SUPREME COURT OF YUKON

Citation: *Dana Naye Ventures v. Doe*, 2011 YKSC 60

Date: 20110803
S.C. No. 10-A0088
Registry: Whitehorse

Between:

DANA NAYE VENTURES

Plaintiff

And

JOHN DOE (#1-8) AND JANE DOE (#1-8)

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Peter Sandiford — Counsel for Dana Naye Ventures
Charles Willms — Counsel for Eric Brown and the Business Development Bank of Canada

REASONS FOR JUDGMENT

INTRODUCTION

[1] The Business Development Bank of Canada ("BDC") applies to quash an *ex parte* order dated March 2, 2011, requiring Eric M. Brown to disclose all documents and answer questions relating to the identities of the John and Jane Doe defendants (the "March 2 Order"). Counsel agreed to argue this application essentially as a hearing *de novo* on the basis of the merits of the underlying application, which was brought by Dana Naye Ventures ("DNV") in September 2010.

BACKGROUND

[2] This action is the second of two filed by Dana Naye Ventures ("DNV") in response to allegedly defamatory comments contained in a report, entitled "Study on the Business Service Environment in the Yukon Territory" (the "Study"). As canvassed in my related and concurrently-released decision in *Dana Naye Ventures v. Canada (Attorney General)*, 2011 YKSC 59, the Study was authored by Eric Brown, a B.C.-based consultant, pursuant to a contract with BDC. In the Study, and before drawing his conclusions, Mr. Brown recorded point-form comments that he received from individuals he interviewed. There are both positive and negative comments included about DNV. The seventeen negative comments are at the heart of this litigation.

[3] In its other action, DNV names BDC and the Attorney General of Canada (the "AG") as defendants for their role in publishing the Study, including the negative comments. Here, DNV is seeking a remedy against the unidentified individuals that communicated the negative comments to Mr. Brown. DNV has no way of knowing the identities of these individuals, unless they obtain them from Mr. Brown.

[4] Accordingly, at the same time it filed this action, DNV also filed an application seeking an order that Mr. Brown disclose all documents and answer questions relating to the identities of the defendants John and Jane Does. DNV's application was served on Mr. Brown, and also on the AG and BDC. None of Mr. Brown, the AG, or BDC filed an appearance or a response to the application. On November 1, 2010, counsel for DNV appeared to argue the application on an *ex parte* basis. I expressed concern at that time about the lack of response from BDC and the AG, both of whom were vigorously defending the related action, and adjourned the application generally to wait for some

further documents from counsel for DNV. The requested order issued on March 2, and on April 26, 2011, BDC filed an application to overturn it. In this application, BDC's counsel also represents Mr. Brown. The AG takes no position on the BDC application.

ANALYSIS

[5] Because BDC's application to quash was argued as a hearing of the original DNV application, the issue I need to determine is whether Eric Brown should be ordered to disclose documents and answer questions that would tend to identify the unidentified John and Jane Doe defendants. If I determine that he should, the March 2 Order will stand, otherwise it will be set aside.

[6] The March 2 order is a so-called *Norwich* order. A *Norwich* order is an equitable remedy that permits discovery of someone who is not a party to the action, or allows a plaintiff to discover the identity of a proposed defendant.

[7] As recently canvassed by Justice Gerow in *College of Opticians of British Columbia v. Coastal Contacts Inc.,* 2010 BCSC 104, the following considerations are relevant in a court's consideration of a *Norwich* order:

> (i) Whether the applicant has provided evidence sufficient to raise a valid, *bona fide* or reasonable claim;
>
> (ii) Whether the applicant has established a relationship with the third party from whom the information is sought such that it establishes that the third party is somehow involved in the acts complained of;
>
> (iii) Whether the third party is the only practicable source of the information is available;
>
> (iv) Whether the third party can be indemnified for costs to which the third party may be exposed because of the disclosure, some [authorities] refer to the associated expenses of complying with the orders, while others speak of damages; and

> (v) Whether the interests of justice favour the obtaining of the disclosure (at para. 17, citing *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619).

[8] Justice Gerow also noted that while a *Norwich* order is equitable, flexible and discretionary, it is also intrusive and extraordinary, and the jurisdiction must be exercised with caution (para. 18).

[9] These criteria were adapted to the circumstances of a defamation case with John Doe defendants in *Warman v. Wilkins-Fournier*, 2010 ONSC 2126 (Div. Ct). In *Warman*, the issue was whether the defendant administrators and moderators of an online message board should be required to disclose documents related to the identities of eight John Does, who had allegedly used pseudonyms to post defamatory messages. At para. 34, Wilton-Siegel J. wrote:

> Given the circumstances in this action, the motions judge was therefore required to have regard to the following considerations: (1) whether the unknown alleged wrongdoer could have a reasonable expectation of anonymity in the particular circumstances; (2) whether the Respondent has established a *prima facie* case against the unknown alleged wrongdoer and is acting in good faith; (3) whether the Respondent has taken reasonable steps to identify the anonymous party and has been unable to do so; and (4) whether the public interests favouring disclosure outweigh the legitimate interests of freedom of expression and right to privacy of the persons sought to be identified if the disclosure is ordered.

[10] Counsel for DNV accepts that in defamation cases the party seeking a *Norwich* order must establish a *prima facie* rather than *bona fide* claim.

