SUPREME COURT OF YUKON

Citation: *GX v Yukon (Government of)*, 2023 YKSC 10

Date: 20230308
S.C. No. 22-A0097
Registry: Whitehorse

BETWEEN:

GX, by their Guardian ad litem, YY and
TA by their Guardian ad litem BB in a representative capacity on behalf of all students and former students of Jack Hulland Elementary School who were subject to holds and restraints and/or who were locked in a room and/or placed in seclusion between January 1, 2002 and June 30, 2022

PLAINTIFFS

AND

Government of Yukon, Department of Education
Jack Hulland Elementary School Council of Attendance Area #22

DEFENDANTS

Before Chief Justice S.M. Duncan

Counsel for the plaintiffs	James R. Tucker and Luke Faught
Counsel for the defendant, Government of Yukon, Department of Education	I.H. Fraser
Counsel for the defendant, Jack Hulland Elementary School Council of Attendance Area #22	Vincent Larochelle and George Filipovic (via telephone)

REASONS FOR DECISION

Introduction

[1] The plaintiffs seek an order preventing the publication of any document or information that would identify them in this matter. This application requires a

determination of whether the interest identified by the plaintiffs is sufficient to restrict the important principle of open courts.

[2] On February 13, 2023, I granted the order requested and advised I would provide brief reasons at a later date. These reasons are set out below.

Background

[3] This is a proposed class action brought through litigation guardians by two representative plaintiffs, who were students at Jack Hulland Elementary School ("Jack Hulland"). The action is brought on behalf of students at Jack Hulland who were subject to holds and restraints and/or who were locked in a room and/or placed in seclusion between January 1, 2002, and June 30, 2022. They claim damages resulting from the alleged assaults and batteries, false imprisonment or in the alternative negligence and from the alleged breaches of the duty of care and of fiduciary duty owed to the plaintiffs. The defendants are the Government of Yukon, Department of Education, and Jack Hulland Elementary School Council of Attendance Area #22 (the "School Council").

[4] The two representative plaintiffs are GX and TA. They are both 12 years old. They both allege they were subject to holds and involuntary seclusion by teachers and staff at Jack Hulland.

[5] Affidavit evidence from GX's litigation guardian states that they struggle with attention deficit hyper-activity disorder ("ADHD"), emotional maturity and regulation. Affidavit evidence from TA's litigation guardian states they have a mild intellectual disability and ADHD.

[6] A court order was previously granted to anonymize the plaintiff's names in the pleadings and style of cause.

[7] The plaintiffs now seek an order prohibiting the publication of any document or information, including evidence, submission, information, or materials related to this court file, that could identify either or both plaintiffs as parties to the proceedings. To implement this order, any party filing material in the Supreme Court would be required to redact any information that could identify either or both plaintiffs. The party would also be required to file unredacted versions of the same material, to be released only to the parties, their counsel, the Supreme Court of Yukon judges, and Court Services Branch staff.

[8] Notice of this application was provided to six accredited media outlets in the Yukon. Two media outlets, APTN and L'Aurore Boréale, contacted the plaintiffs' counsel indicating they were not opposed to the order sought. The others did not respond.

[9] The application is consented to by the defendant School Council. They requested the inclusion of the litigation guardians in the order.

[10] The Government of Yukon, Department of Education ("Yukon government") is unopposed to the application. They raised three matters for the Court's consideration. First, they urged the Court to ensure that its decision was in accordance with the applicable law, set out by the Supreme Court of Canada in *Sherman Estate v Donovan*, 2021 SCC 25 ("*Sherman*"). Second, they noted the court in that case specifically stated that the interest of minors does not change the analysis. Third, they noted that as a proposed class proceeding, and given the subject matter, there is likely to be heightened public interest. To have anonymized individuals acting as representatives of the class, taking steps to affect the rights of others in the class, and thus assuming a type of public function, may be an additional factor for the Court to consider.

Issue

[11] Does the relief sought meet the test of a proportional, minimally impairing restriction of the open court principle, based on a serious risk to an important public interest?

