SUPREME COURT OF YUKON

Citation: *Stuart v. Doe*, 2019 YKSC 53

Date: 20191009
S.C. No. 18-A0102
Registry: Whitehorse

BETWEEN

CHARLES STUART

PLAINTIFF
(DEFENDANT BY COUNTERCLAIM)

AND

JANE DOE

DEFENDANT
(PLAINTIFF BY COUNTERCLAIM)

Before Madam Justice S.M. Duncan

Appearances:
Gary W. Whittle — Counsel for the Plaintiff
George Filipovic — Counsel for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] The defendant brings four procedural applications in an action in defamation. The action arises from a Facebook post by her about the result of her complaint to Yukon College of an alleged sexualized assault on her by a faculty member. Neither the name of the individual nor the name of the educational institution was mentioned in the post. Approximately five weeks after the post, the defendant's former lawyer wrote a demand letter to the plaintiff requesting compensation for the harms caused to the defendant by

the alleged sexualized assault in exchange for not pursuing a civil action against him. Shortly after receipt of confirmation that the defendant's former lawyer was able to practice law in Yukon, the plaintiff commenced this defamation action. The defendant has defended and counterclaimed for damages for the alleged sexualized assault.

[2] The subject matters of the four applications are:

1) anonymity, partial publication ban, and partial sealing;
2) security for costs;
3) production of a document from a third party; and
4) striking of interrogatories.

The following sets out my reasons on each of the applications.

I. ORDER FOR ANONYMITY/PARTIAL PUBLICATION BAN/PARTIAL SEALING

[3] The defendant seeks an order that ensures her identity is not revealed through this court proceeding. She does not seek an order for a publication ban or sealing of the court file that prevents the media or public from attending the hearings of the applications or the trial, or reporting on the evidence, legal arguments, or conduct of the proceedings. Instead, the order sought is to replace the defendant's name in the style of cause with a pseudonym; to ban publication of any information that could identify her as a party to the proceeding; and to seal any material already filed with the Court that contains information that identifies her and to require the parties to file redacted copies of materials that identify her. The defendant requests that this order apply to materials already filed with the Court and that it remain in effect until further order of the Court in the case of the anonymity and publication ban requests, and until the first day of trial for the sealing request, subject to any order of the trial judge.

[4] The reasons for these requests relate to the defendant's contention that the disclosure of her identity in these proceedings will adversely affect her mental health. She deposes to her fears of a significant risk of public shaming and attacks of her, through social media and on-line comments. With a history of suffering from mental health issues, the defendant fears public disclosure will increase the risk of negative consequences to her mental health. The defendant also refers to the judicially recognized objective justification for maintaining the privacy of victims of sexualized assault: the public interest in encouraging reporting. Finally, the defendant relies on judicial notice of harms to mental health that affect victims of sexual assault.

[5] The plaintiff responds to this application with alternative positions. First, he objects to the order sought in its entirety on the basis that the evidence of harm the defendant relies on is hearsay, an issue I will address separately below. The plaintiff further argues the defendant approached this litigation with full knowledge of the effects of public disclosure of her identity, and did not request anonymity until now, bringing into question her credibility on this point. The plaintiff also relies heavily on the sanctity of the open court principle and argues that the defendant has not met the onus to satisfy the test required for the order sought.

[6] Alternatively, the plaintiff's counsel states if this Court is inclined to grant the order sought, he will consent as long as the same order applies to the plaintiff. When asked about the legal basis for the order to apply to him, the plaintiff's counsel stated it was a matter of "fairness" and "*quid pro quo*". The plaintiff's counsel did not provide principled legal arguments for his alternative position.

[7] The plaintiff's objections and alternative position providing conditional consent requires that I proceed through the legal analysis to determine if the applicable legal test is met.

Legal Principles

[8] The application by the defendant requires a weighing of the competing interests of the open court principle and the privacy of an alleged sexual assault complainant in the context of this case. The onus to meet the legal test is on the defendant because she is seeking to restrict the open court principle. As stated in *H.(M.E.) v. Williams*, 2012 ONCA 35, the bar is high. The test is one of necessity, not convenience.

[9] In describing the open court principle, the Supreme Court of Canada in *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*, 2012 SCC 46 ("*Bragg*"), wrote: "the open court principle requires that court proceedings presumptively be open and accessible to the public and to the media. This principle has been described as a "hallmark of a democratic society" (*Vancouver Sun, Re*, [2004 SCC 43], at para. 23) and is inextricably tied to freedom of expression" (para. 11). It is necessary to maintain the independence and impartiality of the courts; integral to public confidence in the justice system and the public's understanding of the administration of justice; and is a principal component of the legitimacy of the judicial process (*Vancouver Sun, Re*, para. 25).

