March 7, 2018

SCC Overturns ABCA Ruling on Mandatory Interlocutory Injunction re: Information on Media Outlet's Website

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Case Commented On: *R v Canadian Broadcasting Corp.*, 2018 SCC 5 (CanLII) ("*CBC* SCC")

The Supreme Court of Canada (SCC) recently overturned the Alberta Court of Appeal's ruling on this case and reinstated the Alberta Court of Queen's Bench decision. This case has been the subject of previous blog postings by my colleague, Hasna Shireen; see here, here and here.

On March 5, 2016, the accused was charged with the first-degree murder of a person under the age of 18 ("the victim"). On March 15, 2016, the Crown requested and the judge ordered a mandatory ban under s 486.4(2.2) of the *Criminal Code*, RSC 1985, c C-46. The ban prohibited the publication, broadcast or transmission of any information that could identify the victim ("publication ban"). There were two articles on the CBC Edmonton website that pre-existed the publication ban, and that identified the victim by name and photograph. The pre-publication ban articles remained on the website after March 15, 2016. CBC had refused to remove identifying information about the victim that pre-existed the publication ban. The Crown filed an Originating Notice seeking an order citing CBC in criminal contempt of the publication ban, and seeking an interlocutory injunction, directing the removal of the identifying information from the website. On January 26, 2017, Justice TD Clackson conducted a trial on the application to consider whether the CBC was in criminal contempt, and Justice Clackson acquitted the CBC on May 26, 2017: see *R v The Canadian Broadcasting Corporation*, 2017 ABQB 329 (CanLII). This case is being appealed, and the CBC reports that the matter will be heard later in 2018.

The issues surrounding the granting of the mandatory interlocutory injunction were dealt with in a separate series of cases. In *R v Canadian Broadcasting Corporation*, 2016 ABQB 204 (CanLII) (*CBC* QB), Justice Peter Michalyshyn held that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed the Crown's application. On appeal to the ABCA, a majority of the Court of Appeal (Justice Frans Slatter and Justice JD Bruce McDonald) allowed the appeal and granted the injunction (see: *R v Canadian Broadcasting Corporation*, 2016 ABCA 326 (CanLII) (*CBC* CA)). In dissent, Justice Sheila Greckol would have dismissed the appeal, finding that the majority applied incorrect legal principles to the Crown's application. In a follow-up decision, Justice Ronald 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). The application for leave to appeal from the *CBC* CA judgment was granted. This post concerns the SCC decision allowing the appeal from the ABCA's decision, and holding that the Alberta Court of Queen's Bench (ABQB) had applied the correct legal test in the *CBC* QB

decision deciding the Crown's application for a mandatory interlocutory injunction, and in deciding the Crown had failed to satisfy the test.

At the SCC, the CBC was supported by several media outlets and the Canadian Media Lawyers Association, who intervened. The SCC's unanimous judgment was delivered by Justice Russell Brown. The ABQB relied on a "modified version" of the tripartite test for an interlocutory injunction as stated in *RJR-MacDonald Inc. v Canada (Attorney General),* [1994] 1 SCR 311, 1994 CanLII 117 (SCC). This required the Crown to prove (*CBC* SCC, para 6):

(1) A strong *prima facie* case for finding CBC in criminal contempt;
(2) That the Crown would suffer irreparable harm were the injunction refused; and
(3) That the balance of convenience favoured granting the injunction.

As for the first branch (a strong *prima facie* case), the Crown had argued that the terms "publish[ed]" and "transmit[ted]" in *Criminal Code* s 486.4(2.1) should be given a broad interpretation that would include web articles published prior to the publication ban. The ABQB had held that the case law did not support the Crown's interpretation. Thus, the Crown would not likely succeed in proving beyond a reasonable doubt that the CBC was in "open and public defiance" of the order by leaving the victim's identifying information on the website after the publication ban was in place (*CBC* SCC, para 7).

The second requirement of irreparable harm was not met either because the ABQB held that the underlying policy objective of protecting a victim's anonymity loses significance when the victim is deceased (*CBC* SCC, para 8).

Finally, in assessing the third requirement that the balance of convenience favoured the granting of an injunction, the ABQB held that the compromising of the CBC's freedom of expression, and of the public's interest in that expression, outweighed any harm that would result from leaving the two previous articles on the CBC's website (*CBC* SCC, para 8).

The majority of the Alberta Court of Appeal held that the ABQB had erred in characterizing the matter as requiring the Crown to demonstrate a strong *prima facie* case of criminal contempt. The Originating Notice sought both a citation for criminal contempt AND the removal of the victim's identifying information from the CBC's website. The request for the interlocutory injunction was tied to the latter request for an order removing the articles from the website and not to the request for a criminal contempt order. Thus, the issue should have been characterized as "whether the Crown has demonstrated a strong *prima facie* case entitling it to a mandatory order directing removal of the identifying material from the website" (*CBC* SCC, para 9, citing *CBC* QB, para 7).

