SCC Court File No.: 34240

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

A.B. BY HER LITIGATION GUARDIAN, C.D.

APPELLANT

- and -

BRAGG COMMUNICATIONS INCORPORATED, A BODY CORPORATE and HALIFAX HERALD LIMITED, A BODY CORPORATE

RESPONDENTS

- and -

DANIEL W. BURNNETT

AMICUS CURIAE

- and -

BULLYING CANADA INC., BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, AND KIDS HELP PHONE, CANADIAN CIVIL LIBERTIES ASSOCIATION, PRIVACY COMMISSIONER OF CANADA, NEWSPAPER CANADA, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, CANADIAN ASSOCIATION OF JOURNALISTS, PROFESSIONAL WRITERS ASSOCIATION OF CANADA, BOOK AND PERIODICAL COUNCIL, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, CANADIAN UNICEF COMMITTEE, INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO, AND BEYOND BORDERS

INTERVENERS

MEMORANDUM OF ARGUMENT OF THE INTERVENER SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

Pursuant to Rules 37 and 42 of the Rules of the Supreme Court of Canada

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TABLE OF CONTENTS

Page

PART I – OVERVIEW AND FACTS 1

PART II – QUESTIONS AT ISSUE 1

PART III – ARGUMENT 1

A. Anonymity Orders & the Right to Privacy 3
B. 'Serious Harm' to Privacy 6
C. Balancing Privacy and Freedom of Expression in Context 9

PART IV – COSTS AND ORDERS SOUGHT 10

PART V – TABLE OF AUTHORITIES 11

PART VI – LEGISLATION 13

PART I – OVERVIEW AND FACTS

1. This appeal offers an opportunity to provide clarity regarding the question of anonymity in judicial processes. The outcome of this decision can have far-reaching implications, particularly in light of increasing electronic access to court records through a variety of mechanisms. Identity is at the crux of online accessibility, and permits the often very personal and sensitive information that is a necessary corollary of court processes to be used in a variety of different contexts unrelated to the objectives of the justice system. It is critical that, when important constitutional values such as privacy and freedom of expression and the open court principle conflict, that these are assessed *in context*, rather than dismissed in the abstract.

2. The facts in this matter are ably presented in the factum of the Appellant.

PART II – QUESTIONS AT ISSUE

3. CIPPIC will focus its submissions on: the appropriate application of the Daegnais/Mentuck test to questions relating to anonymity in judicial proceedings. CIPPIC argues that A number of issues are raised by this appeal. Of the following, CIPPIC seeks to address only issues A through D:

A) What is the appropriate application of the Daegnais/Mentuck test to questions relating to anonymity in judicial proceedings?

B) Should the Dagenais/Mentuck test be adapted to ensure it provides adequate protections for privacy rights?

PART III – ARGUMENT

4. The Open Court principle is a foundational democratic principle of any free and democratic society. It shares a close affinity to freedom of expression and the press, and defends many of the same underlying values. However, as with all fundamental rights and values, the open justice principle is not absolute. Exceptions to the rule exist to ensure open justice does not unduly interfere with other fundamental rights or legitimate interests.

5. The Dagenais/Mentuck test has become the predominant framework for guiding judicial discretionary decisions where the openness of court proceedings and, hence, freedom of expression and of the

press are at issue. The test is adaptable, and should be applied flexibly to meet the diverse interests and contexts it is designed to address. The Dagenais/Mentuck framework has been used to assess the appropriateness of a number of different types of discretionary orders, ranging from publication bans, to orders aimed at preserving the confidentiality of commercial information, to the use of *in camera* sessions, to the appropriate degree of access to court exhibits. Rule 85.04 of the Nova Scotia *Civil Procedure Rules*, while couched in terms of 'confidentiality', reflects the diversity of these varying contexts.

