

## Legal update

### The Supreme Court of Canada reconsiders the applicable test for granting mandatory interlocutory injunctions

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#### February 2018 Litigation

In 1994, the Supreme Court of Canada handed down its landmark decision in the case of [RJR-Macdonald Inc. v. Canada \(Attorney General\)](#).<sup>1</sup> In this case, the Supreme Court articulated the applicable test for granting an interlocutory injunction on the following three criteria: (1) the existence of a serious issue to be tried (2) the possibility of irreparable harm and (3) the balance of inconvenience.<sup>2</sup>

For more than 20 years, this test has been applied by Quebec courts and has strongly influenced the courts of the other Canadian provinces. However, the Supreme Court has recently amended the first part of the test regarding the issuing of a mandatory (in contrast to prohibitive) interlocutory injunction.

On February 9, 2018, the Supreme Court of Canada granted the appeal of a decision rendered by the Alberta Court of Appeal in the context of an action by the Crown against the Canadian Broadcasting Corporation.

The decision deals with a motion by the Crown seeking the issuance of a mandatory interlocutory injunction ordering the CBC to remove from its website certain articles containing identifying information targeted by an order prohibiting its publication, broadcast or transmission, even though these articles had been put on line prior to the issuance of the publication ban.

The decision by the Supreme Court in the case [R. v. Canadian Broadcasting Corp.](#)<sup>3</sup> confirms a number of principles concerning interlocutory injunction, but proves particularly relevant in respect of the burden of proof required under the first part of the test stated in the *RJR-Macdonald* case.

#### **The notion of a serious issue to be tried is replaced by that of a strong *prima facie* case**

The trial judge applied an amended and more stringent version for the first part of the test developed in the *RJR-Macdonald* case. Under that test, rather than simply demonstrating the existence of a serious issue to be tried, the Crown was to establish a "strong *prima facie* case for finding CBC in [...] contempt."<sup>4</sup>

The Supreme Court judges supported the opinion of the trial judge and held that "the potentially severe consequences for a defendant" justified the application of a higher threshold within the context of an application for a mandatory interlocutory injunction.<sup>5</sup>

Under this new test, the court must carry out a more extensive review of the merits of the case at the interlocutory stage. More specifically, the court must be convinced of the existence of "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."<sup>6</sup>

In this case, the Crown was maintaining that the terms "*published*" and "*transmitted*" in the English version of the provisions of the *Criminal Code* pertaining to the publication ban were to be interpreted broadly and that said terms included publications transmitted before the issuance of the ban order.<sup>7</sup>

However, the wording of the relevant provision could also "be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban."<sup>8</sup> The Supreme Court therefore concluded that the trial judge had not erred in refusing interlocutory injunction because "the Crown had not shown a strong *prima facie* case of criminal contempt."<sup>9</sup>

## The impact of this decision in Quebec

Although the criteria for the granting of an interlocutory injunction have been codified in Article 511 of the *Code of Civil Procedure*, the case of *R. v. Canadian Broadcasting Corp.* could nevertheless have a certain impact in Quebec. If Quebec courts consider that the principles developed in this case apply in Quebec, applicants in mandatory interlocutory relief will need to submit evidence and legal arguments demonstrating a "strong *prima facie* case" in order to be granted an interlocutory injunction directing the defendant to "take a positive course of action."

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*The authors wish to thank Audrey Lévesque, law student, for her assistance in the preparation of this legal update.*

## Footnotes

1. [1994] 1 SCR 311.
2. *Ibid*, 347-349.
3. 2018 SCC 5.
4. *Ibid*, para 6.
5. *Ibid*, para 15.
6. *Ibid*, para 17.
7. *Ibid*, para 30.
8. *Ibid*.
9. *Ibid*, para 31.

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