S.C.C. File No. 34240

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COUR TOF APPEAL0

BETWEEN:

A.B. BY HER LITIGATION GUARDIAN, C.D.

Appellant
(Appellant)

- and-

-

BRAGG COMMUNICATIONS INCORPORATED, A BODY CORPORAT, AND THE HALIFAX HERALD LIMITED, A BODY CORPORATE

Respondents
(Respondents)

DANIEL W. BURNETT

Amicus Curiae

- and –

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PART I: OVERVIEW

1. A.B., the 15 year old victim, was the subject of a highly sexualized fake Facebook profile which included her name and photo. In order to protect herself and her reputation she sought to discover the site's creator by obtaining a Court Order compelling Bragg Communications to disclose the subscriber information of the IP address from which the fake profile was created. At present, it is not known if this was some sort of misguided attempt at a prank at the hands of another young person or whether it was the product of the imagination of an adult sexual deviant. A.B. wished to obtain this information, and wished to do so anonymously to prevent further harm to her. The disclosure of her name and the particulars would, without question, exacerbate the harm she has already suffered and re-victimize a young girl through the unwanted publicity of her name.

2. It is submitted that the Nova Scotia Court of Appeal erred in its application of the *Dagenais/Mentuck* test.

PART II: STATEMENT OF POSITION

3. Beyond Borders submits that in civil proceedings, as in criminal proceedings, Courts must take notice of the serious risk to young people - a group recognized as inherently vulnerable- who are engaged with the legal system. This should be so whether their involvement in the legal system is because of their own or someone else's criminal behavior, or through the exercise of their right to seek and obtain relief as a victim of sexualized cyber-bullying.

4. Beyond Borders submits that the appropriate remedy to protect a young person who finds herself in a situation where she requires the assistance of the courts to seek and obtain relief is to allow her to conceal her identity and hide the offensive material from publication through a

confidentiality order. It is further submitted that the remedy of allowing a young person to conceal her identity and hide offensive material from publication does not impede upon the right to free expression or the proper administration of justice.

PART III: STATEMENT OF ARGUMENT

A. Where Insisting on the Principle of Open Courts Will Effectively Preclude Access to the Courts, Publication Bans and/or Confidentiality Orders Are Appropriate

5. Beyond Borders concedes that one of the hallmarks of a system of justice is openness and transparency. Nevertheless, where the operation of the principles of openness and transparency will effectively block an individuals' right to seek and obtain appropriate relief in a court proceeding, these principles must bend somewhat to the public interest of access to justice. As Doherty J.A. wrote in *M.E.H. v. Williams et. al.*:[1]

> If insisting on the openness usually demanded of court proceedings will effectively close the courtroom door to a litigant because of the physical and/or emotional consequences to that litigant of maintaining the openness of the courts, I am satisfied that the first component of the *Dagenais/Mentuck* test would be made out assuming that there was no reasonable alternative to some limit on the openness of the courts.

6. This is precisely what will occur in this case as indicated in the Affidavit of C.D. dated June 17, 2010, in paragraph 11,

> "My daughter and I have carefully weighed her options in light of Justice LeBlanc's decision and we have concluded that if she is required to disclose her name in order to secure the requested Order requiring the Respondent, Bragg Communications Incorporated, to provide the customer information associated with the IP address provided by Facebook, she will not pursue the matter."

[1] 2012 ONCA 35

B. Due to the Different Place in Society Occupied by Youthful Persons, Their Privacy Must be Protected by the Courts

i. Young Persons Occupy a Different Place in Society From Adults

7. Children occupy a different place in society from adults and must be treated differently by the courts. As noted by Holland J. in *Re Southam Inc. and the Queen*:[2]

> …children differ from adults and have special disabilities and needs. Indeed, this is obvious and has long been recognized by the justice system. At common law, courts developed special rules for children, relating, *inter alia*, to contractual and testamentary capacity, tort liability, trusts, evidentiary issues and practice and procedure. Courts of equity took it to be part of their responsibility to protect children in the exercise of the role of *parens patriae*…
>
> Legislatures, as well, have responded to the special needs of children by enacting laws governing their relationship in the family and society at large.

8. An example of the different treatment society affords to young persons in recognition of their inherent vulnerability is found in the reporting obligation of persons who witness crimes. Ordinarily, there is no obligation on a person to report a crime even if they witness the crime being committed, the law being that ordinary citizens have no obligation to report upon their fellow citizens or neighbours. However, in relation to young persons in many provinces there is a positive obligation on the basis of the mere suspicion of abuse of a young person to report such activity and the failure to do so is a serious offence.[3]

ii. Criminal Law has Long Recognized that, Due to their Vulnerability, Young Persons and their Privacy Must be Protected by the Courts

[2] 1984 48 O.R. (2d) 678 (Ontario H.C.J.)

