying information down. The Application Judge found that the balance of convenience favoured the CBC's position. He accepted that the CBC would be "little inconvenienced" if ordered to comply, but harm to its freedom of expression outweighed any "slight" harm that may be caused to the administration of justice should the articles be permitted to remain accessible and unedited.[8]

Alberta Court of Appeal

17. The Court of Appeal was divided in their decision, with the Majority ruling in favour of granting the interim injunction.

18. The Majority held that the Application Judge mischaracterized the issue by finding that the Crown needed to show a strong *prima facie* case for contempt. Instead, the Majority held that the Crown needed to show a strong *prima facie* case entitling it to a mandatory order, directing the removal of the identifying material from its website. The Court noted that "while there is overlap, it is not complete, because the CBC might be found not to be in contempt of

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[6] *Court of Queen's Bench Decision* at paras 12-18, 31-34 - AR at pp 4-6, 7-8
[7] *Court of Queen's Bench Decision* at paras 54-56. See also para 59 – AR at pp 10-11
[8] *Court of Queen's Bench Decision* at paras 59-66 – AR at p 11

court, but might still be required to take down the postings."[9] Therefore, the Crown should logically be entitled to interim relief if they met the test on this basis.

19. The Majority found that "the case will come down to the meaning of the phrase 'published in any document or broadcast or transmitted in any way'" and concluded that the Crown had a strong *prima facie* case. The Court noted that "if nothing else, the interpretation proposed by the CBC would significantly limit the scope of many legal rights and obligations that depend on making information available to third parties."[10]

20. On the issue of irreparable harm, the Court of Appeal found it would be illogical to require proof of harm beyond that which is occasioned from the breach of a mandatory court order. As "the orders are to be granted without proof of harm, parties can be found in breach without proof of harm, it must follow that interim measures to enforce the order can be taken without proof of harm." The Court found that in any event, allowing an ongoing breach of a non-publication order is harmful to the integrity of the administration of justice.[11]

21. In its analysis of the balance of convenience, the Court of Appeal observed that the provisions in question are presumed to be constitutional for the purpose of the contempt proceedings, and that it was not open to the CBC to argue that it is "inconvenient" to obey the law.[12]

22. In her dissenting opinion, the Honourable Justice Greckol disagreed with both the Majority's characterization of the nature of the test, and with their assessment as to whether the Application Judge made errors in its application. She found that the question to be decided was whether the Crown had established a strong *prima facie* case for criminal contempt.[13]

23. In agreeing the with Application Judge that the Crown had not established a strong *prima facie* case, Justice Greckol found that "where the charging words of the section that form the

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[9] ***R v Canadian Broadcasting Corporation***, 2016 ABCA 326 at para 5 ["*Court of Appeal Reasons*"] – AR at p 16
[10] *Court of Appeal Reasons* at paras 8-10 - AR at pp 17-18
[11] *Court of Appeal Reasons* at para 11 - AR at p 18
[12] *Court of Appeal Reasons* at para 12 - AR at p 18
[13] *Court of Appeal Reasons* at paras 34-35 - AR at pp 23-24

gravamen of the prohibition in the court order are subject of two arguable interpretations, the ambit or embrace of the resulting order cannot be clearly determined."[14]

24. With respect to the issue of irreparable harm, Justice Greckol found that the Crown did not show that the Application Judge applied incorrect legal principles, or that he reached a decision that was manifestly unjust. Accordingly, she found that his decision was entitled to deference.[15]

25. On the topic of balance of convenience, Justice Greckol found that while there was "merit to the Crown's position," the Application Judge's decision on the third arm of the tri-partite test was also entitled to deference.[16]

Trial on the Merits

26. The Honourable Justice Clackson rendered his decision on the contempt proceedings on May 16th, 2017. He found that the CBC did not disobey the court order, as making the material accessible to the public on their website did not amount to "publishing" or "transmission." He found that no existing legal definitions of the term "publish," as found in the *Youth Criminal Justice Act*, the criminal libel section of the *Criminal Code*, or the common law, assist with the interpretation of that term in section 486.4(2.2) of the *Code*.[17] He did find that the Alberta Court of Appeal's online "Public Media Access Guide" assists with the interpretation, however, and concluded that allowing access to the articles was not prohibited by the order. Accordingly, he acquitted the CBC of contempt and found that injunctive relief was also not appropriate.[18]

27. Justice Clackson further found that the *mens rea* component of criminal contempt had not been proven, noting that "a difference of opinion is not criminal. And certainly, a reasonable

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[14] *Court of Appeal Reasons* at para 41 - AR at p 25
[15] *Court of Appeal Reasons* at para 54 - AR at p 27
[16] *Court of Appeal Reasons* at paras 59-61 - AR at pp 27-28
[17] ***R v Canadian Broadcasting Corporation***, 2017 ABQB 329 ["***R v CBC - Contempt Trial Decision***"] at paras 25-36
[18] ***R v CBC - Contempt Trial Decision***, 2017 ABQB 329 at paras 37-38, 44, 58

position taken against the weight of authority does not become a criminal act because it is taken."[19]

28. The Crown has filed an appeal of Justice Clackson's decision. An appeal date has not yet been scheduled. [20]

[19] ***R v CBC - Contempt Trial Decision***, 2017 ABQB 329 at para 55
[20] Notice of Appeal filed June 7, 2017 – RR a pp 10-14

PART II – ISSUES

29. The CBC raises the following issues:

Question in Issue A What is the proper approach that a court must follow in considering whether interim injunctive relief is appropriate to enjoin conduct, pending the outcome of a criminal trial?

Respondent's Position with regard to Question in Issue A The Majority of the Court of Appeal was correct in using a modified tri-partite test from *RJR MacDonald* to enjoin the CBC's conduct in this case.

Question in Issue B Should the interim injunction have been granted in this case?

