SUPREME COURT OF YUKON

Citation: *AB v Yukon (Government of)* 2021 YKSC 69

Date: 20211029
S.C. No. 21-A0024
Registry: Whitehorse

BETWEEN:

A.B.,
C.D., BY THEIR LITIGATION GUARDIAN A.B.

PLAINTIFFS

AND

THE GOVERNMENT OF YUKON (DEPARTMENT OF EDUCATION)

DEFENDANT

Before Justice E.M. Campbell

Counsel for the Plaintiffs — Vincent Larochelle

Counsel for the Defendant — Amy Porteous

It is prohibited to publish any information that could disclose the identity of either of the plaintiffs, or any information relating to C.D.'s gender, age, medical diagnosis or symptoms related thereto.

This decision was delivered in the form of Oral Reasons on October 29, 2021. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] CAMPBELL J. (Oral): The plaintiffs have filed a statement of claim seeking a number of declarations and injunctions against the Government of Yukon ("Yukon) with respect to the Department of Education's practices, allocation of space and resources,

and provision of services to students with special needs. The plaintiffs also seek to invalidate an unwritten policy that they state exists within the Department of Education.

[2] One of the plaintiffs is a child. By that, I mean someone who is under 19 years of age, which is the age of majority in the Yukon, and a student in [a Yukon community]. The other plaintiff is the child's [parent]. They have filed an application seeking an order that:

> (i) anonymizes the style of cause referring to the plaintiffs as A.B. and C.D., respectively, which is the equivalent of an order redacting their names; and
>
> (ii) prohibits the publication of any information that could disclose the identity of either of the plaintiffs or any information relating to the student's or the child's gender, age, medical diagnosis and associated symptoms.

[3] The plaintiffs have provided proper notice of their application to the local media outlets listed in the Supreme Court of Yukon's Practice Direction General-11.

[4] I note that none of the local media have filed an appearance or appeared in court to oppose the application. Nonetheless, at the outset of the hearing, counsel for the plaintiffs advised the Court that counsel for the CBC had contacted him to raise some issues regarding the difficulty for the media to ensure that they conform with parts of the initial publication ban sought by the plaintiffs, which sought, among other things, to prohibit the publication of any information relating to the child's physical and mental health or medical information.

[5] I am advised that counsel for the CBC raised some concerns regarding the broadness of the information that could potentially be covered by the expressions

"physical and mental health and medical information", as well as the perceived vagueness of those terms. In order to address those concerns, counsel for the plaintiffs requested, and was permitted, to amend and narrow the application with respect to the child's physical and mental health and medical information.

[6] The plaintiffs are now seeking an order prohibiting the publication of any information relating specifically to the child's medical diagnoses and associated symptoms in addition to any information relating to the child's age and gender, as well as any information that could disclose the identity of either plaintiff. Counsel for the plaintiffs stated that, in light of these changes, counsel for the CBC had informed him that the CBC was taking no position on the application.

[7] I note that Yukon did not oppose the amendment.

[8] At first, Yukon formally opposed the application. However, at the hearing, counsel for Yukon nuanced the government's position. Counsel stated that Yukon's interest in the application is simply to ensure that the Court fully considers the applicable law in determining whether to make an order limiting the constitutionally protected right of freedom of expression.

[9] Counsel for Yukon stated that the government's position is best described as declining to consent to the plaintiffs' application. Therefore, counsel for Yukon's submissions focused on the applicable law and issues raised by this case. Counsel for Yukon did not take a formal position with respect to the outcome of the application.

[10] First, it is important to recognize that court proceedings in Canada are presumptively open to the public. As stated recently by the Supreme Court of Canada in

Sherman Estate v Donovan, 2021 SCC 25, at para. 1:

> This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

[11] As a result, there exists a strong presumption in favour of open courts. However, despite this strong presumption, our law recognizes that in exceptional circumstances competing interests do arise that justify imposing restrictions or limitations on the open court principle.