> ***Canadian Broadcasting Corp. v. The Queen***, 2011 SCC 3, paras. 12-13; ***Civil Procedure Rules***, Rule 85.04; ***Vancouver Sun (Re)***, 2004 SCC 43, para. 31

6. Courts have stressed that it is important, at the outset of any application of the Dagenais/Mentuck test, to first properly locate the affected interest or right that the requested remedy seeks to protect:

> It also bears repeating that the relevant rights and interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner...Trial judges must, at the outset, use their best judgment to determine which rights and interests are in conflict. In most cases this will not be overly onerous. The parties will frame their arguments in terms that make clear the interests they feel are threatened by the issuance or refusal of a publication ban and those they are ready to sacrifice in the face of the threat.

Further, the Dagenais/Mentuck test must be applied in a flexible manner, adapted to the specific interests it is seeking to balance against freedom of expression and the open court principle:

> ...the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*...courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.
>
> ***R. v. Mentuck***, 2001 SCC 76, para. 37; ***Sierra Club Canada v. Canada (Minister of Finance)***, 2002 SCC 41, para. 48

7. In this sense, there is an implicit 'pre step' in the two-step Dagenais/Mentuck test. This pre-step is loosely analogous to the 'pressing and substantial objective' stage of the section 1 justification framework on which the Dagenais/Mentuck framework itself is premised. It aims to identify and characterize the interest that will be balanced against freedom of expression and the open court principle. This 'pre-step' may not necessary in well-established applications of the framework such as publication bans or protective orders for confidential commercial information. However, where courts seek to categorically exclude types of rights or interests from the analysis prior to any contextual weighing of risks, this pre-step may be useful in order to ensure the open court principle does not operate to defeat fundamental rights and important social values. Only after the

implicated right or interest is situated in its proper scope can harm to it and the proportionality of its impact on the open court principle be assessed in context.

> ***A.B. v. Bragg Communications Inc.***, 2010 NSSC 215, paras. 35-38; ***A.B. v. Bragg Communications Inc.***, 2011 NSCA 26, paras. 73-86; ***Sierra Club Canada v. Canada (Minister of Finance)***, 2002 SCC 41, para. 48-57

A. Anonymity Orders & the Right to Privacy

8. While not explicitly enumerated in our *Charter*, the right to privacy permeates democratic values and is enshrined in sections 7 and 8, and enjoying strong protection at common law. This Honourable Court has noted its importance in *O'Connor*, where it stated that: "[r]espect for individual privacy is an essential component of what it means to be 'free'". The right to privacy is also enshrined in international human rights instruments including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The right to privacy, including informational privacy, is closely linked to individual dignity, self-worth and identity.

> ***Cash Converters Canada Inc. v. Oshawa (City)***, 2007 ONCA 502, para. 29; ***R. v. O'Connor***, [1995] 4 S.C.R. 411 (S.C.C.), paras. 112-113; ***Universal Declaration of Human Rights***, G.A. Res. 217 A (III), Article 12; ***International Covenant on Civil and Political Rights***, G.A. Res. 2200A (XXI), Article 17

9. The Ontario Court of Appeal has noted the importance of privacy protections (in the context of privacy protecting laws) within the broader context of modern democracies:

> the governing principles of privacy law including that protection of privacy is a fundamental value in modern democracies and is enshrined in ss. 7 and 8 of the Charter, and privacy rights are to be compromised only where there is a compelling state interest for doing so...

Similarly, the Ontario Divisional court has held that rules of civil procedure, as well as the court's inherent jurisdiction to control its processes, should develop in a manner consistent with any *Charter* rights they implicate, including the right to privacy.

> ***Cash Converters Canada Inc. v. Oshawa (City)***, 2007 ONCA 502, para. 29; ***Warman v. Fournier, et. al.***, 2010 ONSC 2126 (Div. Ct.), paras. 22-23

10. While litigation is inherently a privacy invasive process, participation in the justice system, whether as litigant, defendant or otherwise, does not amount to a waiver of privacy rights. Even the defendant's right to make full answer and defence must, at times, yield to the privacy rights of potentially affected individuals (*McNeil*). Indeed, this Honourable Court has held that "[d]espite the fundamental importance of the media's right of access to information in a modern democracy, it must be consistent with the principle of respect for privacy." (*Lac d'Amiante*)

Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc., 2001 SCC 51, para. 72; ***R. v. McNeil***, 2009 SCC 3, paras. 20, 37-38

11. Courts have attempted to protect privacy rights within the 'innately tough arena' that is our litigation process by striving to minimize the impact of judicial processes on privacy as much as possible, keeping in mind the purpose of the judicial process in question:

> discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous...The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone.

