# In the Court of Appeal of Alberta

**Citation: R v Canadian Broadcasting Corporation, 2018 ABCA 391**

**Date:** 20181123
**Docket:** 1703-0136-A
**Registry:** Edmonton



**Between:**

**Her Majesty the Queen**

Appellant

- and -

**Canadian Broadcasting Corporation**

Respondent

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**The Court:**

**The Honourable Mr. Justice Peter Martin**
**The Honourable Madam Justice Patricia Rowbotham**
**The Honourable Madam Justice Sheila Greckol**

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**Reasons for Judgment Reserved of The Honourable Madam Justice Rowbotham**
**Concurred in by The Honourable Mr. Justice Martin**
**Concurred in by The Honourable Madam Justice Greckol**

Appeal from the Decision by
The Honourable Mr. Justice T.D. Clackson
Dated the 16th day of May, 2017
(2017 ABQB 329, Docket: 160339594X1)

**Reasons for Judgment Reserved of**
**The Honourable Madam Justice Rowbotham**



## I Introduction

[1] The Crown appeals the acquittal of the Canadian Broadcasting Corporation (CBC) of criminal contempt for violating a publication ban (Ban) issued under section 486.4(2.2) of the *Criminal Code*, RSC 1985, c C-46. On an application for a section 486.4 ban, it is mandatory that the presiding judge impose it when the victim of the crime is under the age of 18: s 486.4(2.2)(b). The Ban prohibits "any information that could identify the victim" from being "published in any document or broadcast or transmitted in any way": s 486.4(2.1).

[2] Before the Ban issued, the CBC posted a news story on its website identifying a 14-year old victim of a homicide. Although the CBC did not post any more information identifying the victim after the Ban issued, it refused to remove the information posted before the Ban. The Crown's position is that each time a new reader accessed that online content, the child's identifying information was "published" and "transmitted", and CBC's failure to comply with the Ban after it issued constituted an act of criminal contempt.

[3] The appeal turns on the trial judge's statutory interpretation of the meaning of "published" and "transmitted" as used in section 486.4 of the *Criminal Code*. While similar provisions prohibit making identifying information "available" or "accessible", section 486.4(2.2) is more narrowly worded. Even if this case is under common law contempt and not under the *Criminal Code*, it is clear that this is a state prosecution for criminal law purposes. The form and object of this proceeding is a criminal prosecution thus underlining the criminal nature of some forms of contempt of Court by disobedience: see *Carey v Laiken*, 2015 SCC 17 at paras 30 to 38, [2015] 2 SCR 79, particularly if the assertion is "public defiance" (para 63); *Envacon Inc v 829693 Alberta Ltd*, 2018 ABCA 313 at para 8; *Morasse v Nadeau-Dubois*, 2016 SCC 44 at para 21 and 81, [2016] 2 SCR 232. That is a key feature to the statutory construction analysis which follows. Under the rule of law, prosecution for criminal conduct should never be on an uncertain legal footing.

## II Background

[4] On March 4, 2016, the body of a child was found. On March 5 and March 8, 2016, the CBC posted articles on its website that included the child's name, photograph and other identifying information.

[5] The Ban issued on March 16, 2016 at the first court appearance of the person accused of killing the child. After the Ban issued, the CBC posted no more information identifying the child. However, it refused the requests from Alberta Justice and Solicitor General to remove the

identifying information from the March 5 and 8, 2016, articles which were still accessible on its website.

[6] The Crown's application for an injunction compelling the CBC to remove the identifying information was refused: *R v Canadian Broadcasting Corporation*, 2016 ABQB 204; rev'd 2016 ABCA 326, rev'd 2018 SCC 5. The Supreme Court concluded that the Crown had not discharged its burden of proving "a strong likelihood" that it would ultimately be successful in proving CBC's guilt of criminal contempt. In part, that was because section 486.4(2.1) "might also be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban": para 30. As a result, no injunctive relief—interlocutory or mandatory—was granted to compel the CBC to remove the identifying information.

