A New Look at Interlocutory Injunctions

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The year 2018 has been an important one for case law regarding injunctions: the Supreme Court of Canada and the Court of Appeal of Quebec each rendered decisions that redefined certain parameters for the issuing of a interlocutory injunction.

R. v. *Canadian Broadcasting Corp.*

On February 9, 2018, the Supreme Court of Canada rendered a unanimous decision in *R.* v. *Canadian Broadcasting Corp*.[1] The most significant aspect of this decision is that the Court redefines the serious issue to be tried criterion when it comes to a mandatory interlocutory injunction, which is an injunction that orders the defendant to do something, as opposed to a prohibitive injunction, which orders the defendant to refrain from doing something.

An accused was found guilty of first degree murder of a minor, following which the Canadian Broadcasting Corporation ("**CBC**") published information on its website that revealed the identity of the victim. A ban prohibiting the publishing, broadcasting, or transmission in any way of any information that could identify the victim was ordered under section 486.4(2.2) of the *Criminal Code*, at the Crown's request. CBC refused to remove the information from its website, and the Crown filed an application to have CBC declared guilty of criminal contempt and to obtain an interlocutory injunction ordering the removal of the information from CBC's website. The first judge dismissed the Crown's application, concluding that it had not met its burden with regard to the criteria for obtaining a mandatory interlocutory injunction. The Court of Appeal allowed the appeal and granted the injunction.

The Supreme Court explains that, when it comes to mandatory interlocutory injunctions, the applicant must demonstrate more than the serious issue to be tried, as established by the decision *RJR—MacDonald Inc.* v. *Canada (Attorney General)*.[2] The threshold to be applied is a "strong *prima facie* case," which requires the applicant to establish "[...] 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".[3] The two other criteria for issuing an interlocutory injunction

(irreparable harm and balance of convenience) remain the same.

The Court specifies that the modified test only applies to mandatory interlocutory injunctions, explaining that an interlocutory injunction framed in prohibitive language may nevertheless require the defendant to take positive action. For example, ordering that CBC stop transmitting the information that established the identity of the victim would require positive action on the part of CBC, that is, to take measures to remove the information from its website. The Court emphasizes the importance of looking past the form and the wording used, in order to determine the real essence of the order sought.

Pointing out the discretionary nature of the decision to issue an interlocutory injunction and the duty of deference with regard to intervention on the part of appeal courts, the Court allows the appeal and restores the decision of the chambers judge, concluding that the Crown had not demonstrated a strong *prima facie* case of criminal contempt. In fact, since section 486.4(2.2) of the *Criminal Code* could be reasonably interpreted as only prohibiting publications transmitted *after* the publication ban, the Crown could not establish that it had a strong likelihood to succeed at trial.

Groupe CRH Canada inc. c. *Beauregard*

On June 21, 2018, the Court of Appeal rendered a decision in *Groupe CRH Canada inc.* c. *Beauregard*,[4] which will surely often be cited, since it redefines the relationship that exists between the three criteria for the issuance of an interlocutory injunction.

The respondents, waterfront residents near Chemin de la Butte-aux-Renards (the "**Road**"), commenced legal proceedings to seek an interlocutory and permanent injunction and damages to stop truck traffic on the Road. The Road was the only access road that enables trucks to obtain supplies from the stone quarry operated by the appellant CRH Canada Group Inc. ("**CRH**"), and from manufacturing facilities for products related to asphalting, which belonged to the appellant Bau-Val Inc. ("**Bau-Val**"). The impleaded party, KPH Turcot, was awarded the design-build contract for the Turcot project and would receive its supplies from the CRH quarry, which led to increased traffic on the Road since the spring of 2016. The Superior Court issued an interlocutory injunction prohibiting the operation of trucks in the evenings and at night (from 5:30 p.m. to 6:29 a.m.), limiting the operation of trucks on weekends to three Saturdays per year, and restricting the operation of trucks during the day. Among the grounds of appeal raised, the appellants claimed that the chambers judge did not consider the balance of convenience after having concluded that the respondents met the *prima facie* case criterion.