[11] Although in *Warman* the order for the release of information relating to the identities of unnamed defendants was sought against a party defendant, the Court considered that the party versus non-party status of that person was not a meaningful

distinction in those circumstances. I think the same can be said here, given the centrality of Mr. Brown's report to this action and his implication in *Dana Naye Ventures v. Attorney General of Canada and Business Development Bank of Canada*. I also presume that any costs associated with a disclosure order against Mr. Brown can be resolved between the parties. Accordingly, the factors that were relevant in *Warman* properly guide my assessment of whether the March 2 Order should stand.

[12] Here, DNV has established a *prima facie* case against the Doe defendants. The test for defamation is set out in *Grant v. Torstar Corp.,* 2009 SCC 61, at para. 28:

> A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff...

[13] All of these criteria are met in the case at bar. The fact that the Doe defendants made the pleaded negative comments about DNV to Mr. Brown is sufficient to make out a *prima facie* case for defamation.

[14] I also find that DNV has taken reasonable steps and has been unable to determine the names of the Doe defendants. According to Mr. Brown's affidavit, he is the sole source of this information, apart from the John and Jane Does themselves.

[15] The third consideration before the balancing of public versus private interests is whether the unknown alleged wrongdoer could have a reasonable expectation of anonymity in these circumstances. In *Warman,* that issue wasn't resolved by the Divisional Court, however, it subsequently was by Blishen J. (2011 ONSC 3023). She found that the identities of the John Does should be disclosed, largely because of the

terms of membership in Freedominion, the site on which the comments were posted. Those terms made it reasonable to contemplate that their identities could be disclosed if they posted material that was *prima facie* defamatory.

[16] This case is different. Here, the comments originated in the context of an explicit promise of confidentiality given by Mr. Brown. This is sufficient to give rise to a reasonable expectation of anonymity in the disseminated Study.

[17] The final consideration is whether it would be in the interests of justice to issue an order, and whether the public interests favouring disclosure outweigh the legitimate personal interests of freedom of expression and right to privacy if the disclosure is ordered. Where common-law privilege is raised, I should also consider the application of the *Wigmore* criteria, discussed at length in the related decision at 2009 YKSC 59, and in particular, the public interest in getting at the truth versus the public interest in protecting the identity of the informant.

[18] I find that, in these circumstances, the public and private interests in protecting the anonymity of the Doe defendants tend against the release of their names and the attribution of their comments. In saying this, I recognize that this determination has severe, possibly fatal, consequences for DNV's action against the John and Jane Does.

[19] Issues of privacy and freedom of expression will often come up in defamation cases. While the *Charter* does not apply to private disputes, the engagement of *Charter* values in a dispute offer counterweight to the public interest in promoting the administration of justice and the truth-seeking function of a trial.

[20] With respect to the informants' privacy rights, although it is simply their names being sought, the ability to link those to the comments does have some privacy

implications. However, this is not like the BMG case, where identification of the individuals could theoretically allow the immediate retrieval of significant personal information.

[21] The *Charter* value of freedom of expression is more implicated. One of the core rationales for recognizing a right to free expression is its value in truth-finding and the exchange of ideas. The fear of being sued for libel should not prevent the gathering and publication of information about matters of public interest. In this case, information was sought from individuals about their experience with a particular business service provider, in order that the government can assess the business service environment in the Yukon. The ability to receive truthful answers is critical to the accuracy of this assessment, which, in turn, will be important to any decisions the government might make with respect to local resources.

[22] Also weighted on the same side of this balancing is the public interest in protecting the identities of the informants, which is informed by the *Wigmore* criteria. As canvassed in my other decision, confidence was essential to the relationship between Mr. Brown and the Doe informants. The relationship is a type that should be sedulously fostered in the public good, as it permits government to collect information that can ultimately impact decisions about the provision and improvement of public programs and services.

[23] Also, per the Wigmore criteria, I find that there is a clear public interest in protecting the identity of the Doe informants. I note that courts have declined to release information about informants in other, roughly analogous, situations. For example, in *MacKenzie v. Kutcher,* 2003 NSSC 76, Boudreau J. refused to order the disclosure of the names of employees who participated in an operational review of a hospital mental

health unit. In *MacRae v. BDO Dunwoody Ltd,* 2010 ONSC 3404, Master Glustein refused to order disclosure of the identities of employees participating in an investigation into the Simcoe County Finance Department. Similarly, in *Slavutych v. Baker* [1976] 1 S.C.R. 254, the Supreme Court held that confidentiality should have been maintained in the context of Mr. Slavutych's negative comments on a tenure form sheet for a colleague. In all of these cases, the anonymity of the participants allowed free and frank discussion while protecting important working relationships. It strikes me that confidentiality was similarly vital here. Mr. Brown needed to solicit honest views from individuals that work with DNV and could realistically only do so by guaranteed confidentiality. Otherwise people might decline to participate for fear of jeopardizing a working relationship.

[24] While there is a clear public interest in protecting the identities of the informants, this is not to say that there is no public interest in allowing DNV to receive the information it seeks. The public of course has an interest in seeing that the truth-seeking function of a trial is not thwarted by unnecessarily restricting access to relevant information held by the parties. That said, this is not a case where there is another broad countervailing public interest in the release of the names sought; for example, they are not needed for the investigation of a particular crime, nor are they necessary for inquiries into any 'public safety' type of concern.

[25] I therefore conclude that the public and private interests served by protecting the identities of the John and Jane Doe informants outweigh the public interest in disclosure. Accordingly, I quash the order made on March 2, 2011.

[26] Parties may speak to costs if necessary.

Veale J.