Respondent's Position with regard to Question in Issue B The Majority of the Court of Appeal was correct in finding that the Attorney General had established a strong *prima facie* case that the court order was being breached, and that interim injunctive relief should follow.

PART III – ARGUMENT

30. The CBC argues that the test applied by the Majority created too low a threshold, and resulted in an effective final determination of guilt without a trial on the criminal contempt charge. It is the CBC's position that:

a. Injunctive relief is not appropriate in this case, because it amounts to a conviction without a trial on the criminal charge.

b. If injunctive relief is appropriate, the test should be elevated to the "rarest and clearest of cases" threshold, because freedom of the press is at issue.

31. The Crown submits that the tripartite test for a civil interim injunction, as used by the Court of Appeal, is available to prevent the ongoing breach of a court order, for the following reasons:

a. In its role as *parens patriae*, the Crown may seek injunctive relief to prevent public wrongs.

b. The Superior Court, as a court of inherent jurisdiction, may issue an interim injunction to maintain the rule of law.

c. The test for injunctive relief in defamation cases is not necessary in the absence of a factual dispute.

d. The imposition of a civil interim injunction, requiring the CBC to edit two articles, is not equivalent to a criminal conviction. The procedural protections afforded by the interim injunction proceedings are sufficient given the context, and the legal rights at stake.

A: THE MAJORITY APPLIED THE CORRECT LEGAL TEST:

32. In its analysis, the Majority reasoned that the CBC could be acquitted of the contempt charge, but still be required to take the impugned information down. For that reason, the Majority held that the first part of the tri-partite test should ask whether the Crown has a strong *prima facie* case for a permanent injunction.

33. The CBC takes issue with the manner in which the Majority framed the issue, arguing that injunctive relief should not follow simply because the Court is satisfied, on a strong *prima*

facie basis, that they are persistently breaching a court order; they must mean to breach it too, before the Court can order them to stop.

34. The CBC argues that the Court of Appeal's finding permits the Crown to enjoin conduct, without needing to proceed with a prosecution for contempt. The Crown agrees that it may, and should, be able to do so. To begin with, choosing not to pursue the fullest remedy available should not be a basis for denying other relief allowed by law.[21] There may be public interest in pursuing a more lenient course of action than ordinary committal.[22] Furthermore, this very case demonstrates why it is important for the Crown to have alternate legal remedies available to it. In its judgement relating to the contempt proceedings, the Court of Queen's Bench found that the CBC lacked the requisite mens rea to be guilty of contempt. In his decision, Clackson J. reasoned that:

> …the mens rea can be inferred from the nature of the disobedience. As well, it is reasonable to say that the more strident the disobedience, the more likely the inference of intention. In this case, the CBC disobeyed but not in any manner that could be called strident or even disrespectful. CBC simply refused to accept the Crown's interpretation of the Ban, preferring to accept the judgement of the court. How that stance could undermine the court's authority, escapes me.[23]

35. This finding leaves open the possibility that an individual may be aware of a court order, and intentionally engaged in public activity that breaches the order, but still be found not guilty of criminal contempt. Surely, the Crown and the Court are not then rendered helpless to stop the ongoing breach.

The Attorney General can seek injunctive relief to stop the persistent breach of a court order

36. The ability of the Crown to seek injunctive relief to prevent public wrongs and to compel observance of both provincial and federal laws is well established.[24] This flows from the

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[21] ***MacMillan Bloedel Ltd v Simpson***, [1996] 2 SCR 1048 at para 32. The plaintiffs in that case did not proceed to trial after receiving interim injunctions. This Court commented that their failure to pursue the fullest remedy available to them did not invalidate the order.
[22] ***BCGEU, Re***, 1983 CanLII 594 (BCSC) at paras 47, 49; ***R v Peel Regional Police Service***, 2000 CanLII 22808 (ONSC) at para 69
[23] ***R v CBC - Contempt Trial Decision***, 2017 ABQB 329 at para 51
[24] ***Ontario (AG) v Dieleman***, 1994 CanLII 10546 (ONSC) at para 467, qtng from ***Attorney General v Harris***, [1961] 1 QB 74 (CA) at p 92 [not reproduced] "…the Attorney General

Attorney General's role as *parens patriae*, and its corresponding duty to enforce public rights and preserve the rule of law.[25] The Crown may seek injunctive relief notwithstanding that the statute itself may contain penalties of a different kind, and all possible alternative remedies have not been exhausted.[26]

37. There are a variety of different circumstances in which the Attorney General may seek, and obtain civil interim injunctions to enjoin unlawful activity, including public nuisances, and the flouting of the law. The CBC argues that injunctive relief for "flouting" can only be sought where (1) the statute is inadequate to deter, (2) where the statute provides no penalty for violation, or (3) where there is a serious threat to public safety. A number of cases, however, suggest otherwise; that the application may be brought at the discretion of the Attorney General, and where a breach is established, the Courts will typically grant the injunction.[27]

38. This second approach also shows greater recognition of the flexibility of equitable powers, and the wide discretion they confer on the Court to consider the overarching question of what is just and equitable in any given case. To say a Court can *only* grant injunctive relief against a party if they can't be prosecuted places an unreasonable limit on the Court's ability to consider these principles, and may ultimately work to no one's advantage.

A Court of Inherent Jurisdiction can grant an interim injunction to maintain the rule of law

39. It is clear that there is significant public interest in ensuring that court orders are followed. The damage that is done by disregarding court orders has been described extensively by the case law, and in strong terms. For example, it has been said that "once our laws are flouted and orders of our courts treated with contempt the whole fabric of our freedom is

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represents the community which has a larger and wider interest in seeing that the laws are obeyed and order maintained." See also paras 468-475

[25] ***British Columbia v Canadian Forest Products Ltd***, [2004] 2 SCR 74 at paras 66-68. At para 67, this Court comments that "while a public nuisance may also be a crime, it is more often the subject of injunction proceedings brought by the Attorney General on behalf of the public. The usual objective is abatement."

