CITATION: Her Majesty the Queen in Right of Ontario v. Canadian Broadcasting Corporation, 2019 ONSC 1079
COURT FILE NO.: 18-78211
DATE: 20190215

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Her Majesty the Queen in Right of Ontario Applicant	Sunil Mathai and Jeffrey Costain for the Applicant
– and –	
Canadian Broadcasting Corporation and Post Media Network Canada Corporation Respondent	Richard G. Dearden and Hunter Fox, for the Respondent and Sean Moreman for the Respondent Canadian Broadcasting Corporation
	HEARD: December 18 and 19, 2018 at Ottawa

WARNING

These Reasons for Judgment contain information that identifies alleged victims in a criminal proceeding. In that proceeding, publication bans were ordered pursuant to ss. 486.4(2)(b) and 486.4 (2.2)(b) of the *Criminal Code of Canada*. Pursuant to ss. 486.4 (1)(a)(i) and 486.4(2.1) of the *Criminal Code*, any information that could identify the alleged victims shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR JUDGMENT

BEAUDOIN J.

[1] Her Majesty the Queen in Right of Ontario (the "Crown"), seeks a finding that the Canadian Broadcasting Corporation ("CBC") and Post Media Network Canada ("Post Media"), are in civil contempt of publication bans issued in the criminal proceedings, *R. v. B.* Specifically, the Applicant submits that the articles, "Ex-hostage American C. C. accuses Canadian husband J. B. of abuse, in court documents" and "Mommy will probably go to hellfire": Former hostage C. C.

alleges husband abused her and children" (collectively, the "Impugned Articles"), published by CBC and Post Media respectively, violated a publication ban issued pursuant to s. 486.4 of the *Criminal Code of Canada*, R.S.C., 1985, c. C-46 ("the *Code*"). The ban prohibited the publication of any information that could identify the alleged victims in *R. v. B.*

[2] In addition to seeking a finding of civil contempt against the Respondents, the Crown seeks a declaration that the Impugned Articles contain information that, when read together with the Respondents' previously published articles, could identify the victims in the criminal proceeding, *R. v. B.*

Background Facts

[3] In October 2017, J. B. and his C.C. were freed after being held captive in Afghanistan for five years. Their overseas capture and release were widely reported in international, national, and local media. The couple granted numerous interviews to the media after their rescue and had a widely publicized meeting with Prime Minister Justin Trudeau in Ottawa.

[4] On December 31, 2017, J. B. was charged with a number of serious offences, including sexual assault with a weapon contrary to s. 272 of the *Code*. He was also charged with assault contrary to s. 266 of the *Code*.

[5] On June 1, 2018, J. B. was released from custody following a contested bail hearing. Pre-trial motions in J. B.'s criminal proceeding have commenced and are scheduled to continue in the Ontario Court of Justice on March 25, 2019.

The Publication Bans

[6] When J. B. first appeared in court on January 1, 2018, Justice of the Peace Logue ordered publication bans pursuant to s. 486.4 and s. 517 of the *Code*, at the Crown's request, in relation to the victims and the bail proceedings respectively. When a replacement Information was put before the court on January 26, 2018, the publication bans pursuant to s. 486.4 and s. 517 of the *Code* were continued.

[7] On March 26, 2018, when the replacement Information was amended to particularize one of the victims on one of the charges of assault, the Crown requested, and Justice Clifford of the

Ontario Court of Justice ordered, a publication ban pursuant to s. 486.4(2.2)(b) of the *Code*. At the outset of the bail hearing on May 28, 2018, Justice Wadden of the Ontario Court of Justice confirmed the publication bans.

[8] Prior to September 4, 2018, the Ottawa Citizen (Post Media) published nine articles that detailed critical information in relation to J. B., his criminal charges, and his family. Collectively, these articles reported on the family's freedom from captivity in Afghanistan and return to the Ottawa area.

[9] The Ottawa Citizen then reported that J. B. was facing numerous charges including sexual assault with a weapon (rope), physical assault, criminal harassment, unlawful confinement, and uttering threats. The alleged offences occurred between October 14, and December 30, 2017, while the family was living in Ottawa. It was further reported that there were two victims, but that the Ottawa Citizen was unable to publish, because of a publication ban, any details that might identify either victim.

[10] Prior to September 6, 2018, CBC had also published a number of articles in relation to J. B.'s criminal charges; seven articles published include information about J. B., his criminal charges, and his family. These articles cover much of the same ground as the Post Media publications. Similar to the Post Media publications, CBC was unable, due to a publication ban, to publish any details that might identify the two victims.

The Family Court Proceedings

[11] On or about May 24, 2018, family court proceedings were commenced in Ottawa involving the B. family where, amongst other things, sole custody of the three children was at issue. These proceedings were initialized such that neither party would be named. The proceedings were held in open court, and relied on affidavits that were publicly available in the court file and remain unsealed. A non-publication order was not issued in the family court proceedings.

[12] On July 23, 2018, Justice Tracy Engelking granted a motion for custody. On her own motion, Justice Engelking sealed Part B of her Endorsement, which referenced affidavit evidence that had been filed in support of the motion. That affidavit and Part B of the Endorsement contain information relevant to the criminal charges.

[13] The Ottawa Citizen applied to unseal Part B of the Endorsement. Justice Engelking invited the Ottawa Crown Attorney's Office to make submissions as to whether the lifting of the temporary sealing order could jeopardize the *Code* publication bans.

[14] In correspondence with the Court, Assistant Crown Attorney Jason Neubauer advised that the publication of information contained in Part B of the Endorsement could contravene the publication ban. As such, the Crown requested that if the Court were to unseal Part B, the decision should include a standard cover page setting out the existence and parameters of the *Code* publication ban along with a warning regarding breach of the orders.

[15] Counsel for the Ottawa Citizen advised that any parts of the Endorsement that violated the publication ban, did not need to be redacted because those portions could not be published as a result of the ban.

[16] On September 4, 2018, Justice Engelking released an Endorsement unsealing Part B of her Endorsement with the consent of the parties. Justice Engelking wrote:

> I sought the position of the Crown in regard to the issue of removing the sealing order of Part B. Mr. Neubauer, on behalf of the Crown, has taken no position in respect of the unsealing of the Endorsement so long as the publication bans currently in place continue to be respected.
>
> There shall therefore be an order as follows:
>
> 1) The temporary without prejudice order sealing Part B. of my Endorsement is hereby removed;
>
> 2) The Endorsement of July 23, 2018 may be released in its entirety with a cover page attached containing the following warning:
>
> WARNING
>
> This case pertains to a matter in which publication bans are currently in place pursuant to s. 486.4(1)(a)(i) and s. 486.4(2.1) of the *Criminal Code of Canada.*

The Impugned Articles

[17] I turn to the Impugned Articles.

[18] In the evening of September 4, 2018, the Ottawa Citizen published an article online under the headline "Ex-hostage American C. C. accuses Canadian husband J. B. of abuse, in court documents" ("the Impugned Citizen Article"). The article appeared in the print newspaper the following day. The article contained information regarding allegations of abuse made in unsealed court documents against J. B. while the family was held in captivity and family court orders. The article disclosed that both J. B. and his wife enjoyed bondage.

[19] CBC published an online article under the headline "Mommy will probably go to hellfire": Former hostage C. C. alleges husband abused her and children" ("the Impugned CBC Article"). This article was similar in content to the Ottawa Citizen article, but also included details of assault against one of the children alleged to have occurred while the family was in captivity. The article reported that a judge had granted the mother the right to return to the U.S. with the children. It added that counsel for J. B. said that his client was devastated by this order made by the family court judge.

[20] Following correspondence between CBC and the Ottawa Crown Attorney's Office, the Impugned CBC Article was modified to remove the reference to J. B.'s criminal counsel. Counsel's name was replaced with "a lawyer acting for B. in another matter."

The Aftermath

[21] On September 5, 2018, the Ottawa Crown Attorney, Vikki Bair, emailed the editor of the Ottawa Citizen and was put in touch with their counsel. Ms. Bair communicated her view that the Impugned Citizen Article violated the s. 486.4 publication ban, and asked that it be removed from the website. It was not.

[22] On September 7, 2018, Ms. Bair emailed the author of the Impugned CBC Article advising her of the Crown's view that the article was in violation of the publication ban. Ms. Bair was then put in touch with counsel for CBC, and re-iterated her position. The article was not removed from the website, although it was edited as discussed in para. 20 above.

[23] On September 10, 2018, the Crown brought two applications before Justice Engelking "for direction" related to the Impugned Articles. Justice Engelking's endorsement reads as follows:

The Crown asserts that its pathway to jurisdiction for this court is that: a) the court invited submissions on the Crown's position with respect to the issue of unsealing of Part B of the court's endorsement of July 23, 2018; and b) the court can be asked to change an order that "needs to be changed to deal with a matter that was before the court but that it did not decide" pursuant to r. 25(19) of the *Family Law Rules*. The Ottawa Citizen and CBC take the position that this court does not have jurisdiction to do with the matter on the basis that:

(a) it is not properly before the court pursuant to rr. 1 and 14 of the *Rules of Civil Procedure*;

(b) the Crown has cited no statute, law or rule upon which to base its application;

(c) it is moot;

(d) none of the subcategories of r. 14.05(3), which would permit this to proceed by application, apply; and,

(e) even if r. 25(19) were to apply, the Crown has brought no motion, nor filed any evidence support of the motion to change the order of Sept. 4, 2018 unsealing Part B of the endorsement of July 23, 2018.

The Crown appeared before me on Friday, September 7, 2018, acting as agent for Mr. Dearden for the Ottawa Citizen and having only recently served CBC. For the sake of convenience, I attached the family court file number to the application, it to that point having no file number. I did, however, at that time raise the issue as to whether this matter was in the proper court. I was not convinced, and remain unsatisfied that this Court has jurisdiction to do what the Crown is requesting it to do. Essentially, in its application the Crown is asking the court to opine in the abstract as to whether the Ottawa Citizen or CBC have breached the non-publication bans ordered in the context of J. B.'s criminal proceeding. I am not aware on either what process or what authority the court could do so. When the court released its decision in its entirety on Sept. 4, 2018 it was done so with a warning attached as to the existence of the publication bans and the expectation that they be complied with. The order, in my view, was clear. If they have not been complied with, a remedy must be available from the court which issued them. For reasons given, I am not satisfied that this Court has jurisdiction and I decline to hear her Majesty's application. There is no order of costs for today.