Analysis

[12] In Canadian law, there is a strong presumption in favour of open courts, meaning that the public can attend and observe court proceedings and access court filed materials, and the media can publicize and comment on proceedings and materials in an unrestricted manner. This open court principle is fundamental to a healthy liberal democracy and contributes to the accountability and fairness of the justice system.

[13] Courts have also recognized exceptional circumstances "where competing interests justify a restriction on the open court principle" (*Sherman* at para. 3). Those restrictions can take the form of a publication ban, a sealing order, a redaction order, an anonymization order, or an order excluding the public from a hearing. A justification for such an order requires the applicant to establish in the particular case that i) the open court principle poses a serious risk to a significant interest; ii) the order is necessary to prevent the risk; and iii) the benefits of the order outweigh its negative effects.

i) Serious risk to a significant interest

[14] An individual's privacy interest on its own is generally not enough to justify a restriction on the open court principle. While privacy rights are acknowledged in our jurisprudence to be an important interest, courts recognize that every court proceeding "entails some disquiet for the lives of those concerned" and "intrusions on privacy must

be tolerated because open courts are essential to a health democracy" (*Sherman* at para. 5).

[15] A more limited dimension of privacy is the protection of the dignity of persons. "Dignity … is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner" (*Sherman* at para. 71). When an individual loses the ability to control the dissemination of this kind of core information to others, such as through court proceedings, it can create real human consequences, such as psychological distress. The interest at risk is not a general privacy interest; instead, it is the revealing of sensitive personal information – that is, intimate, personal details about the individual, their lifestyle or their experiences, that go to their biographical core. Defining that information is a fact specific exercise. It can include information such as stigmatized medical conditions, sexual orientation, or details about family structure or work history. "[T]here is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals" (*Sherman* at para. 65). The court in *Sherman* further stated "a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity" (*Sherman* at para. 72).

[16] Here, both plaintiffs, through their litigation guardians, have deposed that identifying them will result in an uncontrolled disclosure of their medical and psychological diagnoses (ADHD, emotional immaturity and dysregulation, intellectual disability), which is core biographical information. They have expressed that as 12-year

old children, disclosure of their identity, and consequently that information, will have a negative psychological impact upon them, and may cause them to be the targets of ridicule, scorn, and unwanted attention from their peers, school staff, and members of the community.

[17] The Supreme Court of Canada in *AB v Bragg Communications Inc.*, 2012 SCC 46 ("*Bragg*"), recognised the inherent vulnerability of children has consistent and deep roots in Canadian law: hence the protection of young peoples' privacy under the *Criminal Code*, R.S.C., 1985, c. C-46, the *Youth Criminal Justice Act*, S.C. 2002, c. 1, and in child welfare legislation. These protections are based on age, not the characteristics or sensitivity of the particular child (*Bragg* at para. 17).

[18] As noted by counsel for the Yukon government, the Supreme Court of Canada has also stated in *Sherman* that the fact the individuals are minors is not in and of itself sufficient to meet the test of a significant public interest at serious risk from the open court principle (para. 92). The information at risk of being revealed must meet the threshold described above – it must be something sensitive about them as an individual, and part of their core sensibility.

[19] In this case, I am satisfied that the described psychological and medical conditions of GX and TA meet the threshold of sensitive personal information going to their biographical core that would affect their dignity if revealed in an uncontrolled manner. The plaintiffs' argument is not confined to the fact of their ages; it extends to the consequences of the inevitable disclosure of their sensitive personal information in this litigation. I accept that given the combination of their status as minor children and their sensitive personal information, protecting them from the threat to their dignity that

revealing this information would cause is a significant public interest in the context of assessing whether the open court principle should be restricted.

ii) Necessity/Minimal impairment

[20] The second stage of the *Sherman* test is a consideration of whether reasonable alternative measures are available. The order must be restricted as much as reasonably possible to prevent the serious risk to the significant public interest (*Sherman* at para. 105; *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para. 57).