[7] At trial the CBC was acquitted of criminal contempt: *R v The Canadian Broadcasting Corporation*, 2017 ABQB 329, 59 Alta LR (6th) 342. (The trial judge also found no civil contempt but that is not appealed.) The trial judge applied the criminal contempt test from *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901, 89 DLR (4th) 609 [*UNA*]. The majority in *UNA* held that like civil contempt, criminal contempt is the disobedience of a court order and the distinction "rests in the concept of public defiance that accompanies criminal contempt". The test requires the Crown to prove that the CBC disobeyed the Ban in a public way, and intended or knew that it would or would likely depreciate or undermine the court's authority: Reasons at paras 15–16. After reviewing the law of civil contempt and its similarities with criminal contempt, the trial judge held that because of the penal nature of criminal contempt, he was required to interpret section 486.4 strictly, and resolve any ambiguity in the CBC's favour.

[8] The trial judge did not accept the Crown's argument that the definition of "publication" in the *Youth Criminal Justice Act*, SC 2002, c 1, [*YCJA*], s 2(1)—which includes "making accessible"—informs the meaning of "publish" in section 486.4: paras 26-27. Nor did he accept that the section 299 *Criminal Code* definition of "publish" in the context of defamatory libel assisted in interpreting the meaning of "publish" in section 486.4: para 29. He found that "publish" did not include "access", and that "accessing is plainly what is going on here. There is no evidence that the CBC is doing anything but opening its library and allowing access"; and section 486.4 did not specifically limit "accessing": paras 20–25.

[9] The trial judge also found that what occurred did not amount to "transmitting" or "broadcasting", which he held to consist of "broad dissemination" rather than mere access to prohibited information. "[G]etting hold of the material or 'accessing' it would not be broadcasting or transmitting. Something more must be done. Similarly, allowing access is not good enough to amount to broadcasting or transmitting. In the end, it is my view that the fact that the CBC maintains the original articles in its archives, which can be accessed, does *not* amount to publication, transmission or broadcast.": paras 41–42 (emphasis in original).

[10] He acquitted the CBC of criminal contempt.

## III Grounds of Appeal and Standard of Review

[11] The Crown contends that the trial judge erred in his interpretation of the meaning of "published" and "transmitted in any way" in section 486.4 of the *Criminal Code*, misapprehended the evidence and failed to recognize its legal significance. The Crown also argues the trial judge misapprehended the legal requirements of criminal contempt and erred in his application of *UNA* by adding an element of criminal *mens rea*.

[12] The Crown's right of appeal is on a question of law alone: s 676(1)(d). The meaning of "published" and "transmitted" in section 486.4 of the *Criminal Code* is a question of law and is reviewable on the correctness standard: *Housen v Nikolaisen*, 2002 SCC 33 at paras 8–9, [2002] 2 SCR 235. See also *Canadian National Railway Co v Canada (Attorney General)*, 2014 SCC 40 at para 33, [2014] 2 SCR 135.

## IV Analysis

[13] As there is an anomaly, in sections 486.4 and 486.6, it is necessary to set out most of the provisions.

[14] Section 486.4 provides:

> **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).
>
> **(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.
>
> **(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. (emphasis added)
>
> **(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.

[15] Section 486.6 provides:

> **486.6 (1)** Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

[16] Curiously, section 486.6(1), the charging section relative to the publication bans, applies only to subsections 486.4 (1) (2) or (3) and states that any person who fails to comply is guilty of an offence punishable on summary conviction. Failure to comply with an order made under subsection 486.4 (2.2) is not included. This may explain why the Crown brought an originating application in the Court of Queen's Bench requesting that the CBC be cited in criminal contempt, rather than charging the CBC with a criminal offence. It is not open to a court to assume that Parliament merely overlooked s 486(2.2) from the list. In this instance, I should assume that when Parliament did not include that reference to s 486(2.2) for a reason: compare *R v Carson*, 2018 SCC 12 at para 26, 145 WCB (2d) 82. Inclusion of s 486(2.2) was a readily available option.

[17] The *Criminal Code* does not define "published", "broadcast" or "transmitted" for the purposes of section 486.4. This means the principles of statutory interpretation must be applied to determine their meaning. Since "broadcast" is not at issue on appeal, no further reference is made to it.

