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Removing Offending Content from the Internet Just Became Harder

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In a fairly short, but fascinating and important 9-0 decision in *R v Canadian Broadcasting Corporation*, 2018 SCC 5 released on February 9, 2018, the Supreme Court of Canada clearly came down on the side of favouring freedom of the press and expression over the importance of protecting the privacy rights of victims of crime. In the process, the Court raised the bar for litigants seeking interim injunctions requiring the removal of offending content from the internet pending the ultimate trial of the issues. The bar is now so high that very few cases will ever reach it in the future. This is welcome news for media outlets and internet service providers, but is a blow to the ability of our courts to grant interim remedies to enforce our defamation and intellectual property laws against those who engage in online defamation or piracy.

The *CBC* decision arose in the criminal law context. The underlying case involved a first degree murder charge in Alberta in relation to a victim who was under 18 years of age. Under the *Criminal Code*, the court was required to issue a mandatory publication ban to protect the identity of the minor victim, which it did. However, a few days before the publication ban was ordered by the court, the CBC had already posted the victim's identity and photograph on its website. The story was widely circulated through social media.

Following the publication ban, the CBC indicated that it would honour the court's order and not publish any further stories identifying the victim. However, it refused to remove from its website the stories that had been posted before the publication ban had come into effect. The Crown brought an application to the court asking that the CBC be found in contempt of court for ignoring the publication ban. It also sought an interim order that, pending the contempt hearing, the CBC be required to remove the pre-existing articles from its website in order to come into compliance with the publication ban.

The court at first instance dismissed the motion for the injunction. The presiding judge concluded 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 had been issued, was in 'open and public defiance' of that order." This rested on the interpretation of the *Criminal Code* provisions that mandated the publication ban. Those provisions prohibit the "public[cation]" and "transmi[ssion]" of information in contravention of the publication ban. It was not clear to the court that the meaning of the words to "publish" and "transmit" could be extended to the passive non-action of simply leaving the articles on the website.

In a 2-1 split decision, the Alberta Court of Appeal reversed the lower court and granted the injunction ordering the CBC to remove the articles from its website. It reasoned that the lower court should not have only considered the likelihood of convicting the CBC of criminal contempt, but also whether the Crown was entitled to enforce the publication ban on a go-forward basis. The appellate court reasoned that if it was ultimately determined that the act of "publishing" was found to be a continuous act, then by leaving the articles on its website, the CBC would be found to have been in wilful disobedience of the order and in contempt of court. The Alberta Court of Appeal felt that the administration of justice would be harmed if the possible ongoing and open disobedience of a court order was permitted to continue. The risk of harm to the administration of justice was found to be a reason to grant the injunction. The CBC appealed to the Supreme Court of Canada.

The Supreme Court sided with the lower court and reversed the Alberta Court of Appeal's decision. In doing so, the SCC confirmed that requiring a party to remove content from the internet constitutes a "mandatory injunction", not a prohibitory one. The difference is critical, because the Court also confirmed that the test to obtain a mandatory injunction is more difficult to meet than the test to obtain a prohibitory injunction. As discussed below, this determination will have implications that go well beyond the criminal law context.

A prohibitory injunction is an order requiring someone to refrain from doing something in breach of another's rights. Examples are orders prohibiting a party from trespassing on the property of another or prohibiting a party from contacting another's customers. For prohibitory injunctions, the well-known test laid out in the seminal 1994 decision of the Supreme Court in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 applies. Under that test, a plaintiff is required to prove that:

i. there is a serious question to be tried;

ii. the plaintiff will suffer irreparable harm; and

iii. the balance of convenience favours the plaintiff.

The first element of the test, "serious issue to be tried", is not a high threshold, and merely requires a plaintiff to show that they have an arguable case. For that reason, motions for prohibitory injunctions are usually won or lost on the second and third elements of the test.

A mandatory injunction is one that requires a party to take some positive action. As the SCC put it in *CBC*, "a mandatory injunction directs the defendant to undertake a positive course of action,

such as taking steps to restore the *status quo*, or to otherwise 'put the situation back to what it should be', which is often costly or burdensome for the defendant and which equity has long been reluctant to compel". Examples of mandatory orders are an order requiring a party to continue to supply another with product under a contract, to require the delivery of property to another, or to take down a fence.

For mandatory injunctions, the first element of the test is more stringent. The plaintiff must do more than show that it has an arguable case. The plaintiff must show that he or she has a "strong *prima facie* case". In *CBC*, the SCC described the meaning of "strong *prima facie* case" as, among other things, a case with a "strong and clear chance of success" or a case where a plaintiff is "almost certain" of success. The SCC concluded that a plaintiff has a burden "to show a case of such merit that it is very likely to succeed at trial", and that, before granting a mandatory injunction, "a 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" being made. In short, therefore, before a plaintiff can obtain an interim mandatory injunction, it must show that it is almost assured of victory at trial. This is a high burden.