[26] ***Ontario (AG) v Grabarchuk***, 1976 CarswellOnt 1020 (Div) at paras 3, 21-28 [Respondent's Book of Authorities "RBOA" - Tab 3 at pp 13, 14-16]

[27] ***Sask (Min for Environmental Assessment Act) v Redberry Dev Corp***, 1987 CanLII 4588 (SKQB) at paras 18-22; ***AG v Chaudry***, [1971] 1 WLR 1614 (CA) [not reproduced]

destroyed,"[28] and that "everything which we have today, and which we cherish in this free and democratic state, we have because of the rule of law."[29] It is important for *every* court order to be obeyed, even if the person against whom it applies believes it to be unconstitutional or otherwise invalid. This Court explained why in *Canada (Human Rights Commission) v Canada Liberty Net*, by saying that "if people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind."[30]

40. It is accepted that a court of inherent jurisdiction "possesses the power required to maintain the rule of law,"[31] and that it in fact is duty bound "to assist provincially created courts to restore the paramountcy of the rule of law."[32] A breach of a court order undermines a court's authority, and a court may act, even on its own, to prevent such a breach from continuing. In *MacMillan Bloedel Ltd v Simpson*, this court explained how vital the Superior Court's power to punish for contempt is to the administration of justice:

> The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law. It is unnecessary in this case to enumerate the precise powers which compose inherent jurisdiction, as the power to punish for contempt ex facie is obviously within that jurisdiction. The power to punish for all forms of contempt is one of the defining features of superior courts. The in facie contempt power is not more vital to the court's authority than the ex facie contempt power. The superior court must not be put in a position of relying on either the provincial attorney general or an inferior court acting at its own instance to enforce its orders.[33]

41. A court of inherent jurisdiction also has the authority to prevent the continuation of a breach through the imposition of an interim injunction. This authority is another essential aspect of maintaining the rule of law. In *BCGEU, Re*, the Superior Court examined the meaning of inherent jurisdiction, and quoted the following:

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[28] ***Canadian Transport (UK) Ltd v Alsbury***, 1952 CarswellBC 63 (SC) [RBOA – Tab 1 at pp 1-7]; affirmed 1952 CarswellBC 87 (CA); affirmed [1953] 1 SCR 516
[29] ***Everywoman's Health Centre Society (1988) v Bridges***, 1989 CanLII 5321(BCSC) at para 8
[30] ***Canada (Human Rights Commission) v Canadian Liberty Net,*** [1998] 1 SCR 626 at para 51
[31] ***MacMillan Bloedel Ltd v Simpson***, [1996] 2 SCR 1048
[32] ***R v Peel Regional Police Service***, 2000 CanLII 22808 (ONSC) at para 68
[33] ***MacMillan Bloedel Ltd v Simpson***, [1996] 2 SCR 1048 at para 45

> For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance.[34]

42. This Court has recently noted that "injunctions are equitable remedies. The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited."[35] The overarching question is whether "the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context specific."[36]

43. In the present case, the Majority found a strong *prima facie* case that the CBC was continuously breaching a provincial court order. They were entitled to stop the breach by issuing injunctive relief. In the circumstances, the order was just and equitable.

The "rarest and clearest of cases" test should not apply when considering injunctive relief for the breach of a court order

44. The CBC argues that the test for interim injunctions in defamation cases should be employed, and that the court must find the "clearest and rarest" of cases before issuing injunctive relief.

45. It has long been held that interim injunctive relief will be rare in defamation cases. In the case of *Rapp v McClelland & Stewart Ltd*, the Court explained why:

> It will be seen that it is not possible to say that any particular imputation is defamatory, regardless of the circumstances of its publication. Whether or not it is so will vary with time, place and the state of public opinion. In any case, whether or not any imputation is defamatory is not a matter of law, but a matter of fact for the jury, and no other jury will be bound to reach the same decision. It is similarly a matter of fact whether any words convey the defamatory imputation alleged,

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[34] ***BCGEU, Re***, 1983 CanLII 594 (BCSC) at para 19, qtng from "The Inherent Jurisdiction of the Court," I.H. Jacob in (1970) 23 Current Legal Problems [not reproduced]
[35] ***Google Inc v Equustek Solutions***, 2017 SCC 34 at para 23, qtng *Injunctions and Specific Performance*, 4th ed, Toronto, Canada Law Book, 2012 [not reproduced]
[36] ***Google Inc v Equustek Solutions***, 2017 SCC 34 at para 25

> and this may depend to a great extent on the circumstances and context of a particular publication.[37]

46. The unique nature of defamation means that a significant factual analysis must be undertaken to determine liability in any given case. A court must determine first, as a question of law, whether the words complained of are capable of being defamatory. From there, the question of whether the statement is actually defamatory in all of the circumstances becomes a question of fact.[38] For that reason, the strength of a defamation case is difficult to analyze in the absence of comprehensive evidence. It is therefore quite logical for the Courts to require the words to be "manifestly defamatory" before they will issue interim relief.

47. In the present case, the facts are not disputed, and the sole issue is a legal one. The strength of the case is therefore easily discernable in the interim application, and the test from *RJR MacDonald* is well suited to determine the availability of injunctive relief.

48. It must be noted that the Majority didn't simply apply the test from *RJR MacDonald* in any event; they incorporated the more stringent requirement that the Crown show a strong *prima facie* case to account for the fact that the remedy being sought was mandatory in nature.

