

# Never Really Over: The Supreme Court Revisits Publication Bans Post Judgment

November 4, 2021

In the immortal words of Katy Perry, “just because it’s over doesn’t mean it’s really over.”

At least when it comes to publication bans.

In its recent decision [Canadian Broadcasting Corp. v. Manitoba, 2021 SCC 33](#), the Supreme Court of Canada ruled that even where a legal proceeding is finished and has been decided on the merits, an appellate court may still have the authority to go back and reconsider a publication ban ordered during that proceeding.

## Background

### *Miscarriage of Justice*

In 1987, Stanley Ostrowski was convicted of first-degree murder. Both the Manitoba Court of Appeal and the Supreme Court of Canada dismissed his appeal.

In 2014, the federal Minister of Justice referred Ostrowski’s criminal matter back to the Manitoba Court of Appeal to determine whether a miscarriage of justice had occurred.

During the hearing before the Court of Appeal, Ostrowski sought to introduce as evidence an affidavit sworn by his lawyer Richard Posner (the “Posner Affidavit”). The Crown opposed the admission of the Posner Affidavit.

Pending its decision on the admissibility of the Posner Affidavit, the Court of Appeal sealed the Posner Affidavit (prohibiting public access to the affidavit) in accordance with the Manitoba *Court of Appeal Rules*, Man. Reg. 555/88R. The court also ordered a publication ban with respect to the Posner Affidavit, preventing the public and media from reporting, publishing, or broadcasting on this material.

In November 2018, the Court of Appeal released its judgment on Ostrowski’s appeal. It determined that there had been a miscarriage of justice with respect to Ostrowski’s criminal proceeding. The appellate court quashed Ostrowski’s conviction and ordered a new trial. In its judgment, the Court of Appeal indicated that it had not admitted the Posner Affidavit into evidence and continued the publication ban indefinitely.

### *CBC’s Motion for Reconsideration*

In May 2019, approximately six months after the release of the Court of Appeal’s judgment, CBC brought a motion to access the Posner Affidavit and set aside the publication ban.

The Court of Appeal dismissed CBC's motion. The court found that it had no jurisdiction to reconsider its own publication ban, citing the common law doctrine of *functus officio*. Under that doctrine, once a court has entered a formal judgment, it generally loses jurisdiction over the matter and cannot go back and change its decision.

CBC sought and obtained leave to appeal this decision to the Supreme Court of Canada.

## The Supreme Court's Decision

### *Majority's Reasons*

Writing for the majority, Justice Kasirer found that the Court of Appeal did have jurisdiction to reconsider its own publication ban, even though the appeal had already been decided on the merits.

Justice Kasirer distinguished between 1) jurisdiction over the merits of a matter and 2) jurisdiction to supervise the court record. Under the doctrine of *functus officio*, a court may lose jurisdiction over the merits of an appeal once it makes its formal judgment. Yet, it retains jurisdiction to control and supervise the court record in matters that are ancillary to, but independent of, the merits of the appeal.

Publication bans and other orders relating to court openness are generally ancillary and independent matters. The question of whether the public can access specific evidence about a case or whether the media can report on that evidence does not affect the ultimate outcome of a case. By contrast, an order allowing or excluding specific evidence could affect the outcome of a case and should not be revisited by the same court once a formal judgment has been entered.

Justice Kasirer concluded that a court may reconsider its own publication ban in two narrow circumstances:

1. **Absence of Notice:** An affected person or entity, to whom it is appropriate to grant standing, was not given notice of the original publication ban. The affected person or entity has now brought a timely motion to vary or set aside the ban;
  1. **"Affected person" and "standing"** : Where a publication ban has been made in absence of notice to the media, representatives of the media will generally have standing to challenge a publication ban if they are able to show that they can make submissions that were not considered by the court and which could have affected the result. However, a court retains residual discretion to deny standing in the interests of justice.
  2. **"Timely motion"**: A court can decline to hear a motion to reconsider a publication ban if it is not brought in a timely fashion. Whether a motion is "timely" depends on the specific circumstances of each case.
2. **Material Change of Circumstances:** There has been a material change of circumstances relating to the making of the order, and had this material change been known at the time that the publication ban was made, it likely would have led to a different outcome.

Applying these two grounds to CBC's appeal, Justice Kasirer found no material change of circumstances that would have led to a different order by the Court of Appeal. Therefore, CBC could only seek to have the Court of Appeal revisit its publication ban on the basis that the publication ban had been made without notice to the broadcaster.

Justice Kasirer ultimately sent the matter back to the Court of Appeal to determine whether 1) CBC had standing to challenge the publication ban and 2) whether CBC's six-month delay in bringing its motion was unreasonable and therefore unable to satisfy the requirement of a "timely" motion. Finally, if those conditions were met, the Court of Appeal would ultimately need to decide whether the publication ban ought to be lifted in accordance with the legal principles set out in the Supreme Court decisions [Sierra Club of Canada v. Canada \(Minister of Finance\), 2002 SCC 41](#) and [Sherman Estate v. Donovan, 2021 SCC 25](#).

Justice Abella disagreed that the matter should be sent back to Court of Appeal. In her view, the six months between the release of the Court of Appeal's judgment and the filing of CBC's motion amounted to an unjustified delay, such that the broadcaster was not entitled to seek reconsideration of the publication ban. Justice Abella therefore concluded that CBC's appeal ought to be dismissed.

### **Key Takeaways**

This decision confirms that in certain limited circumstances, a court may revisit its own publication ban, even where the case subject to that ban has ended.

Those wishing to overturn a publication ban must act promptly. A motion for reconsideration must be brought in a "timely" manner. Although it remains to be seen whether the six months it took CBC to bring its motion was "timely" or not, Justice Abella's dissent suggests that Canadian courts will not look kindly to parties who wait to take action in a case that has been completed for months.

Individuals and the media can seek to lift a publication ban if circumstances have materially changed in a way that would have affected the court's order. Moreover, Justice Kasirer's reasons suggest that a material change of circumstances could also justify imposing (rather than lifting) a publication ban after the fact. For instance, if evidence given in a completed criminal trial could identify a vulnerable minor witness in another ongoing trial, the court might consider it necessary to impose a ban with respect to the completed trial, even if that matter has already been decided.

In this decision, the Supreme Court dealt specifically with an appellate court's power to revisit publication bans. However, the general distinction that Justice Kasirer drew between a court's jurisdiction over the merits of a case and its continuing supervisory jurisdiction over "ancillary but independent" matters leaves the door open to judicial reconsideration of other procedural orders in the future. Although it remains to be seen what "ancillary" matters courts will be willing to revisit, one thing is sure: when it comes to the court's control over its own record, even when it's over, it's never really over.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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