Further, the majority at the Court of Appeal viewed the Crown as having a strong *prima facie* case for a mandatory injunction, since, if "publish[ed]" is viewed as a continuous activity, the CBC was arguably willfully disobeying the publication ban. Such disobedience was considered to be harmful to the integrity of the administration of justice and contrary to Parliament's direction that the orders should be mandatory (*CBC* SCC, para 10, citing *CBC* CA, para 11). Finally, the majority held that the balance of convenience did not favour the CBC, because the

publication ban must be presumed to be constitutional at this stage of the proceedings, and freedom of expression would not be a defence against the contempt charge (*CBC* SCC, para 10).

Justice Greckol in dissent at the Court of Appeal held that the majority's characterization of the relief sought in the Originating Notice as being "hybrid" was misplaced, since the Crown had applied for an interlocutory injunction in respect of the application for a citation for criminal contempt. She held that the ABQB had correctly asked whether the Crown could show a strong *prima facie* case of criminal contempt, and the ABQB's exercise of discretion to refuse an injunction was entitled to deference. Thus, no strong *prima facie* case of criminal contempt could be shown. Further, the ambit of s 486.4 is unsettled (so it was not necessarily clear that there was open defiance of a facially valid court order that would amount to irreparable harm). Also, the victim in this case was deceased, so not vulnerable to harm to his/her privacy. Finally, even if the provisions of the *Criminal Code* are presumed constitutional, the ABQB was allowed to consider freedom of expression in assessing the balance of convenience (*CBC* SCC, para 11).

At the SCC, Justice Brown first analyzed the correct criteria for the granting of a mandatory interlocutory injunction, noting that the lower courts had been divided on the criteria. He held that the appropriate criterion for the first stage of the test is *not* whether there is a serious issue to be tried but rather whether the applicant has shown a strong *prima facie* case. Because a mandatory injunction directs the defendant to undertake a positive course of action, which can be costly or burdensome, equity has been reluctant to compel this at an interlocutory stage. It is thus better to stay the matter until a trial is held. This, therefore, requires an extensive review of the merits at the interlocutory stage (*CBC* SCC, para 15).

The SCC noted, however, that in some cases prohibitive injunctions can also impose costs that are just as burdensome as mandatory injunctions, and it can be difficult to distinguish between them based on how they are described. Thus, the application judge will have to identify the substance of what is being sought and assess the practical consequences of the injunction in light of the particular circumstances of the case (*CBC* SCC, para 16).

Finally, after analyzing the case law, the SCC set out a modified test for a mandatory interlocutory injunction as follows (*CBC* SCC, para 18):

(1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
(2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
(3) The applicant must show that the balance of convenience favours granting the injunction.

The SCC agreed with Justice Greckol that the majority of the ABCA had mischaracterized the nature of the application, and the Crown was therefore required to show a strong *prima facie* case of criminal contempt of court (*CBC* SCC, para 25).

Further, the decision to grant or refuse an interlocutory injunction is a discretionary exercise, and the appellate court must not interfere with this solely because it would have exercised the discretion differently. There are only limited circumstances where the exercise of discretion may be set aside, such as the chambers judge having proceeded on a misunderstanding of the law or the evidence before him or her (*CBC* SCC, para 27).

The SCC held that the Crown had failed to meet the burden of satisfying the court that there was a strong likelihood on the law and the evidence presented that it would be successful in proving the CBC's guilt of criminal contempt (*CBC* SCC, para 28). The majority of the ABCA had conceded that s 486.4(2.1) could be interpreted as prohibiting only publication that occurred for the first time *after* a publication ban, as the meaning of "publish" and "transmit" were not so obvious that the Crown would likely succeed at trial by showing s 486.4(2.1) would capture the impugned articles on the CBC website, which were published *before* the publication ban (*CBC* SCC, para 30). The SCC held that the ABCA's concession that "either position is arguable" acknowledges that the Crown had not shown a strong *prima facie* case of criminal contempt (*CBC* SCC, para 31).

Finally, the SCC held that the Crown had not shown that there had been a *strong likelihood* of success at trial, and thus failed to satisfy its burden that it would likely be successful in proving the CBC's guilt of criminal contempt at trial. The ABQB's decision did not warrant appellate intervention in this case.

While this case may be seen as a triumph for freedom of expression and freedom of the press over privacy (of victims), it actually demonstrates the challenges posed by new technology. In days gone by, if a victim's identity were published in a newspaper report *before* a publication ban, the report would have been kept in libraries or other records, even if that victim was a child. The publication ban would apply prospectively only. It is true that before the era of new technology, information was not as widely or readily available as it is now. Yet, new technology potentially permits the removal of identifying information that was legally published. At the same time, it seems that once information is available in cyberspace, it may be practically impossible to be certain it is permanently and completely removed.

This post may be cited as: Linda McKay-Panos "SCC Overturns ABCA Ruling on Mandatory Interlocutory Injunction re: Information on Media Outlet's Website" (7 March, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/03/Blog_LMP_CBC.pdf