The imposition of an interim injunction is not equivalent to a criminal conviction

49. The CBC argues that injunctive relief is inappropriate, because it is equivalent to a finding a guilt before a trial on the merits has occurred. This position is untenable, as it is clear that there is a qualitative difference between a criminal conviction, and the imposition of an interim injunction.[39]

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[37] ***Rapp v McClelland***, 1981 CanLII 2906 (ONSC) at para 10

[38] ***Rapp v McClelland***, 1981 CanLII 2906 (ONSC) at para 10

[39] ***BCGEUv British Columbia (AG),*** [1988] 2 SCR 214 at paras 61, 63-66; ***Pawlowski v Calgary (City),*** 2008 ABQB 267 at para 38. It was argued that an injunction is tantamount to a conviction. The Court commented that "I see no merit to this argument. The prosecution in Provincial Court is a criminal proceeding; this injunction application is a civil proceeding. While both arise from the same conduct on the part of the Street Church Ministries, the two are entirely different. What is being sought here is the Court's assistance in controlling certain behavior. There is no penal sanction involved in an injunction application and the granting of an injunction is not tantamount to a finding of guilt for criminal purposes."

50. The concept of imposing conditions on an accused, pending trial, to prevent the commission of further offences is not foreign in criminal law. Often, an accused person is bound by an undertaking or a recognizance order to ensure that they will not offend while on release. The court or a justice of the peace has the authority to impose a variety of different conditions, including conditions requiring the accused to reside at a certain address, to observe a curfew, to refrain from drinking, to not be in possession of electronic storage devices, to refrain from using social media, and to not contact witnesses. These restrictions on an accused person's liberties may be imposed if the Crown proves, on a balance of probabilities, that they are required to prevent the accused from committing offences while they await their trial. The standard of evidence used in a bail hearing must be trustworthy and credible, and can include hearsay, a summary of the alleged offences, and witness statements.[40]

51. No such mechanism is available in the *Criminal Code* to bind a corporate accused to conditions, pending the outcome of their criminal trial. While there are specific provisions in the *Criminal Code* providing for probation orders and fines for corporations,[41] there are no provisions which address pre-trial conditions for a corporate accused.[42] As such, the only available option to the Crown to enjoin the ongoing commission of an offence pending trial is through a civil interim injunction.

52. A comparison between the procedural rights afforded, and the standard of proof required, in a civil interim injunction proceeding, and a bail hearing, demonstrates that the approach taken to enjoin the CBC's conduct in this case more than adequately protected their legal rights at stake.

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[40] ***R v Julian***, 1972 CarswellNS 17 (CA) at para 5 [RBOA – Tab 4 at pp 18-19]; ***Toronto Star Newspapers Ltd v Canada***, [2010] 1 SCR 721 at para 28 "there are practically no prohibitions as regards to the evidence the prosecution can lead to show cause why the detention of the accused in custody is justified." See ***Criminal Code,*** RSC 1985, c C-46 ss. 518(1)(d)(e)

[41] ***Criminal Code***, RSC 1985, c C-46 s 727(4) seeking greater punishment, ss 732.1(3.1), (3.2) probation orders, s 735 fines

[42] ***Criminal Code***, RSC 1985, c C-46 ss 620-621, 800(3), 703.2, the noted provisions deal with the starting of proceedings against organizations whether by indictment or by summary conviction proceedings and the service of notice or summons to start the proceedings. S 622 deals with if no representative of the organization attends after service of notice, s 623 the actual trial process. None of these sections deal with any pre-trial conditions.

53. In the case of *R v Pearson,* this court discussed the procedural protections that are constitutionally mandated in the context of a bail hearing, noting that:

> Examples are legion of how the various stages of the criminal process have accommodated themselves to the fundamental principle that the assumed innocence of an accused or a suspect is the starting point for any proposed interference with that person's life, liberty or security of the person. In general, one who proposes to lay an information must believe, on reasonable grounds, that an offence has been committed: see, e.g., *Criminal Code*, s 504. The justice receiving the information must consider, before issuing process, that a case for doing so has been made out: see, e.g., *Criminal Code*, s 507(1). Much the same may be said with respect to the power to arrest. In general, a peace officer must have reasonable grounds to effect the arrest. There must be reasonable and probable grounds to demand a breath sample under s 254(3) of the Code, and reasonable grounds must be shown before a search warrant may be issued: s 487(1). Each of these cases may be seen as an example of the broad but flexible scope of the presumption of innocence as a principle of fundamental justice under s 7 of the *Charter*. The principle does not necessarily require anything in the nature of proof beyond reasonable doubt, because the particular step in the process does not involve a determination of guilt. Precisely what is required depends upon the basic tenets of our legal system as exemplified by specific *Charter* rights, basic principles of penal policy as viewed in the light of "an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves": *Reference re s 94(2) of Motor Vehicle Act (British Columbia)*, supra, at p 513 [SCR].[43]

54. In *Pearson,* the court noted that "the guilt or innocence of the accused is not determined, and punishment is not imposed," during a bail hearing.[44] For that reason, the same procedural protections afforded in a criminal trial need not be present in a bail hearing. Similarly, the guilt or innocence of the CBC in the interim injunction proceedings was not determined, and no punishment imposed.

55. The procedural protections offered by the civil test for an interim injunction in this case included an evidentiary standard of a "strong prima facie case," a higher standard than what is used in judicial interim release proceedings. An evidentiary record, including affidavit evidence, was supplied to provide a factual foundation. The test employed offered more than adequate protections to the rights at stake in the circumstances. This is especially true considering that the order in question was sought and granted on an interim basis.

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[43] ***R v Pearson***, [1992] 3 SCR 665 at para 37
[44] ***R v Pearson***, [1992] 3 SCR 665 at para 42

56. The CBC argues that the order is equivalent to a conviction because it prevents the CBC from restoring itself to its lawful position in the event that it is acquitted after a trial on the merits. This argument is undermined by the fact that the order is interim in nature. The CBC is free to apply to the Court to clarify the order's parameters, or to include a provision which allows it to restore itself in the event of an acquittal.[45]

B. THE MAJORITY WAS CORRECT TO GRANT THE INTERIM INJUNCTION IN THIS CASE

57. An analysis under the tri-partite test shows that the Majority was correct in determining that injunctive relief is appropriate in this case. By leaving the impugned articles on their website, so that they could be accessed and distributed further, the CBC published and transmitted the complainant's identity on an ongoing basis, in contravention of the provincial court order.