[24] On October 9, 2018, the Crown sought an urgent date for the hearing of this Application. On October 22 and 23, 2018, I held case conferences and set a timetable for the hearing of the application. On November 23, 2018, I heard refusals motions arising out of cross-examinations, and on November 27, 2018, I released my decision. The hearing proceeded on the scheduled dates.

The Issues on this Application

[25] This Application raises four distinct issues:

1. Does the Superior Court of Justice have the inherent jurisdiction to hear an application for civil contempt?
2. Is an application the appropriate way of bringing this matter before the court?
3. By publishing the Impugned Citizen Article and the Impugned CBC Article, have either the Respondents committed civil contempt of the publication bans issued in the *R.* v. *B.* matter?
4. Is the declaratory relief sought by the Crown proper?

[26] The determination of these issues requires (a) consideration of the purpose and scope of s. 486.4 of the *Code,* (b) a review of the distinction between civil and criminal contempt, (c) the freedom of the press to report on judicial proceedings pursuant to s. 2(b) of the *Canadian Charter of Rights and Freedoms (*the *"Charter"),* and (d) the open court principle.

[27] Finally, I am asked to consider the "mosaic effect" in support of the request that I find that the non-publication orders have been breached.

[28] As a preliminary matter, Post Media objects to the admissibility of a number of paragraphs in the affidavit of Ms. Bair. The objection is that the subject paragraphs contain argument or opinion.

The Preliminary Issue

[29] In support of this Application, Ms. Bair swore an affidavit dated October 24, 2018, to which she attached a number of exhibits. Post Media submits that paragraphs 3, 18, 27, 28, 34, 35, 37, 39, 40, 41, 42, 43, 45, and 48 contain opinion and argument rather than sworn evidence of facts.

The Law

[30] In this matter, r. 4.06 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "Rules") applies, which provides:

> (2) An affidavit shall be confined to the statement of facts within the personal knowledge of the deponent or to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise.

[31] Rule 39.01(5) states:

> (5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

[32] In *Glasjam Investments Ltd. v. Freedman,* 2014 ONSC 3878, at para. 35, Master Macleod (as he then was) held that affidavits cannot contain opinion and argument:

> Finally the affidavit suffers from containing opinion rather than fact. An affidavit is supposed to be sworn evidence of facts within the knowledge of the deponent. Opinion and argument are not facts but conclusions and unless the witness is tendered as an expert then the witnesses' opinion is neither admissible nor probative of anything. Having a law clerk swear that "I am further advised by [Counsel for Moving Party] and verily believe it to be true, that it is likely that the Notice… has been used as a scheme" is simply improper. Even had [Counsel for Moving Party] sworn the affidavit, the court would not be interested in his opinion. Counsel may properly ask the court to reach a conclusion based on facts properly before the court but the fact that counsel believes the conduct of the other party to be improper is neither here nor there.

[33] In *Coote v. Zellers* (2007), 231 O.A.C. 129 (Div. Ct.), leave to appeal to Ont. C.A. refused, June 30, 2008 (M36083), at para. 17, Justice Himel for the Divisional Court held:

> The applicant's affidavit material sets out his opinions as to whether the evidence supports the referral of his complaint to the Tribunal and, for the most part, consists of argument… The argument of the applicant should not be contained in affidavits filed in support of the application for judicial review. Argument is properly contained in a factum. Accordingly, the affidavit of the applicant which includes attachments must be struck from the record.

Conclusion

[34] As to Ms. Bair's affidavit:

- Paragraph 3 contains inadmissible opinion;
- Paragraph 18 contains inadmissible hearsay on a contentious fact, as does the last sentence of paragraph 27.

- I find that paragraph 28 is simply narrative and that paragraph is not struck.
- Paragraphs 34 and 35 contain opinion and argument and are struck.
- The charts referred to in paragraphs 37 and 39 are summaries setting out the details of the various publications and they are of assistance to the Court, and accordingly, these will not be struck.
- The Crown agrees that paragraph 40 contains opinion and I find that the last two sentences of paragraph 41 do the same.
- The Crown accepts that paragraph 42 contains argument and I conclude that paragraph 43 does as well; accordingly, these paragraphs are struck.
- The last sentence of paragraph of paragraph 48 contains inadmissible opinion.

[35] In the end, nothing much turns on the offending paragraphs, as the issues on this Application ultimately turn on the applicability of the law to the undisputed facts.

Interpretation of s. 486.4 of the *Code*

[36] The scope of s. 486.4 of the *Code* is very much in issue in this proceeding. Interpretation of that section is required to appreciate the full extent of the arguments advanced by the parties and to arrive at a decision. The section reads in part:

> **Order restricting publication — sexual offences**
>
> 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
>
> (a) any of the following offences:
>
> i. an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> ii. any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1) (a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences

(2.1) Subject to subsection (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 may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(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.

Position of the Crown

[37] The Crown relies on *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26: the words of the section must be "read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." It is central to the Crown's argument that the wording of the

publication bans "any information that could identify the victims" be given its broadest meaning, so as to capture any possible means through which identification may take place.

Position of CBC

[38] CBC argues that the Crown's interpretation (a) would render the non-publication order impermissibly vague, (b) offends basic principles of the law of contempt, and (c) would severely curtail the free flow of information that is in the public interest.

[39] CBC relies on the decision of the Queen's Bench of Alberta in *R. v. The Canadian Broadcasting Corporation,* 2017 ABQB 329, 59 Alta. L.R. (6th) 342, (affirmed by Alta. C.A., 2018 ABCA 391). In that case, the court had to consider the same provisions of the *Code* that are in issue here. A 14-year old woman was found deceased and CBC published a report on its website about the death. The reporting provided the name of the victim, a photograph of her, and some personal information.

[40] One week later, at the first appearance of the person alleged to have killed the victim, the presiding Provincial Court Judge made an order that: "any information that could identify the victim shall not be published in any document, or broadcast or transmitted in any way." Shortly thereafter, CBC became aware of the ban. However, while it did not refer to the victim by name in any other reports subsequent to the ban, it did not alter or remove the earlier reports, both of which remain available on its website. When requested to remove or amend the two earlier reports to comply with the ban, CBC refused to do so.

[41] As a result of their refusal, CBC was charged with criminal contempt. The words of s. 486.4 of the *Code* that were in issue were: "not published in any way." The Court said this at para. 21:

> Before considering the meaning of the words, it is important to remember that this is a criminal prosecution. As with all criminal prosecutions, the accused is entitled to know with some precision what behaviour is prohibited. Therefore, while the words used in s. 486.4(2.2), suggest that Parliament intended a broad scope by using the phrase "in any way," where the breach is allegedly criminal, what will constitute an offence needs to be specifically identified. Furthermore, where the Ban limits a *Charter* protected right – here, s. 2(b) dealing with "freedom of thought, belief, opinion and expression, including freedom of the press and other media of

> communication" – the extent of the limitation must be clearly delineated in order to be justifiable.

[42] The court recognized the broad scope of s. 486.4 of the *Code* but, because it was a criminal proceeding, interpreted the words "published in any way" narrowly. The court concluded that the fact that CBC had maintained the original articles in its accessible archives, did not amount to publication, transmission, or broadcast. As such, an acquittal was entered.

[43] Although it was a criminal trial, the Crown in that case also asked the trial judge to make a finding of civil contempt. There was no challenge to the Court's jurisdiction to make that finding. In the end, the court decided that, due to the public nature of its acts, the actions of CBC did not meet the definition of civil contempt.

[44] In this Application, CBC submits that the interpretation offered by the Crown lacks the degree of precision required to trigger liability and that such an expansive interpretation would be at odds with the proper rules of interpretation. Accordingly, CBC argues that the interpretation of the phrase "could identify" proposed by the Crown, as a means to capture any possible form of identification, is far too broad. CBC asks the court to step in and provide context for the media, so that they know what type of information can reasonably be expected to attract liability.

[45] As a result, CBC asks this court to "refine" the wording of section 486.4 (1) in order to import the proper degree of precision to the ban. CBC submits the better reading of the order can be gleaned from the equally authoritative French language version of s. 486.4(1) of the *Code.* CBC argues that this version sets a higher threshold by establishing a ban over information that "would identify" the victim:

> … le juge ou le juge de paix qui préside peut rendre une ordonnance interdisant de publier ou de diffuser de quelque façon que ce soit tout renseignement qui permettrait d'établir l'identité de la victime ou d'un témoin… [Emphasis added].

[46] According to CBC, the combined effect of the English and French wording of the order is that it is capable of at least two different interpretations. CBC submits that where there is more than one reasonable interpretation of an order, a party accused of contempt is entitled to the most favourable construction.

[47] In *Schitthelm v. Kelemen*, 2013 ABQB 42, 557 A.R. 151, at para. 48, the court held:

> Does uncertainty in the order have an impact on the "prosecution" of a contempt allegation? Uncertainty in the order may, of itself, give rise to a reasonable doubt. Where there are multiple reasonable interpretations of an order, or a range of meanings to which the order could give rise, the alleged contemnor is entitled to the benefit of the interpretation that is in their favour. [Citation omitted.]

[48] CBC maintains that there uncertainty disclosed by the French version. CBC refers to *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217, where the Supreme Court of Canada outlined how such discrepancies in the *Code* must be resolved in favour of a narrower interpretation of its provisions.

[49] According to CBC, the French version of the text provides a more precise indication of the type of information that is subject to the ban that which "would permit the identity of the victim or witness to be established" than does the overly broad interpretation of the English version now proposed by the Crown. CBC submits that even if the Crown's interpretation of "could identify" is possible, or even reasonable, it must still give way to the narrower language "would identify" in the French version. CBC argues that this version is more favourable to the accused, and that the wording must be refined to bring precision to the provision.

Position of Post Media

[50] According to Post Media, Parliament was very specific in limiting the scope of a non-publication order under s. 486.4(1) of the *Code* to information "in any document" regarding "proceedings in respect of" the listed offences. Post Media submits that the words "in any document" reference a single document, not a combination of previously published documents.

[51] Post Media submits that the words "proceedings in respect of" refer only to the criminal proceedings involving the listed offences; they do not refer to separate civil proceedings. The Ottawa Citizen family court article did not publish any information about the victim in "proceedings in respect of" the s. 272 *Code* charges against J.B. The Ottawa Citizen family court article reported on only the civil custody proceedings.

