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R. v. Coban

2022 BCSC 14

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2022 BCSC 14 R. v. Coban

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Coban,

2022 BCSC 14

Date: 20220110

Docket: X078463

Registry: New Westminster

Regina

v.

Aydin Coban

Before: The Honourable Madam Justice Devlin

Reasons for Judgment - Constitutional Challenge to s. 486.4(3) of the Criminal Code

Counsel for the Crown:

L.A. Ruzicka, Q.C.

L.J. Kenworthy

Counsel for the Todd Applicants:

C.E. Hunter, Q.C.

N. Gilewicz

Counsel for Media Applicants:

D.W. Burnett, Q.C.

Counsel for the Accused:

T.B. Martin

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Introduction

- [1] The accused, Aydin Coban, is alleged to have sextorted an underage girl, A.T., over the internet between January 2009 and October 2012. He is charged with several offences under the Criminal Code, R.S.C., 1985, c. C-46 [Code], including extorting and criminally harassing A.T., as well as possession and distribution of child pornography.
- [2] As these are child-pornography related proceedings, a mandatory publication ban was imposed pursuant to s. 486.4(3) of the Code. The ban prohibits the publication, broadcast, or transmission of any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material, or recording that constitutes child pornography.
- [3] On this application, two applicants--Carol Todd and the Amanda Todd Legacy Society ("ATLS") (collectively, the "Todd Applicants") and a consortium of the major media outlets across Canada (collectively, the "Media Applicants")--challenge the constitutional validity of the mandatory publication ban under s. 486.4(3). They submit the publication ban restricts their freedom of expression, resulting in a breach of their rights pursuant to s. 2(b) of the Canadian Charter of Rights and Freedoms [Charter], Part I of the Constitution Act, 1982 [Constitution], being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. They submit that s. 486.4(3) cannot be saved by s. 1 of the Charter and that it should be declared unconstitutional and of no force and effect pursuant to s. 52 of the Constitution.
- [4] Counsel for the respondent, the Attorney General of British Columbia (the "Crown"), acknowledges that s. 486.4(3) infringes s. 2(b) of the Charter. However, they take the position the infringement is saved under s. 1.
- [5] Therefore, the issue to be determined on this application is whether, pursuant to s. 1 of the Charter, the infringement is justified as a reasonable limit in a free and democratic society.

Background Facts

- [6] I will briefly set out the circumstances of the alleged offences and then discuss the efforts undertaken by Carol Todd following the death of her daughter, A.T. This background information will provide the necessary context for my analysis.

The Circumstances of the Offences

- [7] Between 2009 to 2012, A.T., aged 12 to 15, was the victim of a persistent campaign of online sextortion by an individual whose true identity was unknown to her. This individual came into possession of videos and images of A.T. exposing herself on a webcam and tried to use those materials to compel her to provide pornographic "shows" on her webcam. This individual, using 21 different phony usernames and accounts, sent electronic messages to A.T., her family, friends, and other people on social media. These messages were sent using Facebook, Skype, YouTube, and Gmail.

- [8] A.T.'s tragic story was widely publicized. On October 10, 2012, A.T. died by suicide. Prior to her death, she created an 8-minute YouTube video entitled "My story: Struggling, bullying, suicide and self-harm" which showed her using a series of flash cards to tell of her experiences being bullied in the time period leading to her death. As of October 12, 2021, A.T.'s video had been viewed 14.5 million times.

The Applicants

- [9] The Todd Applicants filed an affidavit from Carol Todd dated October 12, 2021 and an affidavit from Tian Yao dated October 29, 2021. Carol Todd is A.T.'s mother. In 2013, Carol Todd created the ATLS. As set out in her affidavit, the ATLS "focuses on awareness and the well-being of individuals of all ages, with a strong focus on prevention and awareness related to bullying and cyber bullying, online safety and exploitation/sextortion". In her capacity as an advocate on behalf of the ATLS, Carol Todd has had the opportunity to discuss these issues and share A.T.'s story, including her video, with media organizations nationally and internationally, student groups, parent groups, and school administrators. In addition, she has participated in or contributed to a number of documentaries and other media broadcasts focusing on A.T.'s story and issues related to cyber bullying and sextortion. The ATLS has also created a global campaign of awareness called "Light up Purple for World Mental Health" day on October 10th of each year, which provides both a means to remember A.T. and a way to initiate conversations about mental illness. Carol Todd is widely recognized for her work raising awareness of issues such as cyber bullying and online safety.
- [10] On June 1, 2021, Carol Todd was advised by Crown counsel with conduct of Mr. Coban's prosecution that a publication ban pursuant to s. 486.4(3) of the Code was in place and that the ban prohibited A.T. from being identified as the child depicted in the child pornography materials that were the subject of the charges. In the email, Crown counsel explained that there were other discretionary bans available but they did not request them because "(1) [A.T.'s] name is already in the public domain in a big way and (2) you and others are trying to help other children in [A.T.'s] name, so that protection would not have been welcome". As a result of the publication ban, Carol Todd has been uncertain as to whether she can continue to speak about A.T.'s story. She has declined invitations from media and other organizations to speak about A.T.'s story and the pending trial of Mr. Coban. On a personal level, the restrictions on her ability to discuss A.T.'s story have impacted her mental well-being.
- [11] I was also provided with an affidavit from Norm Todd, A.T.'s father. Although Mr. Todd did not participate in the proceedings, he expressed a desire for the publication ban to continue.
- [12] The Media Applicants filed two affidavits in support of their application - an affidavit from Rumina Daya (the "Daya Affidavit") and an affidavit from Cathie Carmichael. The Daya Affidavit states that a Google search shows over 48 million online publications referring to A.T.'s story and 195,000 regarding Mr. Coban, many of which also refer to A.T. The Media Applicants argue the mandatory publication ban infringes the freedom of expression of the applicants, as well as any victim, the victim's parent, and any journalist or citizen wishing to

publish information regarding the circumstances that identify or could by implication identify the victim. With respect to A.T.'s story, the infringement is pronounced and has resulted in a chilling of expression.

The Statutory Scheme (s. 486.4(3) of the Code)

[13] The mandatory publication ban in s. 486.4(3) was enacted by Bill C-2, An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32, s. 15 which came into force on January 2, 2006. Section 486.4 in its entirety currently reads as follows:

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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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.

Child pornography

- (3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

- (4) An order made under this section 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.