[3] Child and Family Services Act, RSO 1990, c C.11, s.72, Child, Family and Community Service Act, RSBC 1996, c 46, s.14

9. The law has long recognized the vulnerability of young persons and, where they are engaged with the court system, the need to protect their privacy. For well over a century, parliament has consistently seen fit to carve out a special niche to protect young persons involved in the criminal law process in areas involving their privacy and publicity:[4]

Legislation	**Provisions Regarding the Privacy Protection Young Persons (Including Young Victims and Witnesses)**
1892 *Criminal Code*	Trials of persons under the age of 16 should be held *in camera* and separate and apart from adult offenders without publicity.
1894 *An Act Respecting Arrest, Trial and Imprisonment of Youthful Offenders*	Trials of persons under the age of 16 should be held *in camera* and separate and apart from adult offenders without publicity.
1908 *Juvenile Delinquents Act*	Trials to be held *in camera* without publicity.
1984 *Young Offenders Act*	Trials no longer held *in camera*; however, publication ban on youthful defendants, witnesses and victims' names.
2003 *Youth Criminal Justice Act*	Trials no longer held *in camera*; however, publication ban on youthful defendants, witnesses and victims' names

10. When considering the operation and implication of the criminal law legislation that treated the privacy of young persons' differently than that of adults, this Honourable Court, in *C.B. v. The Queen***,** held that section 12 of the *Juvenile Delinquents Act* required that the trials of young persons charged pursuant to that Act be held *in camera.* Writing for a unanimous Court, Chouinard, J. found that:[5]

> In reaching this conclusion I am not unmindful of the fundamental principle of our law that all trials both in criminal and civil matters must be held in open court. There are known exceptions to this principle and further exceptions may on occasion be created by statutory provisions. The question is whether s.12(1) does create such an exception.

[4] The information contained in this table is taken from The Evolution of Juvenile Justice in Canada, Department of Justice Canada, 2004

[5] (1981) 62 C.C.C. (2d) 107, at p. 112,

The equivalent legislation in England leaves little doubt as to who may be present at the trial of a child and as to what the powers and discretion of the Court are Sections 37, 47 and 49 of the Children and Young Persons Act, 1933 (U.K.), c. 12, as revised to August 1, 1980, provide as follows:

> 37(1) Where, in any proceedings in relation to an offence against, or any conduct contrary to, decency or morality, a person who, in the opinion of the court, is a child or young person is called as a witness, the court may direct that all or any persons, not being members or officers of the court or parties to the case, their counsel or solicitors, or persons otherwise directly concerned in the case, be excluded from the court during the taking of the evidence of that witness.....
>
> ....
>
> 49(1) Subject as hereinafter provided, **no newspaper report of any proceedings in a juvenile court shall reveal the name, address or school, or include any particulars calculate to lead to the identification of any child or young person concerned in those proceedings, either as being the person against or in respect of whom the proceedings are taken, or as being a witness therein,** nor shall any picture be published in any newspaper as being or including a picture of any child or young person so concerned in any such proceedings as aforesaid. [emphasis added]

11. One of the reasons for the difference of treatment between youthful and adult offenders may be that, historically public condemnation and scrutiny were considered appropriate and fitting for adult criminals, but not for youthful offenders.[6] Beyond Borders submits the principled reason for this difference in treatment is the perceived societal value of protecting the rights to privacy of young persons. It is recognition of the harm caused to young persons and their future by publicizing their names.

[6] Sherri Davis-Barron, *Canadian Youth & Criminal Law: One Hundred Years of Youth Justice Legislation in Canada* at 436.

12. These principles continue to permeate the criminal law, which continues to recognize the special protection required for young persons who are engaged with the legal system. The *Youth Criminal Justice Act's* (*YCJA*) Declaration of Principle holds, *inter alia*:[7]

> (d) special considerations apply in respect of proceedings against young persons and, in particular,
>
> > (i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and participate in the process, other than the decision to prosecute, that lead to decisions that affect them, **and young persons have special guarantees of their rights and freedoms,**
> >
> > (ii) **victims should be treated with courtesy, compassion and respect for their dignity and privacy** and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system. (emphasis added)

13. The special privacy protections to be afforded to young persons are further particularized in *YCJA* sections 110-11, under the heading *Protection of Privacy of Young Persons*:[8]

> 110(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.
>
> 111(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, **if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with**, an offence committed or alleged to have been committed by a young person.
>
> (3) The youth justice court may, on the application of a child or a young person referred to in subsection (1), make an order permitting the child or young person to publish information that would identify him or her as having been a victim or a witness **if the court is satisfied that the publication would not be contrary to his or her best interests or the public interest.** [Emphasis added]

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[7] Section 3

[8] The predecessor legislation, the Young Offenders Act, (YOA) R.S.C. 1985 c Y-1, contained provisions similar to sections 110 and 111 of the YCJA in section 38 of that Act.