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480 (S.C.C.), paras. 39-42; ***Juman v. Doucette***, 2008 SCC 8, paras. 24-25

12. The digital age poses great threats to the right to privacy. The discoverability and permanence of online information, as well as shifting social norms that have made search engines the first resort most new acquaintances. This means that an individual's Internet record, to a far greater extent than at any time in the past, will inform others' impressions. Further, as informational privacy relates to the right of an individual to determine for herself when, how and to what extent information about her is communicated, information made available online presents an *ongoing* risk to privacy. As the Sedona Conference Working Group on public access to court records noted in its latest draft best practice guidelines: "...the era of 'practical obscurity' has past. Litigants and attorneys must be aware of the possible consequences of filing any private or confidential information."

Jones v. Tsige, 2012 ONCA 32, paras. 31, 67-68; ***R. v. Tessling***, 2004 SCC 67, para. 23; The Sedona Conference Working Group on Protective Orders, Confidentiality & Public Access (WG2), "**The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases**", *The Sedona Conference Working Group Series*, March 2007, ["Sedona WG2"], p. 61

13. This heightened risk to privacy has specific salience for the historical balance struck between the need for open justice and the right to privacy. The open court principle aims to make information public in order to further public scrutiny of judicial decision-making, encourage public debate on legal issues, and to generally instil public confidence in judicial processes. The open availability of information from a court record online greatly multiplies the different contexts in which this information can, and will, be used. The privacy harms that result are no longer limited to a 'sensational news cycle', as was once the case (*A.B. v. Stubbs*).

A.B. v. Stubbs, [1999] 44 O.R. (3d) 391 (Ont. S.C.); L. Austin & F. Pelletier, ***Synthesis of the Comments on JTAC's Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy***, Prepared on Behalf of the Judges Technology Advisory Committee for the Canadian Judicial Council, January 2005, p. 6 ["JTAC"]

14. Put another way, the digital age multiplies the risk that the often sensitive and personal information that is a necessary part of many judicial proceedings will be used for a range of secondary contexts completely unrelated to the objectives of justice. As the specific parameters of such a risk are difficult to quantify and predict, privacy protections typically attempt to aim at creating conditions under which the collection, use and disclosure of personal information is limited to the primary purposes (or contexts) for which it is initially collected. Ongoing embarrassment and humiliation is one of these 'unrelated contexts'. In this sense, it can be said that the online availability of court information threatens to turn the contextual integrity of judicial information into a myth. As is evident from the instant case, this will have increasing detrimental impact on litigant's willingness to participate in the court system and potentially significant impact on access to justice.

> ***Canadian Broadcasting Corp. v. The Queen***, 2011 SCC 3, para. 17; ***Cash Converters Canada Inc. v. Oshawa (City)***, 2007 ONCA 502, paras. 29-30; H. Nissenbaum, "**Protecting Privacy in an Information Age: The Problem of Privacy in Public**", (1998) 17 *Law & Philosophy* 559; Office of the Information & Privacy Commissioner for British Columbia, "**Privacy and Openness in Tribunal Decisions**", presented at Canadian Bar Association, National Administrative Law & Labour and Employment CLE Conference, Ottawa, November 22, 2008 ["**OIPC**"], pp. 4-9

15. A child entering her own last name into a search engine can suddenly discover her father's sensitive medical condition (*A.B. v. Minister of Citizenship and Immigration)*; information can be harvested by mass marketers based on key word searches (JTAC); knowledge of something as innocuous as a recent divorce can be used against an individual in high-priced commercial transactions such as real-estate sales (OIPC); an individual's high school ridicule (*A.B. v. Bragg*) or sensitive medical procedure (*A.B. v. Stubbs*) can become her permanent first impression for future employers, new friends, co-workers, etc:

> Although the Claimant is only seven now, time passes quickly, and in eleven years the child will be an adult. Any report of the present proceedings which identifies the Claimant in a newspaper is, with modern Internet technology, very likely to be almost as readily accessible online in eleven or twelve years' time as it would be if it were published today.