[52] Post Media asserts that s. 486.4(1) of the *Code* must be interpreted in accordance with *Charter* values. It refers to *R. v. Canadian Broadcasting Corporation*, 2018 ABCA 391, 77 Alta. L.R. (6th) 232, at para. 47, where Justice Rowbotham held:

> The highest degree of clarity, explicitness and specificity in a *Criminal Code* offence is necessary before concluding that Parliament intended to authorize a justified infringement of CBC's *Charter*-protected right to publish.

[53] Post Media argues that s. 486.4 of the *Code* does not confer on the Court a "clear, explicit and specific power" to combine "prior reporting" with the Impugned Articles in assessing whether a non-publication order was breached. Post Media further asserts that the Crown's attempt to combine prior reporting of criminal charges with a report about a family court proceeding infringes the freedom of expression constitutionally guaranteed by s. 2(b) of the *Charter* and the open court principle.

In Reply

[54] The Crown submits that there is no ambiguity between the French and English versions of ss. 486.4(1) of the *Code*. The plain and ordinary meaning of the words reveal that both versions are broad in scope.

[55] The Crown submits the term "permettrait d'établir", in the French version, has the same meaning as "could identify" in the English version. First, the plain and ordinary meaning of the verb "permettre" includes, by definition, the notion of uncertainty in the same way as does the verb "could" in English. The verb "permettre" in French, specifically when it is followed by the preposition "de" and an infinitive verb (in this case, "d'établir"), is defined as to give the means, the opportunity, or the possibility of doing a certain thing (see: Paul Robert, *Le Petite Robert 1: Dictionnaire: Alphabétique et Analogique de la Langue Française* (Montréal: Le Robert, 1987), sub verbo "permettre").

[56] The Crown adds that the French version uses the conditional verb tense ("permettrait d'établir"), as does the English version, to reinforce the broader and less certain character of the expression. Accordingly, the Crown submits that the uncertain character in the definition of "permettrait d'établir", coupled with the conditional verb tense, leaves no doubt that the Applicant's broader interpretation should be preferred.

[57] As for the words "proceedings in respect of", the Crown submits that phrase this refers to the timing of the publication ban. Finally, the Crown argues that the issue was decided by the

Supreme Court of Canada in *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122.

Conclusion

[58] I agree with the Crown that there is no appreciable in the difference between the English and the French versions. The French version allows for an event that could happen in the future. Having said that, it is apparent to me that a reference to s. 486.4 of the *Code*, *at large*, is broader than a reference to any of its specific subsections.

[59] More importantly, the breadth of s. 486.4 of the *Code* was decided by the Supreme Court of Canada in *Canadian Newspapers Co.* In that case, the Court had to decide if s. 442(3) of the *Code* (the predecessor to s. 486.4) infringed the freedom of the press guaranteed by s. 2(*b*) of the *Charter*. At para. 18 of the decision, the Court said:

> When considering all of the evidence adduced by appellant, it appears that, of the most serious crimes, sexual assault is one of the most unreported. The main reasons stated by those who do not report this offence are fear of treatment by police or prosecutors, fear of trial procedures and fear of publicity or embarrassment. Section 442(3) is one of the measures adopted by Parliament to remedy this situation, the rationale being that a victim who fears publicity is assured, when deciding whether to report the crime or not, that the judge must prohibit upon request the publication of the complainant's identity or any information that could disclose it. Obviously, since fear of publication is one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication at the time of deciding whether to report plays a vital role in that decision. Therefore, a discretionary provision under which the judge retains the power to decide whether to grant or refuse the ban on publication would be counterproductive, since it would deprive the victim of that certainty. Assuming that there would be a lesser impairment of freedom of the press if the impugned provision were limited to a discretionary power, it is clear, in my view, that such a measure would not, however, achieve Parliament's objective, but rather defeats it.

[60] The Court went to say at paras. 20 - 21:

> While freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognized that the limits imposed by s. 442(3) on the media's rights are minimal. The section applies only to sexual offence cases, it restricts publication of facts disclosing the complainant's identity and it does not provide for a general ban but is limited to instances where the complainant or prosecutor requests the order or the court considers it

> necessary. Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public. Therefore, it cannot be said that the effects of s. 442(3) are such an infringement on the media's rights that the legislation objective is outweighed by the abridgement of freedom of the press.
>
> Respondent further argued that s. 442(3) has a potential chilling effect on the media because in any given case it is difficult to ascertain what evidence could disclose the identity of the complainant. There is thus a risk that the press will choose not to publish any meaningful report on some trials. In my view, it is sufficient to say that media people are certainly competent enough to determine which information is subject to the ban; if not, the judge in his or her order can clarify the matters which cannot be published. [Emphasis added.]

[61] The Supreme Court determined that any information that "is likely to" or "could" identify a victim can contravene a publication ban.

[62] The breadth of publication bans was in issue in *R. v. Adams*, [1995] 4 S.C.R. 70. In that case, the Supreme Court held that publication bans do not expire as such. In *Adams*, the trial judge in a sexual assault case ordered a publication ban as to identity of the complainant. After acquitting the accused, and on his own motion, the trial judge rescinded the ban on the ground that the complainant's evidence was not credible. The Crown appealed that decision directly to the Supreme Court. At paras. 31 -32 of its decision, the Supreme Court said:

> Subsections (3) and (4) of s. 486 make the order banning publication mandatory on the application of the prosecution, the complainant or a witness under the age of 18. In this case, the circumstance that made the order mandatory was an application by the prosecutor. The Crown did not withdraw its application or consent to revocation of the order. Accordingly, the circumstances that were present and required the order to be made had not changed. The trial judge, therefore, did not have the power to revoke the order.
>
> While this conclusion is sufficient to dispose of this case, it is useful to add that, had the Crown consented to the revocation order but the complainant did not, the trial judge would equally have had no authority to revoke. The complainant was also entitled to the publication ban even if the Crown had not applied for it. If, however, both the Crown and the complainant consent, then the circumstances which make the publication ban mandatory are no longer present and, subject to any rights that the accused may have under s. 486(3), the trial judge can revoke the order. There may be circumstances in which the facts are such that both the Crown and the complainant conclude, after hearing the evidence or some of it, that the

> public interest and that of the complainant are better served if the facts are published.

[63] *Adams* was followed in *H.A. v. S.M.*, 2017 ONSC 5650, 140 O.R. (3d) 222. That case arose from an acquittal of a man in a criminal sexual assault case. The exonerated accused and his family brought a civil case against the complainant and the police for various causes of action, including negligent investigation by the police. The police defendants brought a motion to close certain portions of the case from public view. The police also pressed for a publication ban.

[64] The Court had to determine if the publication ban pursuant to s. 486.4(1) of the *Code* that had been issued in the criminal proceedings remained in force. After referring to *Adams*, the motions judge at paras. 17-18 said:

> Yet, the police defendants pressed, both in writing and orally, for the entry of a new publication ban protecting the identity of the complainant in the criminal case. I decline for two reasons. First, it is unnecessary. The publication ban entered in the criminal case remains in full force and effect here. Second, and most importantly, I fear any additional order, especially as proposed by the police defendants, could sew confusion and dilute the strength of the original order. The identity of the complainant, now a civil defendant, is best protected by a simple but strong recognition of its continued existence in this case.
>
> That recognition does not end the matter, however. Counsel for the media suggested the wisdom of a notice on the civil file of the existence of the publication ban to ensure the recognition of the continuation of the order entered in a criminal case. I am grateful to counsel and agree. Accordingly, the following notice shall be posted on the face of this file:
>
> WARNING
>
> The court order made under s. 486.4(1) of the *Criminal Code* shall continue. Any information that could identify S.M., a defendant herein, shall not be published, broadcast, or transmitted in any way.

[65] A similar Warning was made in this case, but with a significant difference in the language. I conclude that the scope of the publication ban is not limited to the criminal proceedings.

[66] I turn next to the distinction between civil and criminal contempt.

The Distinction between Civil and Criminal Contempt

[67] Both civil and criminal contempt of court rest on the court's power to uphold its dignity and process. In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at pp. 931-932, Justice McLachlin, as she then was, said this:

> Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.
>
> These same courts found it necessary to distinguish between civil and criminal contempt. A person who simply breaches a court order, for example by failing to abide by visiting hours stipulated in a child custody order, is viewed as having committed civil contempt. However, when the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts is added to the breach, it becomes criminal. This distinction emerges from *Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516, at p. 527, per Kellock J.:
>
> > The context in which these incidents occurred, the large numbers of men involved and the public nature of the defiance of the order of the court transfer the conduct here in question from the realm of a mere civil contempt, such as an ordinary breach of injunction with respect to private rights in a patent or a trade-mark, for example, into the realm of a public depreciation of the authority of the court tending to bring the administration of justice into scorn.
>
> What the courts have fastened on in this and other cases where criminal contempt has been found is the concept of public defiance that "transcends the limits of any dispute between particular litigants and constitutes an affront to the administration of justice as a whole": The gravamen of the offence is not actual or threatened injury to persons or property; other offences deal with those evils. The gravamen of the offence is rather the open, continuous and flagrant violation of a court order without regard for the effect that may have on the respect accorded to edicts of the court. [Citations omitted.]

[68] Later, at p. 933, Justice McLachlin added:

> While publicity is required for the offence, a civil contempt is not converted to a criminal contempt merely because it attracts publicity, as the union contends, but rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt.

[69] The distinction between civil and criminal contempt was reviewed by the Court in *Schitthelm* at para. 20:

> Courts have differentiated between contempt of a civil nature and contempt of a criminal nature: However, in *Vidéotron Ltée v. Industries Microlec Products Électioniques Inc,* Gonthier J. warns that "too great an insistence on the distinction between civil contempt and criminal contempt" could mask characteristics common to all types of contempt. In *Pro Swing Inc. v. Elta Golf Inc.*, the Supreme Court of Canada states that the decision in *Vidéotron* set "aside the distinction between the civil and criminal aspects" of contempt law. Why is this? As mentioned in *R. v. Cohn* (1984), 48 O.R. (2d) 65, at para. 11:
>
> > ... the [Criminal] *Code* does not specifically provide for or define any such offence nor does it set forth any procedure for the prosecution of such offence or any penalty following conviction therefor. Resort must be had to the common law for these matters. Contempt of court is a common law offence.
>
> Thus, contempt, whether of a criminal or civil nature derives from the same source; the common law. Certainly, the context in which each occurs might differ, and the results that flow from each might inform whether the contempt is "civil" or "criminal." However, as noted in Halsbury's Laws of England, vol. 22, 5th ed. (London, UK: LexisNexis, 2012) at para. 2, footnote 1 [citations omitted], "[t]he classification of contempts as criminal or civil has become progressively less important and has been described as 'unhelpful and almost meaningless' in the present day."