[12] In *Sherman Estate v Donovan*, at para. 38, the Supreme Court of Canada clarified the test to apply when an applicant seeks a discretionary court order that imposes limits on the open court principle. To obtain an order imposing limits on court openness, such as the publication ban or anonymization of the style of cause that the plaintiffs are seeking in this case, an applicant must establish that:

> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[13] In order to be successful, an applicant must establish all three parts of the test. In addition, the inquiry under the three-part test is fact specific and requires that an applicant substantiates their claim.

[14] In this case, affidavit evidence was provided by the child's [parent] in support of the application.

[15] I will now address each of the three elements of the test.

The first question to answer is whether court openness poses a serious risk to an important public interest.

[16] The plaintiffs submit that court openness poses a serious risk to two important public interests in this case: the child's right to privacy; as well as the best interests of the child principle.

[17] First, I will consider the right of privacy invoked by the plaintiffs.

[18] In *Sherman Estate*, the Supreme Court of Canada determined that only a narrow aspect of privacy, which is concerned with a person's dignity, qualifies as a sufficient important public interest to justify imposing limits on the open court principle. The Court specifically stated that embarrassment or shame on their own are not sufficient reasons to impose a sealing order or a publication ban. The Court stated, at para. 77, that the question is whether the information reveals something intimate and personal about the individual, their lifestyle, or their experiences.

[19] The Court also provided, at para. 35, that an applicant must show that:

> … the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

[20] The Court provided further guidance on the notion of dignity at paras. 71 and 72 as follows:

> [71] Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner.

> … Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public …
>
> [72] Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress …

[21] With respect to the question of the seriousness of the risk, the Court in *Sherman Estate* reviewed a non-exhaustive list of factors to consider when assessing the risk associated with the dissemination of the information at issue, such as:

(1) that the seriousness of the risk may be affected by the extent to which the information would be disseminated without limits placed on the open court principle;

(2) consideration may be given to the extent to which the information is already known;

(3) the probability that the dissemination of the information will actually occur; and

(4) the possibility of identifying objectively discernible harm on the basis of logical inferences.

[22] I will now turn to the specific information and evidentiary record submitted by the plaintiffs to determine whether the risk to privacy alleged in this case qualifies as a serious risk to an important public interest.

[23] The statement of claim contains information about the child plaintiff's specific medical diagnoses and at least some of the child's associated symptoms from which the plaintiffs state the child's special needs arise.

[24] The affidavit evidence of the child's [parent] which is uncontradicted and unchallenged, establishes the following:

(1) the plaintiffs live in [redacted] [a] Yukon community [redacted];

(2) the child attends school in [a Yukon community];

(3) the statement of claim accurately describes the child's personal and medical information, including the child's diagnosis and symptoms that they experience either at home or at school;

(4) the child's diagnosis and symptoms are not known outside the child's school-based team;

(5) there are only a small number of individuals in the community who display similar symptoms to the child;

(6) the child is aware of the lawsuit and is very concerned, stressed, and anxious that their private and medical information would be made public and that their student peers, neighbours, and other [redacted] residents [of their community] could find out about their personal life's struggles and medical condition;

(7) both plaintiffs are worried about exclusion, bullying, and stigma at school if personal details regarding the child's medical condition and diagnoses were made public.

(8) the [parent] anticipates that any amount of publicity about her child's private and intimate information would immediately impact the child's emotional and social health;

(9) the impact on the child's emotional and social health would negatively impact the child's educational outcome, which would defeat the purpose of the lawsuit;

(10) the [parent] fears that any publicity about [the] child's medical condition and diagnoses may have harmful and lasting effects on the child's mental health and the development of the child's sense of self worth.

[25] Based on the statement of claim, as well as the affidavit evidence provided by the child's [parent], I am satisfied that the information regarding the child's medical diagnoses and associated symptoms constitute very intimate and personal information that goes to the core of the child's identity and falls within that narrower concept of privacy that the Supreme Court of Canada has recognized as constituting an important public interest that can be weighed against the open court principle. The information regarding the child's diagnosis and associated symptoms are part of who the child is as a person. The affidavit evidence makes it clear that the child and their [parent] have decided not to share that information with many people in order to protect the child and not impede their development.