*a. Statutory Interpretation Principles*

[18] Section 12 of the *Interpretation Act*, RSC 1985, c I-21 requires that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." The starting point for the interpretation of all legislation, including penal statutes, is the modern principle. The "words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 36 OR (3d) 418, quoting E. A. Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87. As the Supreme Court held recently, provisions of the *Criminal Code* are subject to interpretation in "'their entire context and in their grammatical and ordinary sense harmoniously' with [the relevant Part's] scheme and undergirding purpose ...": *R v Jones*, 2017 SCC 60 at para 59, [2017] 2 SCR 696.

[19] Reconciling the former "strict construction" approach with the modern principle is explained in *R v Hasselwander*, [1993] 2 SCR 398 at 412–13, 1993 CanLII 90 (citations omitted):

> The apparent conflict between a strict construction of a penal statute and the remedial interpretation required by s. 12 of the *Interpretation Act* was resolved by according the rule of strict construction of penal statutes a subsidiary role. …
>
> … Thus, the rule of strict construction becomes applicable only when attempts at the neutral interpretation suggested by s. 12 of the *Interpretation Act* still leave reasonable doubt as to the meaning or scope of the text of the statute.

[20] That is, "courts may resort to strict construction of penal statutes where ordinary principles of interpretation do not resolve an ambiguity": *R v Mac*, 2002 SCC 24 at para 4, [2002] 1 SCR 856.

[21] To summarize, when the words used in a *Criminal Code* provision are capable of more than one meaning and the ordinary principles of interpretation do not resolve the ambiguity, the rule of strict construction is engaged. Strict interpretation demands of "statutory language the highest degree of clarity, explicitness and specificity in order to support a conclusion that it was intended to authorize infringements of [rights]. That is, it requires language which is absolutely clear, such that the underlying legislative intent is completely explicit": *University of Calgary v JR*, 2015 ABCA 118 at para 48, 602 AR 35, aff'd 2016 SCC 53 at para 30, [2016] 2 SCR 555. See also Pierre-André Côté, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, c2011) at 475-482 and Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ontario: LexisNexis Canada, 2014).

*b. Discussion*

[22] I first discuss the grammatical and ordinary meaning of "published" and "transmitted in any way" in their context before turning to the scheme and purpose of section 486.4, and publication bans in the *Criminal Code* and other statutes.

**i. "Published"**

[23] Section 299 of the *Criminal Code* provides that a person publishes a libel when it is exhibited in public, when the person causes it to be read or seen, or "shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person". However, that meaning is restricted to libel.

[24] In defamation law, the meaning of the word "publish" is settled. A statement is published each time it is communicated to someone other than the person defamed: *Breeden v Black*, 2012 SCC 19 at para 20, [2012] 1 SCR 666. That is, "publication occur[s] when the impugned statements were read, downloaded and republished .... It is also well established that every repetition or republication of a defamatory statement constitutes a new publication": *ibid*. In *Black*, allegedly defamatory statements were published in a press release and three Canadian newspapers republished them. Establishing publication or republication requires proof that "the defendant has, *by any act*, conveyed defamatory meaning to a single third party who has received it": *Crookes v Newton*, 2011 SCC 47 at para 16, [2011] 3 SCR 269 with emphasis in original. Hyperlinking to defamatory content without repeating the defamatory content is not publication due to its passive nature and lack of control of the content: *ibid* paras 21, 26-27.

[25] In *Re Orr's Stated Case (sub nom Re R v Leong)*, [1961] 38 WWR 114 at 115, 132 CCC 273 (BC SC) the trial judge considered the meaning of publication in what is now section 163(1)) of the *Criminal Code* (publishing obscenity):

> [Publication] has other special meanings in law; publication of a will, publication of an invention. But this does not involve the acceptance of those special meanings in connection with unrelated legal subjects and where the word "publication" is used in a penal statute without definition, and with no context which would assign to it a special meaning, it must be considered to bear the meaning it would bear in ordinary English speech or writing. Certainly, where crime is involved a court should not go out of its way to attribute to the word an extraordinary meaning involving the culpability of the accused, but should rather hew strictly to the line resolving any possible doubt in favour of the accused.

