SUPREME COURT OF YUKON

Citation: *Wood* v. *Van Bibber*, 2013 YKSC 92

Date: 20130827
S.C. No. 09-A0031
Registry: Whitehorse

BETWEEN:

JUANITA WOOD

Plaintiff

AND:

ADAM VAN BIBBER, BETTY BAPTISTE AND SELKIRK FIRST NATION

Defendants

Before: Mr. Justice L.F. Gower

Appearances:
Juanita Wood — Appearing on her own behalf
Debra Fendrick — Counsel for the Defendants

REASONS FOR JUDGMENT DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): This is an application by the defendants in effect to discontinue a publication ban respecting the identity of the plaintiff, which was originally ordered on June 10, 2009, and was subsequently varied on July 9, 2012. The original order sealed the writ of summons and statement of claim, as well as some other material, from public view, and specified that the identity of the plaintiff and any information that could disclose her identity should not be published or broadcast in any way. However, it was open to the defendants to apply to vary or set aside that order on specified notice.

[2] The order was made without notice and, I am informed, without any specific affidavit material from the plaintiff herself in support of that order.

[3] The order was varied, as I indicated, on July 9, 2012, in order to allow the defendants to interview and subpoena witnesses and carry out the investigations necessary for preparing for trial. That application was contested and was disposed of by way of the reasons for judgment of Justice Veale, 2012 YKSC 63. In those reasons Justice Veale referred to the open court principle, which was also discussed in this hearing, and cited the five components of the principle set out in the case of *X.* v. *Y*., 2004 YKSC 45. Suffice it to say that this principle has long been recognized as a cornerstone of the English common law. Justice Veale then went on, at para. 10 of his reasons, to refer to the two-part test, which is now known as the *Dagenais/Mentuck* test, to determine when a publication ban is appropriate.

[4] The test is:

> "a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonable alternative measures will not prevent the risk; and
>
> b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice."

[5] Justice Veale also referred to the Ontario case of *M.E.H.* v. *Williams*, 2012 ONCA 35. In *Williams,* the wife of Col. David Russell Williams was proposing to commence a divorce proceeding seeking a divorce and corollary relief against him. She applied for an order sealing the entire record of the proceeding, and also an order

prohibiting publication of any information that would identify her by name as the person bringing the proceedings against Mr. Williams. Mr. Williams himself was charged with the notorious murder of two victims in Ontario at that time. At para. 25 of the *Williams* decision there is reference again to the first part of the two-part test of the *Dagenais/Mentuck* test:

> "*Mentuck* describes non-publication and sealing orders as potentially justifiable if 'necessary in order to prevent a serious risk to the proper administration of justice.' A serious risk to public interests other than those that fall under the broad rubric of the "proper administration of justice" can also meet the necessity requirement under the first branch of the *Dagenais/Mentuck* test: *Sierra Club of Canada* at paras. 46-51, 55. The interest jeopardized must, however, have a public component. Purely personal interests cannot justify non-publication or sealing orders. Thus, the personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test." (my emphasis)

Later, at para. 30, the Court noted that: "personal emotional distress and embarrassment cannot justify limiting publication of or access to court proceedings and records."

[6] Although this is an application by the defendants, given the reasons for judgment of Justice Veale that I have just referred to, there is a *de facto* onus on Ms. Wood, in responding to the application, to provide a basis for a displacement of the open court principle and further justification for continuation of a ban.

[7] Ms. Wood's affidavit number five, which she filed in response on this issue, states, at para. 7:

> "The allegation of sexual harassment has not been proven, and an allegation of this sort, if publicized, could have serious implications on my ability to earn a living in a small jurisdiction like the Yukon."

And further, at para. 8:

> "As the judgment in this action has been appealed, I respectfully request that the publication ban remain in effect until the appeal process has been completed."

[8] In my view, these statements do not meet the onus expected of Ms. Wood in this matter. With respect to the appeal, Ms. Wood indicated in her submissions on this hearing that she used her full name in her appeal pleadings. So there is no publication ban in place with respect to those appeal proceedings.

[9] There was also reference by the defendants to an email sent from Ms. Wood to one of the defendants, Betty Baptiste, dated June 22, 2013. I will only quote a portion of that:

> "Well, I sure hope u can sleep at night. Actually I hope u never sleep again. You have managed to ruin my career, caused me to have to give up my job. I have no reference anymore to get another job, my self-esteem has been seriously damaged and now I'm getting slapped with double court costs."

And later:

> "You are one manipulative bitch. I hope you're happy. YOU and that fuckhead avb --"

I interject to indicate that that is an obvious reference to the defendant Adam Van Bibber.

> "-- have ruined me. All I did was work my ass off for SFN --"

referring to the Selkirk First Nation,

> "-- and tried to be a nice person. Look what it got me."

[10] That email is at least an indication of sour grapes and at worst is evidence of potential defamatory statements by Ms. Wood herself. It is easy to understand the dilemma which Ms. Baptise would have found herself in in attempting to deal with the contents and impact of this email without risking a violation of the publication ban. I am speaking here about, for example, taking the matter up with the RCMP or others, besides her counsel, not to mention the same potential problem for Mr. Adam Van Bibber.

[11] That creates a situation which was alluded to in another case, *A.B.* v. *Bragg Communication Inc*., 2011 NSCA 26, particularly at para. 85, dealing with a plaintiff who had initiated public proceedings, but was attempting to protect the publication of any information identifying her.

[12] With reference to that paragraph, which is cited by Justice Veale in his reasons, I would say that there are parallels with the case at bar. Here the plaintiff has instigated these defamation proceedings in a public forum, open to attendance by members of the public. She was unsuccessful in prosecuting her allegations of defamation, yet she continues to assert, to at least one of the defendants, that her claim was nevertheless just, and that the defendants, Baptiste and Van Bibber, are to blame for her loss and the consequences of that loss. Thus, to permit the plaintiff to act in this fashion, with the full

benefit of a publication ban, which was designed to keep her identity a secret, would be contrary to the public interest.

[13] In any event, the plaintiff has indicated in her submissions in this application, as she suggested in her affidavit number two, filed August 16, 2013, that, based on her conversations with the RCMP in Pelly Crossing, certain details of the court case and my reasons for judgment are already public knowledge within the community.

[14] Finally, there is also a public interest in allowing the Selkirk First Nation to communicate to its members the outcome of this case, which is of some significance to the First Nation because of (a) the cost of the matter and the amount of time that it has involved, and (b) the fact that the plaintiff herself was a contractor with the First Nation at the time of the alleged defamation. There are significant financial implications for the First Nation as a result of this court case, and, in my view, the First Nation should be unhindered in its ability to discuss the matter openly with its members.

[15] So for all those reasons the application is granted.

[DISCUSSION RE SIGNING THE ORDER]

[16] I think the simpler thing would be for you to send the order up to me for review. I will dispense with Ms. Woods' signature, but I will approve it myself.

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GOWER J.