First, the Court clarifies the fact that there is no true distinction to make between determining if there is a serious issue to be tried and a *prima facie* case: it is essentially sufficient for the application to be neither frivolous nor vexatious. It should be noted that the Court does not refer to the decision *R.* v. *Canadian Broadcasting Corp.* decision rendered a few months earlier, which redefined this criterion for mandatory interlocutory injunctions. This could probably be explained by the fact that the Court of Appeal had before it an application to issue a prohibitive interlocutory injunction for which it must have been of the opinion that the new criterion established by the Supreme Court of Canada did not apply.

With regard to the second criterion, the Court recalls the wording used in article 511 of the *Code of Civil Procedure*, which codifies interlocutory injunctions: prejudice must be serious or irreparable, which means to that an injunction can be issued even if the prejudice can be compensated monetarily, if and so long as the prejudice is "serious."

The most significant aspect of this decision is the analysis carried out by the Court with regard to the balance of convenience criterion. The Court comes to the firm conclusion that a judge who has

before him an application for interlocutory injunction must analyze the balance of convenience criterion, even if the applicant demonstrates a strong *prima facie* case. This conclusion seems to contradict a number of precedents, including the landmark case of *James Bay Development Corporation* v. *Chief Robert Kanatewat*,[5] which was to the effect that the balance of convenience should not be analyzed if the applicant demonstrates a strong *prima facie* case.

> [14] At the interlocutory injunction stage these rights are apparently either (a) clear, or (b) doubtful, or (c) non-existent:
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> (a) If it appears clear, at the interlocutory stage, that the Petitioners have the rights which they invoke then the interlocutory injunction should be granted if considered necessary in accordance with the provisions of the second paragraph of Article 752 C.P.
>
> (b) However, if at this stage the existence of the rights invoked by the Petitioners appears doubtful then the Court should consider the balance of convenience and inconvenience in deciding whether an interlocutory injunction should be granted.
>
> (c) Finally if it appears, at the interlocutory stage, that the rights claimed are non-existent then the interlocutory injunction should be refused.

The Court indicates that even if there were a violation of an objective legislative standard of public order, the criterion of the balance of convenience must still be analyzed and could be used as an argument against the application of the standard. It is clear that this change made by the Court is a major one: henceforth, the applicant is never exempt from demonstrating that the balance of convenience criterion is in the his favour, even if said applicant demonstrates a strong *prima facie* case.

The Court provides two cases in which judges may discontinue their analyses of the *prima facie* case criterion: *[our translation]* “(a) when the applicant does not meet the preliminary condition of the "*prima facie* case" or the "serious issue to be tried", such that the application may be denied for this reason; and (b) when the case is based on a pure question of law” (para. 77).

Finally, the Court briefly mentions that, in Quebec, it is possible for judges to discontinue their analyses based on the *prima facie* case criterion for cases in which the interlocutory injunction is aimed at enforcing contractual obligations. The Court does not elaborate more on this *obiter*, which can be applied in Quebec, where specific performance is the default remedy for not performing a contractual obligation, and not an exception, as it is in common law.

On the basis of its analysis of the balance of convenience, the Court partially allows CRH’s appeal, quashing the injunction which limited the operation of trucks during the day on weekdays. With regard to Bau-Val, as the first judge acknowledged that the traffic generated was minimal, the injunction was quashed.

Conclusion

Litigants parties must be familiar with these two decisions that redefine the criteria required for issuing an interlocutory injunction.

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1. 2018 SCC 5
2. 1994 CanLII 117 (SCC). The Court’s reasons were delivered by the Honourable Justice Brown.
3. para. 17
4. 2018 QCCA 1063 (CanLII)
5. [1975] C.A. 166