



SUPREME COURT OF CANADA

CITATION: A.B. v. Bragg Communications Inc., 2012 SCC 46

DATE: 20120927

DOCKET: 34240

BETWEEN:

A.B. by her Litigation Guardian, C.D.

Appellant

and

Bragg Communications Incorporated, a body corporate, and Halifax Herald Limited, a body corporate

Respondents

- and -

BullyingCanada Inc., British Columbia Civil Liberties Association, Kids Help Phone, Canadian Civil Liberties Association, Privacy Commissioner of Canada, Newspapers Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists,, Professional Writers Association of Canada, Book and Periodical Council, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Unicef Committee, Information and Privacy Commissioner of Ontario and Beyond Borders

Intervenors

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Karakatsanis JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 31)

Abella J. (McLachlin C.J. and LeBel, Deschamps, Fish, Rothstein and Karakatsanis JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

A.B. v. BRAGG COMMUNICATIONS INC.

A.B. by her Litigation Guardian, C.D.

Appellant

v.

**Bragg Communications Incorporated, a body corporate,
and Halifax Herald Limited, a body corporate**

Respondents

and

**BullyingCanada Inc., British Columbia Civil Liberties
Association, Kids Help Phone, Canadian Civil Liberties
Association, Privacy Commissioner of Canada, Newspapers
Canada, Ad IDEM/Canadian Media Lawyers Association,
Canadian Association of Journalists, Professional Writers
Association of Canada, Book and Periodical Council,
Samuelson-Glushko Canadian Internet Policy and Public
Interest Clinic, Canadian Unicef Committee, Information
and Privacy Commissioner of Ontario and Beyond Borders**

Intervenors

Indexed as: A.B. v. Bragg Communications Inc.

2012 SCC 46

File No.: 34240.

2012: May 10; 2012: September 27.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Rothstein and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Courts — Open court principle — Publication bans — Children — 15-year old victim of sexualized cyberbullying applying for order requiring Internet provider to disclose identity of person(s) using IP address to publish fake and allegedly defamatory Facebook profile — Victim requesting to proceed anonymously in application and seeking publication ban on contents of fake profile — Whether victim required to demonstrate specific harm or whether court may find objectively discernable harm.

A 15-year old girl found out that someone had posted a fake Facebook profile using her picture, a slightly modified version of her name, and other particulars identifying her. The picture was accompanied by unflattering commentary about the girl's appearance along with sexually explicit references. Through her father as guardian, the girl brought an application for an order requiring the Internet provider to disclose the identity of the person(s) who used the IP address to publish the profile so that she could identify potential defendants for an action in defamation. As part of her application, she asked for permission to anonymously seek the identity of the creator of the profile and for a publication ban on the content of the profile. Two media groups opposed the request for anonymity and the ban. The Supreme Court of Nova Scotia granted the request that the Internet provider disclose the

information about the publisher of the profile, but denied the request for anonymity and the publication ban because there was insufficient evidence of specific harm to the girl. The judge stayed that part of his order requiring the Internet provider to disclose the publisher's identity until either a successful appeal allowed the girl to proceed anonymously or until she filed a draft order which used her own and her father's real names. The Court of Appeal upheld the decision primarily on the ground that the girl had not discharged the onus of showing that there was evidence of harm to her which justified restricting access to the media.

Held: The appeal should be allowed in part.

The critical importance of the open court principle and a free press has been tenaciously embedded in the jurisprudence. In this case, however, there are interests that are sufficiently compelling to justify restricting such access: privacy and the protection of children from cyberbullying.

Recognition of the inherent vulnerability of children has consistent and deep roots in Canadian law and results in the protection of young people's privacy rights based on age, not the sensitivity of the particular child. In an application involving cyberbullying, there is no need for a child to demonstrate that he or she personally conforms to this legal paradigm. The law attributes the heightened vulnerability based on chronology, not temperament.

While evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm. It is logical to infer that children can suffer harm through cyberbullying, given the psychological toxicity of the phenomenon. Since children are entitled to protect themselves from bullying, cyber or otherwise, there is inevitable harm to them — and to the administration of justice — if they decline to take steps to protect themselves because of the risk of further harm from public disclosure. Since common sense and the evidence show that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication, and since the right to protection will disappear for most children without the further protection of anonymity, the girl's anonymous legal pursuit of the identity of her cyberbully should be allowed.

In *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122, prohibiting identity disclosure was found to represent only minimal harm to press freedom. The serious harm in failing to protect young victims of bullying through anonymity, as a result, outweighs this minimal harm. But once the girl's identity is protected through her right to proceed anonymously, there is little justification for a publication ban on the non-identifying content of the profile. If the non-identifying information is made public, there is no harmful impact on the girl since the information cannot be connected to her. The public's right to open courts – and press freedom – therefore prevail with respect to the non-identifying Facebook content.

Cases Cited

Referred to: *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19; *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65; *R. v. Oakes*, [1986] 1 S.C.R. 103; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27 (CanLII); *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *Doe v. Church of Jesus Christ of Latter-Day Saints in Canada*, 2003 ABQB 794, 342 A.R. 394; *R. v. R.(W.)*, 2010 ONCJ 526 (CanLII); *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122; *R. v. D. H.*, 2002 BCPC 464 (CanLII); *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880.

Statutes and Regulations Cited

Civil Procedure Rules, N.S. Reg. 370/2008.

Criminal Code, R.S.C. 1985, c. C-46, s. 486.

Youth Criminal Justice Act, S.C. 2001, c. 1, s. 110.

Treaties and Other International Instruments

Convention on the Rights of the Child, Can. T.S. 1992 No. 3.

Authors Cited

“Cyberbullying: A Growing Problem”, *Science Daily*, February 22, 2010 (online: www.sciencedaily.com/releases/2010/02/100222104939.htm).

Eltis, Karen. “The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context” (2011), 56 *McGill L.J.* 289.

Jones, Lisa M., David Finkelhor and Jessica Beckwith. “Protecting victims’ identities in press coverage of child victimization” (2010), 11 *Journalism* 347.

Lucock, Carole, and Michael Yeo. “Naming Names: The Pseudonym in the Name of the Law” (2006), 3 *U. Ottawa L. & Tech. J.* 53.

Nova Scotia. Task Force on Bullying and Cyberbullying. *Respectful and Responsible Relationships: There’s No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying*. Nova Scotia: The Task Force, 2012.

UNICEF Innocenti Research Centre. *Child Safety Online: Global challenges and strategies*. Florence, Italy: UNICEF, 2011.

Winn, Peter A. “Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information” (2004), 79 *Wash. L. Rev.* 307.

APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J.N.S. and Saunders and Oland JJ.A.), 2011 NSCA 26, 301 N.S.R. (2d) 34, 953 A.P.R. 34, 228 C.R.R. (2d) 181, 97 C.P.C. (6th) 54, 80 C.C.L.T. (3d) 180, [2011] N.S.J. No. 113 (QL), 2011 CarswellNS 135, affirming a decision of

LeBlanc J., 2010 NSSC 215, 293 N.S.R. (2d) 222, 928 A.P.R. 222, 97 C.P.C. (6th) 24, [2010] N.S.J. No. 360 (QL), 2010 CarswellOnt 397. Appeal allowed in part.

Michelle C. Awad, Q.C., and Jane O'Neill, for the appellant.

Daniel W. Burnett and Paul Brackstone, for the *amicus curiae*.

Written submissions only by *Brian F. P. Murphy* and *Wanda M. Severns*, for the intervener BullyingCanada Inc.

Marko Vesely and *M. Toby Kruger*, for the intervener the British Columbia Civil Liberties Association.

Mahmud Jamal, Jason MacLean, Carly Fidler and *Steven Golick*, for the intervener Kids Help Phone.

Iris Fischer and *Dustin Kenall*, for the intervener the Canadian Civil Liberties Association.

Joseph E. Magnet and *Patricia Kosseim*, for the intervener the Privacy Commissioner of Canada.