58. Interim injunctive relief is appropriate in this case, whether it is given in aid of a permanent injunction or in aid of criminal contempt, and it is appropriate regardless of whether the test from *RJR MacDonald* or the *Liberty Net* is applied.

Definition of Publish

59. Publication bans exist to prevent new audiences from learning prohibited information. Legally and purposively, publication is occasioned every time someone accesses the prohibited material, not just at the precise moment that the material is first posted. By ensuring that the victim's name and photo are accessible via web search, and by facilitating the further dissemination of the article through sharing, tweeting, and facebook icons, the CBC continues to allow the prohibited material to reach new readers. This is irreconcilable with a purposive interpretation of the word "publish", with statutes providing for publication bans, and with jurisprudence considering the harm caused by publication in other contexts.

60. The CBC relies on the case of *R v Telus Communications* to argue that the *Criminal Code* must apply equally irrespective of technological platforms, and that there is no reason why print and internet publications should be treated any differently in the context of a publication ban.

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[45] ***Google Inc v Equustek Solutions***, 2017 SCC 34 at para 51

61. In *Telus*, the question for this Court was whether the Crown could use a general warrant to acquire copies of text messages, or whether they were required to obtain a wiretap authorization. In its analysis of the proper approach, this Court noted that the interpretation of the *Criminal Code* provisions "should not be dictated by the technology used to transmit such communications, like the computer used in this case, but by what was intended to be protected under Part VI." The focus in *Telus* was on a purposive interpretation of the *Criminal Code*, on what rights Part VI was designed to protect.

62. The interpretation advanced by the CBC in this case is not only inconsistent with the existing law and a purposive interpretation; it ignores the nature of how the internet works and the ease and immediacy with which information can be disseminated through a simple internet search. The interpretation proposed by the CBC would result in the publication ban completely failing to achieve its purpose – which is to protect a victim's privacy interests.

Statutory interpretation

63. The publication ban in this case was issued under the authority of *Criminal Code* s 486.4(2.2):

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> …
>
> (2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall
>
> (a) as soon as feasible, inform the victim of their right to make an application for the order; and
>
> (b) on application of the victim or the prosecutor, make the order.

64. The terms "publish, broadcast, or transmitted in any way" are not expressly defined in s 486.4(2.2) of the *Criminal Code.* The plain meanings of the words "publish" and "transmit" support the interpretation that material is published not only when it is first posted on a website, but each and every time someone accesses it, and reads it. To publish means to "make generally

known, and to disseminate to the public."[46] To transmit means "to send information in the form of electrical signals to a computer, etc."[47] Parliament's intention that these terms should be broadly interpreted within s 486.4(2.2) is further illustrated by its use of the phrase "in any way."

65. The term "publication" is defined in section 2 of the *Youth Criminal Justice Act* as "the communication of information by making it known or accessible to the general public through any means, including print, radio or television broadcast, telecommunications or electronic means." There is no reason to interpret *Criminal Code* publication bans differently. Indeed, the CBC's proposed interpretation of "publish" has the illogical effect of providing less privacy protection to youth victims of adult crime than to youth victims of youth crime.

Jurisprudential support

66. According to hundreds of years of common law, including authorities from this Court, publication happens every time a third party reads the material in question.[48] A presumptive case of publication arises where the plaintiff proves that "it can reasonably be inferred that the words were brought to the knowledge of some third person."[49]

67. This long-standing interpretation of the term "publish" has been imported into the internet age. In *Crookes v Wikimedia Foundation,* it was determined that hyperlinking does not necessarily amount to publication. This Court distinguished between the source providing the link, and the source that created the defamatory words by saying "it is the actual creator or poster of the defamatory words … who *is publishing* the libel when a person follows a hyperlink to that content" (emphasis added).[50] The use of the present tense phrase "is publishing" re-affirms that publication occurs each time a person follows the link, and reads the content.

68. The BC and Ontario Courts of Appeal have reached similar conclusions. In deciding when publication occurs for the purpose of calculating limitation periods, both courts rejected the

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[46] Merriam-Webster, Merriam-Webster.com, *sub verbo,* "publish"
[47] Merriam-Webster, Merriam-Webster.com, *sub verbo,* "transmit"
[48] See for example ***Gaskin v Retail Credit Co****,* [1965] SCR 297; ***Black v Breeden****,* [2012] 1 SCR 666 at para 20; ***Editions Ecosociete Inc v Banro Corp****,* [2012] 1 SCR 636 at para 34
[49] ***Gaskin v Retail Credit Co****,* [1965] SCR 297 at p 300, qtng *Gatley on Libel and Slander* [not reproduced]
[50] ***Crookes v Wikimedia Foundation Inc****,* [2011] 3 SCR 269 at paras 27-30

notion of a "single publication" rule. Instead, they followed the English Court of Appeal's judgment in *Loutchansky v Times Newspapers Ltd*, which held that each time a new reader gains access to an article on website archives, a new publication occurs.[51]

69. In the case of *Carter,* the BC Court of Appeal explained the rationale for this, noting that "if defamatory comments are available in cyberspace to harm the reputation of an individual, it seems appropriate that the individual ought to have a remedy. In the instant case, the offending comment remained available on the internet because the defendant respondent did not take effective steps to have the offensive material removed in a timely way."[52]

70. The Ontario Court of Appeal in its decision highlighted the accessibility of information on the internet:

> Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented only by a handful of people, any one of them can republish the message by printing it, or as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again.[53]

71. These concerns apply equally to information that is supposed to be protected by a publication ban. Furthermore, it seems evident that the only purpose of maintaining web archives is so that they can be accessed, and read by new audiences.

