

Balancing Freedom of Expression and the Privacy of Child Victims

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Case Commented On: *R v Canadian Broadcasting Corporation*, [2016 ABQB 204 \(CanLII\)](#)

The Court in *R v Canadian Broadcasting Corporation* allows the Canadian Broadcasting Corporation (CBC) to maintain pre-publication ban articles on the web, thus allowing access to the identity of a deceased child victim. One of the major purposes of a publication ban is to protect a child victim's privacy and thereby ensure future victims will come forward with the assurance of anonymity. This case demonstrates that freedom of expression of the media can take priority over a victim's privacy rights. The case also demonstrates the lack of policy and legal authority dealing with web-based material, the transmission of information, victim's privacy, and publication bans.

Tyrell Perron (the accused) was charged with the first degree murder of a minor (D.H.). The Crown requested a publication ban and a judge ordered a mandatory ban under section [486.4\(2.2\)](#) of the *Criminal Code*, RSC 1985, c C-46. This type of order means there is a prohibition on "the publication, broadcast, or transmission in any way, of information that could identify the victim" (at para 2). Two pre-publication ban articles ("the articles") which identified the victim remained on the CBC Edmonton website, although the CBC agreed not to publish any more articles with the victim's name. The evidence showed that the victim's identity was already well-known through social media and because the victim had lived in a small community. The Attorney General (AG) made an application to seek criminal contempt of court by the CBC for breaching the publication ban. The CBC also challenged the constitutionality of *Criminal Code* section 486.4(2.2) on the ground that it violated freedom of expression. The application sought an interim injunction requiring the CBC to remove the articles from its website pending the outcome of the contempt application. The Alberta Court of Queen's Bench (Justice Peter Michalyshyn) was asked to decide on the interim injunction application.

The Law on Publication Bans and Injunction Applications

Both the parties agreed on the following legal test for granting a mandatory injunction, citing *RJR MacDonald Inc. v Canada (Attorney General)*, [\[1994\] 1 SCR 311 \(CanLII\)](#) and *Medical Laboratory Consultants Inc. v Calgary Health Region*, [2005 ABCA 97 \(CanLII\)](#) (at para 10):

- (a) Does the Crown have a strong *prima facie* case?
- (b) Will the Crown suffer irreparable harm if the injunction is not granted?
- (c) Will greater harm or inconvenience result if the application is not granted, than if it were?

In applying the test to the case at hand the Court decided as follows.

Does the Crown Have a Strong *Prima Facie* Case?

On this part of the test for granting mandatory injunctive relief the Court followed *Modry v Alberta Health Services*, [2015 ABCA 265 \(CanLII\)](#) that the applicant must “demonstrate a strong and clear *prima facie* case”, one “that will probably prevail at trial” or “is likely to succeed at trial” (at para 30). The Court decided that the AG had not demonstrated a strong *prima facie* case of criminal contempt of court that would likely succeed at trial.

The AG relied on criminal and civil analogies in the publication ban context. Using the example of defamatory libel, the AG mentioned [section 299](#) of the *Criminal Code*, which defines “publish” in this context to mean if one “(a) exhibits it in public; (b) causes it to be read or seen; or (c) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person” (at para 22). The AG also referred to civil defamation cases, which consider publication in the context of limitation periods (at para 24). Based on these criminal and civil analogies, the AG argued for a “broad interpretation” of the terms “publish” and “transmit” in the context of publication bans as well as in the criminal contempt context. The Court concluded that the AG’s analogies were not conclusive and a restrained approach should be followed as opposed to a “broad interpretation” of the terms “publish” and “transmit” in the publication ban or criminal contempt of court context (at paras 28 and 33).

The Court was not convinced that the AG would likely succeed in proving beyond a reasonable doubt that the CBC, by leaving the impugned articles on its website, had done anything that constituted a public act of defiance of the court order as per *UNA v Alberta (Attorney General)*, [\[1992\] 1 SCR 901 \(CanLII\)](#) (at para 12). The Court was persuaded that the CBC was not a party who “can predict in advance whether [its] conduct will constitute a crime”, nor did its “action (or inaction) constitutes a public act of defiance of the court in circumstances where it knew, intended or was reckless as to the fact that its act (or failure to act) would publicly bring the court into contempt.” (at para 34).

Will the Crown Suffer Irreparable Harm if The Injunction Is Not Granted?

RJR MacDonald defines “irreparable” as the nature of the harm suffered rather than its magnitude (at para 36). The offences specified in section 486.4 of the *Criminal Code* are offences of a sexual nature. Under this section the court has the authority to impose a publication ban on any information that could identify a victim under the age of 18 years. This protection given to young persons victimized or allegedly victimized by a sexual offence has since been extended to young persons victimized or allegedly victimized by any offence. This extended protection came into force as part of the *Victims Bill of Rights Act*, SC 2015, c 13. One of the main purposes of the Act is to adequately protect the privacy of young victims/alleged victims by making publication bans for victims under the age of 18 mandatory on application to the Court (at para 39).