[70] The topic was more recently canvassed by Justice Cromwell in *Carey v. Laiken,* 2015 SCC 17, [2015] 2 S.C.R. 79, at paras. 31-35:

> The common law has developed to recognize two forms of contempt of court: criminal contempt and civil contempt. The distinction, which the parties to this appeal accept, rests on the element of public defiance accompanying criminal contempt. With civil contempt, where there is no element of public defiance, the matter is generally seen "primarily as coercive rather than punitive". However, one purpose of sentencing for civil contempt is punishment for breaching a court order. Courts sometimes impose substantial fines to match the gravity of the contempt, to deter the contemnor's continuing conduct and to deter others from comparable conduct.
>
> Civil contempt has three elements which must be established beyond a reasonable doubt. These three elements, coupled with the heightened standard of proof, help to ensure that the potential penal consequences of a contempt finding ensue only in appropriate cases.

> The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done". This requirement of clarity ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
>
> The second element is that the party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the wilful blindness doctrine.
>
> Finally, the party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels: The meaning of this element is one of the main points in contention on appeal and I will turn to consider it in more detail momentarily. [Citation omitted]

[71] Justice Cromwell noted, at para. 38, the critical difference between civil and criminal contempt and the required intent:

> It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice. The Court of Appeal followed this approach. As it noted, 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". Instead, contumacy or lack thereof goes to the penalty to be imposed following a finding of contempt. [Citations omitted.]

[72] It could be argued that the Impugned Articles constitute criminal contempt because of their public nature, but, the public nature of the articles is not determinative.

[73] The Impugned Articles did not, on their face, contravene the publication bans. It is only when the articles are read in conjunction with the previous publications that the alleged contempt occurs.

[74] The Impugned Articles do not "transcend the limits of any dispute between particular litigants". I find that the element of public defiance, necessary for a finding of criminal is not present. The distinction between civil and criminal contempt rests on the quality of the acts complained of; the nature of the remedy sought; and the intent that is required.

[75] Even if the Crown sought to have the Respondents found guilty of criminal contempt, that would not preclude the Crown from seeking a finding of civil contempt, so long as this court has the inherent jurisdiction to make that finding.

The Inherent Jurisdiction of the Superior Court to make a finding of *ex facie* Civil Contempt

[76] The Ontario Court of Justice ordered the publications bans. There is no dispute that any alleged contempt here occurred *(ex facie)* outside the face of the court. The Ontario Court of Justice does not have the jurisdiction to sanction someone for contempt in these circumstances. The question remains as to whether the Superior Court of Justice has the inherent jurisdiction to sanction that conduct through a finding of civil contempt.

Position of the Crown

[77] The Crown submits that the jurisprudence is clear that the Superior Court of Justice possesses the core inherent jurisdiction to render assistance to inferior courts to enable them to administer justice fully and effectively. This core inherent jurisdiction of the Superior Court is said by the Crown to include the power to find contempt committed outside the face of the inferior court because the inferior courts do have the power to protect themselves.

[78] The Crown submits that neither the *Code* nor the Rules oust this core inherent jurisdiction of the Superior Court. The Crown relies on jurisprudence from the Supreme Court where that Court held that a Superior Court's inherent powers are maintained, even in the presence of specific *Code* provisions criminalizing breaches of publication bans.

[79] Moreover, the Crown submits that the jurisprudence relied upon by CBC does not limit the Superior Court's core jurisdiction to criminal contempt.

[80] The Crown submits the Respondents' reliance on r. 60.11 of the Rules is misplaced. The Crown acknowledges that r. 60.11 provides a procedure for addressing alleged civil contempt. The Crown submits that it is not a comprehensive code of procedure, as it does address contempt in the face of the court. The Crown asserts that on its face, r. 60.11 is not relevant to the present Application; the publication bans at issue were made in a criminal proceeding, not a "proceeding"

as defined under the Rules. The Crown argues that r. 60.11 only applies to allegations of contempt of orders made within an action or application.

[81] The Crown submits that, given its limited scope, r. 60.11 does not limit the core inherent jurisdiction of the Superior Court to aid an inferior court in the enforcement of the latter court's orders. The Crown cites *Rogacki v. Belz*, (2003), 67 O.R. (3d) 330 (C.A.), where the Court of Appeal held that the Superior Court has the inherent jurisdiction to address an allegation of contempt in relation to matters that did not fall within the scope of the Rules.

Position of CBC

[82] CBC argues that the Court of Appeal acknowledged in *Forrest v. Lacroix Estate* (2000), 48 O.R. (3d) 619 (C.A.), that the exercise of the inherent jurisdiction of the Superior court is subject to any limitation imposed on it by law. CBC maintain that the Rules provide a complete bar to the Application as filed by the Crown.

[83] CBC contends that (a) the present Application presently was improperly brought by the Crown, and (b) the common law clearly dictates that applications for civil contempt are subject to a strict application of the Rules.

[84] CBC submits that the plain language of r. 60.11 is capable of only a single meaning: that civil contempt proceedings must a) be commenced by way of motion; and b) can only be brought in the court in which the order is said to have been made. CBC argues that it is clear from this language that the rule is meant to displace any other means to a finding of contempt available at common law. According to CBC, any other interpretation renders the word "only" in r. 60.11 entirely meaningless.

[85] CBC maintains that its interpretation is in keeping with prevailing view of judges and courts from across the country. After reviewing the law in Canada, the Canadian Judicial Council ("CJC") issued guidelines as to the proper use of inherent jurisdiction to enforce orders by way of contempt (see: Canadian Judicial Council, "Some Guidelines on the Use of Contempt Powers", (Canada: 2001), p. 3:

> (5) Civil contempt is governed in the context of an existing proceeding according to the Rules of Court.

> (6) Criminal contempt is governed by summary process fixed by the court to meet the exigencies of the situation. This process is not governed by the Rules of Court.

[86] CBC acknowledges that inferior courts do not have the power to issue findings of contempt for matters which occur *ex facie*, such as the violation of a publication ban. Further, CBC accepts that is not immune from findings of contempt for alleged violations of orders issued by the Ontario Court of Justice, including the bans in this case. CBC maintains that the appropriate remedy would have been for the Crown to pursue criminal charges in this matter.

Position of Post Media

[87] Post Media agrees with the submissions put forward by CBC in its factum; namely, that this Court does not, pursuant to r.60.11 have inherent jurisdiction to hear this Application.

The Law

[88] As noted by Justice Perell in *EnerWorks Inc. v. Glenbarra Energy Solutions Inc.*, 2012 ONSC 414, at para. 100, the Superior Court's inherent jurisdiction is a "profound and difficult topic".

[89] Section 11(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides: "The Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario."

[90] The Superior Court's jurisdiction in contempt was canvassed at length by the Supreme Court of Canada in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725. The main issue on appeal was whether Parliament, pursuant to its criminal law power, could confer upon youth courts the exclusive power to try youths for contempt *ex facie* of superior courts.

[91] The Court considered whether a Superior Court's inherent jurisdiction could be removed by Parliament or provincial legislation. Justice Lamer concluded that it was necessary to consider the elements of the "core" or "inherent" jurisdiction of superior courts. The Court discussed these issues with reference to the seminal article on the core or inherent jurisdiction of superior courts by I. H. Jacob: "The Inherent Jurisdiction of the Court" (1970), 23 *Current Legal Problems* 23.

The Court noted that Jacob's work is frequently a starting point for and figures prominently in analyses of contempt of court. The Court then noted the following at paras. 30-31:

> Discussing the history of inherent jurisdiction, Jacob says (at p. 25):
>
> > ...the superior courts of common law have exercised the power which has come to be called "inherent jurisdiction" from the earliest times, and ...the exercise of such power developed along two paths, namely, by way of punishment for contempt of court and of its process, and by way of regulating the practice of the court and preventing the abuse of its process.
>
> Regarding the basis of inherent jurisdiction, Jacob states (at p. 27):
>
> > ...the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent." This description has been criticised as being "metaphysical" [cite omitted], but I think nevertheless that it is apt to describe the quality of this jurisdiction. 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. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. While inherent jurisdiction may be difficult to define, it is of paramount importance to the existence of a superior court. The full range of powers which comprise the inherent jurisdiction of a superior court are, together, its "essential character" or "immanent attribute." To remove any part of this core emasculates the court, making it something other than a superior court.
>
> Jacob also states that an inferior court of record has the inherent jurisdiction to punish summarily for in facie contempt, but jurisdiction to punish for ex facie contempt must be conferred explicitly by statute. This point is important in framing the issue before the Court in this case, for the problem with s. 47(2) of the Young Offenders Act is not the grant of jurisdiction to the youth court, but the removal of jurisdiction from the Superior Court. [Emphasis added.]
>
> ....

[92] Later, at para. 38, Justice Lamer wrote:

> 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.

[93] Justice Lamer concluded at para. 41:

> In light of its importance to the very existence of a superior court, no aspect of the contempt power may be removed from a superior court without infringing all those sections of our Constitution which refer to our existing judicial system as inherited from the British, including ss. 96 to 101, s. 129, and the principle of the rule of law recognized both in the preamble and in all our conventions of governance.

[94] While the context was different, the Supreme Court again discussed the issue of inherent jurisdiction in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General),* 2014 SCC 59, [2014] 3 S.C.R. 31. At issue in that case was whether hearing fees imposed by the B.C. Superior Court were unconstitutional. The Court held that neither level of government can enact legislation that removes part of the core or inherent jurisdiction of the superior courts.