- [14] This ban protects the identity of witnesses under 18 years of age or any person depicted in child pornography. While I refer to A.T. throughout these Reasons as a "victim", pursuant to this section, her identity would be included within the scope of the ban because she is a "person who is the subject of a representation, written material or a recording that constitutes child pornography". I note that some of the case law refers to "complainants" who are subject to publication bans, and for the purposes of these reasons, I consider that "victim" and "complainant" are interchangeable terms.
- [15] The ban in s. 486.4(3) has three defining characteristics: it is mandatory (the ban must be imposed in all cases meeting the s. 486.4(3) criteria, and there is no place for judicial discretion), it is automatic (no application is required to trigger the ban), and it is irreversible (once the ban is imposed, it cannot, under any circumstances, be lifted or terminated by anyone). In my view, it is the last of these characteristics--the irreversible nature of the ban--that poses the clearest constitutional hurdle.
- [16] Other s. 486.4 subsections, by contrast, provide for bans that are mandatory-on-application (a judge shall impose a ban if one is applied for, e.g., ss. 486.4(2)(b) and 486.4(2.2)(b)), or discretionary (a judge may impose a ban in certain circumstances, e.g., s. 486.4(1)). They are revocable if the circumstances that triggered the ban cease to exist: see *R. v. Adams*, [1995] 4 S.C.R. 707, 1995 CanLII 56 (SCC) [Adams]. In *Adams*, Justice Sopinka explained that mandatory-on-application bans can be revoked if the applicant for the ban withdraws their application; however, he clarified that as bans were mandatory on the application of a victim, witness, or prosecutor, the ban could not be revoked without the consent of each:

Adams at para. 32.

- [17] The applicants also contrast the ban in s. 486.4(3) with the ban under s. 111 of the Youth Criminal Justice Act, S.C. 2002, c. 1 [YCJA], which they suggest reflects a more appropriate balancing of freedom of expression with the need to protect victims. Although s. 111(1) creates a mandatory and automatic publication ban for children or young persons who are victims or witnesses of YCJA offences, s. 111(2)(a) provides an exception, allowing the child or young person to publish their identity once they attain the age of 18 (or earlier, with parental consent). The court also has the discretion to permit the child or young person to publish their identity before they attain the age of 18 if the court is satisfied that the publication would not be contrary to the child's best interests or the public interest: s. 111(3). Where the child or young person is deceased, s. 111(2)(b) allows their parents to publish their identity. If information is published pursuant to ss. 111(2) or (3), the publication ban comes to an end: s. 112. In other words, the victim--or the parents of a deceased victim--can, under certain circumstances, trigger an exception that brings an end to the ban.
- [18] The nature of the s. 486.4(3) ban was considered in *R. v. K.B.*, 2014 NSPC 24 [K.B.], which all parties refer to. Here, the Halifax Herald applied to have a s. 486.4(3) ban revoked in another highly publicized case about child pornography. Campbell P.C.J. of the Nova Scotia Provincial Court concluded that he had no discretion not to impose the ban (at para. 4):

The language of section 486.4(3) of the Criminal Code is clear. It says that a judge "shall" order a publication ban in every case where child pornography is alleged to be involved. When the word "shall" is used in a statute it means that the judge has no choice in the matter. When child pornography is involved the judge has to make the order. There is no discretion to be exercised. There is no provision that allows the judge to consider whether the imposition of the ban is in the public interest, in anyone's interest, is practically enforceable, has been notoriously flouted or is even contrary to the public interest.

- [19] He went on to contrast s. 486.4(3) with the other subsections that are mandatory-on-application (at para. 22):

Each of the cases referenced in support of the application deals with publication bans that are different in a singularly important way from the one under s. 486.4(3). In each case the ban is mandatory only when an application has been made for it. The cases stand for the proposition that when the parties who could apply no longer want it, the judge can consider the circumstances and revoke it. That is not the case here. Under section 486.4(3) the judge has to impose the ban even if no one asks for it, no one wants it, no one thinks it makes any sense at all, and it will have no real effect. Whether there are exceptional circumstances is irrelevant. Whether the ban is enforceable is irrelevant.

- [20] Ultimately, he concluded that in the circumstances of the case (which was not a constitutional challenge), he had no discretion to revoke the ban:

56. Finally, the law requires that a ban be imposed under s. 486.4(3). When a case involves an allegation of child pornography, the law orders the judge to issue the ban. Period.
57. Parliament has decided that when child pornography is involved the ban is absolute and cannot be set aside at anyone's request.
59. If a solution is to be found to deal with this case it should not be one that either disregards the law or tinkers with it in such an important area. If that law is to be changed it should be changed by parliament having careful regard to all of the implications.

Analysis

What is the scope of the s. 2(b) infringement?

- [21] Section 2(b) of the Charter provides that everyone has, as a fundamental freedom, "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".
- [22] The guarantee of free expression in s. 2(b) protects three core values: (1) democratic discourse, (2) truth-finding through the open exchange of ideas and information, and (3) individual self-fulfilment: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 1989 CanLII 87 (SCC) [*Irwin Toy*] at 976. Further, the right to freedom of expression flows from human dignity: *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43 at para. 59.
- [23] Freedom of expression is given a generous, purposive interpretation and can be communicated through "an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts": *Irwin Toy* at 969-970. Indeed, s. 2(b) is so vast as to protect child pornography as a form of expression: *R. v. Sharpe*, 2001 SCC 2 [*Sharpe*]; *R. v. Butler*, [1992] 1 S.C.R. 452, 1992 CanLII 124 (SCC).
- [24] Both applicants assert a form of public expression that the Crown concedes falls within the core values protected by s. 2(b). As the Crown emphasized in their submissions, when conducting my analysis, it is important that I consider the factual and societal context in which the law is applied. I must also consider the scope of the infringement in order to determine the appropriate remedy: *Ontario (Attorney General) v. G*, 2020 SCC 38 [G] at para. 116. Therefore, before I begin my analysis under s. 1, I will canvas the applicants' positions.
- [25] The Todd Applicants, in written argument at paras. 71-72 explain that their expression engages each of the values protected by s. 2(b):

The Todd Applicants submit that their expression falls under all three core values. Carol Todd and ATLS have tirelessly worked to raise awareness and educate with respect to both [A.T.]'s story, but also by turning that story into a positive legacy of prevention and awareness about cyber bullying, sexual exploitation of young persons and mental health of teens. Carol believes that she cannot effectively speak about such issues without sharing [A.T.]'s story, and she does not want to

participate in obliterating [A.T.]'s legacy by speaking about those issues in a generic way. Continuing to be able to do this advocacy and awareness work, speak about [A.T.], and to provide resources and support to others facing similar issues has and continues to be an important part of Carol's own healing and mental health journey following [A.T.]'s death.

There is no way for Carol Todd to speak about cyber bullying, sexual exploitation or [A.T.]'s story without risking violating the publication ban imposed by s. 486.4(3), as she is indelibly linked to her daughter and her daughter's story is known worldwide. The impact of the Publication Ban is such that it may result in the erasure of her daughter's story from the public consciousness and the end of the Amanda Todd Legacy Society and its campaign of public education, prevention and awareness.

