

## Publication Bans and Interim Mandatory Injunctions in the Context of Freedom of Expression and the Privacy of Youthful Victims

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Case Commented On: *R v Canadian Broadcasting Corporation*, [2016 ABCA 326 \(CanLII\)](#)

The Court of Queen's Bench of Alberta in *R v Canadian Broadcasting Corporation*, [2016 ABQB 204 \(CanLII\)](#) (*CBC QB*) denied an interim mandatory injunction and allowed the Canadian Broadcasting Corporation (CBC) to retain past posts with identifying information of a youthful victim on the CBC website. The Crown appealed the denial of the interim mandatory injunction. The Majority at the Court of Appeal held that the Chambers Judge applied the wrong legal test, that the injunction is a civil matter attached to a criminal charge, and that the Chambers Judge had considered a number of irrelevant factors. Thus, the Court of Appeal overturned the prior decision and granted an interim mandatory injunction. In my previous [blog post](#), I criticized the Court of Queen's Bench decision because that decision gave priority to freedom of expression of the media over a young victim's privacy rights. 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. In *R v Canadian Broadcasting Corporation*, [2016 ABCA 326 \(CanLII\)](#) the Court granted the interim mandatory injunction and maintained the integrity of the administration of justice by protecting the identity of the youthful victim in public interest.

### Procedural History

The Crown requested a publication ban and the Chambers Judge ordered a mandatory ban under section [486.4\(2.2\)](#) of the *Criminal Code*, RSC 1985, c C-46 ("*Criminal Code*") respecting the identity of the youthful victim. However, prior to the non-publication order being made, the CBC had posted articles to its website disclosing the identity of the young victim. Though the CBC has agreed not to make any further postings they declined to remove the historical postings. The Crown brought an application for contempt and for removal of the historical postings, and then brought this application for an interim mandatory injunction requiring the immediate removal of the historical postings.

Both the parties accepted, and the Chambers Judge applied, the traditional three part test for an interim mandatory injunction: a) a strong *prima facie case*, b) irreparable harm, and c) an assessment of the balance of convenience (at para 3). He decided that the Crown did not have a strong *prima facie case*, no irreparable harm had been proven, and that the balance of convenience favoured the respondent. Thus, the Chambers Judge denied the Crown's application for an interim mandatory injunction to require the CBC to remove historical postings from its website. The Alberta Court of Appeal was asked to decide on the interim mandatory injunction application.

## The Judgment of the Majority

Mr. Justice Slatter and Mr. Justice McDonald reviewed the traditional three part test and held the following.

### *A Strong Prima Facie Case*

The Chambers Judge did not characterize the issue accurately as he proceeded on the assumption that the Crown had to demonstrate a “strong *prima facie* case . . . of criminal contempt of court” in order to obtain the interim injunction (at para 4). This case was started by originating notice, which asked for four kinds of relief:

1. That the CBC be cited in criminal contempt of court.
2. That the CBC be directed to remove any information from their website that could identify the complainant . . .
3. That an appropriate sentence be imposed against the CBC and
4. Any such further order that this Honourable Court deems appropriate.  
(at para 5)

The originating notice has a “hybrid” aspect. The application for a permanent injunction and order to remove the information from the website only needed proof on the civil standard. However, the contempt portion required a different standard of proof (i.e., beyond a reasonable doubt) and had different requirements (i.e., to prove *mens rea*). The different aspects only partially overlapped, as the CBC might have been found not to be in contempt of court, but might still have been required to remove the historical objectionable postings (at para 5). As noted by the Court of Appeal:

The Originating Notice included in its preamble a statement that:

AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that the Respondent remove any information from their website that could identify the complainant in the [subject] case (at para 6).

The originating notice did not directly relate the request for an interim injunction to the contempt application. The request for an interim injunction is tied back to the second type of relief requested (i.e., the removal of the past postings with identifying information of a youthful victim). Thus, the correct issue is whether the Crown has demonstrated a strong *prima facie* case that it is entitled to a mandatory order directing removal of the identifying material from the website. Interim relief is available in rare circumstances. In a penal case like a contempt application, interim relief is not an option while the contempt application is pending at trial. The Crown is seeking an interim injunction requiring removal of the postings from the website in anticipation of it receiving the second type of relief requested in the originating notice (at para 7).