Ryder Gilliland and *Adam Lazier*, for the interveners Newspapers Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of

Journalists, Professional Writers Association of Canada and Book and Periodical Council.

Written submissions only by *Tamir Israel*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

Jeffrey S. Leon, Ranjan K. Agarwal and *Daniel Holden*, for the intervener the Canadian Unicef Committee.

Written submissions only by *William S. Challis* and *Stephen McCammon*, for the intervener the Information and Privacy Commissioner of Ontario.

Written submissions only by *Jonathan M. Rosenthal*, for the intervener Beyond Borders.

The judgment of the Court was delivered by

ABELLA J.—

[1] On March 4, 2010, a 15-year-old girl, A.B., found out that someone had posted a Facebook profile using her picture, a slightly modified version of her name, and other particulars identifying her. Accompanying the picture was some

unflattering commentary about the girl's appearance along with sexually explicit references. The page was removed by the internet provider later that month.

[2] Once notified of the situation, Facebook's counsel in Palo Alto, California provided the IP address associated with the account, which was said to be located in Dartmouth, Nova Scotia. The girl's counsel determined that it was an "Eastlink address" in Dartmouth, Nova Scotia. Further inquiry confirmed that the respondent Bragg Communications owns Eastlink, a provider of Internet and entertainment services in Atlantic Canada.

[3] Eastlink consented to giving more specific information about the address if it had authorization from a court to do so. As a result, A.B., through her father as guardian, brought a preliminary application under Nova Scotia's *Civil Procedure Rules*, N.S. Reg. 370/2008, for an order requiring Eastlink to disclose the identity of the person(s) who used the IP address to publish the profile to assist her in identifying potential defendants for an action in defamation. She stated in her Notice of Application that she had "suffered harm and seeks to minimize the chance of further harm" (A.R., at p. 98). As part of her application, she asked the court for permission to seek the identity of the creator of the fake profile anonymously and for a publication ban on the content of the fake Facebook profile. She did not ask that the hearing be held in camera.

[4] Eastlink did not oppose her motion. The Halifax Herald and Global Television became aware of the girl's application when notice of the request for a

publication ban appeared as an automatic advisory on the Nova Scotia publication ban media advisory website. They advised the court that they opposed both of the girl's requests: the right to proceed anonymously and a publication ban.

[5] The court granted the order requiring Eastlink to disclose the information about the publisher of the fake Facebook profile on the basis that a *prima facie* case of defamation had been established and there were no other means of identifying the person who published the defamation. But it denied the request for anonymity and the publication ban because there was insufficient evidence of specific harm to the girl.

[6] The judge stayed that part of his order requiring Eastlink to disclose the publisher's identity until either a successful appeal allowed the girl to proceed anonymously, or until she filed a draft order which used her own and her father's real names.

[7] The decision was upheld by the Court of Appeal primarily on the ground that the girl had not discharged the onus of showing that there was real and substantial harm to her which justified restricting access to the media.

[8] Both courts ordered costs against the girl in favour of the two media outlets.

[9] In my view, both courts erred in failing to consider the objectively discernable harm to A.B. I agree with her that she should be entitled to proceed anonymously, but once her identity has been protected, I see no reason for a further publication ban preventing the publication of the non-identifying content of the fake Facebook profile.

Analysis

[10] A.B.'s appeal to this Court is based on what she says is the failure to properly balance the competitive risks in this case: the harm inherent in revealing her identity versus the risk of harm to the open court principle in allowing her to proceed anonymously and under a publication ban. Unless her privacy is protected, she argued, young victims of sexualized cyberbullying like her will refuse to proceed with their protective claims and will, as a result, be denied access to justice.