- [26] The Todd Applicants say it is impossible for them to engage in their advocacy work without revealing information that could identify A.T., due to the circumstances of the offences and the widespread publication of events leading up to the arrest and charging of the accused. In other words, the publication ban has silenced the Todd Applicants.
- [27] The Media Applicants support the Todd Applicants' position and they emphasize the vital importance of a person's control over their own privacy choices. They argue that beyond the circumstances of this particular case, the mandatory publication ban silences living victims, preventing them from deciding whether to identify themselves or speak out about what has happened to them. In written submissions, the Media Applicants explained that "a victim should have the control over their own decision of whether to remain anonymous or to share their story". In the case of a deceased victim, they submit that a parent should have that choice.
- [28] Additionally, in written submissions, the Media Applicants explained, and I accept, that the ban not only prevents the publication of A.T.'s name, photo, or descriptive information, but rather, due to widespread publicity of A.T.'s story, "it would risk violation of the ban to publish central and essential facts of the trial which are already public". They explained that A.T. may be identifiable based on the circumstances of the offence alone. As counsel for the Media Applicants stated in his submissions, the problem is that "one cannot put the genie of notoriety back in the bottle". Accordingly, the ban results in a complete denial of the Media Applicants' expressive rights.
- [29] I accept that the proliferation of technology only exacerbates this problem. As James Rossiter explained in *Law of Publication Bans, Private Hearings and Sealing Orders* (Toronto: Thomson Reuters, 2006) (loose-leaf updated 2021, Release 2), the "global electronic age" has called the effectiveness of publication bans into question and has made their enforcement considerably more difficult (at ch. 1.9). This is particularly so in the present case, where information about A.T. and the circumstances of the offence is readily available over the internet to anyone who searches for it. Rossiter refers to the following decision of Justice Nordheimer in *R. v. J. S-R.*, [2008] O.J. No. 4160, 2008 CanLII 54303 (Ont. Sup. Ct. J.) [J.S-R.]:

[59] The effectiveness of publication bans is an issue that has been debated for some time. It is an issue regarding which concern was expressed by Chief Justice Lamer in *Dagenais* where he said, at para. 89:

It should also be noted that recent technological advances have brought with them considerable difficulties for those who seek to enforce bans. The efficacy of bans has been reduced by the growth of interprovincial and international television and radio broadcasts available through cable television, satellite dishes, and shortwave radios. It has also been reduced by the advent of information exchanges available through computer networks. In this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult

[60] That concern has only been exacerbated in the almost fifteen years since *Dagenais* was decided. We can now add to the list of holes through which information can slip the realities of blogs, podcasts, satellite radio, specialty television channels, websites such as "YouTube" and "facebook", and the ever increasing number of personal websites. Most, if not all, of these outlets lie outside any effective control by this court.

[30] In the 14 years since *J.S.-R.* was decided, the social landscape has continued to evolve. In *R. v. K.R.J.*, 2016 SCC 31, for example, the Court recognized that the rate of technological change has fundamentally altered the social context in which sexual crimes occur. At para. 102, the Court observed with reference to social media websites and other internet platforms:

These new online services have given young people -- who are often early adopters of new technologies -- unprecedented access to digital communities. At the same time, sexual offenders have been given unprecedented access to potential victims and avenues to facilitate sexual offending.

[31] More recently in *R. v. Friesen*, 2020 SCC 9 [Friesen], the Court echoed these comments, stating at para. 47:

New technologies have enabled new forms of sexual violence against children and provided sexual offenders with new ways to access children. Social media provides sexual offenders "unprecedented access" to potential child victims (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 102). The Internet both directly connects sexual offenders with child victims and allows for indirect connections through the child's caregiver. Online child luring can be both a prelude to sexual assault and a way to induce or threaten children to perform sexual acts on camera (see *R. v. Woodward*, 2011 ONCA 610, 107 O.R. (3d) 81; *R. v. Rafiq*, 2015 ONCA 768, 342 O.A.C. 193). The Internet has also "accelerated the proliferation of child pornography" (*R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 114, per Deschamps J.).

[32] It is within the context of these new technologies and the proliferation of online social media platforms that the Todd Applicants argue the deleterious effects of the ban arise: The result, in their submission, is that Carol Todd and ATLS are prevented from contributing to the important dialogue on cyber bullying, online extortion, and mental health. Because of ubiquitous access to the story on the internet, A.T.'s name is already so well known to the

public that there is no way for the Todd Applicants to continue their advocacy work without breaching the ban.

- [33] The Crown concedes, and I find, that s. 486.4(3) infringes s. 2(b) of the Charter. The effect of the ban is to completely silence both the Todd Applicants and the Media Applicants. The infringement is absolute. Rather than prohibiting disclosure of a "sliver of information", as the Crown contends, I find the publication ban has the effect of subjecting both applicants to a complete gag order. This is a serious infringement of s. 2(b), which impacts the Todd Applicants' ability to engage in the type of self-fulfilment contemplated by s. 2(b). For both applicants, this infringement also impacts the values of democratic discourse and truth-finding that underlie s. 2(b).
- [34] Additionally, in my view, the most severe restriction results from s. 486.4(3)'s effect on victims, who are likewise subjected to a complete gag order. Although such an infringement does not arise on the facts of this case, to determine whether a law withstands Charter scrutiny, I must consider the scope and operation of the law, including other reasonably foreseeable circumstances where the impugned law may apply: *R. v. Nur*, 2015 SCC 15 at para. 51. In cases where a living victim wishes to speak out about being victimized - as A.T. did during her lifetime - I consider that s. 486.4(3) would severely infringe the victim's s. 2(b) rights in a way that implicates each of the values underlying freedom of expression.

Is the legislation a reasonable limit that is demonstrably justified in a free and democratic society?

- [35] As stated earlier, because s. 486.4(3) infringes rights protected by s. 2(b) of the Charter, it cannot be constitutionally valid unless the Crown satisfies me that it is a reasonable limit on freedom of expression pursuant to s. 1 of the Charter. Section 1 reads as follows:
1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
- [36] The Crown bears the burden of establishing, on the balance of probabilities, that the Charter infringement is justified, taking into consideration the specific factual and social context within which the law is applied: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 1995 CanLII 64 (SCC), at paras. 132-133, 137 (McLachlin J.). Although the law's impact on the claimant is a significant factor, the "broader societal context in which the law operates must inform the s. 1 justification analysis": *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 69 [Hutterian Brethren].
- [37] In *Toronto Star Newspaper Ltd. v. Canada*, 2010 SCC 21 at para. 18, the Supreme Court of Canada confirmed that the validity of a mandatory statutory ban, such as the one at issue on this application, is determined by conducting an analysis based on the factors set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, 1986 CanLII 46 (SCC) [Oakes]. The Oakes test asks first, whether the law addresses a pressing and substantial objective; and second, whether the legislative

means by which the objective is furthered are proportionate. The proportionality branch of the Oakes test has three components: the means must be rationally connected to the objective; they must be minimally impairing; and the effects of the law must be proportionate with its objective.

- [38] With respect to the importance of the media's ability to report on judicial proceedings, the Media Applicants refer to the Dagenais/Mentuck test (*Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76) and the recent consideration of that test in *Sherman Estate v. Donovan*, 2021 SCC 25. They submit these cases inform the context for the application of the Oakes test. While I must apply the Oakes test rather than the Dagenais/Mentuck test in this case, I accept that these cases provide some guidance as to the importance of freedom of expression and openness of the courts.