Further, it is not merely the news reporting cycle that will facilitate this online exposure. Litigants can expect to become immortalized in the court's ultimate reasons for judgment, which are almost universally posted online now with minimal additional anonymization.

> ***A.B. v. Bragg Communications Inc.***, 2011 NSCA 26; ***A.B. v. Minister of Citizenship and Immigration***, 2006 FC 444, 4 February 2010; ***A.B. v. Stubbs***, [1999] 44 O.R. (3d) 391 (Ont. S.C.); ***JTAC***, paras. 55-57; ***OIPC***, pp. 15, 17; ***Re (a child) (by his mother and litigation friend) v. Cambridge University Hospitals NHS Foundation Trust,*** [2011] EWHC 454 (U.K. Q.B.), para. 15

16. In this sense, the specific harms that will result from a privacy invasion are difficult to quantify. Where personal information is disclosed as part of the judicial process, it is not mere embarrassment that is

being imposed on litigants. Rather, the autonomy and dignity attaching to their right to informational privacy are being put at risk, as noted in *R. v. O'Connor*:

> When a private document or record is revealed and the reasonable expectation of privacy therein is thereby displaced, the invasion is not with respect to the particular document or record in question. Rather, it is an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society.

It is therefore critical that courts ensure the "thoughts and papers, however embarrassing, defamatory or scandalous" of participants in judicial processes are intruded upon as minimally as is necessary to satisfy the objectives of justice.

> ***Juman v. Doucette***, 2008 SCC 8, paras. 24-25; ***R. v. O'Connor***, [1995] 4 S.C.R. 411 (S.C.C.), para. 119

17. In conclusion, privacy is a fundamental human right that enjoys constitutional or quasi-constitutional status. While it is not absolute, it is certainly of sufficient importance to qualify as an 'interest' capable of being seriously threatened by open justice. Reference to additional, ancillary harms that may accompany harm to this right should not be required. This does not change the underlying conclusion that in most situations, privacy or fear of embarrassment might not trump the open justice principle. However, given the constitutional status of both of these important rights, the analysis should occur in context, not in the abstract, so that the relative positive and negative impact a requested order can have on each of these core democratic values can be properly weighed.

> ***Canadian Broadcasting Corp. v. New Brunswick (Attorney General)***, [1996] 3 S.C.R. 480 (S.C.C.), paras. 39-42; ***Murray v. Express Newspapers plc and another***, [2008] EWCA Civ 446, paras. 24-26

B. 'Serious Harm' to Privacy

18. Properly construed, the first branch of the Dagenais/Mentuck test, when applied to anonymization orders, should assess whether the requested order is 'necessary to address serious risks to individual privacy rights.' This analysis should take into account the difficulties inherent in attempts to quantify 'harm' to fundamental rights such as privacy and freedom of expression. It should also be noted that harm to the 'principle' of privacy is also more worthy of protection than harm to the mere private interests of one litigant, as was the case in *Sierra Club of Canada* ('general commercial interest of preserving confidential information').

> ***Canadian Broadcasting Corp. v. The Queen***, 2011 SCC 3, para. 14; ***Sierra Club Canada v. Canada (Minister of Finance)***, 2002 SCC 41, para. 55

19. In a number of different contexts, Courts have devised various means of determining the severity of

harm to the right of privacy. Typically, this involves an objective analysis of the sensitivity of the information in question and the reasonable expectations of privacy that attach to it. This Honourable Court's section 8 jurisprudence has developed a nuanced framework aimed at articulating where reasonable expectations of privacy persist. It examines the subjective expectations of the individual, and analyzes whether these are objectively reasonable. Where intimate details regarding an individual's lifestyle and personal choices are implicated, higher and more reasonable expectations of privacy persist.