[11] The open court principle requires that court proceedings presumptively be open and accessible to the public and to the media. This principle has been described as a "hallmark of a democratic society" (*Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, at para. 23) and is inextricably tied to freedom of expression. A.B. requested two restrictions on the open court principle: the right to proceed anonymously and a publication ban on the content of the fake Facebook profile. The inquiry is into whether each of these measures is necessary to protect an important legal interest and impairs free expression as little as possible. If alternative measures can just as effectively protect the interests engaged, the restriction is unjustified. If no such

alternatives exist, the inquiry turns to whether the proper balance was struck between the open court principle and the privacy rights of the girl: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442.

[12] The Halifax Herald and Global Television did not appear in the proceedings before this Court. Their “position” was, however, ably advanced by an *amicus curiae*. In his view, like the Court of Appeal, the mere fact of the girl’s age did not, in the absence of evidence of specific harm to her, trump the open court principle and freedom of the press.

[13] Since *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, the critical importance of the open court principle and a free press has been tenaciously embedded in the jurisprudence and need not be further revisited here. What does need some exploration, however, are the interests said to justify restricting such access in this case: privacy and the protection of children from cyberbullying. These interests must be shown to be sufficiently compelling to warrant restrictions on freedom of the press and open courts. As Dickson J. noted in *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, there are cases in which the protection of social values must prevail over openness (pp. 186-87).

[14] The girl’s privacy interests in this case are tied both to her age and to the nature of the victimization she seeks protection from. It is not merely a question of her privacy, but of her privacy from the relentlessly intrusive humiliation of sexualized online bullying: Carole Lucock and Michael Yeo, “Naming Names: The

Pseudonym in the Name of the Law" (2006), 3 *U. Ottawa L. & Tech. J.* 53, at pp. 72-73; Karen Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56, *McGill L.J.* 289, at p. 302.

[15] The *amicus curiae* pointed to the absence of evidence of harm from the girl about her own emotional vulnerability. But, while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm.

[16] This Court found objective harm, for example, in upholding the constitutionality of Quebec's *Rules of Practice* that limited the media's ability to film, take photographs, and conduct interviews in relation to legal proceedings (in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 19), and in prohibiting the media from broadcasting a video exhibit (in *Canadian Broadcasting Corp. v. The Queen*, [2011] 1 S.C.R. 65). In the former, Deschamps J. held (at para. 56) that the *Dagenais/Mentuck* test requires neither more nor less than the one from *R. v. Oakes*, [1986] 1 S.C.R. 103. In other words, absent scientific or empirical evidence of the necessity of restricting access, the court can find harm by applying reason and logic: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 72; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 91.

[17] Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people's privacy under the *Criminal Code*, R.S.C. 1985, c. C-46 (s. 486), the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (s. 110), and child welfare legislation, not to mention international protections such as the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, all based on age, not the sensitivity of the particular child. As a result, in an application involving sexualized cyberbullying, there is no need for a particular child to demonstrate that she personally conforms to this legal paradigm. The law attributes the heightened vulnerability based on chronology, not temperament: See *R. v. D.B.*, [2008] 2 S.C.R. 3, at paras. 41, 61 and 84-87; *R. v. Sharpe*, [2001] 1 S.C.R. 45, at paras. 170-74.

[18] This led Cohen J. in *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27 (Can LII), to explain the importance of privacy in the specific context of young persons who are participants in the justice system:

The concern to avoid labeling and stigmatization is essential to an understanding of why the protection of privacy is such an important value in the *Act*. However it is not the only explanation. The value of the privacy of young persons under the *Act* has deeper roots than exclusively pragmatic considerations would suggest. We must also look to the Charter, because the protection of privacy of young persons has undoubtedly constitutional significance.

Privacy is recognized in Canadian constitutional jurisprudence as implicating liberty and security interests. In *Dymett*, the court stated that privacy is worthy of constitutional protection because it is "grounded in man's physical and moral autonomy," is "essential for the well-being of the individual," and is "at the heart of liberty in a modern state"

(para. 17). *These considerations apply equally if not more strongly in the case of young persons.* Furthermore, the constitutional protection of privacy embraces the privacy of young persons, not only as an aspect of their rights under section 7 and 8 of the Charter, but by virtue of the presumption of their diminished moral culpability, which has been found to be a principle of fundamental justice under the *Charter*.

