



SUPREME COURT OF CANADA

CITATION: R. v. Canadian Broadcasting Corp.,
2018 SCC 5

APPEAL HEARD: November 1, 2017
JUDGMENT RENDERED: February 9, 2018
DOCKET: 37360

BETWEEN:

Canadian Broadcasting Corporation
Appellant
and

Her Majesty The Queen
Respondent

- and -

**CTV, a Division of Bell Media Inc., Global News, a division of Corus Television
Limited Partnership, The Globe and Mail Inc., Postmedia Network Inc., Vice
Studio Canada Inc., Aboriginal Peoples Television Network and AD
IDEM/Canadian Media Lawyers Association**
Interveners

CORAM: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,
Brown and Rowe JJ.

REASONS FOR JUDGMENT: Brown J. (McLachlin C.J. and Abella, Moldaver,
(paras. 1 to 33) Karakatsanis, Wagner, Gascon, Côté and Rowe JJ.
concurring)

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R. v. CANADIAN BROADCASTING CORP.

Canadian Broadcasting Corporation

Appellant

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2017: November 1; 2018: February 9.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté,
Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

Injunctions — Interlocutory injunctions — Publication bans — Mandatory publication ban issued pursuant to Criminal Code respecting identity of young victim — Media outlet refused to remove from its website articles which pre-existed publication ban and which identified victim by name and photograph — Crown bringing application for contempt and for mandatory interlocutory injunction requiring removal of information from media outlet's website — Applicable framework for granting mandatory interlocutory injunction — Whether Crown must establish strong prima facie case or serious issue to be tried — Whether chambers judge erred in refusing interlocutory injunction because Crown failed to show strong prima facie case of criminal contempt — Criminal Code, R.S.C. 1985, c. C-46, s. 486.4(2.1)(2.2).

An accused was charged with the first degree murder of a person under the age of 18. Upon the Crown's request, a mandatory ban prohibiting the publication, broadcast or transmission in any way of any information that could identify the victim was ordered pursuant to s. 486.4(2.2) of the *Criminal Code*. Prior to the issuance of the publication ban, CBC posted information revealing the identity of the victim on its website. As a result of CBC's refusal to remove this information, the Crown sought an order citing CBC in criminal contempt of the publication ban and an interlocutory injunction directing the removal of the victim's identifying information. The chambers judge concluded that the Crown had not established the

requirements for a mandatory interlocutory injunction, and dismissed its application. The majority of the Court of Appeal allowed the appeal and granted the mandatory interlocutory injunction.

Held: The appeal should be allowed.

To obtain 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, but rather whether the applicant has demonstrated a strong *prima facie* case. The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction further demand an extensive review of the merits at the interlocutory stage. This modified *RJR—MacDonald* test 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. The applicant must also demonstrate that irreparable harm will result if the relief is not granted and that the balance of convenience favours granting the injunction.

In this case, a literal reading of the originating notice shows that the Crown brought an application for criminal contempt and sought an interim injunction in that proceeding. The Crown thus proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt. The originating notice itself, and the sequencing therein of the relief sought, belies its putatively hybrid character. The two applications are linked, such that the latter is tied

not to the mere placement by CBC of the victim's identifying information on its website, but to the sought-after criminal contempt citation. Each prayer for relief does not launch an independent proceeding; rather, both relate to the alleged criminal contempt. In addition, an injunction is not a cause of action, in the sense of containing its own authorizing force. It is a remedy. An originating application must state both the claim and the basis for it and the remedy sought. Here, the Crown's originating notice discloses only a single basis for seeking a remedy: CBC's alleged criminal contempt of court. Therefore, the Crown was bound to show a strong *prima facie* case of criminal contempt of court. This case should not however be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters. The delineation of the circumstances in which an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct is not decided here.