R. v. Tessling, 2004 SCC 67

20. In articulating the parameters of a newly recognized tort of 'invasion of seclusion', the Ontario Court of Appeal noted in *Jones v. Tsige* that privacy is invaded where 'distress, humiliation or anguish' are caused. The Court also adopted a set of criteria from the Manitoba Privacy Act that were deemed indicative of the severity of a particular invasion of privacy. These included "the effect of the wrong on the plaintiff's health, welfare, social, business or financial position" and "any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong". In addition, where certain categories of information historically deemed to be sensitive (financial or health records, sexual practices and orientation, employment, diary or private correspondence) are involved in the invasion of privacy, 'humiliation' is more likely to occur. The presence of embarrassment or humiliation was also an indicator that an invasion of privacy was sufficiently severe to warrant damages under Quebec's *Charter of Human Rights and Freedoms* (*Aubry)*.

Jones v. Tsige, 2012 ONCA 32, paras. 71-72, 81; ***Aubry v.*** É***ditions Vice-Versa***, [1998] 1 S.C.R. 591 (S.C.C.), per Lamer, C.J., paras. 31-32 (dissenting); per L'Heureux-Dubé and Bastarache, JJ., paras. 69-72

21. The UK courts have developed a two-step tort to help balance competing constitutional rights to privacy and freedom of expression. The first step assesses whether a breach of privacy has occurred, and the severity of that breach. The second step assesses the degree to which privacy has been invaded and the relative degree to which freedom of expression is implicated. The first step applies a "reasonable person of ordinary sensibilities" to determine whether a privacy breach has occurred or not. Scenarios where an invasion of privacy results in "humiliation or severe embarrassment" are more likely offend the ordinary sensibilities of the reasonable person.

Murray v. Express Newspapers plc and another, [2008] EWCA Civ 446, paras. 24-26, 35, 43(v)

22. Children tend to evoke higher expectations of privacy. For example, in *Murray*, the U.K. Court of Appeal reversed a lower court decision on the basis that, in finding a potential litigant had no expectation of privacy in photos published of him by the media, it had failed to consider the impact of the litigant's status as a child:

> In our opinion it is at least arguable that David had a reasonable expectation of privacy. The fact that he is a child is in our view of greater significance than the judge thought. The courts have recognised the importance of the rights of children in many different contexts and so too has the international community...It is true, as the judges say, at para 164, that the photographs showed no more than could be seen by anyone in the street but, once published, they would be disseminated to a potentially large number of people on the basis that they were children of well known parents, leading to the possibility of further intrusion in the future...It seems to us that, subject to the facts of the particular case, the law should indeed protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be objected to on behalf of the child. That is the context in which the photographs of David were taken. It is important to note that so to hold does not mean that the child will have, as the judge puts it in para 66, a guarantee of privacy. To hold that the child has a reasonable expectation of privacy is only the first step. Then comes the balance which must be struck between the child's rights to respect for his or her private life under article 8 and the publisher's rights to freedom of expression under article 10.
>
> ***Murray v. Express Newspapers plc and another***, [2008] EWCA Civ 446, paras. 40, 50, 57-58

23. In the specific context of minor litigants, our legislatures have signalled the need for heightened protection for identification in specific contexts, such as with respect to young offenders. In examining the general impact of digitization on privacy and related concerns, the Sedona Conference working group tasked with the issue included 'the privacy of minors' and the 'involvement of personal information' as amongst the 'exceptional circumstances' justifying exceptions to the general rule that settlements made by public actors (whether registered with a court or not) should be open and public:

> For these reasons, there should be a strong presumption against the confidentiality of any settlement entered into with a public entity or of any information otherwise disclosable under a public records law...A particularly strong presumption of public access exists with regard to any monies paid by public entities in settlement. Only exceptional circumstances (such as those involving intimate personal information, the privacy of minors, or law enforcement needs) should warrant the confidentiality of these types of settlements.

In some jurisdictions, such as under the U.S. Federal Court, rebuttably presumptive anonymity has been adopted for all minor children participating in any judicial proceeding.

