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# From the Schoolyard to Cyberspace: The Supreme Court of Canada Recognizes the Importance of Privacy for Victims of Cyber-bullying

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Consistent with recent provincial parliamentary initiatives to codify awareness and prevention of bullying,[1] the Supreme Court of Canada released a judgment on September 27, 2012 that upheld a minor's right to anonymity in a case involving cyber-bullying.

In *A.B. v. Bragg Communications Inc.*,[2] the Court considered whether A.B., a 15-year-old girl who had been the victim of "cyber-bullying", was entitled to anonymously apply for her Internet provider to disclose the names of persons who created a fraudulent Facebook account in her likeness for the purpose of bringing a defamation action against those persons. The Court unanimously reversed the decisions of the Supreme Court of Nova Scotia and the Nova Scotia Court of Appeal that denied A.B.'s right to privacy and anonymity.

*Facts*

In March of 2010, A.B. discovered that someone had created a fake Facebook profile using her picture and a slightly modified version of her name, amongst other identifying particulars. Included on the profile was some "unflattering commentary about the girl's appearance along with sexually explicit references."[3] The page was removed by the Internet provider shortly thereafter.

Facebook provided A.B. with the IP address of the computer that was used to create the fake account. A.B.'s lawyer then determined that the IP address was associated with an Atlantic Canada Internet provider called Eastlink, which was owned by the respondent in this case, Bragg Communications.

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[1] See Bill 13 (the "Accepting Schools Act, 2012") and Bill 14 (the "Anti-Bullying Act, 2012"). Bill 13 is an amendment to the *Education Act*, R.S.O. 1990, c. E.2 ("*Education Act*") with respect to bullying and other matters. Bill 14 is an amendment to the *Education Act* that is attempting to designate a Bullying Awareness and Prevention Week in schools and to provide for curricula geared toward the prevention of bullying as well as policies and accountability in schools with respect to bullying. Bill 13 received Royal Assent on June 19, 2012 and Bill 14 is currently at second reading.

[2] 2012 SCC 46 at para. 1 [*Bragg*].

[3] *Ibid.*

Eastlink agreed to provide information about the IP address that had been associated with the fake account, but only with prior authorization of a court. A.B. subsequently filed a Notice of Application under Nova Scotia's *Civil Procedure Rules*,[4] and with her father acting as litigation guardian, sought to require Eastlink to disclose the identity of the person or persons associated with that IP address.

The Supreme Court of Nova Scotia denied A.B.'s request for anonymity because it found no evidence of "specific harm" to her should her name be published. Eastlink did not oppose her motion.

*The Media's Position*

The Halifax Herald and Global Television opposed A.B's requests to proceed anonymously and to be granted a publication ban. They argued that A.B.'s age was not in itself a sufficient reason to justify abandoning the need for a finding of specific harm in this case. The Supreme Court of Nova Scotia and the Court of Appeal agreed, holding that the media's access to content and information should not be restricted.

## ***The Supreme Court of Canada***

On appeal from the Nova Scotia Court of Appeal, Madam Justice Abella held that the lower courts erred in failing to consider the "objectively discernable harm" to A.B. In reaching this decision, the Court expressly took into account the importance of the "open court principle" and of freedom of the press, but held that privacy and the protection of children can justify restricted access to the press. Justice Abella was careful to note, however, that this restriction did not extend to the non-identifying content of the Facebook profile. In this sense, the Court sought to impair the rights of the press as minimally as possible, and therefore find a balance between the competing democratic and legal principles at play.

*The Protection of A.B.'s Identity - Cyber-bullying Meets Threshold of "Objectively Discernable Harm"*

The Court held that, in an application for anonymity in a case of cyber-bullying, there is no need for a child to demonstrate that he or she is subjectively "vulnerable", because vulnerability is assumed. The law attributes this heightened vulnerability based on "chronology, not temperament".[5] This is a departure from the previous requirement of subjective harm, although the Court stated that subjective evidence of a direct, harmful consequence to an individual applicant may still be relevant in any given determination of vulnerability.[6]

In determining that cyber-bullying meets the threshold of "objectively discernable harm", the Court took into account the 2012 Report of the Nova Scotia Task Force on Bullying and Cyberbullying.[7] The report discussed, in part, the particularly harmful nature of the

[4] N.S. Reg. 370/2008.
[5] *Bragg*, *supra* note 3 at para. 17.
[6] *Ibid*., at para. 15.
[7] The Nova Scotia Task Force on Cyberbullying was created following a tragic series of youth suicides, and it released a report on its findings called "Respectful and Responsible Relationships: There's No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbulling (2012)". This Report was cited in *Bragg* at para. 20.