[95] In *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R. 78, the issue was whether a Superior Court had inherent jurisdiction to grant interim costs in litigation taking place in the provincial court. Justice Binnie, writing for the majority, said this at paras. 28 - 30:

> In *United Nurses of Alberta*, this Court upheld a criminal contempt order made by the superior court against a union that defied a ruling issued by the province's Labour Relations Board. The superior court relied on its inherent jurisdiction to come to the aid of the tribunal.
>
> While contempt proceedings are the best known form of "assistance to inferior courts", the inherent jurisdiction of the superior court is not so limited. Other examples include "the issue of a subpoena to attend and give evidence; and to exercise general superintendence over the proceedings of inferior courts, e.g., to admit to bail" (Jacob, at pp. 48-49). In summary, Jacob states, "The inherent jurisdiction of the court may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways" (p. 23). I agree with this analysis. A "categories" approach is not appropriate.
>
> Of course the very plenitude of this inherent jurisdiction requires that it be exercised sparingly and with caution. In the case of inferior tribunals, the superior court may render "assistance" (not meddle), but only in circumstances where the inferior

> tribunals are powerless to act and it is essential to avoid an injustice that action be taken. This requirement is consistent with the "sufficiently special" circumstances required for interim costs orders by *Little Sisters (No. 2)*, at para. 37, as will be discussed.

[96] Turning specifically to the issue of contempt, Justice Watt in *R. v. Gibbons*, 2010 ONCA 77, 100 O.R. (3d) 248 (affirmed by the S.C.C., 2012 SCC 28), said at para. 39:

> The authority to punish disobedience or compel compliance by proceedings for contempt originates in the common law. Section 9 of the *Criminal Code* does not expressly enact power to punish for criminal contempt, rather merely preserves the common law jurisdiction to do so. The authority to punish for civil contempt equally resides in the common law: the authority of the Superior Court to control its own process. It is the common law that furnishes the legal foundation for a proceeding for contempt. [Citations omitted.] [Emphasis added.]

[97] The appeal in *Gibbons* dealt with a contempt hearing based on a lower court decision and concerned the application of s. 127 of the *Code* (Disobeying a Court Order). At par. 41, Justice Watt provides a useful commentary on the powers of r.60:

> [I]n the end, rr. 60.11 and 60.12 do not furnish the legal foundation for a proceeding for contempt. The Rules specify the procedure to be followed in a proceeding for civil contempt, but do not establish the authority to take contempt proceedings. Despite their elegant detail, rr. 60.11 and 60.12 are as much dependent on the common law for their legal foundation ...

[98] Furthermore, the Superior Court's inherent jurisdiction to punish for contempt of court, where such contempt consists of a violation of a court order, has been repeatedly referenced in jurisprudence: see *Mississippi Valley Conservation Authority v. Mion*, 2018 ONSC 104, 73 M.P.L.R. (5th) 133 (affirmed by the Ont. C.A., 2018 ONCA 691), at para. 9; *Regina v. B.E.S.T. Plating Shoppe Ltd.* (1987), 59 O.R. (2d) 145 (C.A.), at para. 11. *Township of Uxbridge v. Wasim*, 2017 ONSC 7607, 70 M.P.L.R. (5th) 45, at para. 28.

[99] These decisions make it clear that the inherent jurisdiction Superior Court cannot be ousted by statute. The exercise of that jurisdiction, however, can be limited only by clear and express language. I conclude that r. 61 does not oust the Superior Court's core jurisdiction nor does it limit the exercise of its contempt powers.

[100] The Respondents make much of the fact that most of the cases relied upon by the Crown are cases where the court was asked to make a finding of criminal contempt. In my view, that is a distinction without a difference. Whether the finding of contempt is criminal or civil, it is still a part of the Superior Court's inherent core jurisdiction.

Is an Application the Appropriate Way of Bringing this Matter Before the Court?

[101] Having determined that r. 60 does not oust the inherent jurisdiction of the Superior Court, the question remains as to the proper procedure for the exercise of that jurisdiction. The case law suggests that a summary procedure should be invoked. This make sense having regard to the conduct that may be involved and the possible remedies that could be sought. Having said that, is the Application Rule (r.14.05) available?

[102] Here, the Notice of Application pleads that this Application is commenced pursuant to ss. 14.05(3) (d), (g), and (h) of the Rules, and to the inherent jurisdiction of the Superior Court of Justice.

[103] Subrules 14.05(3)(d) and (g) state that a proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is:

> (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution
>
> (g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application

[104] Subrule 14.05(3)(h) states that a proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is: "in respect of any matter where it is unlikely that there will be any material facts in dispute."

Position of Post Media

[105] Post Media submits that (a) material facts include those that establish the constituent elements of a claim or defence to the allegations of contempt, and (b) r. 14.05(3) (h) does not

provide this Court with authority to hear this Application specifically because there are several material facts in dispute.

[106] Post Media argues firstly, that the scope of the orders prohibiting the publication of information that could identify the victims is a material fact in dispute in this Application. Post Media adds that this Court must decide, as a fact, what non-publication orders the Respondents allegedly breached regarding the identities of the victims. Did the Respondents breach the non-publication orders that Mr. Neubauer informed Justice Engelking were issued pursuant to s. 486.4(1)(a)(i) and s. 486.4(2.1) of the *Code*? Or, did the Respondents breach the non-publication orders Ms. Bair now claims were issued pursuant to ss. 486.4 (at large) and 486.4(2.2) of the *Code*?

[107] Secondly, Post Media argues that their actual knowledge of the non-publication orders allegedly breached and their intention to breach those non-publication orders are material facts in dispute.

[108] Thirdly, Post Media submits that the question of whether the family court article, when read in combination with previously published articles, could identify the victims covered by the non-publication orders is a material fact put in issue by the Crown.

Position of CBC

[109] On this issue, CBC relies on its argument that r. 60.11 of the Rules expressly outlines the singular approach for civil contempt available at law in Ontario.

[110] CBC joins in supporting the arguments of Post Media. CBC submits that the issue in this case requires the interpretation, and scope, and application of an order issued by the Ontario court of Justice, and not any of the enumerated instruments in the Application Rule in particular.

[111] CBC agrees with Post Media and submits that the very question of whether the family court article violates one or both of the publication bans is a material fact in issue, negating the ability of the Crown to proceed pursuant to r. 14.05(3) (h).

Position of the Crown

[112] The Crown submits that an Application brought pursuant to r. 14.05(3) (h) of the Rules is the appropriate way of bringing this matter before the court. The Crown cites *Seabrook v. Pantrust,*

2018 ONSC 5471, 42 E.T.R. (4th) 157, at para. 5, where that Court held that so long as a proceeding is capable of being resolved as an application, it should be resolved in that manner (i.e. the most expeditious and least expensive determination of a proceeding on its merits).

[113] The Crown submits that there are no material facts in dispute, no complex issues requiring expert evidence or the assessment of credibility, and no need for the exchange of pleadings or for discoveries. While the parties may disagree on whether civil contempt has been established, the Crown says that this is not a material fact in dispute. The Respondents do not deny publishing any of the articles attributed to them, and those articles speak for themselves. The Crown stresses that the ultimate issue before this Court turns on whether the content of the articles could identify the victims in the criminal proceedings, thus violating the publication bans. According to the Crown, these contested issues do not constitute material facts in dispute.

[114] The Crown submits that the Application and relief sought is of utmost importance and impact, since the negative impact on the privacy interests of the protected victims necessitate the expeditious procedure afforded by proceeding by way of application.

Analysis and Conclusion

[115] Rule 60.11 does not apply to this proceeding. The publication bans at issue were made in a criminal proceeding, which is not a "proceeding", as defined in the Rules. Rule 60.11 only applies only to allegations of contempt of orders made within an action or application.

[116] I find that r. 14.05(h) of the Rules, is the only rule upon which the Crown may base its application. Rule 14.05 cannot be interpreted without regard to r. 38.10. The latter rule provides:

> (1) On the hearing of an application the presiding judge may,
>
> (a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or
>
> (b) order that the whole application or any issue proceed to trial and give such directions as are just.

[117] A finding that a material fact is in dispute does not automatically result in an application being converted into an action. The Court can direct that limited oral evidence be presented on one or more issues and the application can still be dealt with in a relatively summary fashion.

[118] As Justice Perell said in *Sekhon v. Aerocar Limousine Services Co-Operative Ltd.*, 2013 ONSC 542, at paras. 48 - 51:

> Where the Legislature has stipulated that a proceeding may be by application, there is a *prima facie* right to proceed in that way and the matter should not be converted into an action without good reason to do so
>
> Where an application is statutorily authorized, the court should not convert it into an action unless: (a) material facts are in dispute; and (b) the court cannot properly resolve the material facts without the benefit of a trial
>
> Procedural fairness is the critical determinant of whether an application should be converted into a trial. If the application cannot fairly be determined by the summary process of affidavits and cross-examinations, then the application should proceed to trial and a hearing of witnesses: However, if the determination of the issues, including issues of credibility can properly be made on the application record, then the application should not be converted into an action with a trial
>
> In determining whether to convert an application into a trial of an issue, the court will consider such factors as: (a) whether there are material facts in dispute; (b) the presence of complex issues; (c) whether there is a need for the exchange of pleadings and discovery; and (d) the importance and the nature of the relief sought by application: The court should consider whether the affidavits and the transcript of the cross-examination is sufficient to decide any credibility issues or whether a trial is required[Citations omitted.].

[119] The Application Rule was relied on in *Mississippi Valley Conservation Authority*, even though a finding of criminal contempt was sought. In *B.E.S.T. Plating Shoppe Ltd.*, the Court of Appeal did not object to the lower court proceeding by application, even though criminal contempt was sought. The Court of Appeal set aside the finding of contempt made by the application judge, in part, because the respondents in that case had not been granted an adjournment to cross-examine on the affidavits. The Court of Appeal noted at para. 11:

> The application of the municipality was stated to be made pursuant to r. 14.05(3) (b) and r. 60.11 and the Court's inherent jurisdiction. It is not necessary to decide whether those two rules authorize this application. The law is clear that the Supreme Court has inherent jurisdiction to punish for contempt of court where such contempt consists of a violation of a court order and that proceedings for contempt may be initiated by service of a notice of application returnable before a Supreme Court judge. Accordingly, the Weekly Court Judge was right in dismissing the appellants' preliminary motion to dismiss the original application of the municipality for a contempt order. [Citations omitted.]

[120] A civil contempt proceeding was commenced by way of an application for a declaration in *Uxbridge (Township) v. Wasim*, 2017 ONSC 7607, 70 M.P.L.R. (5th) 45. In that case, the court referred to r. 60 of the Rules but went on to say at para. 28:

> In the present case the injunctions were issued by a Justice of the Peace in proceedings under the *Provincial Offences Act*. There is no procedure to bring a motion for civil contempt in the Ontario Court of Justice in these circumstances. The Superior Court of Justice has jurisdiction by virtue of the *Municipal Act*, 2001, and its' inherent jurisdiction to hear an application for contempt of court arising from a restraining order enforcing a municipal bylaw. [Citations omitted.]