14. Beyond Borders submits that, the significant principle which can be derived from the criminal laws treatment of youthful persons is that their vulnerability and the need for the protection of their privacy is assumed. Individual young persons, whether they have been accused of a crime, have been victim to a crime, or have witnessed the commission of a crime, will automatically have their privacy protected through a ban on the publication of their identity. There is no need for them to apply for this protection and to proffer evidence that, by virtue of their youth, they are vulnerable and deserving of special protection.

15. Beyond Borders submits that where a young person has been subjected to conduct of such a serious nature as sexualized cyber-bullying, and seeks a publication ban and confidentiality order to allow her to seek redress through the Court system, Courts must take notice of the serious emotional harm that the young person risks if her identity and the content of the impugned bullying were to be available for publication.

C. In Circumstances Where the Nature of the Litigation is Serious and there was an Attack on the Young Person's Autonomy, Their Privacy Should be Protected

16. It is respectfully submitted that every Court must be entitled to take judicial notice of the harm that is likely to flow from such an intrusion into the personal privacy of a young person whose identity in the internet age is likely to be as much defined by her on-line profile as by her off-line personality. Given the nature of the conduct in this case, and in light of how the criminal law treats young persons, Courts must be entitled to take notice of such harm without requiring the young person to demonstrate by evidence the depth and nature of her grief. In circumstances where the nature of the content is as sexualized and derogatory as in this case, it is submitted that a serious risk of harm should be, as it is in the criminal law, a given.

17. It is worthy of note that the criminal law protections for young persons developed in a time when the internet did not exist and, in the case of the *JDA*, the predominant media was the newspaper. The range of traditional media pales in comparison to the power of the internet to virtually reach across the globe at a mere keystroke.

18. In a case where the sexual autonomy of a young person was attacked online, it cannot be said that her testimony and publication of her name will be simply distressful and embarrassing. Given her inherent vulnerabilities as a youth, vulnerabilities and protections recognized by Canadian law, this type of case involving a youthful person should not be compared to a "typical" case where a plaintiff seeks damages for harm.

D. There is no Principled Difference between Criminal and Civil Proceedings that Justifies Denying Young Persons the Protection of their Identities in Court Proceedings Engaging Issues of Sexual Exploitation

19. The way in which criminal courts treat youthful individuals reflects a legislative and judicial recognition of the need to protect the identities of young persons involved in or alleged to be involved in the commission of criminal acts, whether as the perpetrator of the act or as a victim or witness to the criminal act. Although there are many important differences between criminal and civil proceedings, it is submitted that a failure to recognize the vulnerability of young persons in the civil law because of these differences undermines the purpose for which these protections exist in the criminal law.

20. It is submitted that the balance found in criminal law between the protection of young persons and the constitutional right of the freedom of expression is equally applicable in civil proceedings where a young person has been the victim of sexualized online bullying. Although it

may be argued that A.B. has "chosen" to engage the court system, as opposed to a young person accused of a crime or subpoenaed to testify in court, it is submitted that this difference in form does not undermine the purpose behind the need to protect young persons who are victims of conduct of this nature. Rather, A.B. has chosen to exercise her right to seek and obtain appropriate relief for the harm caused to her through a court proceeding.[9] She should not be required to choose between defending her reputation against sexualized, online bullying and having to participate in possibly further spreading the very content she seek redress for even farther into the public view.

21. Currently, unlike the extensive protections provided to young persons in criminal proceedings, there do not appear to be any corresponding Rules of Civil Practice that provide such protection to young persons. The absence of such rules, however, it is submitted should not be a bar to A.B. and other young persons from gaining the protection of the courts in these types of circumstances. Rather, it is submitted that the differing treatment of young persons and their inherent vulnerabilities is a guiding principle that should inform the application of the *Dagenais/Mentuck* test. If our law is to be governed by principles, those principles should be applied consistently and rationally in both civil and criminal proceedings.

22. Beyond Borders submits that A.B.'s status as a young person establishes a special vulnerability such that courts ought to intervene. Her youthfulness is not "simply a circumstance" amongst many to be considered in the publication ban and confidentiality order analysis. Rather, it is a core aspect of her person and should be a defining feature of the analysis. Beyond Borders submits that a proper balancing of her interests and the constitutional rights of others requires that her status as a youthful person be a guiding frame within which the analysis is conducted, rather than simply one of many factors to be weighed.

[9] M.E.H, *supra*

PART IV: SUBMISSIONS ON COSTS

23. Beyond Borders does not seek costs and requests that no costs be ordered against it.

PART V: REQUEST TO MAKE ORAL SUBMISSIONS

24. Beyond Borders requests to make brief oral submissions in support of its position.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of April, 2012.

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PART VI – LIST OF AUTHORITIES

TAB	AUTHORITY	PARAGRAPHS
1.	*M.E.H. v. Williams et. al 2012 ONCA 35*	5, 20
2.	*R v Southam Inc. and the Queen, 1984 48 O.R.(2d) 678 (Ont.H.C.J.)*	7
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PART VII – RELEVANT STATUES

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