[26] While the evidence reveals that the child experiences symptoms of their condition at school, one cannot assume that the child's peers, school staff members other than the school-based team, or members of the community with whom the child interacts have necessarily noticed these symptoms or would be in a position to link them to certain medical diagnoses let alone any diagnosis at all. The dissemination of that information would therefore create a situation where the child would lose control over fundamental personal information about themselves that the plaintiffs have chosen

not to share with many. Making that personal information available to the public would therefore create a situation that the Supreme Court of Canada has recognized as being damaging to dignity because it erodes one's ability to present aspects of oneself to others in a selective manner.

[27] It is also important to consider that the information the plaintiffs seek to protect from dissemination relates to a child. In *AB v Bragg Communications Inc*, 2012 SCC 46, at para. 17, the Supreme Court of Canada stated that:

> Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. … [emphasis in original]

[28] I acknowledge that in *Sherman Estate* the Supreme Court of Canada has also stated, at para. 92, that:

> The fact that some of the affected individuals [in that case] may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy [citation omitted], the mere fact that information concerns minors does not displace the generally applicable analysis …

[29] However, I am of the view that the information the plaintiffs seek to protect in this case is not generic. As stated before, the child's medical diagnosis and associated symptoms strike to the core of the child's identity. I am therefore of the view that it is appropriate to consider the heightened vulnerability of the child plaintiff based on age as recognized in *AB v Bragg*.

[30] In addition, I am of the view that human experience aligns with the concerns and fears reported in the child's [parent] affidavit regarding the negative impact that the dissemination of the information would have, among other things, on the child's development as well as their emotional and psychological health. I am of the view that

the fears and concerns expressed by the plaintiffs are objectively reasonable. Human experience sadly reveals that children who are different, including children with special needs, are more susceptible than others to being the subject of teasing, mockery, rejection, and bullying from their peers at school. A child targeted in that way may suffer from tangible negative effects to their mental, emotional, and even sometimes physical health and development.

[31] With respect to the probability and extent to which the information would be disseminated if no limitations were imposed, I note that this is an action against Yukon. As such, an inference can be made that this case is likely to attract more public attention and scrutiny than an action involving a civil dispute between two private parties. It is also possible to infer from the nature of the case and the involvement of the territorial government as a named defendant that there is a heightened possibility that this proceeding may be of interest to the media and reported across the territory, including in [the plaintiffs' community].

[32] I am also of the view that the presence of two media representatives in the court room when this application was heard is an indication of the legitimate media interest in this case. There is therefore a real possibility that the circumstances surrounding this case will be reported on or published across the territory, including [in the plaintiffs' community].

[33] Overall, I am satisfied that the plaintiffs have established that the open court principle poses a serious risk to the child's dignity, which is an important public interest.

> ***The second question to answer is whether the order sought is necessary to prevent a serious risk to the identified interest because reasonably alternative measures will not prevent the risk.***

[34] The plaintiffs not only seek to proceed anonymously by anonymizing the style of cause, they seek an order prohibiting the publication of any information that could disclose the identity of either of the plaintiffs or any information relating to the child's gender, age, medical diagnosis and associated symptoms.

[35] At the hearing, I questioned whether it was necessary to prohibit the publication of the child's diagnosis and associated symptoms if an order permitting the plaintiffs to proceed anonymously or to anonymize the style of cause was granted. I noted that in many cases the anonymization of the proceeding was considered sufficient to protect the serious risk identified by the applicants. I also considered other options, such as ordering a publication ban on other potentially less important elements of the lawsuit, such as the name of the community where the child attends school.

[36] However, after hearing the submissions of counsel and reviewing the evidence, I have come to the conclusion that there are no other reasonable alternatives in this case. Parts of the plaintiffs' lawsuit are directly linked to the services and space or lack thereof that exist in [the community where the child attends school]. Therefore, prohibiting the publication of the name of the community would not constitute a reasonable alternative to the publication ban sought by the plaintiffs, as many would recognize the community based on the description of different elements of the school, included in the statement of claim, that are relevant to the case.

