

Civil Litigation

SCC clarifies test for mandatory interlocutory injunctions

By **Cristin Schmitz**

(February 9, 2018, 4:13 PM EST) -- The Supreme Court has clarified the test for mandatory interlocutory injunctions in a judgment which holds that CBC need not remove website content that identified a young murder victim before a publication ban shielded her identity.



Justice Russell Brown

Justice Russell Brown's Feb. 9 judgment restores the 2016 decision of an Alberta Queen's Bench chambers judge that the Alberta Crown failed to meet the requirements for a mandatory interlocutory injunction to compel CBC to remove two stories featuring the name and photo of a 14-year-old girl who was found dead in an Edson, Alta., apartment building on March 4, 2016: *R. v. Canadian Broadcasting Corp.* 2018 SCC 5.

Justice Brown held that the Crown failed to show that there was a strong likelihood on the law and evidence presented on the injunction application that the Crown would be successful in proving CBC's guilt of criminal contempt of court.

"This is not an easy burden to discharge and ... the Crown has failed to do so here," Justice Brown concluded.

Justice Brown's ruling marks the first time the Supreme Court of Canada has defined what threshold applies for the first stage of the three-pronged *RJR-MacDonald* test an applicant must meet when seeking a mandatory interlocutory injunction.

("Mandatory" injunctions compel a defendant to do something as contrasted with "prohibitive" injunctions which compel a defendant to refrain from doing something.)

While courts in Canada have disagreed over the first-stage threshold, "in my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR-MacDonald* test is *not* whether there is a serious issue to be tried" — which is a "less searching" threshold, Justice Brown remarked.

Rather, he ruled that the threshold is "whether the applicant has shown a strong *prima facie* case."

The former Alberta law professor went on to explain that a strong *prima facie* case requires an applicant to show "a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is 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 (emphasis in the original)."



Iain MacKinnon, Linden and Associates

The high threshold the Supreme Court adopted for mandatory interlocutory injunctions is appropriate, said Iain MacKinnon of Toronto's Linden and Associates, counsel for the interveners CTV, Global, the *Globe and Mail*, Postmedia, Vice, APTN and AD IDEM/Canadian Media Lawyers Association.

"What [the court] confirmed is existing law in some provinces ... and the upshot is it's going to be, as it should be, very difficult for anybody to restrict freedom of expression, and particularly order the removal of an online publication when there is ambiguity as to whether that expression or publication is a violation of any law," MacKinnon said.

The CBC published its stories March 5, 2016, and March 8, 2016 — i.e. before the compulsory publication ban for victims under age 18 was obtained by the Crown under s. 486.4(2.1 and 2.2) of the *Criminal Code* at the March 15 first court appearance of the person charged with first degree murder in the teenager's death.

After CBC declined to remove the earlier-posted identifying information from its website, the Crown asked the Court of Queen's Bench to cite CBC in criminal contempt of court.

The Crown also asked the court to grant, in the meantime, an "interim" injunction directing CBC to remove any website information that could identify the victim. (CBC was eventually acquitted last year of criminal contempt but a Crown appeal is pending.)

The hotly contested question of whether a "mandatory interlocutory injunction" could be justified in the case wound up at the Supreme Court of Canada, after the Alberta Court of Appeal split 2-1 in 2016 to grant the mandatory interlocutory injunction (however the stories have remained on the website pending the outcome of the Supreme Court's decision).

The Supreme Court held that there was no basis for the Appeal Court's majority to interfere — the majority should not have overturned the chambers judge's refusal to grant the mandatory interlocutory injunction.

The CBC maintained the stories it published prior to the ban do not fall within the Code's s. 486.4's proscriptions against "publishing" and "transmitting" — while the Crown contended for a broader interpretation of those terms.

The chambers judge applied a modified version of the tripartite test for an interlocutory injunction that was stated in *RJR-MacDonald Inc. v. Canada (A.G.)*[1994] 1 S.C.R. 311.

The modified test required the Crown to prove: (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.

The chambers judge found that the Crown was already skewered by the first prong of the test: the case authorities did not support the Crown's broad interpretation of the terms publishing and transmitting. He went on to find that the Crown could not likely succeed in proving beyond a reasonable doubt that CBC, by leaving the victim's identifying information on its website after the publication ban, was in "open and public defiance" of that order, i.e. was in criminal contempt.

Photo of Justice Russell Brown by Andrew Balfour Photography