Does the legislation address a pressing and substantial objective?

- [39] The first step in the Oakes test requires me to identify the objective of the infringing measure and consider whether it is "sufficiently important to be capable in principle of justifying a limitation on the rights and freedoms guaranteed by the constitution" (*RJR-Macdonald* at para. 143, per McLachlin J.). As McLachlin J. (as she then was) explained in *RJR-Macdonald*, courts must take care not to overstate the objective in an Oakes analysis: "The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified" (at para. 144, emphasis in original).

- [40] In their written submissions, the Crown frames the legislation's objective in the following way:

The mandatory ban is intended to provide strict privacy protection to persons depicted in child pornography, whether known or unknown, in order to protect their dignity, encourage reporting of offences, and facilitate their meaningful participation in the criminal justice system.

- [41] They say this is a pressing and substantial objective. They rely on *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, 1988 CanLII 52 (SCC) [*Canadian Newspapers*], where the court held that the purpose of a similar publication ban had the following pressing and substantial objective (at 130):

In the present case, the impugned provision purports to foster complaints by victims of sexual assault by protecting them from the trauma of wide-spread publication resulting in embarrassment and humiliation. Encouraging victims to come forward and complain facilitates the prosecution and conviction of those guilty of sexual offences. Ultimately, the overall objective of the publication ban imposed by s. 442(3) is to favour the suppression of crime and to improve the administration of justice

- [42] Canadian Newspapers considered a ban under s. 442(3) of the Criminal Code, R.S.C. 1970, c. C-34 (predecessor legislation of s. 486.4 in the current Code), which provided for a ban that was discretionary, but became mandatory on application:
- 442.
- (3) Where an accused is charged with an offence mentioned in section 246.4, the presiding judge, magistrate or justice may, or if application is made by the complainant or prosecutor, shall, make an order directing that the identity of the complainant and any information that could disclose the identity of the complainant shall not be published in any newspaper or broadcast.
- [43] The Crown says that s. 486.4(3) has a similar objective: Its focus is on reassuring potential future victims that if they come forward, their identities will be protected. The Crown argues that the mandatory, automatic, and irreversible nature of the ban provides certainty that the publication ban order will be made in every case. This, the Crown says, encourages victims and witnesses to come forward, which in turn assists the court to fulfil its truth-seeking function.
- [44] The Crown also made submissions about the extent to which child pornography is inherently harmful. I accept, as do the applicants, that child pornography is an insidious offence: see e.g., Sharpe. As recently observed by the Supreme Court of Canada in Friesen, "new technologies have enabled new forms of sexual violence against children and provided sexual offenders with new ways to access children" such that "[s]ocial media provides sexual offenders 'unprecedented access' to potential child victims" (at para. 47).
- [45] The Todd Applicants do not dispute the prevalence or insidious nature of child pornography; rather, they argue that the nature of child pornography in and of itself does not justify the impugned provision. They concede that there might be a pressing and substantial objective, but submit that the provision must fail at the second branch of the Oakes test as it is not proportionate.
- [46] The Media Applicants, on the other hand, argue that while a publication ban--even one that operates presumptively--could serve a pressing and substantial objective, the removal of a victim's choice has no connection to any pressing and substantial objective. The Media Applicants distinguish this case from Canadian Newspapers, observing that to provide future victims with certainty about their anonymity does not logically require removal of their choice as to whether or not to remain anonymous. In effect, they concede that a mandatory and automatic ban might be required, but they say there is no pressing and substantial objective underlying a ban that cannot be lifted at the victim's request.

[47] I agree that the objective of the mandatory, automatic, and irreversible ban is, as stated by Crown, to "provide strict privacy protection to persons depicted in child pornography, whether known or unknown, in order to protect their dignity, encourage reporting of offences, and facilitate their meaningful participation in the criminal justice system". I accept that this is a pressing and substantial objective. Therefore, I find the first branch of the Oakes test is fulfilled.

Are the means by which the goal is furthered proportionate?

[48] As stated earlier, under this prong of the Oakes framework, there are three factors to consider: Is the infringement rationally connected to the legislative objective; do the infringing measures impair the right as little as reasonably possible in order to achieve the legislative objective; and on balance, are the salutary effects of the measures proportionate to the deleterious effects? In conducting my analysis, I am mindful that s. 1 of the Charter "does not demand that the limit on the right be perfectly calibrated, judged in hindsight, but only that it be 'reasonable' and 'demonstrably justified'": Hutterian Brethren at para. 37.

Is the limit rationally connected to the legislative objective?

[49] To establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic": RJR-Macdonald at para. 153, per McLachlin J. The rational connection requirement is aimed at preventing limits from being imposed arbitrarily. The onus is on the government to show "it is reasonable to suppose that the limit may further the goal, not that it will do so": Hutterian Brethren, para. 48. The test may be satisfied by common sense observations and inferences of the court: RJR-Macdonald at para. 137, per McLachlin J.

[50] The Crown submits the mandatory ban in s. 486.4(3) is rationally connected to Parliament's objective of protecting the privacy of child pornography victims, encouraging reporting of offences, and facilitating participation in the criminal justice system. In support of their position, the Crown relies on Canadian Newspapers, where the Supreme Court of Canada recognized that protecting a victim's privacy encourages reporting. The Court commented 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" (at 132). Lamer J., writing for the court, explained that a discretionary ban would not achieve this objective (at 132):

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.

[51] In Adams, Sopinka J. added that similar problems would arise if a ban was revocable at the discretion of the trial judge (at 721):

A revocable publication ban, like a discretionary ban, would fail to provide the certainty that is necessary to encourage victims to come forward. If the trial judge were given the power by the legislation to revoke the ban, the complainant would never be certain that her anonymity would be protected. The ban would serve as little more than a temporary guarantee of anonymity

[52] The Crown also relies on *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 [Bragg], where the Court observed "[i]n the context of sexual assault, this Court has already recognized that protecting a victim's privacy encourages reporting. It does not take much of an analytical leap to conclude that the likelihood of a child protecting himself or herself from bullying will be greatly enhanced if the protection can be sought anonymously" (para. 25). The Crown submits that in the context of child pornography, where there can be both known and unknown victims, the mandatory, automatic, and irreversible publication ban is rationally connected to Parliament's objective.

[53] The applicants, on the other hand, contend that the question at this stage is not whether the publication ban is rationally connected to the need to protect privacy, but rather, whether the mandatory, automatic, and irreversible nature of the ban is rationally connected to this legislative objective. Both applicants contend it is not. They observe that the ban in *Canadian Newspapers* was only mandatory on application, and that the victim had applied for the ban in that case. They point to the concluding remarks in *Canadian Newspapers*, where Lamer J. expressly narrowed the scope of the Court's decision to circumstances where the victim desired the ban (at 135):

Before concluding I should mention that this case has been argued and decided throughout on the assumption that what is being weighed is a restriction to the freedom of the press in order to ensure to victims of sexual assaults that their identity will not be disclosed through the media, if that is their wish. The section, however, enables an application to be made by the "prosecutor" alone. Obviously, the arguments invoked and successfully so under s. 1 in this case would not necessarily carry the day in a situation where the prosecutor was not acting on behalf of the complainant. As this is not our case, we need not and should not decide the matter. However, it must be understood that the answers to the constitutional questions and the disposition of this appeal apply only to a case where under the section, the application has been made by or on behalf of the complainant.