72. It is apparent from this long standing definition of publish that the Attorney General has a strong, *prima facie* case that the CBC is breaching the court order. As this Court has found, "when Parliament uses a term with a legal meaning, it intends the term to be given that meaning. Words that have a well-understood legal meaning when used in a statue should be given that

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[51] ***Carter v BC Federation of Foster Parents Assn***, 2005 BCCA 398 at paras 14-21*;* ***Shtaif v Toronto Life Publishing Co Ltd***, 2013 ONCA 405 at paras 27-40

[52] ***Carter v BC Federation of Foster Parents Assn***, 2005 BCCA 398 at para 20

[53] ***Shtaif v Toronto Life Publishing Co Ltd***, 2013 ONCA 405 at para 38, qtng ***Loutchansky v. Times Newspapers Ltd***, 2 WLR 640 (UK CA) [not reproduced]

meaning unless Parliament clearly indicates otherwise."[54] "Publish" has a legal meaning: to make information known or accessible to the public. Here, by leaving the teenage victim's identifying information on its website, the CBC ensures that it is always available to reach new readers – in other words, it continues to publish the information, in defiance of the court order.

There is no requirement to use the Charter as an interpretive aid

73. The CBC argues that the definition of publish proposed by the Crown is inconsistent with *Charter* values, and that a narrower interpretation of the term should be favoured. In support of its argument, the CBC points to the fact that both the Majority and the Application Judge commented that "either position is arguable" in relation to whether publication occurs once, or is ongoing.

74. The fact that other courts have come to differing conclusions about the interpretation of a provision does not mean that ambiguity exists. "It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purpose of approach set out by Driedger,"[55] and to thereafter determine if ambiguity exists. For ambiguity to exist, each reading must be equally in accordance with the intentions of the statute. It is only where such genuine ambiguity exists that the courts will resort to external interpretative aids, such as the *Charter*.[56]

75. The definitions of "publish" and "transmit" proposed by the CBC are entirely inconsistent with the purpose of the publication ban sections in the *Criminal Code.* Such a narrow construction creates an incentive to rush to publish before a ban can be issued, rendering any ban issued completely ineffective, and the Court helpless to do anything about it. Effectively, the CBC's interpretation takes the decision to request and receive a publication ban out of the victim's hands, as there is nearly always a delay between the time of a person's arrest and their first appearance in court, and therefore always an opportunity to publish before the ban can be requested. Creating pressure to obtain publication bans at the earliest possible opportunity also creates incredible logistical difficulties for a court dealing with discretionary

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[54] ***R v DLW***, [2016] 1 SCR 402 at para 20
[55] ***Bell ExpressVu Ltd Partnership v Rex***, [2002] 2 SCR 559 at para 30
[56] ***Bell ExpressVu Ltd Partnership v Rex***, [2002] 2 SCR 559 at para 29

bans, which require notice to the media and time for argument, and may not be conducive to being done at a first appearance in a busy docket courtroom.

A news agency cannot make the material "accessible" to the public without contravening the publication ban

76. The CBC argues that, because the Court has its own records that may be accessed and viewed by members of the public, news media outlets should also be permitted to make the impugned information accessible to members of the public. They further argue that criminal liability cannot attach as a result of another party's actions, without the accused person's knowledge.

77. It is trite that communication is a two way street, which requires someone to impart the information, and someone to receive it.[57] For the most part, a person can't receive information without taking some kind of an active step; they have to purchase a newspaper and read it, turn on their television or radio and pay attention, conduct an internet search using selected search terms, listen to the person who is speaking to them. Denying liability because another party must participate in the communication would lead to absurd results. Further, it is difficult to understand what a publication ban is meant to do, if not prevent the media from making certain information available or accessible to the public.

78. It is also inaccurate to claim that a publisher may be subject to prosecution if a ban is ordered without their knowledge, as all criminal offences have a *mens rea* component that must be proven beyond a reasonable doubt. In this particular case, the CBC was expressly told about the ban, and expressly told that the impugned information was being communicated from their website.

79. Additionally, it seems clear that there is, at the very least, a strong *prima facie* basis for concluding that a website operated by the CBC does more than passively host information; that it transmits information over the internet in response to requests made by the reader, or "end user." A host server's role in transmitting information has been described by this Court in the following way:

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[57] ***Society of Composers, Authors & Music Publishers of Canada v Canadian Assn of Internet Providers***, [2004] 2 SCR 427 at para 46

> The internet is a huge communications facility which consists of a worldwide network of computer networks deployed to communicate information. A "content provider" uploads his or her data, usually in the form of a website, to a host server. The content is then forwarded to a destination computer (the end user). End users and content providers can connect to the internet with a modem under contract with an Internet Service Provider.
>
> An internet transmission is generally made in response to a request sent over the internet from the end user (referred to as a "pull"). The host server provider transmits content (usually in accordance with its contractual obligation to the content provider)….
>
> ….First, the file is incorporated to an Internet-accessible server. Second, upon request and at a time chosen by the recipient, the file is broken down into packets and transmitted from the host server to the recipient's server, via one or more routers. Third, the recipient, usually using a computer, can reconstitute and open the file upon reception or save it to open it later; either action involves a reproduction of the file, again as that term is commonly understood.[58]

80. This Court went on to note that making information available generally occurs at the point of transmission.[59]

81. The impugned information in this case is present on the CBC's website. The uncontroverted evidence shows that the information was communicated from the CBC's website to the reader in response to search terms being entered.[60] This provides a strong *prima facie* basis upon which to conclude that the transmission occurred as a result of the CBC's role as content provider.

There is a strong prima facie case to prove mens rea

82. Even if the CBC is correct in arguing that the Crown was required to prove a strong *prima facie* case for contempt, and not just for an interim injunction, there is in any event strong *prima facie* evidence to prove the *mens rea* in this case.