The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. Appellate intervention is justified only where the chambers judge proceeded on a misunderstanding of the law or of the evidence before him, where an inference can be demonstrated to be wrong by further evidence that has since become available, where there has been a change of circumstances or where the decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge could have reached it. In this case, the Crown's burden was not to show a case for criminal contempt that leans one way or another, but rather a case, based on the law and evidence presented,

that has a strong likelihood that it 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. The chambers judge applied the correct legal test in deciding the Crown's application and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

Cases Cited

Applied: *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; **distinguished:** *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; **referred to:** *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396; *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824; *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352; *Conway v. Zinkhofer*, 2006 ABCA 74; *D.E. & Sons Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1; *AMEC E&C Services Ltd. v. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, aff'd 2003 NSCA 126, 219 N.S.R. (2d) 126; *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152; *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 F.C.R. 274; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*,

2011 SKCA 120, 341 D.L.R. (4th) 407; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277; *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405; *H&R Block Canada Inc. v. Inisoft Corp.*, 2009 CanLII 37911; *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387; *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51; *Shepherd Home Ltd. v. Sandham*, [1970] 3 All E.R. 402; *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793; *Quality Pallets and Recycling Inc. v. Canadian Pacific Railway Co.*, 2007 CanLII 13712; *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CanLII 26148; *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720 (QL); *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042; *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331, aff'd [1991] 1 S.C.R. 62; *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services)*, 2008 FCA 214, 378 N.R. 335, leave to appeal refused, [2008] 3 S.C.R. viii.

Statutes and Regulations Cited

Alberta Rules of Court, Alta. Reg. 124/2010, r. 3.8(1).

Criminal Code, R.S.C. 1985, c. C-46, s. 486.4 (2.1), (2.2).

Authors Cited

Sharpe, Robert J. *Injunctions and Specific Performance*, 4th ed. Toronto: Canada Law Book, 2012.

Vermette, Marie-Andrée. “A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions”, in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation, 2011*. Toronto: Carswell, 2011, 367.

APPEAL from a judgment of the Alberta Court of Appeal (Slatter, McDonald and Greckol JJ.A.), 2016 ABCA 326, 404 D.L.R. (4th) 318, 43 Alta. L.R. (6th) 213, [2017] 3 W.W.R. 413, 93 C.P.C. (7th) 269, [2016] A.J. No. 1085 (QL), 2016 CarswellAlta 2034 (WL Can.), setting aside a decision of Michalyshyn J., 2016 ABQB 204, [2016] 9 W.W.R. 613, 37 Alta. L.R. (6th) 299, 86 C.P.C. (7th) 373, [2016] A.J. No. 336 (QL), 2016 CarswellAlta 620 (WL Can.). Appeal allowed.

Frederick S. Kozak, Q.C., Sean Ward, Tess Layton and Sean Moreman,
for the appellant.

Iwona Kuklicz and Julie Snowdon, for the respondent.

Iain A.C. MacKinnon, for the interveners.

The judgment of the Court was delivered by

BROWN J. —

I. Introduction

[1] The background leading to this appeal was summarized in the reasons of the chambers judge:¹

On March 5, 2016 [the accused], was charged with the first degree murder of D.H., a person under the age of 18 (“the victim”). On March 15, 2016 the Crown requested and a judge ordered a mandatory ban under s. 486.4(2.2) of the *Criminal Code*, R.S.C., 1985, c. C-46. The order prohibits the publication, broadcast or transmission in any way of information that could identify the victim.

As of March 16, 2016, two articles which pre-existed the publication ban, and which identified the victim by name and photograph (“the articles”), continued to exist on the CBC Edmonton website.

In response to a March 16, 2016 Edmonton Police Service inquiry, a senior digital producer with CBC Edmonton advised that no future stories would contain the victim’s identifying information.

On March 18, 2016, however, the pre-publication ban articles remained on the website, unaltered.

One of the articles contains some evidence that the victim’s identity appears already in wide circulation, by way of social media, but also by reason of the fact the victim attended school and lived in a

¹2016 ABQB 204, [2016] 9 W.W.R. 613, at paras. 2-6 (emphasis added).

smaller Alberta community where the murder is alleged to have occurred.

[2] Because CBC would not remove from its website the victim's identifying information published prior to the order granting a publication ban, the Crown filed an Originating Notice seeking an order citing CBC in criminal contempt of the publication ban, and an interlocutory injunction² directing removal of that information from CBC's website. As the terms of that Originating Notice are important to my proposed disposition of this appeal, I reproduce them here, in relevant part³:

TAKE NOTICE that an Application will be made by the Attorney General of Alberta on behalf of her Majesty the Queen before the presiding Justice of the Court of Queen's Bench, . . . for an Order citing [CBC] in criminal contempt of court.

AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case.

RELIEF SOUGHT:

1. That [CBC] be cited in criminal contempt of court.
2. That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case.
3. That an appropriate sentence be imposed against [CBC].

² The Crown's Originating Notice uses the term "interim injunction". In substance, however, the Crown's application was for an interlocutory injunction. (See R.J. Sharpe, *Injunctions and Specific Performance* (4th ed. 2012), at paras. 2.15 and 2.55.)

³ A.R., at pp. 39-40.

4. Any such further order that this Honourable Court deems appropriate.

[3] The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. On appeal, the Court of Appeal divided on whether the Crown was entitled to a mandatory interlocutory injunction. While the majority allowed the appeal and granted the injunction, Greckol J.A., in dissent, would have dismissed the appeal, finding that the majority applied incorrect legal principles to the Crown's application.⁴

[4] For the reasons that follow, I would allow the appeal. In my respectful view, the chambers judge applied the correct legal test in deciding the Crown's application, and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

II. Legislative Provisions

[5] Sections 486.4(2.1) and 486.4(2.2) of the *Criminal Code*,⁵ taken together, provide that a presiding judge or justice shall make an order, upon application by the victim or the prosecutor, for a publication ban in cases involving offences against victims under the age of 18 years. Specifically, the Crown or the victim is entitled to

⁴ 2016 ABCA 326, 404 D.L.R. (4th) 318.

⁵ R.S.C. 1985, c. C-46.

an order “directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way”.

III. Judicial History

A. *The Chambers Judge’s Reasons*

[6] Acceding to the parties’ submissions, the chambers judge applied a modified version of the tripartite test for an interlocutory injunction stated in *RJR—MacDonald Inc. v. Canada (Attorney General)*.⁶ This 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.

[7] As to the requirement of a strong *prima facie* case, the Crown had argued for a “broad interpretation” of s. 486.4(2.1)’s terms “publish[ed]” and “transmit[ted]”, such that it would catch web-based articles posted *prior* to the publication ban.⁷ The chambers judge, however, concluded that the case authorities did not support such an interpretation. In these circumstances, and applying the test for criminal contempt stated in *United Nurses of Alberta v. Alberta (Attorney General)*,⁸ he found that the Crown could not “likely succeed” in proving beyond a reasonable doubt that CBC, by

⁶ [1994] 1 S.C.R. 311.

⁷ Chambers judge’s reasons, at para. 26.

⁸ [1992] 1 S.C.R. 901, at p. 933.

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.⁹

[8] Regarding the requirement of irreparable harm, the Crown had argued such harm would be suffered by the administration of justice, since the ongoing display of the victim's identifying information on CBC's website would deter others from seeking assistance or remedies. The chambers judge declined to so find, however, noting that the underlying policy objective of protecting a victim's anonymity loses significance where the victim is deceased. And, in assessing balance of convenience, the chambers judge determined that the compromising of CBC's freedom of expression, and of the public's interest in that expression, outweighed any harm to the administration of justice that would result from leaving the two impugned articles on CBC's website.

B. *The Court of Appeal*

[9] At the Court of Appeal, the majority (Slatter and McDonald JJ.A.) reversed the chambers judge and granted the mandatory interlocutory injunction sought by the Crown. The chambers judge, it held, had erred by characterizing this matter as requiring the Crown to demonstrate a strong *prima facie* case of criminal contempt. Rather, the Originating Notice, "[w]hile essentially civil in nature, . . . has a 'hybrid' aspect to it"¹⁰, in that it seeks both a citation for criminal contempt *and* the

⁹ Chambers judge's reasons, at para. 34.

¹⁰ para. 5.

removal of the victim’s identifying information from CBC’s website. The request for the interlocutory injunction, the majority explained, is “tied back” to the latter request for an order removing the identifying information, and not to the request for a criminal contempt citation.¹¹ The issue, therefore, was “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”.¹²

[10] As to whether or not s. 486.4(2.1)’s reference to identifying information that is “published” is (as the Crown contends) met by the ongoing appearance of such information on a website after it is first posted, the majority conceded that “either position is arguable”.¹³ That said, the majority viewed the Crown as having a strong *prima facie* case for a mandatory interlocutory injunction, since, if “published” is construed as a continuous activity, CBC is arguably wilfully disobeying the publication ban. Further, such disobedience is harmful to the integrity of the administration of justice, and contrary to Parliament’s direction that such orders are to be mandatory.¹⁴ Finally, the balance of convenience did not favour CBC, since the publication ban must be presumed to be constitutional at this stage of the proceedings, and freedom of expression would not, in any case, be a defence against the contempt charge.