[Emphasis added.]

[54] The Todd Applicants argue that the case of *K.B.* and the instant case are "at the very least two clear examples of circumstances in which there is no rational connection between the pressing and substantial objective sought to be addressed by s. 486.4(3) and the mandatory, automatic nature of the resultant Publication Ban." The Media Applicants suggest that there is no logical connection between the legislative objective and the irreversible nature of the ban--they contend that taking away a victim's choice is in no way related to protecting their privacy, encouraging reporting, or encouraging participation in the criminal justice system.

[55] The focus at this stage of the inquiry is whether the mandatory, automatic, and irreversible publication ban is rationally connected to the legislative objective of protecting the privacy of the victims of child pornography, encouraging reporting of offences, and facilitating participation in the criminal justice system. I am satisfied that it was reasonable for the government to suppose that a ban with these qualities would further this goal. These qualities, alone or in combination, offer certainty that victims' identities will not be disclosed after they make a report: The mandatory nature of the ban offers certainty that the ban will take effect, and that it is not dependent on a judge's discretion. The automatic nature of the ban guarantees that the ban will apply immediately, even if no application is made for it. The irreversible nature of the ban provides certainty that the ban will endure. Each of these measures reduces the risk that a victim's identity will be published, thus protecting their privacy and encouraging the reporting of offences. Whether the ban goes too far in pursuit of this goal is a question that must be addressed at the minimal impairment stage, and it is there that I will consider the bulk of the applicants' arguments.

Does the limit minimally impair the right?

- [56] The second step in the proportionality analysis requires the government to show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", meaning "the law must be carefully tailored so that rights are impaired no more than necessary" (RJR-Macdonald at para. 160, per McLachlin J.). However, as discussed in *Hutterian Brethren*, the requirement should not be taken to an "impractical extreme"; rather, the test at the minimum impairment stage is "whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner" (para. 55).
- [57] The Crown relies on *Canadian Newspapers* for the proposition that prohibiting identity disclosure is a minimal harm to freedom of expression. They say this supports their position that there are no less harmful means of achieving the government's objective. They submit that the difference between the mandatory-on-application publication ban in *Canadian Newspapers* and the ban in s. 486.4(3) is reasonable given the heightened vulnerability and privacy interests of those children under the age of 18 years who would be the subject of a s. 486.4(3) ban: They say Parliament sought to ensure that the child victim's anonymity was a certainty rather than a possibility.
- [58] However, *Canadian Newspapers* is distinguishable for two key reasons. First, *Canadian Newspapers* considered the infringement of the press's freedom of expression in a setting where the victim approved of the publication ban; it very expressly did not consider the infringement resulting from denying the victims themselves--or their families--the right to tell their story. While the victim's identity might be considered a mere "sliver of information" vis-à-vis the media's expressive rights (Bragg at para. 28), as the Todd Applicants put it in their submissions, to "a parent trying to keep the legacy of their child alive it is everything". The publication ban therefore impairs additional rights in this context, compared to *Canadian Newspapers*. I accept that the impairment of the victim or their family's ability to

tell their story is a significant harm that impacts on each of the values underlying s. 2(b), namely self-fulfilment, truth-seeking, and democratic discourse.

- [59] Second, I accept that the press's freedom of expression is more significantly impacted in this case than in *Canadian Newspapers* because of the widespread publication of A.T.'s story. While it may be true that in most cases, the media could report on the basic facts of the case without a risk of identifying the victim, I accept that in this case, the media may be prevented from publishing essential facts of the trial due to the possibility of revealing A.T.'s identity. I cannot accept, as the Court did in *Canadian Newspapers*, that "nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial" (at 133).
- [60] The applicants argue that the Crown's reliance on *Canadian Newspapers* actually supports their own position that the ban is not minimally impairing because child pornography (s. 163.1) offences are included in the list of offences in s. 486.4(1) that shall be subject to a publication ban pursuant to s. 486.4(2)(b) if an application is made by a victim, a prosecutor, or a witness under the age of 18. The applicants stress that this less impairing ban is what was found to be constitutionally valid in *Canadian Newspapers*. They refer to the exception in s. 111 of the YCJA as a further example of a less-impairing alternative.
- [61] In my view, the problem is not that the ban is automatic or mandatory; the problem is that the ban cannot be removed or terminated once in place, even at the request of the victim themselves. Making the ban either discretionary (non-mandatory) or on-application (non-automatic) would not resolve the infringement in this case. In the case of a mandatory on-application ban, a prosecutor could still apply for a ban against the victim's wishes. Indeed, this is precisely what occurred in *R. v. Canadian Broadcasting Corp.*, 2003 SKPC 87 [CBC] (rev'd on other grounds: 2004 SKQB 320, leave to appeal ref'd: [2007] S.C.C.A. No. 110 (Sask. C.A.); 2007 CarswellSask 318 (SCC)), where the court found that a mandatory-on-application ban violated s. 2(b) to the extent that it could be brought without the victim's consent. At the same time, if the ban were mandatory-on-application, prospective victims could not be certain that a ban would be imposed in every single case.
- [62] On the other hand, while a discretionary ban might reduce the impairment by offering an opportunity for the victim's voice to be heard, it comes at even greater cost to the legislative objective because it further reduces certainty. If the ban were discretionary, a victim could apply for a ban, but there would be no guarantee that their application would be granted. As noted in *Canadian Newspapers*, "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" (at 132). The Court explained in *Adams* that such a measure might not be rationally connected to a legislative objective that depends on providing victims with certainty that their identities would not be published (at para. 25).