83. To prove the *mens rea* of criminal contempt, the Crown must show that the accused acted with intent, knowledge, or recklessness as to the fact that public disobedience will tend to

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[58] ***Society of Composers, Authors & Music Publishers of Canada v Canadian Assn of Internet Providers***, [2004] 2 SCR 427 at paras 8-10
[59] ***Society of Composers, Authors & Music Publishers of Canada v Canadian Assn of Internet Providers***, [2004] 2 SCR 427 at para 65
[60] Affidavit of Michelle Davio – RR at pp 5-9

depreciate the authority of the court. An open and public defiance of a court order will tend to depreciate the authority of the court.[61]

84. The CBC argues that it lacks the requisite *mens rea*, because it interprets the terms "publish" and "transmit" differently; and accordingly is not intentionally breaching a court order. This amounts to a mistake of law, and does not provide the CBC with a defence.[62] It is trite that "ignorance of the law by a person who commits an offence is not an excuse for committing that offence," and that no defence can arise based on ignorance of the existence of the law or mistake as to its meaning, scope, or application.[63] As stated by this court in the case of *R v Forster*:

> it is a principle of our criminal law that an honest but mistaken belief in respect of the legal consequences of one's deliberate actions does not furnish a defence to a criminal charge, even when the mistake cannot be attributed to the negligence of the accused: *Molis v. The Queen,* [1980] 2 S.C.R. 356. This Court recently reaffirmed in *R. v. Docherty,* [1989] 2 S.C.R. 941, at p. 960, the principle that knowledge that one's actions are contrary to the law is not a component of the *mens rea* for an offence, and consequently does not operate as a defence.[64]

85. The reasons underpinning this long standing legal principle have been described as follows:

1. Allowing a defence of ignorance of law would involve the courts in insuperable evidential problems.

2. It would encourage ignorance where knowledge is socially desireable.

3. Otherwise, every person would be a law unto himself, infringing the principle of legality and contradicting the moral principles underlying the law.

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[61] ***UNA v Alberta (AG),*** [1992] 1 SCR 901 at para 25

[62] ***R v Star Phoenix 911909****,* 2003 SKCA 108 at para 27. The Court found the news agency guilty of contravening a court order. The news agency argued that they believed their actions did not contravene the order, and that therefore they lacked *mens rea.* The Court found that "The mistake of the appellant is its belief that the ban did not apply to the information in the transfer hearing. Thus, the mistake is one as to the existence of the law or the extent of the application of the law, which is a mistake of law not a mistake of fact. The appellant did not misapprehend the facts – it misapprehended the effect of the order of Justice Smith."

[63] ***Criminal Code****,* RSC 1985, c C-46, s 19; ***R v Molis,*** [1980] 2 SCR 356; ***R v Jones,*** [1991] 3 SCR 110

[64] ***R v Forster****,* [1992] 1 SCR 339 at para 15

4. Ignorance of the law is blameworthy in itself.[65]

86. In the case of *Carey v Laiken,* this Court explained why a mistake of law cannot provide a defence to a charge of civil contempt, noting that it could "permit an alleged contemnor to rely on a misinterpretation of a clear order to avoid a contempt finding, which would significantly undermine the authority of court orders."[66]

87. Permitting a mistake of law to provide a defence to charges of criminal contempt would similarly create an incentive to misunderstand the law and rely on subjective, erroneous interpretations. Here, CBC knew of the existence of the publication ban – indeed, it phoned Alberta Justice to confirm it, and received confirmation three times.[67] Its ongoing publication is public, and is at minimum reckless to depreciating the authority of the courts.

The Test in Liberty Net is met

88. Interim injunctive relief is appropriate in this case, even if the more stringent test from *Liberty Net* is applied. According to the test, the Court must "consider the likelihood of a finding of defamation at trial. The words in question must be clearly defamatory and obviously impossible to justify, such that the trial judge's acceptance of a defence of justification would necessarily have to be set aside as some perverse finding on appeal."

89. The first branch of the test for an interim injunction in a defamation case asks whether the words are defamatory; in this case, the question is whether the CBC is publishing or transmitting in any way by leaving the identifying information on their website. For the reasons described above, the Respondent takes the position that they clearly are.

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[65] ***La Souveraine, Compagnie d'assurance générale v Autorité des marchés financiers***, [2013] 3 SCR 756 at para 70, citing Don Stuart, ***Canadian Criminal Law: A Treatise*** (3rd ed 1995) at pp 295-298 [not reproduced]

[66] ***Carey v Laiken***, [2015] 2 SCR 79 at para 42. See also para 38, in which this Court commented that "to require a contemnor to have intended to disobey the order would put the test too high and result in mistakes of law becoming a defence to an allegation of civil contempt, but not to a murder charge."

[67] "[T]here is an obligation upon the media to make themselves knowledgeable as to these matters": ***R v Canadian Broadcasting Corporation Corp,*** 2007 BCSC 1970 at para 9

90. In defamation cases where no statement of defence has been issued, and there is no intention to justify the words, the factual questions are much easier to resolve, and the interim injunction can be determined by examining the legal question.[68]

91. In the present case, the facts have never been in dispute. It is not a matter of contention that (1) the CBC placed the identifying information of the victim on their website (2) a publication ban was subsequently ordered, and (3) the CBC chose to leave the identifying information on their website, while knowing about the ban. In the circumstances, there is no need, and no record upon which, to determine whether any defence raised would be perverse. The only issue is legal; whether there is publication or transmission in any way. This is precisely the issue that the Majority identified in their analysis, and precisely the basis upon which they granted the order.