¹¹ para. 6.

¹² para. 7.

¹³ para. 10.

¹⁴ para. 11.

[11] Justice Greckol would have dismissed the appeal. In her view, the majority’s characterization of the relief sought in the Originating Notice as “hybrid” was misplaced, since the Crown’s application for an interlocutory injunction was brought in respect of the sought-after citation for criminal contempt. The chambers judge asked the right question (being, whether the Crown could show a strong *prima facie* case of criminal contempt), and his exercise of discretion to refuse an injunction was entitled to deference. And here, where the proscriptions against “publish[ing]” and “transmitt[ing]” may reasonably bear two meanings, one capturing the impugned articles and one not, no strong *prima facie* case of criminal contempt could be shown. Further, and even allowing that open defiance of a facially valid court order may amount to irreparable harm to the administration of justice, the ambit of s. 486.4’s proscriptions is an unsettled question. And, as the victim in this case is deceased, the privacy of the victim is not vulnerable to harm. Finally, and even if the pertinent provisions of the *Criminal Code* are presumed constitutional, the chambers judge was entitled to consider freedom of expression in assessing the balance of convenience.

IV. Analysis

A. *What Is the Applicable Framework for Granting a Mandatory Interlocutory Injunction?*

[12] In *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*¹⁵ and then again in *RJR—MacDonald*, this Court has said that applications for an interlocutory

¹⁵ [1987] 1 S.C.R. 110.

injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*¹⁶ At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a “serious question to be tried”, in the sense that the application is neither frivolous nor vexatious.¹⁷ The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused.¹⁸ Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.¹⁹

[13] This general framework is, however, just that — general. (Indeed, in *RJR—MacDonald* the Court identified two exceptions which may call for “an extensive review of the merits” at the first stage of the analysis.²⁰) In this case, the parties have at every level of court agreed that, where a *mandatory* interlocutory injunction is sought, the appropriate inquiry at the first stage of the *RJR—MacDonald* test is into whether the applicants have shown a strong *prima facie* case. I note that this heightened threshold was not applied by this Court in upholding such an injunction in *Google Inc. v. Equustek Solutions Inc.*²¹ In *Google*, however, the appellant did not argue that the first stage of the *RJR—MacDonald* test should be

¹⁶ [1975] A.C. 396.

¹⁷ *RJR—MacDonald*, at pp. 334-35.

¹⁸ *RJR—MacDonald*, at pp. 334 and 348.

¹⁹ *RJR—MacDonald*, at p. 334.

²⁰ pp. 338-39.

²¹ 2017 SCC 34, [2017] 1 S.C.R. 824.

modified. Rather, the appellant agreed that only a “serious issue to be tried” needed to be shown and therefore the Court was not asked to consider whether a heightened threshold should apply.²² By contrast, in this case, the application by the courts below of a heightened threshold raises for the first time the question of just what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction.

[14] Canadian courts have, since *RJR—MacDonald*, been divided on this question. In Alberta, Nova Scotia and Ontario, for example, the applicant must establish a strong *prima facie* case.²³ Conversely, other courts have applied the less searching “serious issue to be tried” threshold.²⁴

[15] 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, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as

²² *Google*, at paras. 25-27.

²³ *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I (4th) 161, at para. 4; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352, at para. 40; *Conway v. Zinkhofer*, 2006 ABCA 74, at paras. 28-29 (CanLII); *D.E. & Sons Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1, at para. 10; *AMEC E & C Services Ltd. v. Whitman Benn and Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369, at para. 20, aff’d 2003 NSCA 126, 219 N.S.R. (2d) 126; and *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152, at para. 54.

²⁴ *Sawridge Band v. Canada*, 2004 FCA 16, [2004] 3 F.C.R. 274, at para. 45; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414, at paras. 1 and 22-25; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407, at para. 42; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293, at paras. 16-17; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture and Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277, at para. 65.