- [63] Conversely, allowing the victim themselves (or, as I will discuss below, perhaps a representative of a deceased or minor victim) to trigger an exception offers the victim an opportunity to be heard at little or no cost to the legislative objective. It does not reduce the certainty that a ban will be imposed, nor the certainty that the ban will endure if the victim wishes for it to endure. Nor would an exception raise the problems identified by Sopinka J. in *Adams* regarding revocable bans. In *Adams*, Sopinka J. commented that a revocable ban "would fail to provide the certainty that is necessary to encourage victims to come forward" because "[i]f the trial judge were given the power by the legislation to revoke the ban, the complainant would never be certain that her anonymity would be protected" (at para. 26). Sopinka J.'s comments addressed the possibility of a trial judge revoking a ban contrary to a victim's wishes; however, an exception triggered by the victim themselves (or possibly their parents) does not present the same risks. In such a case, a victim could be assured that their anonymity would be protected unless and until they elected to bring an end to the protection. *Adams* is, therefore, distinguishable.
- [64] While there may be a risk that a representative of a minor or deceased victim could bring an end to the ban against the victim's wishes (or that a victim could be pressured into triggering the exception), such a risk could be mitigated with a carefully crafted exception. An exception of this nature would achieve Parliament's objective in a real and substantial way while vastly reducing the s. 2(b) infringement. I agree with the applicants that s. 111 of the YCJA demonstrates an example of a less-impairing alternative measure, which would provide sufficient protection for victims while substantially accomplishing the legislative objective. Section 486.4(3) is, therefore, not minimally impairing.
- [65] As I find that s. 486.4(3) does not satisfy the minimal impairment requirement, it is not necessary for me to balance its deleterious effects against its salutary effects: *Oakes* at para. 79. I must instead determine the appropriate remedy for the violation of s. 2(b).
- [66] I note that if I had gone on to the final stage of the *Oakes* test, I would have found that the deleterious effects outweighed the salutary effects of the ban. Significantly, the Crown has not advanced a satisfactory explanation for the irreversible nature of the ban: I am not satisfied that significant salutary effects flow from removing a victim's choice about whether to bring an end to the ban. The deleterious effects, as I have alluded to, are significant.

What is the appropriate remedy?

Position of the Parties

- [67] The applicants submit that the appropriate remedy would be to declare the provision to be of no force or effect pursuant to s. 52(1) of the Constitution. They concede that the declaration of invalidity may have to be suspended for such time as Parliament requires to address the extent of the inconsistency. In the event of a suspension, the applicants seek a constitutional exemption pursuant to s. 24(1) of the Charter to permit them to publish, broadcast, or transmit information that would identify A.T. during the period of the

suspension.

- [68] In their Notice of Application, the Media Applicants also seek an alternative remedy of reading in a provision such that bans under section 486.4(3) no longer apply when a victim, or their parent in the case of a deceased victim, chooses to publish the identity of the victim, analogous to s. 111 of the YCJA.
- [69] In the Crown's written submissions, they explain that "a more surgical approach" is necessary. The Crown contends that the appropriate remedy would be to cure the constitutional defect by reading in the phrase "on application made by the victim, the prosecutor or any such witness", which would make the provision consistent with the publication ban that was upheld in *Canadian Newspapers*. The Crown also suggests that courts should adopt common law rules for determining whether to vary a publication ban on application, including by making certain inquiries into the victim's capacity to give informed consent.
- [70] The difficulty with the Crown's position is that it does not strike at the heart of the constitutional problem in this case: The problem is neither that the ban is automatic (that it takes effect without application), nor that it is mandatory (that the court must impose the ban in every case, without exercising its discretion). Rather, the problem is that the ban cannot be reversed once it is ordered, even by the victim themselves (or a representative of a deceased victim). If I granted the remedy sought by the Crown, then the ban could be lifted if the circumstances that justified its existence ceased to exist, as explained in *Adams*; however, if the Crown wished to maintain a ban against the wishes of the complainant, the complainant would be without relief. This would remove the "automatic" character of the ban (thus impairing the legislative objective of protecting all victims, known and unknown), but it would do little to address the real problem in this case, which is the removal of the victim's choice about whether to publish their own identity. Indeed, if I granted this remedy, the Crown could, in theory, proceed to apply for a ban contrary to Carol Todd's wishes. Thus, the "surgical approach" proposed by the Crown, while more circumscribed, does nothing to address the root of the problem in this case.
- [71] The effect of the provision in this case is to silence the Todd Applicants from speaking about this matter, which is significant to them. In my view, this is a very serious infringement of their freedom of expression. I have also found a serious infringement of the Media Applicants' freedom of expression, as they may be completely prevented from reporting on this case. Further, as noted, the most severe infringement would result from the effect of the publication ban on living victims whose voices would be silenced. Rather than preventing a "sliver of information" from being disclosed, I find the ban--in this case and in cases of future victims who may wish to speak out--amounts to a complete gag order. I must consider whether anything short of a declaration of invalidity can remedy such an infringement.

Governing Legal Framework

[72] In *G*, the Supreme Court discussed the use of "tailored remedies" to address constitutional defects short of fully invalidating legislation. The majority emphasized that courts should use tailored remedies where possible to preserve the constitutional aspects of legislation: *G* at para. 116. These remedies include reading in, reading down, and severance (at para. 113):

Reading down is when a court limits the reach of legislation by declaring it to be of no force and effect to a precisely defined extent. Reading down is an appropriate remedy when "the offending portion of a statute can be defined in a limited manner" (Schachter, at p. 697). Inversely, reading in is when a court broadens the grasp of legislation by declaring an implied limitation on its scope to be without force or effect. Reading in is an appropriate remedy when the inconsistency with the Constitution can be defined as "what the statute wrongly excludes rather than what it wrongly includes" (Schachter, at p. 698, emphasis in original). Severance is when a court declares certain words to be of no force or effect, thereby achieving the same effects as reading down or reading in, depending on whether the severed portion serves to limit or broaden the legislation's reach. Severance is appropriate where the offending portion is set out explicitly in the words of the legislation. These forms of remedy illustrate a court's flexibility in responding to a constitutional violation.

[Emphasis in original.]

[73] However, the majority in *G* cautioned that "if granted in the wrong circumstances, tailored remedies can intrude on the legislative sphere" (at para. 114). Tailored remedies, the majority explained, "should only be granted where it can be fairly assumed that 'the legislature would have passed the constitutionally sound part of the scheme without the unsound part' and where it is possible to precisely define the constitutional aspect of the law": *G* at para. 114. The majority in *G* adopted Lamer C.J.C.'s guidance from *Schachter v. Canada*, [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68 about the limitations of the judicial role (at 707):

the court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In such cases, to read in would amount to making ad hoc choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature, not the courts.

[74] Additionally, in the context of s. 2(b), remedies such as reading in or reading down can create a "disjunction between the law as written by the legislature and as interpreted by the court", potentially chilling freedom of expression (Kent Roach, *Constitutional Remedies in Canada*, 2nd ed (Toronto: Thomson Reuters, 2021) at 14.7.

[75] *CBC* is an example of a reading in remedy that flowed with precision from the requirements of the Constitution. In this case, the trial judge found former s. 486(4) invalid to the extent that a prosecutor could apply for a mandatory-on-application ban without a victim's consent.

The prosecutor in this case had sought a ban in a high profile sexual assault trial without first consulting with either victim. After a conviction was entered, one of the victims identified herself in an interview with CBC, indicating that she had done so to help other First Nations people who had been victims in the past, and that coming forward was part of her spiritual healing journey. CBC was charged with breaching the ban and ultimately challenged its constitutionality. Both victims had testified that they wished to be identified. One victim noted that she had opposed the ban from the outset, and that it had been ordered over her protests. She believed the ban was "an extension of the abuse she had to endure and a perpetuation of the isolation and secrecy to which she was subjected", and said it led her to feel "a sense of powerlessness and like I had no voice": CBC at para. 21. The court concluded that the section had a pressing and substantial objective of preventing further victimization of victims and promoting the reporting of sexual crimes: CBC at para. 53. However, it failed the Oakes test (at paras. 62, 64):

Dr. Sochting validated the positions taken by A.B. and Donna Bouchard, stating that the imposition of a publication ban on an unwilling complainant may actually impede healing and recovery. The lack of control over this aspect of the proceedings where the victim does not have the final say would keep them more in the role of victim, preventing them from moving on to empowerment as a survivor.