[10] The importance of maintaining privacy of participants in the justice system has been described by the Court in *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, as follows: "Privacy is recognized in Canadian constitutional jurisprudence as implicating liberty and security interests". In *R. v. Dyment*, [1998] 2 S.C.R. 417*,* the court stated that privacy is worthy of constitutional protection because it is "grounded in man's

physical and moral autonomy", is "essential for the well-being of the individual", and is "at the heart of liberty in a modern state" (para. 17) (reaffirmed at para. 18 of *Bragg*).

[11] The legal test to determine whether an interest is sufficient to restrict the open court principle was set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at para. 73 and *R. v. Mentuck*, 2001 SCC 76 at para. 32 and confirmed more recently in *Bragg* (see para. 11). First, each proposed restriction is examined to determine if it is necessary to prevent a serious risk to an important legal interest and if it impairs free expression as little as possible. This is the minimal impairment requirement. If no reasonable alternatives to the restriction exist, then the inquiry next turns to whether a proper balance is struck between the open court principle and the other important legal interest. The benefits of the restrictive measures sought must outweigh their negative impact on the open court principle. This is the proportionality requirement.

[12] The type of interest that justifies restricting the open court principle must be an overriding public interest; described as a social value of superordinate importance (*MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), quoted in *Vancouver Sun, Re,* at para. 60). Personal interests such as emotional distress or embarrassment are insufficient to restrict the open court principle.

[13] As noted in *Galloway v. A.B.*, 2019 BCSC 395 ("*Galloway*") (para. 19), evidence in support of any restriction must be "convincing" and "subject to close scrutiny and meet rigorous standards: *Toronto Star Newspapers Ltd. v. Ontario*, (2003) 67 O.R. (3d) 577, 232 D.L.R. (4th) 217 Ont. C.A. at para. 19, aff'd 2005 SCC 41 (S.C.C.)". Evidence can be of:

1) a direct, harmful consequence to the individual applicant;

2) an objective harm, evident by applying reason and logic (*Bragg*, para. 16); or

3) judicial notice of harm.

[14] The Court in *Galloway* noted that courts have accepted that the risk to the privacy interest of alleged sexual assault victims during their interaction with the justice system is a significant enough interest to warrant some restriction of the open court principle (para. 28). Courts have relied on the three types of evidence of harm noted above in determining the test has been met. Examples of the three types are found in the following cases. First, in *W.(C.) v. M. (L.G.)*, 2004 BCSC 1499, C.W., the Court allowed a plaintiff in a civil sexual assault case to be identified by initials only in court documents, relying on evidence of direct harm to the plaintiff of her exposure in the media. Second, in *Bragg*, the Court accepted that prohibited disclosure of the identity of a sexual assault complainant was a justifiable restriction on the open court principle for the objective reason that privacy will encourage reporting which is in the public interest and therefore beneficial to the administration of justice. Third, judicial notice of harm was relied on in *A.B. v. Canada (Citizenship and Immigration)*, 2018 FC 237, where the Court wrote at para. 41:

> The Court may take judicial notice of the highly undesirable effects of the disclosure of the identity of victims of sexual assault. In particular, victims may be re-traumatized if their names are made public, and their healing process may be made more difficult (*ABC* at para 4). Depending on the context, public disclosure may also act as a disincentive to launch a complaint after a sexual assault - ironically, the open court principle hampers access to justice in such cases …

Yukon decisions

[15] Counsel agree that *X. v. Y.*, 2004 YKSC 45 ("*X. v. Y.*") is the leading case in the Yukon. Generic initials were permitted for both the plaintiff and defendants, after the Court applied the *Dagenais*/*Mentuck* test. This was a case of allegations of historical sexual assault of the plaintiff during his time at residential school. The plaintiff provided evidence of psychological trauma and suicidal ideation that would be exacerbated by public disclosure of his identity. Disclosure of the identity of the defendants was likely to reveal the identity of the plaintiff because of family connections. In addition to considering evidence of specific harms, the Court took judicial notice of the extremely sensitive nature of cases involving allegations of sexual assault and of the stress and anxiety created by bringing any case to court.

[16] In *J.W. v. Van Bibber*, 2012 YKSC 63, an action in defamation, the pleadings and affidavits were sealed and a publication ban issued after the plaintiff brought an application without notice and without evidence. The Court then varied the order to allow the defendants to interview and subpoena witnesses and carry out investigations necessary for the defence of the case, in large part because the accepted practice in the Yukon on an application of this kind was to require notice to the opposing party and direct evidence from the applicant. Further, the expert opinion evidence proffered by the plaintiff that there was a real risk of emotional harm to the plaintiff was premised on the assumption there would be "persistent, insistent and incessant" efforts by the media to invade her privacy. There was no evidence to support this assumption.

