



## Education Law eBulletin

A newsletter for educators

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### Supreme Court of Canada grants Anonymity to Cyberbullying Victim

In our November 2011 edition of the Shibley Righton Education eBulletin, we reviewed a Nova Scotia Court of Appeal decision titled *A.B. v. Bragg Communications Inc.*, detailing the circumstances surrounding a situation in which a teenage girl discovered that someone had created a false Facebook page using her identity. The Facebook page had been made public and discussed the victim's physical appearance, weight and included allegedly defamatory sexual commentary of a private and intimate nature. Upon learning of the profile, the victim accessed the page and printed a hardcopy of the content. Through legal action, the student and her family were able to determine the IP address of the computer that created the fake profile and the Internet Service Provider, Bragg Communications Inc. The student's family brought an application for an order requiring Bragg to disclose the identity of the users of the IP address.

At the same time, the victim also sought an order allowing her to pursue the matter by her initials as well as a partial publication ban to prevent the public from learning of the comments that had been posted to the fake Facebook profile. The victim sought the publication ban on the basis that making her identity public, together with the content, would subject her to further public humiliation as details of the initial defamatory comments were published. The victim's request to proceed with the action anonymously was opposed by two media groups.

Both the Nova Scotia Supreme Court judge and the Nova Scotia Court of Appeal refused the victim's request for a publication ban stating that public embarrassment was not a sufficient reason to limit the principle of open courts.

However, on September 27, 2012, in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, the Supreme Court of Canada unanimously overturned the lower courts' decisions. In arriving at this conclusion, Justice Abella, writing for the court, stated that children are inherently vulnerable, evidenced by the fact that Canadian law protects young people's privacy under various legislation including the *Criminal Code* and child welfare legislation. The Court therefore held that where sexualized cyberbullying is involved, given the inherent vulnerability of children, there was no need for the victim to demonstrate that he or she is particularly sensitive and requires protection; the law itself attributes a heightened vulnerability based on age, not temperament.

In addition, Justice Abella referred to several expert findings noting that cyberbullying was particularly insidious insofar as online content is spread widely and quickly. This, together with the fact that it can be done anonymously, makes bullying "easier, faster, more prevalent, and crueler than ever before." The Court further recognized that a bullied child is unlikely to report bullying, much less take legal action, absent a grant of anonymity, and that anonymity necessarily protects victims of sexualized bullying from being revictimized upon the publication of details. Therefore, the Court held that the victim in this case was entitled to be

free from the fear of revictimization through the media and allowed her to proceed with her claim anonymously, reversing the decisions of the lower courts.

However, the Supreme Court of Canada also addressed the importance of freedom of the press. Although the victim could proceed anonymously with her attempts to identify and seek damages from the cyberbully, the Court also held that any non-identifying content in the false Facebook profile could be published.

The Supreme Court of Canada's findings in this matter are not surprising; as discussed in our November 2011 eBulletin, this Court has previously recognized that our youth and our elderly are "vulnerable persons" in need of extra protections. In this decision, the Supreme Court has clearly recognized that all children are "inherently vulnerable," regardless of temperament, that cyberbullying presents a clear risk to these children, and that allowing victims to proceed anonymously will encourage the reporting of bullying activity and aid victims who wish to seek redress against their tormentors.

The Supreme Court of Canada's reasons in the *A.B.* decision raise several interesting questions. In granting anonymity, Justice Abella repeatedly emphasized the fact that the student in *A.B.* was the victim of *sexualized* cyberbullying. In its decision, the Court held that, "...young victims of *sexualized* bullying are *particularly* vulnerable to the harms of revictimization upon publication...". Further, the Court specifically held that there is no need for a particular child to show that she is "inherently vulnerable" in an application involving *sexualized* cyberbullying. Consequently, despite the Court's statements regarding the inherent vulnerability of children and the invasive nature of the internet, it remains to be seen whether only those situations in which sexually explicit statements are made will be subject to a publication ban.

In addition, the *A.B.* decision scrutinizes the power of the internet and the potential harm that results from the online publication of humiliating information. However, the reality is that false and hurtful statements, including sexualized bullying, continue on the playground and in our schools and neighbourhoods. The question remains that if a student who is subject to the 'traditional' type of bullying wishes to take recourse against her tormentors, will she be entitled to the same protections as a student who is the victim of cyberbullying? Although the harm may not have occurred online, arguably the publication of any details resulting from a court action, which would likely be reported online, would result in the same revictimization given the accessibility of online news.

Finally, the Court's statement that a child who is the victim of sexualized bullying is "inherently vulnerable" based on her age and therefore need not demonstrate evidence of a direct, harmful consequence raises another question regarding privacy in general. In our view, this statement raises the possibility that an adult who is the victim of cyberbullying may be entitled to a publication ban and/or anonymity in the event that he or she can establish either a direct, harmful consequence of publication or objectively discernible harm.

Using the courts to seek redress for bullying is not a new concept. However, given the Supreme Court of Canada's comments in *A.B.*, one can expect to see an increase in litigation regarding bullying – be it in schools, online, or the workplace. We therefore recommend that school board administrators ensure that principals take all complaints seriously act appropriately when responding to students' concerns to ensure that school boards do not become parties to the litigation.