The CBC argued that in this case there was no evidence of irreparable harm to the victim because he had unfortunately died tragically. The CBC also claimed that the definition of “victim” does not include a person other than one against whom an offence has been committed. Finally, it argued that there was no evidence of any other harm, irreparable or otherwise, that would result if the injunction was not granted (at para 44). On this basis, the CBC submitted that an interim injunction could not be granted without evidence of harm (at para 45).

The AG argued that there would be irreparable harm to the administration of justice if the injunction was not granted, although she did not deny the absence of ongoing harm to the

deceased young person or actual evidence of harm to any other. The AG emphasized the recognition by Parliament and the courts of the need to protect young persons affected by crime, and of the need to protect anonymity, even in the case of deceased young persons (at para 47). According to *AB (Litigation Guardian of) v Bragg Communications Inc.*, [2012 SCC 46 \(CanLII\)](#) this protection will ensure other young persons will not be deterred from “seeking therapeutic assistance and other remedies, including legal remedies where appropriate” (at para 47). Moreover, the Court has recognized in the context of sexual assaults that protecting a victim’s privacy encourages reporting: *Canadian Newspapers Co. v Canada (Attorney General)*, [1988 CanLII 52 \(SCC\)](#).

However, the Court agreed with the CBC that the policy objectives of encouraging young victims to come forward in cases of sexual offences were not present here. Without evidence, the Court did not accept that young victims of any offence would be deterred from coming forward if the identity of a young murder victim is not protected or that this would otherwise prevent some type of harm to the administration of justice (at para 54).

Will Greater Harm or Inconvenience Result if the Application is Not Granted, Than if it Were?

Several matters will be considered based on each individual case to weigh the “balance of inconvenience” for both the parties as per *RJR MacDonald*. The AG claimed broader impact and serious risk of prejudice to the administration of justice if the court did not grant an injunction. The AG did not raise any privacy interests of the deceased victim. The CBC raised freedom of expression and the public interest in having reasonable access to the CBC’s expression (at paras 58-59).

The Court recognized that *Charter* freedom of expression guarantees are potentially compromised by any publication ban. A publication ban of the earlier published articles against CBC undeniably would compromise the CBC’s freedom of expression and the public’s interest in that expression. The Court agreed that “compromise is an aspect of harm that must be balanced against the evidence of harm to the administration of justice if the injunction is not granted.” (at para 60) The Court concluded on the basis of evidence before it that the harm to the administration of justice was trivial in this case (at para 60).

Commentary

The Crown’s argument on analogous grounds for publication bans indicates gaps in the law in terms of policy, legislation, and case law for a deceased victim’s rights. The Crown argued for publication bans from the perspective of harm to the administration of justice rather than the victim’s privacy. The Court seemed reluctant to acknowledge the privacy interests of the deceased victim and his or her family as potential harm to the administration of justice. The balance between a victim’s privacy and freedom of expression requires compromises. This case shows that courts may be more likely to favour the interests of the media and freedom of expression. As a result it is possible that the willingness of future living victims coming forward may be curtailed for fear of media exposure.

Access to information on the web and freedom of expression are constantly creating new issues in law. The CBC argued that the publication ban was being sought after-the-fact and would be ineffective because of the reach of social media (at para 62). The law is lagging in terms of the reality of social media and the speed and spread of information. In this case, the CBC complied with the publication ban for any articles prepared and posted after the publication ban, and made sure that no links were available to take readers from any newer articles back in time to the older ones; however, the pre-publication ban articles remain searchable and linkable (at para 55). The courts could demonstrate a commitment to the privacy interests of victims and their families by ordering the media to remove all versions of the story from their websites, pre- and post-publication ban, with minimal effort on their part.

It would have been more rational for the Court to have found in favour of the interim injunction and ordered the pre-publication ban articles to be removed by the CBC. This rationale follows from the purpose of the original order for a mandatory ban under section 486.4(2.2) of the *Criminal Code* that “prohibits the publication, broadcast or transmission in any way of information that could identify the victim”. The victim in this case was a child. The offences specified in section 486.4 of the *Criminal Code* authorize the court to impose a publication ban on any information that could identify a victim under the age of 18 years. The *Victims Bill of Rights Act* also empowers the court to adequately protect the privacy of young victims/alleged victims by making publication bans for victims under the age of 18. Canada is also a co-sponsor of a resolution that led to the adoption in July 2005 of the *Guidelines on Justice for Child Victims and Witnesses of Crime* (UN Economic and Social Council (ECOSOC), UN Economic and Social Council 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, 22 July 2005, E/RES/2005/20). These guidelines call for the “best interests of the child” to be a primary consideration in the treatment of children involved in the criminal justice system. Ordering the CBC to remove the offending articles would prevent further victimization of this deceased child and his family.

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