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.²⁵ Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, “the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial”.²⁶ The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR—Macdonald* as “extensive review of the merits” at the interlocutory stage.²⁷

[16] A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions.²⁸ While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR—MacDonald* test, I acknowledge 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

²⁵ *Injunctions and Specific Performance*, at paras. 1.510, 1.530 and 2.640.

²⁶ *Injunctions and Specific Performance*, at para. 2.640.

²⁷ *RJR—MacDonald*, at pp. 338-39.

²⁸ *Injunctions and Specific Performance*, at paras. 1.530 and 1.540. See also *Potash*, at paras. 43-44.

take . . . positive actions”.²⁹ For example, in this case, ceasing to transmit the victim’s identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have 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 and, in light of the particular circumstances of the matter, “what the practical consequences of the . . . injunction are likely to be”.³⁰ In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.

[17] This brings me to just what is entailed by showing a “strong *prima facie* case”. Courts have employed various formulations, requiring the applicant to establish a “strong and clear chance of success”,³¹ a “strong and clear” or “unusually strong and clear” case;³² that he or she is “clearly right” or “clearly in the right”,³³ that he or she enjoys a “high probability” or “great likelihood of success”,³⁴ a “high

²⁹ *Potash*, at para. 44; see also *Injunctions and Specific Performance*, at para. 1.540.

³⁰ *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405, at para. 20.

³¹ *H&R Block Canada Inc. v. Inisoft Corp.*, 2009 CanLII 37911 (Ont. S.C.J.), at para. 24.

³² *Fradenburgh v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 5387, at para. 14 (CanLII); *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Ct. (Gen. Div.)), at paras. 49 and 52 (citing *Shepherd Home Ltd. v. Sandham*, [1970] 3 All E.R. 402 (Ch. D.), at p. 409).

³³ *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.*, 2002 CanLII 34862 (Ont. S.C.J.), at para. 9; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793, at para. 12 (CanLII).

³⁴ *Quality Pallets and Recycling Inc. v. Canadian Pacific Railway Co.*, 2007 CanLII 13712 (Ont. S.C.J.), at para. 16.

degree of assurance” of success;³⁵ a “significant prospect” of success;³⁶ or “almost certain” success.³⁷ Common to all these formulations is a burden on the 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.

[18] In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR—MacDonald* test, which proceeds as follows:

- (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.

B. *Does the Liberty Net “Rarest and Clearest of Cases” Test Apply in These Circumstances?*

³⁵ *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.*, 2002 CanLII 26148 (Ont. S.C.J.), at para. 16.

³⁶ *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720, at para. 11 (QL).

³⁷ *Barton-Reid*, at paras. 9, 12 and 17. (See, generally, M. A. Vermette, “A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions” in T. L. Archibald and R. S. Echlin eds., *Annual Review of Civil Litigation, 2011* (2011) 367, at pp. 378-79.)

[19] CBC argues that, on an application for an interlocutory injunction where a media organization’s right to free expression is at stake, the application judge should apply the test stated in *Canada (Human Rights Commission) v. Canadian Liberty Net*.³⁸ This would entail the applicant showing “the rarest and clearest of cases”³⁹, such that the conduct complained of would be impossible to defend.

[20] In *Liberty Net*, the Court explained that the *RJR—MacDonald* tripartite test is not appropriately applied to cases of “pure” speech, comprising the expression of “the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself”.⁴⁰ This appeal does not present such a case. The reason the Court gave in *Liberty Net* for not applying the *RJR—Macdonald* test to “pure” speech was that the defendant in such cases “has no tangible or measurable interest” [also described as a “tangible, immediate utility”] other than the expression itself.⁴¹ Where discriminatory hate speech or other potentially low-value speech is at issue (as was the case in *Liberty Net*), the *RJR—MacDonald* test would “stac[k] the cards” against the defendant at the second and third stages.⁴² In this appeal, however, the chambers judge correctly identified a “tangible, immediate utility” to CBC’s posting of the identifying information, being the “public’s interest” in CBC’s right to express that information, and in freedom of the press.⁴³ Because CBC does not therefore face the same disadvantage as

³⁸ [1998] 1 S.C.R. 626.

³⁹ *Liberty Net*, at para. 49.

⁴⁰ paras. 47 and 49.

⁴¹ para. 47 (emphasis in original).