dissemination of cyber-bullying, in that "the content can be spread widely, quickly ---- and anonymously".[8]

The Court also considered the fact that disallowing the protection of privacy in these types of cases may prevent victims from bringing their cases forward, due to the "risk of further harm from public disclosure".[9] This would have the broader effect of decreasing access to justice and bringing the administration of justice into disrepute. As Justice Abella wrote, "the likelihood of a child protecting himself or herself from bullying will be greatly enhanced if the protection can be sought anonymously".[10]

*The Publication Ban – Balancing Privacy Interests with the Open Court Principle*

Although the Court ruled in favour of protecting A.B.'s privacy and anonymity, it was careful to give something back to the press. At paragraph 13, Abella confirmed that the importance of the open court principle and a free press are "tenaciously embedded in the jurisprudence". The open court principle states that it is essential to public confidence in the court system and the rule of law that the courts are seen by all to operate openly, fostered by publicity of court proceedings through the press. As such, freedom of expression, and by extension freedom of the press, should therefore only be restricted in the clearest of circumstances.[11] Following from that, the publication ban was not applied to the non-identifying content of the fake Facebook profile.

The Court cited previous Supreme Court of Canada decisions that attempted to balance the open court principle with the desire to withhold a victim's identity. In that case, the Court found the impairment of the open court principle to be "minimal", and the content at issue to be merely a "sliver of information".[12] As has been mentioned, the Court in *Bragg* was cautious in extending its requirement for privacy and anonymity. The Court held that the open court principle should prevail with respect to the publication of "non-identifying content" of the fake Facebook profile. No harmful impact to A.B. could result where there was no connection between her identity and the content that would allow the information to be linked back to her.[13]

## ***Implications of this Decision in the Context of Education***

The decision in *Bragg* has important implications for the role that bullying plays in the context of our education system. In *Bragg*, the Supreme Court of Canada expressly recognized the widening scope of the traditional notion of bullying, taking it from the schoolyard to the vast, and arguably more permeating world of cyber-space.

In coming to this decision, the Court is attempting to keep pace with the ever-changing world of

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[8] *Bragg*, *supra* note 3 at para. 22. The Report of the Nova Scotia Task Force on Bullying and Cyberbullying defined bullying at pp. 42-43 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."
[9] *Bragg*, *supra* note 3 at para. 23.
[10] *Ibid*., at para. 25.
[11] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.
[12] *Bragg*, *supra* note 3 at para. 28. The Court discusses *F.N. (Re)*, [2000] 1 S.C.R. 880 at para. 12. and *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122.
[13] *Bragg*, *supra* note 3 at para. 30.

technology and the corresponding implications on our justice system. This decision recognizes the prevalence of social media in our society and the harm that can result from its misuse, specifically in the context of bullying.

Further, the right to privacy in cases of cyber-bullying is now recognized to be an important enough consideration that the courts will compromise the open court principle for the protection of children. While A.B.'s status as a minor proved to be a crucial consideration for the Court in reaching its decision, the recognition of the importance of privacy in light of the potential for harm in its absence is a step in the right direction for the recognition of the importance of privacy for *all* victims of cyber-bullying, regardless of age.

This decision also lends credibility to the doctrine of "bullying" as a distinct category of harm apart from its link to any human rights or accommodation issues[14] (although there is likely still overlap with these areas). This decision and its express recognition of the harm caused by bullying is in line with recent parliamentary initiatives to address all forms of bullying as a standalone issue in both the education and workplace contexts.[15]

Teachers, principals and school boards have both a statutory and common law duty of care to protect their students from bullying.[16] These actors must recognize the severity of the harm that bullying can cause to students, both to the academic success of the victim and to the maintenance of a positive learning environment. They must proactively implement measures, including but not limited to the creation of anti-bullying policies, in order to prevent and effectively address all instances of bullying and to stay current with what may be required or expected of them under the law.

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[14] E.g. if the bullying is triggered by victim's race, disability, or another enumerated ground under *Human Rights Code*, R.S.O. 1990, c. H.19.
[15] *Supra* note 2; Bill 168, "Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009", which amended the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1.
[16] See generally Anne-Louise Cole, "Too cruel for school: Liability for Bullying in Schools" (2012) The Litigator, April 2012, pages 6-9. The Litigator is the main publication of the Ontario Trial Lawyers Association.
[17] Sabrina and Jared would like to thank Harris Rosen of Fogler, Rubinoff LLP for his insight during the writing of this article.