Where the complainant does not wish the protection of an identity ban, and bearing in mind the therapeutic or personal reasons for this position, the complainant's wishes should not be thwarted by a simple request by Crown counsel or an under-age witness for such a ban. In other words, to allow this can no longer be said to meet the criteria set out in the second prong of Oakes, nor on the wording of Sharpe. The opposite may be in fact true. Such lack of control by the complainant is potentially harmful and therefore not rationally connected to the purported objective. Thus, it cannot be said to be a minimal impairment of freedom of expression, nor is it reasonably proportionate to the stated objective. This Court finds that the test in s. 1 has not been satisfied in the case at bar, specifically in light of the lack of proportionality between objective and means.

[76] The court went on to order as a remedy that the following bolded words be read into the section (at para. 70):

- s. 486(4) The presiding judge or justice shall
- (b) on application made by the complainant or by the prosecutor or any such witness, with the consent of the complainant, make an order under that subsection.

[77] In CBC, reading in changed "little other than the critical feature of designating the complainant as gatekeeper in any application for a mandatory ban" (at para. 72). Indeed, the words read in by the Court comported with another, arguably more plausible interpretation of the statute, as noted by Professor Sankoff:

In truth, the reference to the prosecutor in this section was probably never intended to mandate automatic publication bans in circumstances where the complainant did not actually want one. The more likely interpretation simply reflects the fact that in most cases the complainant will not be physically present when the application is made, and the prosecutor must have the ability to make the application on the complainant's behalf. It is difficult to accept that any other interpretation constitutes a reasonable limitation on s. 2(b), as the need for a publication ban is hardly compelling in cases where the complainant wishes to have his or her name made public.

(Peter J. Sankoff, *The Law of Witnesses and Evidence in Canada*, vol 2 (Toronto: Thomson Reuters, 2019) at 21.3(c)(ii)).

- [78] However, in many other cases, a remedy will not flow with precision from the requirements of the Constitution. For example, a majority of the Supreme Court found that a tailored remedy would be inappropriate where it required the courts to "engage not in a valid process of statutory interpretation, but in impermissible reading in of content foreign to the enactment": *R. v. Zundel*, 1992 CanLII 75 (SCC), [1992] 2 S.C.R. 731 at 771. Likewise, a tailored remedy is not appropriate if it results in the court making "detailed and complicated consequential amendments to the existing legislation" that are "better left to Parliament or the legislatures": *R. v. Demers*, 2004 SCC 46 at para. 58. This is because courts--unlike legislatures--are neither accountable to an electorate, nor possessed of the kinds of resources required to make complex public policy decisions.
- [79] Reading in an exception was not appropriate in *G*. In this case, a majority of the Supreme Court of Canada concluded that Ontario's sexual offender registry laws were unconstitutional in their application to those found not criminally responsible by reason of mental disorder ("NCRMD") of a sexual offence. The law in question allowed those convicted of offences to be removed or exempted from the registry after individualized assessments, but those found NCRMD of the same offences could never be removed or exempted from reporting. The law was not minimally impairing because "the inclusion of any method of exempting and removing those found NCRMD from the registry based on individualized assessment would be less impairing": *G* at para. 74 (emphasis in original). However, "reading in an individualized assessment requirement would intrude on the legislative sphere" because there were "many ways to provide for such an assessment and 'it is the legislature's role to fill in the gaps, not the court's'": *G* at para. 165. Ultimately, given the "limited and precisely defined nature of the violation in the context of the overall scheme of the sex offender registry", the majority concluded that reading down the law such that it was "of no force and effect to the extent it applies to everyone unconstitutionally affected" was an appropriate tailored remedy: *G* at paras. 164, 166.

Application of the Legal Framework

- [80] To determine the appropriate remedy in this case, I must first identify the full extent of the unconstitutionality by looking at the precise nature and scope of the Charter violation: *G* at para. 116. I must then consider whether a tailored remedy could be employed to preserve

the constitutional aspects of the legislation, or whether such a remedy would intrude on the role of Parliament: G at para. 116. As noted, I find the applicants' freedom of expression has been seriously infringed. The scope of the infringement is significant and intractable: A ban under s. 486.4(3) cannot be reversed under any circumstances, and there are no exceptions. I have explained that the section results in a complete gag order for all involved on the facts before me. Even the Court has no discretion to remove the ban.

- [81] At a conceptual level, if I add words to the provision as suggested by the Crown or the Media applicants, I would be reading down the legislation (or narrowing its reach). However, to provide an effective remedy short of declaring the entire section to be of no force and effect, I would have to step into the shoes of the legislature and craft an exception.
- [82] Like the majority in G, I find that crafting an exception would intrude on the legislative sphere because there are many ways to provide for such an exception; the selection of the appropriate exception criteria should fall to the democratically accountable legislature, rather than the courts: see G at para. 165. The precise wording of this exception raises various issues: First, at what age and under what circumstances should a minor victim be able to trigger the exception without parental consent? Section 111 of the YCJA, for example, allows a child to publish their identity automatically once they attain the age of 18 or receive the consent of their parents (s. 111(2)(a)), or with the court's leave (s. 111(3)). Second, when the victim is deceased, who (if anyone) may speak on their behalf, and under what circumstances? Section 111(2)(b) of the YCJA, for example, permits the parents of the child or young person to trigger an exception automatically, without requiring court approval. Third, if an application process is necessary (as in s. 111(3) of the YCJA) and the courts are granted discretion to consider whether to waive the ban, what factors should be considered? The Crown provided a non-exhaustive list of such considerations in their written submissions at para. 117. I find this list is illustrative of the problem in this case, which is that I am asked, in effect, to decide significant policy issues and craft an extensive legislative amendment.
- [83] The Media Applicants, on the other hand, contend that I ought to simply adopt the language of the YCJA, which they say would honour a legislative choice made by Parliament in an analogous circumstance, where another class of vulnerable victims was concerned. However, the policy objectives underlying young offenders and child pornography offences differ. Unique issues may emerge in the context of child pornography--consider, for example, Campbell P.C.J.'s comments in K.B. at paras. 41-43:

Child pornography is an offence that involves behaviour that can plumb the depths of human depravity. Even parents have been known to produce and distribute pornographic images of their own children. This interpretation would mean that a sole surviving parent being dealt with in Youth Justice Court could publish the name of his deceased child as the person whose image appears in the child pornography that he himself is accused of having produced. A 17 year old father makes pornographic images of his baby. Both baby and mother die. On the interpretation as argued, as the parent, he could publish the name of the child. The parent who made the child

pornography could release the name of his victim.