[121] I conclude that there are no material facts in dispute as to what was published or when. The articles were published by the Respondents. This Application, for the most part, requires an interpretation of the law and the application of the law to the facts of the case. I am satisfied that an application is an appropriate procedure to bring this issue before the Court.

Have the Respondents Committed Civil Contempt of the Publication Bans?

[122] To find the Respondents in civil contempt, I must find, beyond a reasonable doubt, the following elements of the offence:

1. The order alleged to have been breached must state clearly and unequivocally what should and should not be done;
2. The party alleged to have breached the order must have had actual knowledge of it; and
3. The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act the order compels.

[123] The publication bans were issued, re-issued, and confirmed in the Ontario Court of Justice, with orders on the record and as recorded on the Informations. The transcripts of January 1, J\and 26, March 26, and May 28, 2018, are admissible to establish the making of the publication bans by the various Justices of the Ontario Court of Justice in the criminal proceedings.

Position of the Crown

[124] In this Application, The Crown submits that all three elements are established to the requisite standard as against both Respondents. Citing *Carey*, The crown submits that no intent to breach the publication bans need be established here: that intent is not an element of civil contempt. The Crown asserts that the identity of the victims to be protected was clear. The criminal

proceeding involves sexual assault with a weapon, contrary to s. 272 of the *Code*, as well as other charges, invoking both paragraphs of s. 486.4(1). A second victim was also covered by the initial ban ordered pursuant to s. 486.4 (at large) and the later order pursuant to 486.4 (2.1) of the *Code*.

[125] The Crown maintains that where the publication bans were not missing any essential details about where, when, or to whom they applied; nor did the orders incorporate overly broad language. No external circumstances obscured the meaning of the bans.

[126] As for knowledge of the orders, the Crown argues that actual knowledge may be directly proven or inferred, and if not, then the doctrine of wilful blindness may apply. The Crown submits that all three paths are available in this case.

[127] The Crown notes that both Respondents acknowledged that the identities of the victims were protected by court-ordered publication bans in their published news stories concerning the criminal proceedings. These stories are admissible to prove knowledge of the orders under "the documents in possession rule" as the stories provide circumstantial evidence of the Respondents' respective knowledge of the contents, connection or complicity in the transactions to which they relate.

[128] The Crown adds that the authors of the majority of the stories acknowledged their awareness of the publication bans in their answers to undertakings ordered answered.

[129] According to the Crown, Post Media's knowledge of the publication bans can also be inferred from the fact that counsel for the Post Media was informed of the existence of the bans prior to the Ottawa Citizen's publication of the Impugned Citizen Article.

[130] The Crown further submits that knowledge of the publication bans can also be inferred by the existence of Justice Engelking's Warning, as attached to her endorsement. Her endorsement and related materials were clearly relied upon by the authors of the Impugned Articles, and both authors acknowledged Her Honour's Warning.

[131] Finally, the Crown says that the email response from the author of the Impugned CBC Article, may also be used to infer knowledge of the publication bans by CBC, given her admission that an executive producer provided direction on the publication ban.

[132] The Crown submits that the only possible inference available on the evidence is that the Respondents intentionally published the Impugned Articles.

[133] The Crown argues that the Impugned Articles must be read in the context of the prior reporting, and the question of whether the articles in this case can identify the victims requires consideration of all the circumstances. (the "Mosaic Effect")

[134] While the Impugned Articles do not directly mention the criminal proceedings, just as the articles written about the criminal proceedings do not name the victims, the Crown argues that it is the combination of the identity of the accused, the types of abuse alleged, and the temporal and factual connections between the criminal and family court proceedings that serve to identify the victims.

Position of the CBC

[135] CBC submits that there is a reasonable doubt as to the clarity of the order. CBC relies on the communications of the assistant crown attorney, Mr. Neubauer, who was invited to participate in the family proceedings, to provide guidance to the court on the scope of the publication ban ordered in the criminal matter.

[136] Mr. Neubauer advised the court that "the publication bans currently in place were issued under s. 486.4(1)(a)(i) and s. 486.4(2.1) [of the *Code*]". That language was used in the Warning that appeared in the family court file.

[137] CBC highlights that the Crown has offered only one witness in this matter: Ms. Bair. On cross-examination, Ms. Bair disagreed with Mr. Neubauer. In Ms. Bair's view, the publication bans imposed in the criminal proceeding were made pursuant to both s. 486.4 "at large", and s. 486.4(2.2) of the *Code*.

[138] CBC submits that this disagreement within the Crown Attorney's office, as to the statutory provisions under which the orders were made is sufficient to give rise to reasonable doubt about whether there was a "clear order" and/or or whether the order was "clearly communicated" to CBC or other members of the public. CBC maintains that this distinction is not immaterial; s. 486.4(1)(a) of the *Code* deals expressly with the identification of a victim of a sexual offence.

[139] CBC submits that its family court article makes no mention of the victim's allegations of sexual assault. CBC says that, as a result, there is no evidence to demonstrate that it published information that could identify the individual as a victim of a sexual offence under that section of the *Code*. CBC points out that its Impugned Article only discussed events that occurred in Afghanistan.

[140] CBC says it did not report on the aspects of the custody proceeding outlined in affidavit evidence that detail claims that are the basis of the criminal proceedings against J. B.

[141] CBC submits that the only correct way to determine whether the family court article violated the ban is to look at the facts contained within it, and not, as the Crown has done, to seek out additional facts in other publications.

Position of Post Media

[142] Post Media takes the same position as CBC with regard to the clarity of the order. It adds a non-publication order issued pursuant to s. 486.4 of the *Code* (at large) fails to clearly and unequivocally state what should or should not be done because s. 486.4 provides for three different types of orders.

[143] Post Media submits that the author of the article on the family law proceedings did not have knowledge of the publication ban made pursuant to s. 486.4 of the *Code* (at large). In answer to the question ordered answered, he advised: "Yes I knew about the publication bans by virtue of the Warning that Justice Engelking issued." Post Media argues that there can be no doubt that he did not have actual knowledge of the orders made in the criminal proceedings that the Crown now alleges were breached.

[144] As for the actual knowledge of its other reporters, Post Media asserts that there is no evidence in the record that those individuals had actual knowledge of the specific provisions of the *Code* that the Crown now claims were breached by Post Media. In response to court-ordered questions, Post Media argues that the reporters' answers do not refer to a specific provision of the *Code*. Accordingly, Post Media says there is no proof beyond a reasonable doubt that these reporters had actual knowledge of the non-publication orders in issue.

[145] Post Media submits that it did not intentionally publish the Ottawa Citizen family court article in breach of a non-publication order issued pursuant to s. 486.4 of the *Code* (at large).

Conclusion

[146] I conclude that the Application for a finding of civil contempt must fail. The Crown has failed satisfy me beyond a reasonable doubt that the non-publication order was sufficiently clear at the time the Impugned CBC and Post Media Articles were published. That is not to say that the publication bans made at various times in the Ontario Court of Justice were not clear. But, as the Supreme Court said in *Carey* at para. 33:

> The first element is that the order alleged to have been breached "must state clearly and unequivocally what should and should not be done". This requirement of clarity ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning. [Citations omitted.] [Emphasis added.]

[147] Here, the meaning of the publication ban was obscured following the attendances before Justice Engelking and by the wording of the Warning that she issued in those proceedings. While this was not a further publication ban, the Warning contained narrower language than s. 486.4 of the *Code* (at large). On their face, the Impugned Articles did not refer to charges pursuant to the ss. 486.4(2) (i) or 486.4 (2.2) of the *Code* for offences committed here in Ottawa. The Impugned Articles commented on events that happened while or before the couple were in captivity. Ms. Bair admitted that the Warning contained an error. That admission and the confusion within the Crown Attorney's office is fatal to making a finding of the first element of civil contempt.

[148] While I need not decide it, I am satisfied that the Respondents had actual knowledge of the publication bans for all of the reasons advanced by the Crown. Once informed of the Crown's view, the Respondents did not deny being aware of the bans, they took a principled and arguable stand in disputing the Crown's interpretation of the provisions of the *Code*. On their face, the Impugned Articles did not breach the publication bans. Only when the Impugned Articles are read in conjunction with the previous reporting does any problem arise.

[149] As the court said in *Schitthelm* at para. 48: "Where there are multiple reasonable interpretations of an order, or a range of meanings to which the order could give rise, the alleged contemnor is entitled to the benefit of the interpretation that is in their favour." I am not satisfied beyond a reasonable doubt that Respondents intentionally did the act prohibited by the publication bans.

[150] Similar concerns were apparent in the *Canadian Broadcasting Corporation* decision from Alberta (see para. 39 above). There, CBC had published reports on its website about the death of a young woman which revealed her identity *before* a publication ban was ordered in subsequent criminal proceedings. CBC did not refer to the victim in any subsequent reporting but refused to remove its earlier report from its website. When requested to remove or amend the earlier reports, CBC refused.

[151] CBC was charged with criminal contempt and an application was made for an interim injunction compelling it to comply with the publication ban. That application was heard and denied. That decision was reversed by the Alberta Court of Appeal, and an interim mandatory injunction was granted. The decision of the Alberta Court of Appeal was overturned by the Supreme Court in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196.

[152] The Supreme Court concluded that the Crown had failed to show a strong *prima facie* case of criminal contempt. At para. 10, Justice Brown referred to the Supreme Court's earlier decision in *United Nurses of Alberta,* noted the opposing arguments before the chambers judge, and noted that the Court of Appeal had conceded "that either position was arguable". He concluded that this was not enough to establish a strong *prima facie* case.

[153] While those appeals were making their way to the Supreme Court, the criminal contempt trial proceeded (see: *R. v. Canadian Broadcasting Corp.*, 2017 ABQB 329, 59 Alta. L.R. (6th) 342). The trial judge found that CBC had taken a principled stand on a subject of considerable uncertainty.

[154] As noted earlier, the trial judge acquitted CBC, concluding that the words "were not published in any way" contained in s. 486.4 of the *Code* did not apply to the prior reporting. The decision was upheld on appeal, where Justice Rowbotham discussed Parliament's purpose in

enacting sections 486.4 (2.1) and (2.2). At a para. 42, he concluded: "It is at least arguable that once the identifying information is first published, its continued existence on the website does not constitute "mak[ing] the information known in the community."