[21] In this case, the plaintiffs are requesting the redaction of material that would disclose their identity. In oral argument, counsel gave examples of information to be redacted such as their names, names of their parents, their birthdates, addresses, phone numbers, and any government identification – in other words, any identifying information. There is no request to redact the name of the school, the individuals' medical or psychological information, the allegations, or any other details. There is no request for a sealing order except for the materials on this application in which the plaintiffs' names are disclosed. The proposed order requires that unredacted copies of all materials be filed with the Court, and viewable by the parties, their counsel, the judges, and the court clerks as required.

[22] I am satisfied that the order sought is as restrictive as reasonably possible. The details of the allegations and the plaintiffs' circumstances will not be redacted. The only redactions and restrictions on publication will be the identifying information of the plaintiffs. The public and the media will have access to all other court-filed material and

will be able to attend the court hearings. This is a minimal impairment of the open court principle.

iii) Proportionality

[23] To meet this third aspect of the test, the applicants must show that the benefits of the order necessary to protect them from the serious risk to revealing their identities outweigh the harmful effects of the order, including the negative impact on the open court principle (*Sherman* at para. 106; *P1 (Litigation guardian of)* v *XYZ School*, 2022 ONCA 571 at para. 66). In conducting this balancing exercise, the court must consider whether the information the order seeks to protect is peripheral or central to the judicial process.

[24] In this case, the identity of the plaintiffs is not central to the case. I have heard the Yukon government's expression of concern that in a proposed class proceeding, there may be a heightened public interest in the identity of the class representatives, given their role in representing the class. They provided no authority for this, and it was not a basis for them to oppose the order, only a factor they wished me to consider.

[25] Assuming the action is certified, the representative plaintiffs are accountable to the class members and the Court in their management of the progress of the proceeding, their decision-making about how the action is to proceed and their provision of instructions to counsel. There is no court order issued or sought affecting the disclosure of the identity of those representative plaintiffs to the class members. The public, including the media, will know, to the extent the information is not privileged, what steps are being taken in the proceeding through the materials in the court file, the

submissions at the hearings, and the orders granted. Accountability is preserved through the availability of that information.

[26] The identity of the individual plaintiffs is peripheral to the litigation and their removal from the public record for the purpose of protecting the dignity of the minor plaintiff children outweighs any negative impact on the open court principle and any other harmful effects.

Conclusion

[27] The strong presumption of court openness remains a cornerstone of our democratic society. Any court-imposed discretionary limit on the open court principle must meet all three of the pre-requisites set out by the Supreme Court of Canada in *Sherman*: serious risk to a significant public interest, necessity, and proportionality. Here, the dignity of the minor plaintiffs is a significant public interest that is at serious risk in this litigation from the open court principle because of the inevitable disclosure of sensitive personal information; the proposed remedy is minimally impairing and necessary; and its benefits outweigh the harms.

[28] The order is as follows:

1. In any material filed in Supreme Court file 22-A0097:

    a. The Plaintiff [redacted], by their Guardian ad litem, [redacted], shall be referred to as GX, by their Guardian ad litem, YY, and

    b. The Plaintiff, [redacted], by their Guardian ad litem [redacted], shall be referred to as TA, by their Guardian ad litem, BB.

2. This application shall be heard in Chambers on short notice.

3. No one shall publish any document or transmit in any way information including evidence, submission, information or materials in relation to court file 22-A0097, that could identify either or both the plaintiffs or their Guardians ad litem as parties to this proceeding.

4. Any material to be filed in Supreme Court file 22-A0097 that contains information that could identify either or both plaintiffs or their Guardians ad litem shall be redacted by the party filing the material and both the redacted and unredacted versions of the material shall be filed. Unredacted versions shall only be released to the parties and their counsel, the Court Services Branch staff and Supreme Court of Yukon judges.

5. This order does not preclude reference to the plaintiffs' status or former status as students at Jack Hulland Elementary School.

6. The material submitted in support of this application be sealed, until further order of the Court.

7. A copy of this Order, redacted to remove information identifying the plaintiffs, and their Guardians ad litem shall be filed and be accessible to the public. An unredacted copy of this Order shall only be released to the parties and their counsel, the Court Services Branch staff and Supreme Court of Yukon judges.

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DUNCAN C.J.