[17] In *Wood v. Van Bibber*, 2013 YKSC 92, another decision in the same action in defamation, the Court granted the defendants' application to discontinue the publication

ban and sealing order. The Court applied the *Dagenais*/*Mentuck* test and found that the evidence of the plaintiff amounted to nothing more than personal emotional distress and embarrassment, which was insufficient to meet the required threshold. Further, the Court noted the applicant commenced an appeal using her full name without seeking an anonymity order.

Hearsay evidence

[18] Before applying the foregoing legal principles to the facts of this case, I will address the plaintiff's objection that some of the defendant's affidavit evidence should be struck because it is hearsay. The plaintiff's objection for the purpose of this application appears to be limited to Exhibit 8 to the defendant's Affidavit #2, a memo dated April 16, 2019, from the defendant's counselling therapist. In the memo, the therapist sets out her education, credentials, background and experience, and provides her address, phone number and website address. She concludes based on twenty-one hours of counselling the defendant over the previous seven months that a public disclosure of her identity in the context of the alleged sexualized assault would likely cause significant adverse affect to her mental health. She describes the defendant to be in a "vulnerable psychological state" and says "the potential negative impact on her mental health of her identity being revealed may include: increasing suicidal risk to 'high', death by suicide, severe clinical depression, severe anxiety, severe panic response and increased trauma response".

[19] The plaintiff says this is inadmissible hearsay because it purports to be an expert opinion not in the form of an affidavit. The statements sought to be relied upon are made by a person who cannot be cross-examined on them.

[20] The defendant notes that her counsellor is an expert whose credentials were set out in her memo, providing a basis for her opinion. Counsel agree that Rule 49(12) of the Yukon *Rules of Court* allows the use of hearsay evidence in an interlocutory application: "if the source of the information is given, an affidavit may contain statements as to the deponent's information and belief, if it is made (a) in respect of an application for pre-trial order".

[21] The principled approach to the hearsay rule permits the admission of hearsay if it is necessary and reliable. A statement is reliable when it is made in circumstances that would provide a guarantee of trustworthiness. In interlocutory matters in British Columbia, hearsay is generally admissible, provided it identifies the source from which the information is based and the deponent is familiar with the information and believes it to be true (*Canada (Attorney General) v. Acero*, 2006 BCSC 1015, para. 17). This is similar to the Yukon Rule 49(12) and has been followed in the Yukon: see *Cobalt Construction Inc. v. Kluane First Nation*, 2013 YKSC 124 ("*Cobalt*"). In that case even though the deponent did not expressly state in his affidavit that he believed certain representations made by other parties to be true, he did identify the sources of the information. The Court on reviewing the evidence as a whole on that point accepted that the deponent relied on the information and therefore implicitly believed it to be true (para. 21).

[22] In this case, Exhibit 8 to the defendant's Affidavit #2 is one piece of evidence of direct harm relied on by her in support of an order that her identity not be revealed. The memo written by the treating therapist sets out her expertise and the basis for her conclusion, and the defendant in her affidavit at para. 31 agrees with its contents. Even

though she did not use the express phrase "I believe her statements to be true", this is not fatal to the admissibility of memo, following *Cobalt*. The memo sets out factors related to the defendant's mental health, and the connection between the defendant's condition and the risk of publicity. Its use is limited in this application to support the argument in favour of not revealing the defendant's identity in this litigation.

[23] Given the more relaxed approach to hearsay evidence in an interlocutory application, as codified in Rule 49(12) and interpreted through case law, as well as the limited use of the memo in this application, I find that Exhibit 8 to the defendant's Affidavit #2 is admissible evidence in this application.

Application of legal principles to this case

(i) Evidence of Harm

[24] I will first address the evidence of harm provided by the defendant and the objections to that evidence by the plaintiff. In describing the harm to her of public exposure in this litigation, the defendant relies on direct evidence of harm specific to her; on the objective harm identified by courts in cases involving sexual assault complainants; and on judicial notice of harm caused by publicity to victims of sexual assault as described in *A.B. v. Canada (Minister of Citizenship and Immigration)* and also recognized in the Yukon decision *X. v. Y.* For the following reasons I find that the defendant has met the evidentiary test to support an order that ensures her identity will not be revealed through this litigation.