> ***F.N. (Re)***, 2000 SCC 35; ***Sedona WG2,*** pp. 2, 49

24. Applying this analysis, the instant case provides a compelling rationale for finding that 'harm to privacy' exists. The privacy of a minor is at stake, the subject matter in question is relates to the fact a minor has been ridiculed by her peers. Forcing A.B. to disclose her true identity on the public record is likely to subject her to further ridicule, embarrassment and humiliation and, hence, implicate her dignity. As such, to the extent that A.B.'s right to privacy has been implicated, the salutary effects of an anonymization order to this right must be balanced against any deleterious impact on freedom of expression.

Aubry v. Éditions Vice-Versa, [1998] 1 S.C.R. 591 (S.C.C.), per Lamer, C.J., paras. 31, dissenting; ***Murray v. Express Newspapers plc and another***, [2008] EWCA Civ 446, paras. 24-26

C. Balancing Privacy and Freedom of Expression in Context

25. The final step of the Dagenais/Mentuck test requires courts to weigh the salutary benefits of an anonymization order outweigh any detrimental impact on freedom of expression and open justice. The salutary benefits to the right to privacy in this case relate to the harms listed above. Humiliation and embarrassment will be prevented, and the A.B.'s dignity will remain intact. In addition, as A.B.'s litigation guardian has sworn on the record that A.B. will not proceed without an anonymization order, and hence can no longer do so, it appears that the truth-finding component of freedom of expression may be furthered by issuing the order, as it will facilitated a resolution in court of the issues raised by the case at bar.

Canadian Broadcasting Corp. v. The Queen, 2011 SCC 3, para. 12

26. As noted in *F.N. (Re)*, merely excising all identifiers from the Court record (A.B.'s real name, address, phone number, social insurance number, her father's name, etc.) removes no more than a 'sliver of information' from the public record and, in many cases, will impact on open justice and freedom of expression minimally. This is because the identity of the individual does not detract from public debate over the *substantive* issues at the heart of the litigation (barring, of course, scenarios where the identity of the litigant is directly at issue, such as where she is a public official, for example).

F.N. (Re), 2000 SCC 35, para. 12

27. In many cases, such as in the instant case, A.B. claims that true anonymity requires limitations on access to some court records as well. Where such issues arise, it should fall to courts to balance the added benefit to privacy and anonymity, on the one hand, and the corresponding detriment to freedom of expression. In the instant case, the fake Facebook profile itself includes a photograph of A.B., as well as other particulars which would identify her. Such information appears more likely to lead to identification of A.B. than a list of allegedly defamatory 'scandalous sexual commentary' that does not refer to A.B. directly by name, or from which her name has been removed. On the other hand, while access to court records is a corollary of the open court principle, it is not clear that media access to each element of the Facebook profile in question is necessary for a full and complete understanding of the legal and substantive issues before the trial judge. Indeed, in concluding that a *prima facie* case for defamation existed, Justice LeBlanc did not need to provide any great detail regarding the 'scandalous sexual commentary' in order to reach his conclusion.

A.B. v. Bragg Communications Inc., 2010 NSSC 215, paras. 3, 18

28. A full publication ban covering the subject matter of the proceeding may, as suggested by the trial judge in the Court below, provide even greater protection of A.B.'s privacy and dignity. It would also provide the highest assurance that she will not be identified. However, a full publication ban will impact too egregiously on the open court principle and on freedom of expression, as the public marketplace of ideas will be robbed of the important substantive issues being debated in A.B.; the outcome will be secret and, hence, free of the disinfecting public eye; and, finally, the public will lack guidance on how to guide their future actions in accordance with the law. However, this no longer appears to be the remedy advanced by A.B.

