

Confidentiality for “young victims of  
online sexualized bullying”:  
was *AB v. Bragg* an equality case?

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UOttawa Association of Women & the Law

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15 year old AB

fake FB profile

photo of AB

weight  
appearance

allegedly preferred sexual acts

friend request

CD

taken down

lawyer

IP address

# Bragg Communications

court order

application

compelling disclosure of  
customer information

defamation action

confidentiality  
partial publication ban

revictimization

# Rules of Civil Procedure

media

# Halifax Herald Global Television

3 days

Leblanc J

allowed AB's motion to  
abridge time

disclosure request

1. prima facie defamation case
2. no other means to ID poster
3. public interest not served by maintaining anonymity

however

dismissed

# **1. serious risk**

well grounded in evidence

beyond personal interest

no alternative measures

tailored order

**2. weighing**  
salutary effects of ban >  
deleterious effects

a serious risk to the proper  
administration of justice

revisit

replication

“danger to [AB’s] emotional health”

“physical, psychological,  
emotional or mental effects”

“embarrassment”

open courts

“positive and negative aspects”

“public would not be aware of  
how social networking  
programs work and how they  
can be destructive to the  
public and particularly to  
young persons”

“pernicious conduct”

“speak up for better control of such conduct arising from free and unlimited ability to publish such material on internet sites”

won

# Halifax Herald Global Television

\$1500 to Halifax Herald  
\$750 to Global Television

“need for an adjournment to  
allow [AB] to file a  
supplementary brief, requiring  
the Herald to file a  
supplementary brief in reply”

AB appealed

dismissed

\$2,000 Halifax Herald  
\$1,000 to Global Television  
+ disbursements

Oland JA  
MacDonald CJNS  
Saunders JA

“a teenager who finds herself the victim of on-line bullying against the public’s right to be informed by a free and independent press given unrestricted access to open court proceedings.”

*parens patriae*  
evidence of harm

“at a loss to understand how fault can be laid at the feet of the judge of first instance for ‘failing’ to initiate a form of relief which had never been raised in argument”

cautiously  
party under disability  
to fill legislative gaps

unpersuaded

criminal  
family

“a circumstance, among many factors for the judge to take into account”

embarrassed

defamation

“cloak of secrecy”

“contrary to the quintessential  
features of defamation law”

“A.B. has chosen to defend her reputation in court. When one makes that election, one is bound by the rules. Actions are tried by judge and jury. The case is heard in open court. The pleadings are available for public inspection. When injury to reputation is alleged, it is hardly surprising that personal and potentially embarrassing details will be disclosed.

But that is the reality of pursuing litigation in Canadian courts, where the open-court principle is enshrined.”

“a victim of sexual assault, seeking civil redress for crimes to which she was subjected”

“anathema to an action in  
defamation”

serious risk of harm

“fatal”

“easy”

displace the rule of opennness  
and public access to courts

“inconvenience and  
embarrassment”

“Should she be successful, one might expect that she will be lauded for her courage in defending her good name and rooting out on-line bullies who lurk in the bushes, behind a nameless IP address.”

“The public will be much better informed as to what words constitute defamation, and alerted to the consequences of sharing information through social networking among “friends” on a 21st century bulletin board with a proven global reach.”

appeal

# Halifax Herald Global Television

*amicus*

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British Columbia Civil Liberties Association

Beyond Borders

BullyingCanada Inc.

Canadian UNICEF Committee

Canadian Civil Liberties Association

Canadian Internet and Public Policy Interest Clinic

Kids Help Phone

Media Coalition

Information and Privacy Commissioner of Ontario

Privacy Commissioner of Canada

allowed AB's appeal in part

necessary to protect an  
important legal interest

impairing free expression and  
the open court principle as  
little as possible

open court principle  
privacy

harm to AB's privacy

“relentlessly intrusive  
humiliation of online  
sexualized bullying”

“objectively discernable harm”

“reason and logic”

vulnerability of children and  
the need to protect them

“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”

“diminished moral culpability”

Prof Wayne MacKay

# Nova Scotia Task Force on Bullying and Cyberbullying

loss of self esteem  
anxiety  
fear  
greater risk of suicide

cyberbullying

“spread widely, quickly and  
anonymously”

anonymous reporting mechanisms

solutions won't be found  
retaliation

Kids Help Phone

privacy for sexual assault  
victims encourages reporting

“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.”

“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.”

open court principle

*minimally impair*

“relatively unimportant”

sexualized cyberbullying

pseudonymn

non-identifying

privacy  
protecting children  
access to justice  
open courts  
free expression  
free press

democracy

the “e” word

equality

equality for children  
gender equality  
sexual identity equality

equal protection  
equal benefit

gender equality  
sexual identity equality

sexualized

preferred sexual acts

discriminatory tropes

misogynistic

sexualized

GLBTQ phobia

privacy

equality

1. inadequate statistics?
2. didn't think of it
3. decided against it

why does it matter?

I don't think so.

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