[26] The trial judge in *Re Orr* adopted the common meaning of 'publish', "to make publicly or generally known" and held that a private screening of a film among a small group of friends, with "[n]o invitation to the public" and "no suggestion of commercialism" was not "publication" of the film.

[27] In *R v Giftcraft Ltd* (1984), 13 CCC (3d) 192, [1984] OJ No 390 (H Ct J) the trial judge distinguished the meaning of 'publish' in what is now section 457(1)(a)) of the *Criminal Code* (which prohibits publishing the likeness of banknotes) from technical copyright and libel meanings of the word. The dictionary meaning of 'publish,' "to make public" applied with the result that Giftcraft Ltd 'published' the likeness of banknotes when it distributed them even though it had not printed them.

[28] I was also referred to this Court's "Public and Media Access Guide," where the following appears:

> A publication ban will prohibit publishing the information in print, radio, television or via the Internet. Publication bans only restrict publication, not access. The publication ban does not limit viewing, searching or copying for private use.

[29] To summarize, the *Criminal Code* defines publish only for libel and its grammatical and ordinary meaning—'to make public or generally known'—has been used to interpret the word when used in other *Criminal Code* provisions. The word has been interpreted broadly in the law of defamation to include republication. None of these interpretations, however, addresses the question that arises in this case: whether the ordinary meaning of "published" refers to the one-time act when content is first published online or whether content is "published" each time a new reader accesses the previously published content. This case is not concerned with defamation, copyright or intellectual property. I turn to the broader statutory context of "published" after the discussion of "transmitted in any way".

**ii. "Transmitted in any way"**

[30] The *Oxford English Dictionary*, 2nd ed, includes the following definition:

> Transmit – I.1.a. "To cause (a thing) to pass, go, or be conveyed to another person, place, or thing; to send across an intervening space"

[31] This definition corresponds to the word 'transmission' as used in the *Interpretation Act*. Although the *Interpretation Act* does not define the word, its definitions for 'broadcasting' and 'radiocommunication', refer to the transmission of data. Similarly, the definition of 'telecommunications' in section 35(1) of the *Interpretation Act* refers to the transmission of information through other media. Transmitting, as distinguished from emitting or receiving, is the process of sending information to a destination.

[32] The Supreme Court has considered the meaning of "transmission" in copyright law: *Society of Composers, Authors & Music Publishers of Canada v Canadian Assn of Internet Providers*, 2004 SCC 45, [2004] 2 SCR 427 [*SOCAN*]. The issue was whether the defendants, Internet Service Providers located in Canada, "transmitted" copyrighted material. The following

passages illuminate the meaning of ‘transmitted’ in the context of the internet (with emphasis added):

> 8 A “content provider” uploads his or her data, usually in the form of a website, to a host server. The content is then forwarded to a destination computer (the end user). End users and content providers can connect to the Internet with a modem under contract with an Internet Service Provider.
>
> 9 An Internet transmission is generally made in response to a request sent over the Internet from the end user (referred to as a “pull”). The host server provider transmits content … .
>
> [...]
>
> 20 The host server breaks the content down into units of data called “packets” .... The various packets are forwarded … until they reach the Internet Service Provider at the receiving end which … transmits the packets to a computer operated by the end user. The result is the reconstitution on the end user’s computer of all that is required to view … the work, either at that time or later if the work is saved on the end user’s computer.

[33] The foregoing suggests that transmission occurs between the host server and the Internet Service Provider and between the Internet Service Provider and the end user who accesses the content. The court also acknowledged that the issue in that case “plays out against the much larger conundrum of trying to apply national laws to a fast-evolving technology that in essence respects no national boundaries”: para 41. And, “Internet liability is thus a vast field where the legal harvest is only beginning to ripen”: *ibid.*