Irreparable Harm

92. The Court of Appeal found that the Crown was not required to prove irreparable harm, over and above the harm that flows from breaching a court order. Because there is no requirement for the Crown to prove harm in the contempt proceedings, it would be illogical to deny injunctive relief on the basis that there was no proof of harm in the interim proceedings.

93. Canadian Courts have recognized that the tri-partite test must be applied flexibly, to account for the different considerations that may arise in individual cases:

> …the strength of the case, irreparable harm and balance of convenience considerations, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue.[69]

94. The CBC argues that the reasoning of the Application Judge should be preferred to that of the Court of Appeal, and that evidence of the effects of a breach should be tendered before it can be found to be harmful. This argument ignores the principle that "contraventions of the law

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[68] ***Canadian National Railway v Google Inc,*** 2010 ONSC 3121 at para 31-32

[69] ***Potash Corp of Saskatchewan Inc v Mosaic Potash Esterhazy Limited Partnership,*** 2011 SKCA 120 at para 26

are inherently contrary to the public interest and are presumed to cause harm or the risk of harm."[70]

95. In the case of *Harper v Canada*, this Court commented that:

> …in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at pp. 348-49:
>
> When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.[71]

96. Similarly, section 486.4(2.2) is presumed to produce a public good. It is presumptively harmful to breach that provision. The Majority was correct in holding that an ongoing breach of a court order is harmful to the administration of justice.

Balance of Convenience

97. The balance of convenience requires the court to assess "which of the two parties will suffer greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits." Relevant factors include the nature of the relief sought and the harm the parties contend they will suffer. The Application Judge wrote that evidence of the CBC's inconvenience was "hard to find," and concluded that the CBC would be "little inconvenienced" if the interim injunction were granted.[72]

98. The CBC argues that measures which prohibit their ability to publish the information of interest restricts their freedom of expression, and that this must be considered when assessing the Balance of Convenience. This position seems at odds with the CBC's assertion that they are not

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[70] ***College of Opticians of Ontario v John Doe No 1***, 2006 CarswellOnt 8285 (SCJ) at para 51 [RBOA – Tab 2 at p 11]
[71] ***Harper v Canada (Attorney General),*** [2000] 2 SCR 764 at para 9
[72] *Court of Queen's Bench Decision* at para 61 - AR at p 11

"publishing" or "transmitting" the identifying information, that they are simply passively archiving the material in question.

99. Whether the ban violates CBC's right to freedom of expression cannot be considered in the contempt proceedings because it is a collateral issue. An order prohibiting publication cannot be sidestepped by asserting "that the [order] was erroneously granted or even that it was void. The proper course is to move against the [order] or to appeal and the court will not permit the original order to be attacked collaterally in contempt proceedings."[73]

100. The Majority correctly noted that the issue of freedom of expression is collateral to the contempt proceedings,[74] and that the Application Judge erred by incorporating it into his analysis of inconvenience.

101. Properly considered, the ongoing harm of defiance of the court order outweighs the inconvenience, if any, of editing a web article.

Consideration of s 2(b)in the balance of convenience analysis

102. The Respondent maintains the position that consideration of s 2(b) rights in the balance of convenience analysis is a collateral issue. However, since the Appellant has made reference to this in their argument as noted above, for completeness the Respondent will briefly deal with this aspect.

103. As the Majority properly noted relying on this Court's previous decisions, at the stage of an interim interlocutory order s 486.4 (2.2) must be presumed to be constitutional.[75]

104. It is also of note that not all speech is entitled to the same level of protection. Speech that is determined to be unlawful does not enjoy the same constitutional protection as other forms of expression.[76]

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[73] ***Canada (Human Rights Commission) v Taylor,*** [1990] 3 SCR 892 at para 182, qtng R. J. Sharpe, *Injunctions and Specific Performance*, 4th ed, Toronto, Canada Law Book, 2012 [not reproduced]

[74] *Court of Appeal Reasons* at para 12 – AR at p 18

[75] *Court of Appeal Reasons* at para 12 – AR at p 18; see also ***Canadian Newspapers Co v Canada (Attorney General)***, [1988] 2 SCR 122; ***Toronto Star Newspapers Ltd v Canada***, [2010] 1 SCR 721

105. If freedom of expression were relevant, however, it would be important to observe that the identifying information is only a "sliver of information" and prohibitions on publication cause minimal harm.[77] Nothing is prohibiting the CBC from being present at the trial, and reporting the facts of the case and the conduct of the trial.

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[76] ***RWDSU, Local 580 v Dolphin Delivery Ltd***, [1986] 2 SCR 573 at para 27; ***Google Inc v Equustek Solutions***, 2017 SCC 34 at para 48, this Court commented that "This is not an order to remove speech that, on its face, engages freedom of expression values, it is an order to de-index websites that are in violation of several court orders."

[77] ***AB v Bragg Communications Inc***, [2012] 2 SCR 567 at para 28. In ***R v Barton,*** 2017 ABCA 216 at para 107, the Alberta Court of Appeal noted when considering the application of s 276 in the context of a victim who had been killed "Canadians would be shocked if a victim of crime could be stripped of his or her dignity after death." And further at para 312 "We live in a society where every individual's life, liberty and security of the person have equal value and where every individual's autonomy has meaning. It is a society where the criminal law must reflect and respect each individual's rights and dignity." This reasoning is equally applicable to a mandatory publication ban under s 486.4 (2.2) which is only preventing the identification of a victim of crime. Each person (dead or alive) is entitled to protect their own privacy and dignity which this mandatory publication ban does.

PART IV – COSTS

106. The Respondent makes no submissions regarding costs.

PART V – ORDER SOUGHT

106. The Respondent requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Calgary, Alberta, this 17th day of July, 2017.

IWONA KUKLICZ
COUNSEL FOR THE RESPONDENT

JULIE SNOWDON
COUNSEL FOR THE RESPONDENT

IK/kel

PART VI – TABLE OF AUTHORITIES AND LEGISLATION

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