[155] Rowbotham, J. concluded at para. 45:

> Having carefully considered all of the above, I am of the view that section 486.4 is capable of two interpretations. That is, arguments for both the broad and narrow interpretation of "published" and "transmitted" are plausible using the modern approach of statutory interpretation. This leaves a reasonable doubt as to their meaning and scope, which requires us to apply the rule of strict construction.

[156] Justice Rowbotham noted that publication bans of some form are found in other provisions of the *Code*, and that different language is used in those provisions. He referred to s. 2(1) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 that defines "publication" as including making information "accessible to the general public…" In conclusion, Justice Rowbotham held at para. 49:

> I fully recognize the pervasive nature of the internet and the concern that what is on the internet stays forever but in my view it is Parliament that must initiate any desired reform. Given my conclusion about the meaning of "published" and "transmitted in any way", I need not address the other grounds of appeal. The trial judge did not err in his interpretation of the meanings of "published" in s. 486.4 of the *Criminal Code*. [Emphasis added.]

[157] While these decisions involve a *prior* reporting, the court's reluctance to make a finding of contempt in the presence of an arguable case is clear. These findings are sufficient to deal with the issue of contempt. The larger issue in this case is the application of the "mosaic effect" and whether it can be applied in deciding whether to grant the declaratory relief sought.

Is the Declaratory Relief Sought by the Crown Improper?

[158] In the absence of a finding of contempt, the Crown seeks a declaration that the Impugned Articles contain information that, when read together with the Respondents' respective previously published articles, could identify the victims in the *R.* v. *B.* criminal proceeding.

[159] The materials and the arguments before me do not focus on this issue at any great length. CBC submits such a declaration cannot form the basis for the stand-alone relief. It argues that a declaration is restricted to the determination of one's rights.

[160] Post Media argues that I should decline to hear this request because the Crown is seeking essentially the same relief it sought before Justice Engelking; which she refused.

[161] The Crown maintains that this is public interest litigation and that it can rely on the rights of the victims, whose rights are based on the orders made pursuant to ss. 486.4 (2.1) and 2.2 of the *Code*. The Crown says there is a live controversy as to whether the Impugned Articles offend the publication ban; the issue is not moot. While the Crown accepts CBCs submission that a declaration is limited to a determination of one's rights, it asserts that such a declaration will give future direction to the parties.

Analysis

[162] I am satisfied that the Crown has standing to seek declaratory relief. It is the party which sought the non-publication orders on behalf of the victims. Furthermore, this Application can be considered public interest litigation.

The Law

[163] Section 97 of the *Courts of Justice Act* provides: "The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed."

[164] The general rules surrounding the granting of declarations were summarized recently by Perell J. in *Glaspell v. Ontario (Minister of Municipal Affairs and Housing*, 2015 ONSC 3965, 40 M.P.L.R. (5th) 77, at paras. 27-29:

> Under s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Superior Court may make binding declarations of right, whether or not any consequential relief is or could be claimed. Declaratory orders are in the discretion of the court:
>
> The court's discretion to make a declaration should be exercised sparingly and with extreme caution. As a general policy, the court will not make a declaratory order or decide a case when the decision will serve no practical purpose because the dispute

> is theoretical, hypothetical or abstract, and the remedy of declaratory relief is not generally available where the dispute or legal right may never arise.
>
> Being a discretionary remedy, the court will withhold the exercise of its discretion to grant a declaration in circumstances in which a declaration cannot meaningfully be acted upon by parties; a declaration must have some utility. [Citations omitted.]

[165] A declaration must be distinguished from a finding of fact. This was discussed by Justice Lang at para. 27 in *Harrison v. Antonopoulos* (2002), 62 O.R. (3d) 463 (S.C.):

> Declaratory relief, being only a declaration of parties' rights, is mainly sought in commercial matters to help parties define their rights, and as a means to settle matters amicably where reasonable people would otherwise disagree on their mutual obligations and wish to resolve the matter in order to avoid future disputes. In other words, a cause of action need not be extant at the time a party requests declaratory relief. Because declaratory relief is in essence a request for an advance ruling, courts have discretion to refuse such relief. This is the type of relief contemplated by s. 108(2) of the [*Courts of Justice Act*] — a declaration of parties' rights with no coercive effect or remedial entitlement.

Position of the Crown

[166] As noted earlier, the Crown accepts that the Impugned Articles do not directly mention the criminal proceedings, just as the articles written about the criminal proceedings do not name the victims. The Crown relies on the "mosaic effect" and argues, however, that the Impugned Articles must be read in the context of the prior reporting; the question of whether the Impugned Articles can identify the victims requires consideration of all the circumstances.

[167] The Crown says that more than just concealing a victim's name may be needed to comply with a publication ban. The Crown asserts that it is the combination of the identity of the accused, the types of abuse alleged, and the temporal and factual connections between the Ontario court of Justice and family court proceedings that serve to identify the victims. Given that J. B. and his family were in the news prior to the criminal charges being laid; the charges would make his identity even more well-known.

[168] The Crown refers to the articles published by the Ottawa Citizen which revealed that J. B. was charged with physically assaulting, sexually assaulting with a rope, confining, and threatening an unnamed victim while he was living with C. C. in Ottawa. The Impugned Citizen Article

provides details about assault allegations made against J. B. while in captivity and that his wife she has obtained a restraining order against him. Furthermore the article reports that J. B. and his wife enjoyed bondage.

[169] The Crown argues that the CBC reporting goes further than does the Ottawa Citizen. The Crown provided the Court with examples of information set out in the reporting and from which the identities of the victims could be surmised.

[170] According to the Crown, the Impugned Articles, combined with knowledge of past events described therein, make it highly likely that a reader could determine the identity of one of the victims in the criminal proceedings who is protected by the publication ban.

[171] In addition, the Crown argues the Impugned Articles state that none of the specific allegations have been proven in court. That statement gives rise to the inference that a trial on these allegations is still to come; namely, J.B.'s criminal charges. The Crown maintains that the Impugned Citizen Article makes connections to "unsealed court documents", and the Impugned CBC Article makes connections to "recently unsealed records."

[172] The Crown suggests that while this Court appreciates the distinctions between documents sealed and unsealed in the family court proceedings, as opposed to a publication ban originating in a criminal proceeding, the public is not attuned to these distinctions. As such, the Crown says that when a member of the public reads that there was a publication ban protecting the identity of the victim of the criminal charges, and is subsequently provided with information that arises from "previously sealed" court documents, a direct link between the allegations in the Impugned Articles and the criminal charges is created in the minds of individuals who lack the requisite understanding of court procedures. The Crown concludes that "people" will understand that information previously banned from publication has now been revealed, which leads inescapably to the conclusion as to the identities of the victims.

Position of CBC

[173] CBC argues that the "mosaic effect" should not be applied to this matter; if however, the Court rejects that argument, the evidence filed by the Crown does not support the conclusion the Crown asks the Court to reach.

[174] According to CBC, the mosaic effect requires at least two pieces of information that can be pieced together to form a conclusion. Given that the Crown clearly acknowledges that the family court proceeding article does not make any reference to sexual assault; and that the criminal proceeding articles do not refer to any crimes against the children, CBC asserts that there can be no "cumulative effect" of CBC's reporting that identifies the victims in that regard as alleged by the Crown.

[175] CBC notes that the Crown submitted no evidence that a member of the public who does not already know the identity of the victims was in fact able to identify them. CBC argues that the evidence shows that Crown Attorneys, who already know the identity of the victims, conducted a search and prepared a table to support a pre-determined narrative.

[176] Accordingly, CBC says the Crown's evidence only establishes that individuals who already know the identities of the victims are able to comb through publicly available information and mow a very well-manicured path toward their identification. CBC submits that there is no evidence that a member of the public, who does not know the identities of the victims, would be able to come to the same conclusion.

[177] CBC contends that the only way to interpret the publication ban in keeping with *Charter* values is to evaluate the publication on its face, and without seeking out extrinsic facts to establish the so-called mosaic effect as the Crown has done. CBC says it is unaware of any case in Canada where the application of the mosaic effect has been relied upon to support a finding that a publication ban was violated.

[178] CBC argues that application of the Crown's approach leads to an impermissible censoring of the media, whose role it is to report on matters of public interest. It further submits that if the Crown's position is adopted in law, either the media will self-censor in anticipation of unknown future events; or the media will, as a result of previously published information, be prevented from reporting on matters as they arise.

[179] CBC relies on this statement from Justice Cory of the Supreme Court in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law

> that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

[180] CBC argues that the application of the mosaic effect to the current facts, would have a chilling effect. Under the Crown's approach to identification, CBC would, as a result of the information that was already available to the public on its website, have been prohibited from reporting on the family matter in any meaningful way, despite the matter clearly being in the public interest,.

[181] CBC states that it reported on a civil family matter that is connected to a criminal matter. If there were facts contained in the family court file which could identify the victim of crime, CBC submits that it was incumbent on the victim to identify those facts to the court in advance of any publication, and to obtain a discretionary order over them. To incorporate the criminal publication ban through the so-called mosaic effect retroactively into the family court matter, as the Crown proposes, renders it impossible to cover that matter at all. CBC argues that this is not, and cannot be, the law.

[182] CBC submits that the mosaic effect imposes a significant burden on the media to know every detail it has ever published on a topic prior to making editorial decisions on what may be published at any given time. CBC suggests that the more attention a story gets, or a longer period between when a crime is committed, charges are laid, and a publication ban is ordered can create a near impossible burden to overcome with any degree of certainty. In the alternative, CBC says that even if the media could isolate all of its previous coverage to review what is available to the public, it is still too difficult to know in advance which bits of information a member of the public could piece together in order to determine what can and cannot be published.

Position of Post Media

[183] Post Media relies on its *Charter* right to freedom of expression to report on judicial proceedings and on the open court principle and Post Media relies on the *Edmonton Journal* case, cited at para. 179 above. Post Media emphasizes that its family court article only reported on the family court custody proceedings involving a notorious Ottawa couple who were held in captivity for five years in Afghanistan. The article reported on: (i) judicial proceedings held in open court;

(ii) affidavits that were publicly available in the court file that were not sealed; and (iii) a publicly available endorsement of the Honourable Justice Engelking that awarded custody of the children to the mother and permitted her to take the children out of the jurisdiction to the United States of America. Post Media adds that its family court article did not report on those paragraphs in Part B of Justice Engelking's Endorsement that referred to the criminal proceedings.