. . .

[T]he protection of the privacy of young persons fosters respect for dignity, personal integrity and autonomy of the young person. [Emphasis added; paras. 40-41 and 44.]

[19] And in *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, L'Heureux-Dubé J. upheld the constitutionality of the *Criminal Code* provisions that allowed for the admission of video tape evidence from child complainants in sexual assault cases, based on the need to reduce the stress and trauma suffered by child complainants in the criminal justice system: pp. 445-46; see also *Doe v. Church of Jesus Christ of Latter-Day Saints in Canada*, 2003 ABQB 794, 341 A.R. 395, at para. 9.

[20] It is logical to infer that children may suffer harm through cyberbullying. Such a conclusion is consistent with the psychological toxicity of the phenomenon described in the Report of the Nova Scotia Task Force on Bullying and Cyberbullying, chaired by Prof. A. Wayne MacKay, the first provincial task force focussed on online bullying: (*Respectful and Responsible Relationships: There's No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying* (2012)). The Task Force was created as a result of “[a] tragic series of youth suicides” (p. 4).

[21] The Report defined bullying as

. . . behaviour that is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person's body, feelings, self-esteem, reputation or property. Bullying can be direct or indirect, and can take place by written, verbal, physical or electronic means, or any other form of expression. [pp. 42-43]

Its harmful consequences were described as "extensive", including loss of self-esteem, anxiety, fear and school drop-outs (p. 4). Moreover, victims of bullying were almost twice as likely to report that they attempted suicide compared to young people who had not been bullied (at p. 86): See also *R. v. R.(W.)*, 2010 ONCJ 526 (Can LII), at paras. 11 and 16, and "Cyberbullying: A Growing Problem", *Science Daily* (February 22, 2010, online).

[22] The Report also noted that cyberbullying can be particularly harmful because the content can be spread widely, quickly — and anonymously:

The immediacy and broad reach of modern electronic technology has made bullying easier, faster, more prevalent, and crueler than ever before.

. . . cyber-bullying follows you home and into your bedroom; you can never feel safe, it is "non-stop bullying". . . . cyberbullying is particularly insidious because it invades the home where children normally feel safe, and it is constant and inescapable because victims can be reached at all times and in all places.

The anonymity available to cyberbullies complicates the picture further as it removes the traditional requirement for a power imbalance between the bully and victim, and makes it difficult to prove the identity of the perpetrator.

Anonymity allows people who might not otherwise engage in bullying behaviour the opportunity to do so with less chance of repercussion. . . .

. . . The cyber-world provides bullies with a vast unsupervised public playground . . . [pp. 11-12]

[23] In addition to the psychological harm of cyberbullying, we must consider the resulting inevitable harm to children — and the administration of justice — if they decline to take steps to protect themselves because of the risk of further harm from public disclosure.

[24] Professor MacKay's Report is consistent with the inference that, absent a grant of anonymity, a bullied child may not pursue responsive legal action. He notes that half of all bullying goes unreported, largely out of fear that reporting will not be met with solutions or understanding sufficient to overcome the fear of retaliation: p. 10. One of his recommendations, as a result, was that mechanisms be developed to report cyberbullying *anonymously* (p. 66; Appendix E; see also Peter A. Winn, "Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information" (2004), 79 *Wash. L. Rev.* 307, at p. 328).

[25] In the context of sexual assault, this Court has already recognized that protecting a victim's privacy encourages reporting: *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122. It does not take much of an analytical leap to conclude that the likelihood of a child protecting himself or herself from bullying will be greatly enhanced if the protection can be sought anonymously.

As the Kids Help Phone factum constructively notes (at para. 16), protecting children's anonymity could help ensure that they will seek therapeutic assistance and other remedies, including legal remedies where appropriate. In particular, “[w]hile media publicity is likely to have a negative effect on all victims, there is evidence to be particularly concerned about child victims. . . . Child victims need to be able to trust that their privacy will be protected as much as possible by those whom they have turned to for help”: Lisa M. Jones, David Finkelhor and Jessica Beckwith, “Protecting victims’ identities in press coverage of child victimization” (2010), 11 *Journalism* 347, at pp. 349-50.