A.B. v. Bragg Communications Inc., 2010 NSSC 215, para. 33

PART IV – COSTS AND ORDERS SOUGHT

29. CIPPIC does not seek costs in this matter and asks that costs not be awarded against it. CIPPIC asks that the appeal be allowed, and the matter remitted back to the trial level for an assessment of the issues at stake in light of the framework outlined above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of May, 2012

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PART V – TABLE OF AUTHORITIES

Authority		Reference in Factum
	Cases	
1.	*A.B. v. Bragg Communications Inc.*, 2010 NSSC 215	7, 27-28
2.	*A.B. v. Bragg Communications Inc.*, 2011 NSCA 26	7, 15
3.	*A.B. v. Minister of Citizenship and Immigration*, 2006 FC 444, 4 February 2010	15
4.	*A.B. v. Stubbs*, [1999] 44 O.R. (3d) 391 (Ont. S.C.)	13, 15
5.	*Aubry v. Éditions Vice-Versa*, [1998] 1 S.C.R. 591 (S.C.C.)	20, 24
6.	*Cash Converters Canada Inc. v. Oshawa (City)*, 2007 ONCA 502	8-9, 14
7.	*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.)	11, 17
8.	*Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3	5, 14, 18, 25
9.	*F.N. (Re)*, 2000 SCC 35	23, 26
10.	*Jones v. Tsige*, 2012 ONCA 32	12, 20
11.	*Juman v. Doucette*, 2008 SCC 8	11, 16
12.	*Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51	10
13.	*Murray v. Express Newspapers plc and another*, [2008] EWCA Civ. 446 (U.K. C.A.)	17, 21-22, 24
14.	*Re (a child) (by his mother and litigation friend) v. Cambridge University Hospitals NHS Foundation Trust*, [2011] EWHC 454 (U.K. Q.B.)	15
15.	*R. v. McNeil*, 2009 SCC 3	10
16.	*R. v. Mentuck*, 2001 SCC 76	6
17.	*R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.)	8, 16
18.	*R. v. Tessling*, 2004 SCC 67	12, 19
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20.	*Vancouver Sun (Re)*, 2004 SCC 43	5
21.	*Warman v. Fournier et. al.*, 2010 ONSC 2126 (Div. Ct.)	9

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22.	L. Austin & F. Pelletier, "Synthesis of the Comments on JTAC's Discussion Paper on Open Courts, Electronic Access to Court Records, and Privacy", Prepared on Behalf of the *Judges Technology Advisory Committee for the Canadian Judicial Council*, January 2005, ["JTAC"]	13, 15
23.	H. Nissenbaum, "Protecting Privacy in an Information Age: The Problem of Privacy in Public", (1998) 17 *Law & Philosophy* 559	14
24.	Office of the Information & Privacy Commissioner for British Columbia, "Privacy and Openness in Tribunal Decisions", presented at Canadian Bar Association, *National Administrative Law & Labour and Employment CLE Conference*, Ottawa, November 22, 2008, ["OIPC"]	14-15
25.	The Sedona Conference Working Group on Protective Orders, Confidentiality & Public Access (WG2), "The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases", *The Sedona Conference Working Group Series*, March 2007, ["Sedona WG2"]	12, 23

Legislation

26.	*Civil Procedure Rules*, Rule 85.04	5
27.	*International Convention on Civil and Political Rights*, G.A. Res. 2200A(XXI), Article 17	8
28.	*Universal Declaration of Human Rights*, G.A. Res. 217 A(III), Article 12	8

PART VI – LEGISLATION

Civil Procedure Rules, Rule 85.04 – Order for Confidentiality

(1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the Canadian Charter of Rights and Freedoms and the open courts principle.

(2) An order that provides for any of the following is an example of an order for confidentiality:

(a) sealing a court document or an exhibit in a proceeding;

(b) requiring the prothonotary to block access to a recording of all or part of a proceeding;

(c) banning publication of part or all of a proceeding;

(d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by a pseudonym, including in a heading.

(3) A judge who is satisfied that it is in accordance with law to make an order excluding the public from a courtroom, under Section 37 of the *Judicature Act*, may make an order for confidentiality to aid the purpose of the exclusion.

International Convention on Civil and Political Rights, G.A. Res. 2200A(XXI), Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

Universal Declaration of Human Rights, G.A. Res. 217 A(III), Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.