

SUPREME COURT OF YUKON

Citation: *J.W. v. Van Bibber*, 2013 YKSC 79

Date: 20130805
Docket: S.C. No. 09-A0031
Registry: Whitehorse

BETWEEN:

J.W.

Plaintiff

AND:

**ADAM VAN BIBBER, BETTY BAPTISTE
AND SELKIRK FIRST NATION**

Defendants

Publication of information that could disclose the identity of the plaintiff has been prohibited by court order.

Before: Mr. Justice L.F. Gower

Appearances:

J.W.

Debra Fendrick

Appearing on her own behalf
Counsel for the Defendants

RULING ON APPLICATION DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application for an order awarding costs of this proceeding to the defendants and an order that the defendants be awarded double costs from December 1, 2011 to the conclusion of the proceeding.

[2] The applicants rely on Rule 39 of the *Rules of Court*, in particular sub-rules (41) through (43) of Rule 39, and the fact that the defendants' counsel wrote a letter to the

plaintiff's counsel on December 1, 2011 which indicated at that point that the defendants were:

“... agreeable to a Consent Dismissal Order on a without costs basis (i.e. each party bearing its own costs), but should this matter continue and in fact, expand, we will be vigorously defending it and seeking costs.

...

Please be advised that in the event the offer of settlement in this letter is not accepted, we will be bringing it to the attention of the Court for consideration in relation to costs after the Court has rendered judgment on all other issues in this proceeding.”

That last paragraph tracks the language in Rule 39(41) and would have been notice to the plaintiff's counsel at the time of the potential consequences in the event the defendants were successful at trial, and that they would be entitled to make a further application for increased costs up to and including double costs from the date of that letter.

[3] We have had a fulsome discussion about the various issues which have been raised in several affidavits on this application, and I do not think that I need to go into extensive detail in terms of my reasoning on the issue of costs. I see the matter as being relatively straightforward. I will also say that I am in substantial agreement with the submissions of the defendants' counsel on all of the points that she raised.

[4] The principle point raised by Ms. W. in response is that double costs should only be awarded from the date on which she received disclosure from the Yukon Government pursuant to what was initially an ATIPP application, and subsequently relief granted by way of a consent order of March 5, 2013. That material included the notes from the personal file of Melanie Harris on this matter which were the subject of much

examination at the trial, and are referred to specifically in my reasons for judgment, cited at 2013 YKSC 58.

[5] I fail to understand how late disclosure pursuant to that consent order has a bearing on the issue of double costs. It seems to me that if the plaintiff was concerned that there was potential information out there relevant to this case, then the plaintiff's counsel should have sought that information at an earlier date. I am not satisfied with the explanation given by Ms. W. at this application as to the reasons why that matter was left so late in the day, until virtually the eve of trial, to apply for it. That application could and should have been brought much sooner. I give no weight to that explanation.

[6] Seeing as how that is essentially the main point of dissention by Ms. W. that she can fairly argue at this time - she has raised another of other points, but those relate to the matter of her appeal and also details regarding the assessment of costs which will be dealt with by the Clerk at a later date - I agree with the defendants' counsel that there is no reason not to award costs as sought in this matter. Pursuant to Rule 60(9), "... costs of and incidental to a proceeding shall follow the event unless the court otherwise orders." I see no reason to order otherwise in this case.

[7] I am also cognizant of the fact that although there were mutual delays in the disclosure of various materials, particularly matters relating to requests from examinations for discovery in this matter, there is also the very serious issue of the material non-disclosure by Ms. W. in relation to her medical records, which is one of the circumstances that I take into account in exercising my discretion on costs.

[8] In the result, I am prepared to grant the relief sought by way of a general order, on the understanding that the defendants will return before the Clerk for a formal assessment of the specific costs in the draft bill of costs, in the event that the matter cannot be agreed to by Ms. W.

GOWER J.