[26] Studies have confirmed that allowing the names of child victims and other identifying information to appear in the media can exacerbate trauma, complicate recovery, discourage future disclosures, and inhibit cooperation with authorities. (See e.g., UNICEF Innocenti Research Centre, *Child Safety Online: Global challenges and strategies* (2011), at pp. 15–16; and *R. v. D.H.*, 2002 BCPC 464 (Can LII), at para. 8).

[27] If we value the right of children to protect themselves from bullying, cyber or otherwise, if common sense and the evidence persuade us that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication, and if we accept that the right to protection will disappear for most children without the further protection of anonymity, we are compellingly drawn in this case to allowing A.B.’s anonymous legal pursuit of the identity of her cyberbully.

[28] The answer to the other side of the balancing inquiry — what are the countervailing harms to the open courts principle and freedom of the press — has already been decided by this Court in *Canadian Newspapers*. In that case, the constitutionality of the provision in the *Criminal Code* prohibiting disclosure of the identity of sexual assault complainants was challenged on the basis that its mandatory nature unduly restricted freedom of the press. In upholding the constitutionality of the provision, Lamer J. observed that:

While freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognized that the limits imposed by [prohibiting identity disclosure] on the media's rights are *minimal*. . . . Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public. [Emphasis added; p. 133.]

In other words, the harm has been found to be “minimal”. This perspective of the relative insignificance of knowing a party’s identity was confirmed by Binnie J. in *F.N.* where he referred to identity in the context of the Young Offenders legislation as being merely a “sliver of information”: *F.N. (Re)*, [2000] 1 S.C.R. 880, at para. 12.

[29] The acknowledgment of the relative unimportance of the identity of a sexual assault victim is a complete answer to the argument that the non-disclosure of the identity of a young victim of online sexualized bullying is harmful to the exercise of press freedom or the open courts principle. *Canadian Newspapers* clearly

establishes that the benefits of protecting such victims through anonymity outweigh the risk to the open court principle.

[30] On the other hand, as in *Canadian Newspapers*, once A.B.'s identity is protected through her right to proceed anonymously, there seems to me to be little justification for a publication ban on the non-identifying content of the fake Facebook profile. If the non-identifying information is made public, there is no harmful impact since the information cannot be connected to A.B. The public's right to open courts and press freedom therefore prevail with respect to the non-identifying Facebook content.

[31] I would allow the appeal in part to permit A.B. to proceed anonymously in her application for an order requiring Eastlink to disclose the identity of the relevant IP user(s). I would, however, not impose a publication ban on that part of the fake Facebook profile that contains no identifying information. I would set aside the costs orders against A.B. in the prior proceedings but would not make a costs order in this Court.

Appeal allowed in part.

Solicitors for the appellant: McInnes Cooper, Halifax.

Solicitors for the amicus curiae: Owen Bird Law Corporation, Vancouver.

Solicitors for the intervener BullyingCanada Inc.: Murphy Group, Moncton.

Solicitors for the intervener the British Columbia Civil Liberties Association: Lawson Lundell, Vancouver.

Solicitors for the intervener Kids Help Phone: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Blake, Cassels & Graydon, Toronto.

Solicitors for the intervener the Privacy Commissioner of Canada: Office of the Privacy Commissioner of Canada, Ottawa; University of Ottawa, Ottawa.

Solicitors for the intervener Newspapers Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists, Professional Writers Association of Canada and Book and Periodical Council: Blake, Cassels & Graydon, Toronto.

Solicitor for the intervener Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: University of Ottawa, Ottawa.

Solicitors for the intervener the Canadian Unicef Committee: Bennett Jones, Toronto.

Solicitor for the intervener the Information and Privacy Commissioner of Ontario: Information and Privacy Commissioner of Ontario, Toronto.

Solicitor for the intervener Beyond Borders: Jonathan M. Rosenthal, Toronto.