[34] *R v Spencer*, 2011 SKCA 144 at para 70, 377 Sask R 280, aff’d 2014 SCC 43, [2014] 2 SCR 212 considered whether passively hosting content online is “transmitting” under section 163.1(3) of the *Criminal Code* (child pornography). That section also criminalizes making child pornography “available”. The court considered excerpts from *Hansard*, which suggested that the child pornography provisions were amended to include “transmits” to cover one-to-one distribution such as via e-mail and “makes available” to capture posting child pornography on a publicly-accessible website but not taking steps to distribute it. *Hansard* indicates these two terms were included to criminalize situations that might not otherwise constitute “distributes”. Caldwell JA held that the section makes it a crime “to do anything which disseminates or facilitates the dissemination of child pornography.” In his view, prohibited activity under section 163.1(3) includes both “overt acts of dissemination (i.e., transmit, distribute, sell, import and export) and the facilitation of the carrying out of those acts (i.e., make available, advertise and possess)”: para 70. Based on the principle that different words are presumed to have different meanings, Caldwell JA concluded that the fault element for ‘makes available’ does not require the same positive intention as ‘transmits’ or there would be no distinction between the terms. As a result, he held that

passively hosting prohibited content on internet file-sharing programs constitutes 'makes available'. The Court of Appeal remitted the issue of guilt back to trial but its analysis and the Supreme Court's express agreement with much of Caldwell JA's reasoning suggests that "transmits" in *Spencer* is even narrower than in *SOCAN*.

[35] Applying this line of reasoning to section 486.4 would lead to the conclusion that by passively maintaining the previously existing identifying information about the victim on its website, the CBC would likely have 'made it available' or 'makes it accessible' but did not 'transmit' it. Section 486.4(2.1) does not list 'making available' or 'makes accessible' as prohibited conduct.

[36] In this appeal, section 486.4 prohibits "transmitted in any way" (emphasis added). The trial judge found the qualifier "in any way" added nothing to the meaning of transmitted or published for three reasons. First, a criminal act must be specifically identified; second, *UNA* holds that criminal contempt can be "neither vague nor arbitrary" and requires that a "person can predict in advance whether his or her conduct will constitute a crime"; and, third, freedom of speech is a *Charter*-protected right and any limit on that right must be clearly delineated in order to be justifiable.

[37] The trial judge's analysis of the relevance of "in any way" to qualify "transmitted" was correct. The definition of an offence must be sufficiently clear to ensure some predictability. The law must give fair notice of conduct which is criminal": *Alberta v The Edmonton Sun*, 2003 ABCA 3 at para 50, 221 DLR (4th) 438. Given the narrow interpretation of transmit—host server to Internet Service Provider and Internet Service Provider to end user in *SOCAN*, and one-to-one distribution such as via e-mail but not passively making it available in *Spencer*—it is doubtful that the qualifier "in any way" adds anything of relevance to the question on appeal.

### iii. Scheme and Purpose of Publication Bans

[38] Part of the modern approach to statutory interpretation requires regard to the scheme of relevant parts of the *Criminal Code* and the provision's purpose.

[39] Sections 486.4(2.1) and (2.2) were enacted in 2015 by the *Victims Bill of Rights Act*, SC 2015, c 13. The *Victims Bill of Rights Act* legislative summary states:

> This enactment enacts the *Canadian Victims Bill of Rights*, which specifies that victims of crime have the following rights: …
>
> > (*c*) the right to have their security and privacy considered by the appropriate authorities in the criminal justice system; …
>
> This enactment amends the *Criminal Code* to …

> (*g*) make publication bans for victims under the age of 18 mandatory on application;



[40] Parliament's purpose in enacting the sections appears to have had two components: security and privacy for victims of crime. One method Parliament selected to implement those purposes was to allow publication bans on identifying information. Allowing public access to that information undermines that objective. This suggests that maintaining identifying information on a publicly accessible website after a section 486.4 ban has issued is contrary to the stated purpose of the legislation.

[41] Sections 486.4(2.1) and (2.2) "expand the ability of the court to grant a publication ban ….": *R v Clark*, 2015 ABQB 729 at para 8, [2015] AJ No 1247 (QL). The sections use the identical language to other related and existing *Criminal Code* publication bans. Regard must therefore be had to the broader publication ban scheme for interpretive guidance.

[42] First, like other sections, section 486.4 does not apply "in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community": s 486.4(4). 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".

