

Freedom of Expression Versus Privacy Rights: Stay of Enforcement of an Interim Mandatory Injunction in the Context of Publication Bans

By: Hasna Shireen

Case Commented On: *R v Canadian Broadcasting Corporation*, [2016 ABCA 372 \(CanLII\)](#)

In two previous ABlawg posts (see [here](#) and [here](#)), I commented on the decisions in *R v Canadian Broadcasting Corporation*, [2016 ABQB 204](#), overturned [2016 ABCA 326 \(CanLII\)](#), in which Alberta courts dealt with the issue of whether the Canadian Broadcasting Corporation (CBC) should be able to retain identifying information about a youthful homicide victim on its website. A majority of the Court of Appeal granted the Crown's application for a mandatory injunction banning the continued publication of this material. In a follow-up decision, Mr. Justice Berger granted a Stay of Enforcement of the majority judgment pending an application for leave to appeal to the Supreme Court of Canada (see *R v Canadian Broadcasting Corporation*, [2016 ABCA 372 \(CanLII\)](#) at para 14).

Procedural History

The Crown requested a publication ban and the Chambers Judge ordered a mandatory ban under s 486.4(2.2) of the *Criminal Code*, RSC 1985, c C-46 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. The CBC declined to remove the historical postings though they agreed not to make any further postings. The Crown brought an application for contempt and for removal of the historical postings, and then brought an application for an interim mandatory injunction requiring the immediate removal of the historical postings.

The Court of Queen's Bench of Alberta in *R v Canadian Broadcasting Corporation*, [2016 ABQB 204 \(CanLII\)](#) (CBC QB) denied the interim mandatory injunction and allowed CBC to retain past posts with identifying information of the youthful victim on its website. The Crown appealed the denial of the interim mandatory injunction, which was granted by a majority of the Court of Appeal ([2016 ABCA 326 \(CanLII\)](#), (CBC CA).

CBC then made an application for a stay of execution of the interim mandatory injunction. CBC relied on the test under s 65.1(2) of the *Supreme Court Act*, RSC 1985, c S-26, which authorises the Court appealed from to order a stay of execution before the filing and service of an application for leave to appeal to the Supreme Court. The appellate Court may exercise this power if it is satisfied that the applicant intends to apply for leave to appeal, and delay would result in a miscarriage of justice (at para 4).

CBC advised the Court that it intended to file the leave application and had instructed its legal counsel and notified the Crown of this intent. The CBC argued that without the benefit of the stay, it was required to comply with the Court of Appeal judgment and, if ultimately successful

on appeal to the Supreme Court of Canada, reposting the information would expose it to criminal liability in light of the publication ban (at para 5).

The test for a stay of a non-money judgment in an application for injunctive relief is:

- a) an arguable appeal;
- b) irreparable harm is likely if the stay is refused; and
- c) the balance of convenience favours granting the stay (at para 6).

Mr. Justice Berger was swayed by the consideration that irreparable harm was established if the threshold of an arguable appeal was met. He stated that if the CBC's appeal is successful, that would amount to an arguable denial of its freedom of expression (at para 7). He also assessed the balance of convenience threshold and decided that he favoured granting the stay if irreparable harm was established (at para 8).

The Crown argued that the integrity of the administration of justice is harmed when a mandatory non-publication order is violated (at para 10, citing CBC CA at para 50). The Crown emphasized the mandatory nature of a non-publication order and focused on the majority's conclusion that interim measures to enforce such an order can be taken without proof of harm.

Justice Berger considered the dissenting judge's opinion at the Court of Appeal, that when the youthful victim passed away, the non-publication order was rendered trivial and the postings caused no harm. On the other hand, the Crown relied on the majority's declaration that the Chambers Judge erred in stating 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).

Justice Berger noted that the arguability of the appeal was dependent on the interpretation of the phrase "published in any document or broadcast or transmitted in any way" found in s 486.4 of the *Criminal Code*. He also considered the majority opinion that "while either position is arguable, it cannot be said that the Crown does not have a strong prima facie case" (at para 13, citing CBC CA at para 10). However, referring to CBC QB at para 49, he also stated that whether an appeal is arguable is a low threshold, and the CBC had raised a serious question, which on its merits was neither frivolous nor vexatious (at para 13). Based on these considerations, Justice Berger decided to grant a Stay of Enforcement.

Commentary

In my [blog post](#) on the Court of Appeal judgment in this case, I criticized the Court of Queen's Bench decision because it gave priority to freedom of expression of the media over a deceased 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. The Court of Appeal majority decided that the Chambers Judge erred in stating that "the policy objectives of encouraging young victims to come forward are largely not present here" as the young victim had died (CBC CA at para 11). The Chambers Judge seemed reluctant to acknowledge the privacy interests of the deceased victim and her family as a potential harm to the administration of justice. Ordering the CBC to remove the offending articles would prevent further victimization of this deceased child and her family. However, the recent Stay of Enforcement order by Justice Berger again favoured freedom of expression over the privacy interests of the deceased child's family, and may discourage future victims from coming forward.

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