⁴² para. 47.

⁴³ Chambers judge’s reasons, at para. 59.

defendants face at the second and third stages of the *RJR—MacDonald* test in cases of low- to no-value speech, it is unnecessary to apply the “clearest of cases” threshold, and I would not do so.

C. *What Strong Prima Facie Case Must the Crown Show?*

[21] As I have already canvassed, in this case the majority at the Court of Appeal, in reversing the chambers judge, reasoned that he had mischaracterized the basis for which the Crown had sought the injunction. Specifically, the majority said that the Originating Notice, properly read, was “hybrid”⁴⁴, such that the application for the injunction did not “relate directly”⁴⁵ to the criminal contempt citation, but to the direction sought that CBC remove the victim’s identifying information from its website. The identical wording shared by part of the Originating Notice’s preamble (“AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case”) and the part of the Originating Notice which sought an injunction (“That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case”) was said to demonstrate “that the request for an interim injunction is tied back . . . to . . . the removal of the objectionable postings”.⁴⁶ The “strong *prima facie* case” which the Crown was bound to show, then, was *not* one of criminal contempt, but rather of an

⁴⁴ para. 5.

⁴⁵ para. 6.

⁴⁶ C.A. reasons, at para. 6.

“entitl[ement] . . . to a mandatory order directing removal of the identifying material from the website”.⁴⁷

[22] In dissent, Greckol J.A. saw the matter differently. “A literal reading of the Originating Notice”, she said, “shows that the Crown brought an application for criminal contempt and sought an interim injunction in that proceeding”.⁴⁸ This was in her view confirmed by the record which reveals that the Crown had proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt.

[23] For two reasons, I agree with Greckol J.A. First, the Originating Notice itself, and the sequencing therein of the relief sought, belies its putatively hybrid character. It begins by giving notice (“TAKE NOTICE”) of an “an [a]pplication . . . for an Order citing [CBC] in criminal contempt of court”. That notice is immediately followed by a *further* notice (“AND FURTHER TAKE NOTICE”) of an “application . . . for an interim injunction, directing that [CBC] remove any information from [its] website that could identify the complainant in the [subject] case”.⁴⁹ The text “AND FURTHER TAKE NOTICE” makes plain that the two applications are linked, such that the latter is tied *not* to the mere placement by CBC of the victim’s identifying information on its website, but to the sought-after criminal contempt citation. In other words, each prayer for relief does not launch an independent proceeding; rather, both relate to the alleged criminal contempt.

⁴⁷ C.A. reasons, at para. 7.

⁴⁸ C.A. reasons, at para. 23 (emphasis added).

⁴⁹ A.R., at p. 39.

[24] The second reason goes to the fundamental nature of an injunction and its relation to a cause of action. Rule 3.8(1) of the *Alberta Rules of Court*⁵⁰ requires that an originating application state *both* “the claim and the basis for it”, *and* “the remedy sought”. In other words, an applicant must record both “a basis” *and* “[a] remedy”. An injunction is generally “a remedy ancillary to a cause of action”.⁵¹ And here, the Crown’s Originating Notice discloses only a single basis for seeking that remedy: CBC’s alleged criminal contempt of court. As I have already noted, this is consistent with how the Crown framed its case at the courts below.

[25] The majority’s conclusion at the Court of Appeal that the basis for the injunction is an “entitl[ement] . . . to a mandatory order directing removal of the identifying material from the website”⁵², therefore, simply begs the question: what, precisely, is the source in law of that entitlement? An injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy. This is undoubtedly why, before both the chambers judge and the Court of Appeal, the Crown framed the matter as an application for an interlocutory injunction in the proceedings for a criminal contempt citation.⁵³ And, on that point, I respectfully endorse Greckol J.A.’s conclusion that it was not for the Court of Appeal to re-cast the Crown’s case as a civil application for an interlocutory injunction pending a permanent injunction. The Crown was bound to show a strong *prima facie* case of criminal contempt of court.

⁵⁰ Alta. Reg. 124/2010.

⁵¹ *Amchem Products Inc. v. British Columbia (Workers’ Compensation Board)*, [1993] 1 S.C.R. 897, at p. 930 (emphasis added).

⁵² C.A. reasons, at para. 7.

⁵³ C.A. reasons, at paras. 25-26; chambers judge’s reasons, at para. 7.