You might ask why anyone would do that. His purpose for publication could be as simple as to spite the deceased child's surviving grandparents. It could be blackmail. Based on this interpretation his authority to do that could not be limited even by requiring him to make an application to the court to have it tested against public interest, the child's interest or anything else.

Under s. 486.4(3) he could never do that. No one could do that. But under this interpretation, as a young person, he could. But what are the chances of that happening? What are the chances of this case happening? It only has to happen once.

[84] Campbell P.C.J. concluded by emphasizing that when judges are asked to "tinker with the law by agreeing to highly creative interpretations for the purposes of one case, issues of important public policy can be involved": K.B. at para. 50. He explained that such policy decisions should be made after careful consideration by the legislature and "not as a side effect of a decision to provide a desired result in an individual case" because, critically, "[w]hat appears like an elegant solution for one case can't be restricted to one case" (at para. 50). I agree with Campbell P.C.J.: This is not an appropriate case to provide a tailored remedy, as to do so would be to inappropriately tinker with the legislation. The precise scope of any exception does not flow with precision from the requirements of the Constitution; rather, it raises complex policy issues that require the legislature's expertise. For this reason, I decline to read the law down to incorporate any judicially crafted exception.

[85] Further, this is not a case like G where a broad legal scheme (the sex offender registry) has unconstitutional effects in its application to a limited and precisely-defined scope of persons (NCRMD offenders), and where the law can easily be read down in its application to this class of persons. This case is distinguishable from G for two reasons: First, there are other options in the s. 486.4 legislative scheme whose constitutionality is not impugned on the facts of this case, and these sections offer similar protection for future cases, even if the impugned section is struck down. While s. 486.4(3) provides for mandatory, automatic, and irreversible publication bans for s. 163.1 (child pornography) offences, ss. 486.4(1) and (2)--which also apply to s. 163.1 offences--provide for bans that may be ordered at the discretion of the court, and which are mandatory on the application of a victim or prosecutor. While these sections do not provide the same level of automatic protection as s. 486.4(3) (which takes effect without requiring an application or an exercise of judicial discretion), I am satisfied that they still provide considerable protection. Second, while the majority in G was able to read down the offence to limit its application to a precisely-defined class of persons--namely, those found NCRMD who have been absolutely discharged--the lines that would define the exception in this case are more blurred. Specifically, where the victim is deceased, as A.T. is in this case, there remains an open question about who can waive the ban on their behalf. Should it be a parent, both parents, a guardian, or someone else? In this case, one of A.T.'s parents wishes to waive the ban, and another wishes for it to remain in

place. The central question of who speaks for a deceased victim is a decision properly left to the legislature. Similar questions arise with respect to victims who are minors. For this reason, I cannot read the law down such that s. 486.4(3) is of no force and effect only to a precisely defined extent, as to do so would require me to decide from among a number of options in a way that intrudes on the jurisdiction of the legislature. Instead, I must find the entire section to be of no force and effect and leave the legislature to decide the scope of any exception.

- [86] I conclude, for the reasons above, that s. 486.4(3) in its entirety is of no force and effect. However, that does not conclude my analysis as I must consider the temporal effect of the declaration of constitutional invalidity. There are various forms that a declaration of invalidity may take. As the Court explained in *R. v. Albashir*, 2021 SCC 48 [Albashir], declarations may be either prospective or retroactive; immediate or suspended.
- [87] Absent a compelling public interest, declarations will generally be immediate: *Albashir* at para. 31. The government bears the burden to demonstrate a compelling public interest that justifies suspending the declaration: *Albashir* at para. 46. As I have discussed, there are other provisions within s. 486.4 that provide a means to obtain a publication ban; these sections could address the same concerns as s. 486.4(3), which weighs against suspending the declaration of invalidity. The Crown has not provided any evidence in support of suspending the declaration of invalidity, nor made a case for any particular length of suspension. I find they have not demonstrated that "an immediately effective declaration would endanger a compelling public interest that outweighs the importance of immediate constitutional compliance and an immediately effective remedy for those whose Charter rights will be violated": *G* at para. 139. Accordingly, the declaration of invalidity will take immediate effect.
- [88] The declaration will also be prospective in nature. While there is a presumption that judicial remedies are retroactive (*Albashir* at para. 38), this presumption cannot apply in the case before me. The reason for this is simple: Sections 486.4(1) and (2) do not apply automatically, like s. 486.4(3) did, to offences under s. 163.1 of the Code. Rather, they are triggered by judicial discretion (s. 486.4(1)) or an application by the Crown (s. 486.4(2)). This means that after this declaration takes effect, the public will only receive the benefit of ss. 486.4(1) and (2) bans in the place of s. 486.4(3) if publication bans have been triggered separately under those sections. I accept that in many cases, the court may have decided not to order and/or the Crown may have decided not to apply for bans under either ss. 486(1) or (2) if a ban was already in effect pursuant to s. 486.4(3). Indeed, that is precisely what occurred in this case: Armed with knowledge that a s. 486.4(3) ban was in place, the Crown did not apply for an additional ban under s. 486.4(2). I am satisfied that if I were to give the declaration of invalidity retroactive effect, the likely result in at least some cases is that I would deprive victims and/or witnesses of the protection of any publication ban at all. I consider that doing so would "create a legal vacuum that would compromise compelling public interests": *Albashir* at para. 65.

- [89] The appropriate remedy is for my declaration to take immediate, prospective effect. However, as the ban in this case predates this declaration of invalidity, my declaration will not impact the existing ban. Rather, I consider it appropriate to grant the applicants a constitutional exemption pursuant to s. 24(1) of the Charter. As noted in *Albashir*, a person whose Charter rights are breached by a law declared to be unconstitutional may still apply for a personal remedy under s. 24(1), even if the breach relates to a period of time before the declaration of invalidity came into force (at paras. 62-65).
- [90] Although the applicants have sought a constitutional remedy for the period of any suspended declaration of invalidity, as noted, there will be no suspension in this case. The effect of my prospective declaration, however, is the same as if I had suspended the declaration of invalidity: A prospective declaration--like a suspended declaration--is not an effective remedy for the applicants in this case. In the circumstances, ss. 52(1) and s. 24(1) can be combined to provide an effective remedy: *Albashir* at para. 62. Accordingly, I grant the applicants a s. 24(1) exemption, effective immediately, such that they are no longer required to abide by the s. 486.4(3) ban. I find this remedy is appropriate and just and that it does not otherwise undermine my declaration of invalidity or any other compelling public interests: *Albashir* at paras. 61-66.

Disposition

- [91] I find that the Crown's s. 1 argument must fail. Therefore, I declare s. 486.4(3) of no force and effect. This declaration takes immediate and prospective effect. I grant the applicants a constitutional exemption pursuant to s. 24(1) of the Charter - in other words, they may publish, broadcast, or transmit information pertaining to the case immediately, subject to any other publication bans that remain in effect.

"Devlin J."

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