[184] Post Media submits that the application of the Crown's mosaic effect approach has no boundaries and raises serious questions: Where is the line to be drawn on the date of previously published documents – one year, ten years, or no time limit? Where is the line to be drawn on the source of the previously published documents? Can social media be combined with the Impugned Articles? Can publications by other media be combined with the Impugned Articles? Is the Impugned Article to be read according to an objective standard? If so, what is the standard? Is the standard that of a reasonable and ordinary member of the public?

[185] Post Media argues that only Parliament can decide that the Court could consider previously published articles in combination with new publication in deciding whether there was a breach of a non-publication order. Post Media states that an interpretation of s. 486.4 of the *Code* that allows the Crown to rely on previously published articles by the Ottawa Citizen in a civil contempt application is not in accord with the plain and ordinary meaning of s. 486.4, and infringes Post Media's freedom of expression guaranteed by s. 2(b) of the *Charter* and the open court principle.

Analysis and Conclusion

[186] There is very little case law that provides guidance on the scope of a publication ban as it relates to subsequent or related proceedings involving the same parties or that specifically refers to the mosaic effect.

[187] In *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766, [2008] 3 F.C.R. 248, at para. 82: Justice Noël, for the Court, defined the mosaic principle as follows: "This principle advances that information, which in isolation appears meaningless or trivial, could when fitted together permit a comprehensive understanding of the information being protected."

[188] While not explicitly stated, the "mosaic effect" has been considered in two cases cited to the Court. In *B. (A.) v. D. (C.)*, 2010 BCSC 1530, the plaintiff sued one of her former high school teachers and the school board which employed him. After the teacher was charged, several newspapers, including the Vancouver Sun and a community newspaper, published articles about the criminal proceedings against the former teacher. The articles named the former teacher, the school at which he taught the plaintiff, and the school board which employed the former teacher; but the articles did not name the plaintiff.

[189] In the civil proceedings, both the former teacher and the school board applied for a ban on the publication of their names and any information that would identify them to the public. A prior ban had been made regarding the plaintiff's name. In addition, there was an existing ban under s. 486.4(2) of the *Code*.

[190] Three of the four issues identified by the British Columbia Supreme Court at para. 38 are relevant here:

> 1. Is a ban on publication of the former teacher's name and information that would tend to identify him required for compliance with the existing ban on publication of information that would tend to identify the plaintiff?
>
> 2. ...
>
> 3. Is a ban on publication of the name of the plaintiff's former high school required for compliance with the existing ban on publication of information that would tend to identify the plaintiff?
>
> 4. Is a ban on publication of the name of the school district which formerly employed the former teacher required for compliance with the existing ban on publication of information that would tend to identify the plaintiff? [Emphasis added.]

[191] The Court accurately identified the competing interests in issue at para. 43:

> **(c) Competing interests**
>
> Publication ban applications arise in differing circumstances, and the rights and interests which the court must balance vary. In this case, the interests that favoured a publication ban are the interest of the plaintiff in maintaining her privacy, and the interest of the public in encouraging victims to seek damages from sexual

> wrongdoers. The interests that opposed a publication ban and suggest that any ban should be minimal are the interest of the public and the press in freedom of expression, including open and accessible courts, and the public interest in an open public dialogue on the functioning of public institutions like school boards.

[192] The Court went on to discuss the right to freedom of expression pursuant to s. 2(b) of the *Charter* and the right to privacy. At para. 77, the Court reviewed the conclusions of the Supreme Court of Canada in *Canadian Newspapers Co.*, and stated:

> In order to effectively conceal the identity of a person who is protected by a publication ban, it may be necessary in some cases to conceal more than just the individual's name. Information such as familial connections, geographic place names, and the like may, in combination with other information, reveal the identity of an individual who is protected by a publication ban. [Emphasis added.]

[193] The Court determined that if the former teacher's name were published in relation to the case, members of the community might be able to identify the complainant and listed factors at para. 80 such as: schools being akin to small communities; if the plaintiff's evidence were to be accepted, it would show previous publication of names of defendants; the teacher's name was unusual; the only criminal and civil proceedings alleging misconduct by the teacher were the proceedings involving the complainant; and the suppression of the name of the teacher was just a "sliver" of information. Therefore, while the "mosaic effect" was not expressly argued, the court issued a further publication ban and concluded at para. 81:

> If the former teacher's name is published in this case, it could lead members of the public, particularly people who were students and teachers at the plaintiff's former school, to identify the complainant as the person involved in the criminal proceedings and these related civil proceedings. As a result, the September 27, 2010 ban shall be clarified to provide for restraint on the publication of the former teacher's name.

[194] The "mosaic effect" was implicitly considered in the *R. v. Canadian Broadcasting Corporation* (2017) (at para. 39 above) decision. Although he entered an acquittal, the trial judge was very aware of the "mosaic effect." At paras. 7 – 11, he said:

> From the evidence, it is clear that one could, and can still, search CBC website and gain access to the two impugned articles. Additionally, one could conduct a general Internet search using a search engine, such as "Google," and be directed to CBC website as well as other news aggregation websites. Many of the aggregation

> services will direct the searcher to CBC website where the impugned article may be accessed, although there are a number of other news aggregators and providers that offer access to the same information by directing the searcher to an information originator other than CBC.
>
> Therefore, even if CBC removes or edits the two stories, the prohibited information can still be obtained from other sources. It is also true that there are newspaper reports created prior to the Ban which disclosed the prohibited information. Therefore, someone could gain access to the information from those organizations which maintain print libraries.
>
> Furthermore, the information can be accessed from the court by requesting access. As such, requiring CBC to remove the prohibited information will not, invariably, translate to its removal from the public domain.
>
> If one accesses the information on CBC website, one can obviously, share it with others by sending it through a variety social media tools, including Facebook and Twitter. Apparently, the March 5th, story had been shared, in some fashion, over 200 times by the time the Ban prohibiting publication was ordered.

[195] In summary, the Supreme Court in *Canadian Newspapers* confirmed that the words "could identify" contained in s. 486.4 of the *Code* must be given a broad meaning. That decision was published over 30 years ago, when newspapers and print media were the dominant sources of information. The publication landscape has since changed dramatically since then.

[196] While the courts have continued to recognize the broad scope of s. 486.4 of the *Code*, they have adopted a narrower approach in contempt proceedings.

[197] In the present Application, the Crown seeks a finding of civil contempt; the criminal contempt case law is still relevant. Quoting from *Halsbury's Laws of England*, vol. 22, 5th ed. (London, UK: LexisNexis, 2012) at para. 2, footnote 1, the court in *Schitthelm*, at para. 20, noted, "[t]he classification of contempts as criminal or civil has become progressively less important and has been described as 'unhelpful and almost meaningless' in the present day."

[198] The case law cited in this decision reveals the tension that exists between the competing interests in play: a) the policy objectives behind s. 486.4 of the *Code*, (b) the freedom of press guaranteed by s. 2(b) of the *Charter*, and, (c) the open court principle.

[199] There is no expert evidence before me that a member of the public, who does not already know the identity of the victims, would in fact be able to identify them. Having said that, and for

all of the reasons advanced by the Crown, I find that the Impugned Articles contain information that, when read together with the Respondents' previously published articles, could identify the victims in the criminal proceeding, *R. v. B.* That does not end the discussion.

[200] Because this matter was so notorious, it is hard to imagine how the press could have reported on the family court proceedings in any way without leading to the same result. A reporting limited to the facts surrounding the parties' separation following the laying of the criminal charges after their return to Canada, and the permission granted to J. B.'s wife to relocate to the U.S. with the children, could just as well have identified the victims of the criminal charges.

[201] As the party seeking to protect this information, the burden should have fallen on the Crown to mitigate the risk of the victims being identified by examining what information had already been approved for release and tailoring their request for a ban in the family court proceedings accordingly.

[202] The Respondents were entitled to report on the family court proceedings. This family's ordeal in Afghanistan was widely publicised. This family was publicly received by the Prime Minister upon their release. There was a clear public interest in what happened to this family in Afghanistan and upon their return to Canada.

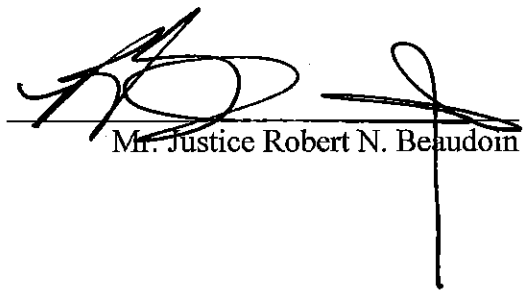
[203] Having made that finding, I am not satisfied that I should grant the declaratory relief sought. A declaration is distinguished from a finding of fact. A declaration is a discretionary and equitable remedy and "the court will withhold the exercise of its discretion to grant a declaration in circumstances in which a declaration cannot meaningfully be acted upon by parties; a declaration must have some utility." (see: *Godin v. Sabourin*, 2016 ONSC 770, at para. 6)

[204] On the facts of this case, I cannot see any utility in the declaration sought or how a declaration that the Impugned Articles could have identified the victims, could be meaningfully acted upon by the Respondents. While the parties attempted to get some direction before Justice Engleking, she was not provided with the extensive record that was placed before me. In any event, I am not satisfied that a change in the wording of the Warning would have affected the principled dispute that arose over the interpretation of the publication bans in place.

[205] There may indeed be cases that are so notorious that it will prove almost impossible to enforce publication bans. This is particularly so because of the growing numbers and various types of media platforms accessible through the internet and social media. Perhaps, as suggested, Parliament will amend s. 486.4 of the *Code* to define "publication" to include making information accessible. Even so, such an amendment may not be sufficient to address the many valid issues raised by the Respondents on this Application.

[206] For all of these reasons, the Application is dismissed.

[207] If the parties are unable to come to an agreement on costs, they are to provide me with their brief written submissions (not exceeding 5 pages) within 30 days of the release of this Decision.



Mr. Justice Robert N. Beaudoin

Released: February 15, 2019

CITATION: Her Majesty the Queen in Right of Ontario v. Canadian Broadcasting Corporation, 2019 ONSC 1079
COURT FILE NO.: 18-78211
DATE: 20190215

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Her Majesty the Queen in Right of Ontario

Applicant

– and –

Canadian Broadcasting Corporation and
Post Media Network Canada Corporation

Respondent

REASONS FOR JUDGMENT

Beaudoin J.

Released: February 15, 2019