[26] I add this. It is implicit in the foregoing analysis that, in some circumstances, an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct. The delineation of those circumstances, however, I would not decide here. To be clear, the disposition of this appeal should not be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters, or that — even had the Crown been able to show in this case a strong *prima facie* case of criminal contempt — an injunction would have been available.

D. *Is the Crown Entitled to a Mandatory Interlocutory Injunction?*

[27] The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. In *Metropolitan Stores*,⁵⁴ the Court endorsed this statement of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton*⁵⁵ about the circumstances in which that exercise of discretion may be set aside. Appellate intervention is justified only where the chambers judge proceeded “on a misunderstanding of the law or of the evidence before him”, where an inference “can be demonstrated to be wrong by further evidence that has [since] become available”, where there has been a change of circumstances, or where the “decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no

⁵⁴ pp. 154-55.

⁵⁵ [1982] 1 All E.R. 1042, at p. 1046 (H.L.).

reasonable judge . . . could have reached it”.⁵⁶ This principle was recently affirmed in *Google*.⁵⁷

[28] In this case, and as I have explained, the first stage of the modified *RJR*—*MacDonald* test required the Crown to satisfy the chambers judge that there was a strong likelihood on the law and the evidence presented that it would be successful in proving CBC’s guilt of criminal contempt of court. This is not an easy burden to discharge and, as I shall explain, the Crown has failed to do so here.

[29] In *United Nurses of Alberta*, McLachlin J. (as she then was) described the elements of criminal contempt of court in these terms:

To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt.⁵⁸

[30] As to the *actus reus* — that is, as to whether the Crown could demonstrate a strong *prima facie* case that CBC “defied or disobeyed [the publication ban] in a public way”⁵⁹ by leaving the victim’s identifying information on its website — the chambers judge rejected the Crown’s submission that s. 486.4(2.1)’s terms

⁵⁶ See also *B.C. (A.G.) v. Wale*, [1987] 2 W.W.R. 331 (B.C.C.A.), aff’d [1991] 1 S.C.R. 62; *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177; *Musqueam Indian Band v. Canada (Minister of Public Works and Government Services)*, 2008 FCA 214, 378 N.R. 335, at para. 37, leave to appeal refused, [2008] 3 S.C.R. viii.

⁵⁷ para. 22.

⁵⁸ p. 933 (emphasis added).

⁵⁹ Chambers judge’s reasons, at para. 12.

“publish[ed]” and “transmit[ted]” should be “broad[ly]” interpreted.⁶⁰ In his view, the meaning of that text was not so obvious that the Crown could “likely succeed at trial” in showing that s. 486.4(2.1) would capture the impugned articles on CBC’s website, since they had been posted *prior* to the issuance of a publication ban. In other words, and as CBC argued before the chambers judge, the statutory text might also be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban.

[31] Significantly, the majority at the Court of Appeal conceded that “either position is arguable”.⁶¹ In my respectful view, that was, in substance, an acknowledgment that the Crown had not shown a strong *prima facie* case of criminal contempt. Before us, the Crown urged this Court to infer that the majority nevertheless “leaned” towards the Crown’s preferred interpretation of “publish[ed]” when it stated that to see the matter otherwise would “significantly limit the scope of many legal rights and obligations that depend on making information available to third parties [and] [i]f publishing is a continuous activity, then it is also arguable that [CBC] is wilfully disobeying the court order”.⁶² But, even allowing that this may be so, the Crown’s burden was not to show a case for criminal contempt that “leans” one way or another, but rather a case, based on the law and evidence presented, that has a *strong likelihood* of success at trial. And, again with respect, I see nothing in the chambers judge’s reasons or, for that matter, in the majority reasons which persuades

⁶⁰ para. 33.

⁶¹ C.A. reasons, at para. 10.

⁶² C.A. reasons, at para. 10; Transcript, at pp. 65 and 70-71.

me that the chambers judge, in refusing the interlocutory injunction sought here, committed any of the errors described in *Hadmor* as justifying appellate intervention.

[32] My finding on this point is determinative, and obviates the need to consider *mens rea*, or the other two stages of the *RJR—MacDonald* test.

V. Conclusion

[33] I would allow this appeal.

Appeal allowed.

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