[43] Second, other *Criminal Code* offences use different language to identify prohibited means of communicating information. Section 163.1(3) provides that every person who "transmits, makes available, distributes, sells, advertises, imports, exports or possesses for the purpose of transmission" child pornography commits an offence. As noted above, courts have drawn a distinction between 'makes available' and 'transmits' for the purposes of this offence: *Spencer*. Section 162(4) (voyeuristic recordings) prohibits both 'publishes' and 'makes available', suggesting that there is a distinction. Section 162.1(1) (intimate images without consent) uses 'publishes', 'transmits' and 'makes available'. This lends support to the conclusion that 'transmit' and 'publish' each have a separate and distinct meaning from 'makes available'. It is well established that the contextual reading of legislation involves a presumption of consistent expression throughout the statute which recognizes both that the same words connote the same meaning, and also that different words or "forms of expression" (in this instance, different lists which distinguish legal terms) connote different meanings: see eg *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 81, [2013] 2 SCR 559; *Contino v Leonelli-Contino*, 2005 SCC 63 at para 25, [2005] 3 SCR 217. It is true that such presumption can be rebutted, and some legal terms can *include* other terms: compare *Barreau du Québec v Quebec (Attorney General)*, 2017 SCC 56 at para 25, [2017] 2 SCR 488. But this statute has a list which clearly distinguishes Term A from Term B, and another list which distinguishes Term A from Term B and Term C. The court can take the hint about Term A when it appears by itself. Wilson J's interpretation in *Re Orr* is also to this effect. The reasoning in *Spencer* and *Re Orr* suggests that it

is unlikely that the CBC "published" prohibited information simply by leaving the un-redacted articles on its website.

[44] Publication bans are also found in the *YCJA*. Statutes "dealing with similar subjects must be presumed to be coherent" and "interpretations favouring harmony among statutes should prevail over discordant ones": *Pointe-Claire (City) v Quebec (Labour Court)*, [1997] 1 SCR 1015 at para 61, [1997] SCJ No 41 (QL). Section 2(1) of the *YCJA* defines "publication" to including making information "accessible to the general public through any means, including print, radio or television broadcast, telecommunication or electronic means" (with emphasis). It also defines "disclosure" to mean "the communication of information other than by way of publication", which is also prohibited in certain circumstances. Neither definition is found in the *Criminal Code* which tends to suggest that if Parliament meant to give "published" a broad meaning it would have done so. As section 486.4(2.2) came into force in 2015 and as both the *YCJA* and the *Criminal Code* are enactments of Parliament, I must assume that any differences in these provisions were intentional rather than inadvertent.

[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.

[46] I fully appreciate the harm that is intended to be reduced by the issuance of publication bans of youth victims of crime. Nevertheless, criminal contempt is a serious offence that "may result in imprisonment, constituting a denial of liberty": *UNA*. Violation of a section 486.4 ban is a summary conviction offence: s 486.6. A review of reported appellate-level criminal contempt cases reveals that six and four-month sentences with lengthy probation periods are not uncommon, see for example, *Regina (City) v Cunningham*, (1994) 123 Sask R 233, [1994] 8 WWR 457 (CA); *MacMillan Bloedel Ltd v Simpson* (1993), 32 BCAC 244, 106 DLR (4th) 540; *Puddester v Newfoundland (Attorney General)*, 2001 NLCA 25, 226 Nfld & PEIR 1.

[47] 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. Parliament did so in other *Criminal Code* publication ban provisions and in the *YCJA*. Further, it is critical for an accused to know precisely what constitutes the order which it is alleged to have breached.

[48] Accordingly, I conclude that the narrow definitions of published and transmitted apply. That is, "published" and "transmitted in any way" do not capture the CBC's refusal to remove or redact previous identifying information after the Ban issued. In this respect online publication of identifying information is no different than if reported in traditional media. If section 486.4(2.1) and (2.2) are intended to apply when identifying information is published and transmitted *before* a section 486.4 ban issues, statutory amendments are required.

## V. Conclusion

[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*.

[50] The appeal is dismissed.

Appeal heard on June 5, 2018

Reasons filed at Edmonton, Alberta
this 23rd day of November, 2018

I concur: _____
Martin J.A.

_____
Rowbotham J.A.

I concur: _____
Authorized to sign for: Greckol J.A.

**Appearances:**

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