[37] Going back to the anonymization of the style of cause, in many cases, courts have found that anonymization of the style of cause sufficed. However, in this case, the plaintiffs have established that more is warranted to effectively protect the child's dignity

from the serious risk posed by the open court principle. [redacted - name of the community as well as brief description of the community and school in question].

[38] In addition, as mentioned, the evidence before me is to the effect that only a small number of people in [the plaintiffs' community] exhibit the same symptoms as the child plaintiff. In that context, I agree that permitting the publication of multiple facets of the child's conditions, such as the diagnoses and associated symptoms in addition to the child's special needs, which are not covered by the publication ban sought, would likely result in the identification of the child and defeat any order allowing the plaintiffs to proceed by anonymizing the style of cause.

[39] Counsel for Yukon pointed out that a redaction order, which in this case amounts to anonymizing the style of cause, is considered a more serious limitation to the open court principle than a publication ban, as it removes the redacted information from the court file. Counsel for Yukon suggested that anonymizing the style of cause may not be required in this case and that a publication ban covering the identity of the plaintiffs would achieve the same result.

[40] Counsel for the plaintiffs submits that the names of his clients is of no added value to the public considering the nature of this case. He added that anonymizing the style of cause would make it easier for the public and the media to refer to the case and locate the file at the Registry than a publication ban.

[41] I agree with counsel for the plaintiffs that an order anonymizing the style of cause is appropriate in this case. I note that in *AB v Bragg*, the Court ordered the redaction of the style of cause to ensure the anonymity of the plaintiff of sexualized online bullying on the basis of the relative unimportance of the plaintiff's identity in that case.

[42] I am of the view that in doing so, the Supreme Court of Canada acknowledged that this was a valid consideration in determining the type of limitations to impose on the open court principle.

[43] I am of the view that the case before me is also a case where the identity of the plaintiffs is of little added value to the public and that the benefit of protecting the child's identity outweighs the risk to the open court principle.

[44] Finally, I note that no other potentially suitable alternative to the order sought by the plaintiffs has been presented to me on this application.

[45] As a result, I am of the view that there is no other way to meaningfully protect the serious risk that the dissemination of the child's private information poses to the child's dignity.

> ***The last element to consider is whether, as a matter of proportionality, the benefits of the order outweigh its negative effects.***

[46] The benefits of the order sought by the plaintiffs relate to the importance of ensuring that the child's emotional, mental, and physical health, as well as their development, are protected and not impeded by the plaintiffs' pursuit of an action that they believe is warranted in order to obtain and ensure the provision of educational services that meet the special needs not only of the child plaintiff but of other students.

[47] The negative effect on the openness principle is that the public and the media will not be able to report on the full set of circumstances that comprises this case. However, at this stage of the proceeding, I am satisfied that sufficient information remains available and publishable to ensure meaningful reporting about this case.

[48] As a result, I am satisfied that the plaintiffs have met the three-part test set out by the Supreme Court of Canada in *Sherman Estate*. They have established that the order

they seek is required in the specific circumstances of this proceeding. I am therefore prepared to grant an order that anonymizes the style of cause referring to the plaintiffs as A.B. and C.D., respectively, as well as an order that prohibits the publication of any information that could disclose the identity of either of the plaintiffs or any information relating to the child plaintiff's gender, age, medical diagnosis and associated symptoms.

[49] As I have concluded that the limitations sought by the plaintiffs on the open court principle are warranted due to the serious risk that it would pose to the child's dignity, after specific consideration to the fact that the plaintiff is a child, I do not find it necessary to determine whether the best interests of the child is in itself a principle of public importance that can be considered under the three-part test adopted in *Sherman Estate*.

[50] I will now address the issue of costs briefly.

[51] The issue of costs of this application may be discussed in case management or submissions may be made at a date to be determined through the Office of the Supreme Court Trial Coordinator, if necessary.

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CAMPBELL J.