The main issue before the court is the interpretation of the phrase: “published in any document or broadcast or transmitted in any way” under section 486.4 of the *Criminal Code*. The focus has been on the scope of the term “publish”, in light of the companion word “transmitted”. The CBC argued that things that happened prior to the non-publication order are not caught by that order, because they were not “published” after the order was granted. The Crown would not be entitled to an order requiring removal of the postings, if the CBC is correct in maintaining its historic

postings do not amount to a “publishing” or “transmission”. (at para 8) The Crown argued that “publishing” is a continuous state of affairs and it is also arguable that the CBC is wilfully disobeying the court order. While the majority found either position arguable, they determined that “it cannot be said that the Crown does not have a strong *prima facie* case” (at para 10).

### ***Irreparable Harm***

The CBC argued that a non-publication order is mandatory under the *Criminal Code* without proof of harm, but a mandatory injunction enforcing that order requires proof of harm. Parliament has declared that the identity of youthful victims should be protected in the public interest, and it cannot be argued that ignoring those provisions is not harmful. The CBC, by allowing an ongoing breach of a non-publication order, is harming the integrity of the administration of justice. The Chambers Judge made an error of law and contradicting Parliament’s direction by concluding at that “the policy objectives of encouraging young victims to come forward . . . are largely not present here” (at para 11, citing *CBC QB* at para 54). This kind of analysis conflicts with the mandatory nature of non-publication orders.

### ***Balance of Convenience***

The Chambers Judge decided that the balance of convenience favoured the CBC because the non-publication order limits the CBC’s freedom of expression. The CBC has not yet issued a constitutional challenge (despite a “declared intention” to do so (at para 12)), and therefore relevant provisions of the *Criminal Code* must be assumed at this stage to be constitutional. “To the extent that they limit freedom of expression, it must be presumed (at this stage of the litigation) that those provisions are justified in a free and democratic society” (at para 12). The CBC “cannot argue that it is ‘inconvenient’ for it to obey the law”. Further, the Chambers Judge recognized at para. 66 that the CBC “would be little inconvenienced if ordered to comply with the publication ban . . .” (at para 12).

Although granting or denying a mandatory interim injunction is a discretionary matter, which is entitled to deference on appeal, the Majority found that the Chamber Judge made palpable and overriding errors and the Crown had met the three-part test. Thus, the Court allowed the appeal and granted an interim injunction (at para 13).

### **The Dissenting Judgment**

The Dissenting Judge (Ms. Justice Greckol) disagreed with the Majority about the characterization of the nature of the application before the Chambers Judge. Ms. Justice Greckol stated that “there is no such “hybrid” application or application for a civil interim injunction in anticipation of a permanent injunction at trial” (at para 23). She also stated that the Chambers Judge applied the correct tri-partite test based on the facts (at para 62). She noted that “granting a mandatory interim injunction is a discretionary matter and is entitled to deference on appeal” (at para 62). Ms. Justice Greckol decided that the Chambers Judge applied correct legal principles based on the facts and evidence, and upheld the decision of the Chambers Judge.

## Commentary

Access to information on the web and freedom of expression are constantly creating new issues in law. To balance a victim's privacy with freedom of expression is challenging with web-based information. The purpose of ordering a mandatory ban under section 486.4(2.2) of the *Criminal Code* is to "prohibit[s] the publication, broadcast or transmission in any way of information that could identify the victim". 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. Therefore, the purpose 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. The victim in this case was a child. To maintain the integrity of the administration of justice, Parliament declared that the identity of youthful victims should be protected in the public interest. The Court of Appeal granted an interim mandatory injunction which would have required the CBC to remove from its website some historical postings that disclose the identity of a youthful victim of a crime. Thus, this decision upheld the integrity of the administration of justice by protecting the identity of a youthful victim.

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