One of the difficulties with the SCC's decision in *CBC* is the basis for the Court's determination that what was being sought by the Crown in that case was a mandatory injunction rather than a prohibitory one. After all, one could characterize the order to take down the articles from the website as simply an order prohibiting the CBC from ongoing, continuous publication of the articles. The Supreme Court acknowledged that "distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may 'have the effect of forcing the enjoined party to take positive actions'". The SCC advised lower courts to "look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought". A court is to look at the practical consequences of an order and if, in "substance, the overall effect of the injunction would be to require the defendant to do something", as opposed to "refrain from doing something", then it is a mandatory injunction involving the higher threshold test.

However, in this case, the only basis upon which the SCC concluded that that what was being sought against the CBC was a mandatory injunction was the fact that if the injunction were granted, an employee of the CBC would have to remove the articles from its website. Presumably, that could be done with a few keystrokes and mouse-clicks. There was no discussion about whether requiring the CBC to take such action would be "costly" or "burdensome". The implication of this decision appears to be that even the smallest effort on the part of the defendant to comply with the injunction will result in the order being classified as mandatory rather than prohibitive.

The difficulty with the SCC's determination in *CBC* that the removal of content from the internet constitutes a mandatory injunction comes clearly into focus when one considers the same court's decision in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, released less than nine months ago. In that case, the SCC upheld an injunction requiring Google, a non-party to a commercial dispute, to de-list an entire website, effectively removing it from the internet. The

underlying dispute arose between a manufacturer and one of its distributors. The manufacturer learned that the distributor was selling the manufacturer's products through the distributor's website under its own brand rather than the manufacturer's brand. These sales by the distributor were unauthorized and in competition with the manufacturer. The manufacturer alleged breach of contract, breach of confidence and infringement of its trade secrets, and obtained orders prohibiting the distributor from continuing to sell the offending products online pending trial. The distributor ignored the orders and continued to sell online from an undisclosed location. The manufacturer then asked Google to de-list the distributor's website so that searches on Google's search engine would not lead to the distributor's website. Google agreed to de-list pages of the website, but not the entire website. The manufacturer accepted this compromise. However, every time a webpage was de-listed, the distributor would alter its website and sell through another webpage. Because Google refused to de-list the entire website, the manufacturer sought an injunction against it to require it to do so, not just in Canada, but on a worldwide basis.

The Supreme Court upheld the injunction against Google granted by the lower court. In doing so, the SCC applied the less stringent test for a prohibitory injunction, rather than the more stringent test for a mandatory injunction. It did so even though the act of de-listing a website on a worldwide basis is undoubtedly at least as intrusive, costly or burdensome as the removal of articles from a website. The SCC recognized the inconsistency between its decision in *CBC* and in *Google*. However, it did not explicitly overrule *Google* or even explicitly question its reasoning in *Google*. Rather, it distinguished the *Google* decision on the basis that the parties in that case had not argued that the more stringent "strong *prima facie* case" test should apply. The implication, however, is that *Google* may have been decided differently had the parties in that case argued that a mandatory injunction was being sought and therefore the more stringent test ought to have applied.

We are now left with inconsistency, uncertainty and possibly undesirable consequences moving forward. *Google* has been implicitly overruled by *CBC*, meaning that in all future cases, a party seeking an order requiring the removal of content from the internet will have to meet the higher threshold test for obtaining a mandatory injunction. A manufacturer in a similar position to the one in *Google* may no longer be able to obtain the same remedy for similar wrongs.

The result of *CBC* may be that any order that requires even the slightest action, no matter how easy or insignificant, may be characterized as a mandatory injunction requiring a plaintiff to meet the more stringent test. This may turn orders once thought as prohibitory into mandatory ones. For example, if an order prohibiting a party from contacting the plaintiff's customers is also coupled with an order requiring the defendant to delete the customer list in their possession (it is common to seek both forms of relief), does that now become a mandatory order requiring the higher threshold test to be met?

The ultimate effect of *CBC* will likely largely be felt outside the criminal law context. Moving forward, parties who have a good arguable case, but not necessarily an overwhelming one, will have a much harder time trying to stop online conduct that infringes on their rights before they

get to trial. If leaving content on a website does not constitute ongoing “publishing”, can a plaintiff complain about ongoing defamation or breaches of its copyright? The next manufacturer whose product is being pirated by their distributor; the next author whose work has been copied and posted online; or the next person who is being victimized by online defamation or harassment, may have to wait for years for a remedy while their case winds through the court system to trial.

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