[25] The following evidence of direct harm is persuasive:

- a hospital emergency room record of her attendance with a complaint of suicidal ideation, after the publication five days earlier of the first article

about the litigation in the Yukon News (although the hospital records do not reference this);

- the memo from her treating therapist dated April 16, 2019, describing the defendant to be in a "vulnerable psychological state" and stating that negative outcomes to her of public disclosure of her identity in the matter of the alleged sexual assault include high risk of suicide, severe clinical depression, severe anxiety, severe panic response and increased trauma response; and
- negative comments about her motives and credibility made in response to the two Yukon News articles published to date about this case, without disclosing her name, causing the defendant "tremendous anxiety" and fear that people will jump to conclusions about her.

[26] I also accept the existence of objectively discernable harm from a failure to protect the anonymity of the defendant. As noted in *Bragg*, "this Court has already recognized that protecting a victim's privacy encourages reporting: *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122" (para. 25). Even in a civil case of sexual assault, the existence of objective harm to the administration of justice of discouraging sexual assault victim reporting and testimony that is created by the publicity of the alleged victim is recognized by the courts. In this case, the facts are similar to those in *Galloway*, because the defendant has not pursued "her claim through the public trial process" (para. 33, *Galloway*) but must raise the alleged sexual assault in her defence to the defamation action. While it is true she has chosen to pursue a counterclaim for damages for assault in the defamation action, she had no choice but to

raise the alleged assault first in her defence to the defamation claim. As noted by the Court in *Galloway* at para. 33, "[t]he chilling effect of public exposure during a criminal trial is comparable to the risk of being named in a defamation trial."

[27] Finally, I do take judicial notice as the Courts did in *A.B. v. Canada (Minister of Citizenship and Immigration)* and *X. v. Y.* that victims of alleged sexual assault "may be re-traumatized if their names are made public, and their healing process may be made more difficult" (*A.B.* at para 41 and para. 16 in *X. v. Y*).

[28] To support his objection to the defendant's evidence of harm, the plaintiff relies on the following:

a) The defendant voluntarily disclosed information about her mental health through an interview she gave to the Yukon News in early October 2017. She revealed she had received counselling from a psychiatrist to help with her diagnoses of post-traumatic stress disorder and borderline personality disorder.

b) After the incident, she posted two drawings on Facebook: one is a self-portrait drawing with the caption "me too" that was reposted by a local public representative with name attribution to the defendant.

c) She sent a text to the plaintiff after the incident in which she stated it was her intention to speak publicly about his behaviour and that she was aware it could negatively affect her education, career, emotional/mental health and how people saw her but she had decided to do so anyway.

d) She posted two messages to her Facebook friends referring to a sexualized assault and an assault and admitted to informing her current boyfriend of the incident.

[29] All of this evidence was in the defendant's affidavit filed in support of this application and the plaintiff chose not to cross-examine her on it. I note that the plaintiff made these arguments on the basis that the defendant's Affidavit #2 would not be struck. The only arguments made by the plaintiff in any detail about that affidavit for the purpose of this application related to the hearsay nature of Exhibit 8. Given the principles on which Rule 49(12) is based, I will admit the Affidavit #2 evidence of the defendant for the purpose of argument on this application.

[30] I accept the defendant's evidence that the Facebook posts and drawings that were more widely distributed were general and vague. The posts that contained more specific information had more limited distribution. I also note that she gave the interview to the Yukon News in early October, 2017 about past difficulties she has had with accessing mental health services, in order to raise awareness of barriers for mental health patients. At the time of that interview, she was not yet a victim of the alleged sexual assault in this case. I accept that publicity of detailed information about the alleged sexual assault, combined with information about her mental health may increase the risk of personal attacks through social media or other online tools if the defendant were identified.

[31] The facts that the defendant's former lawyer wrote a demand letter to the plaintiff threatening litigation and that the defendant sent a text to the plaintiff shortly after the incident stating that she intended to "go public" does not prohibit her now from seeking

anonymity. At those times, the defendant may not have been aware of the possibility of seeking court orders that would not reveal her identity. It is speculative as to whether the defendant's expressed intentions to commence litigation publicly before the plaintiff started the defamation action would have occurred. I rely on the facts as they currently exist, not on statements made at earlier times about matters that did not come to pass.

[32] The Court in *Galloway* in a similar factual context found that the existence of previous publications did not vitiate the effects of the anonymity orders sought. In *Galloway*, the defendant's public art installation describing her experience as a sexual assault survivor and her self-description as a sexual assault survivor were relied on by the plaintiff as evidence of pre-existing publication of her identity as a sexual assault victim. The plaintiff argued that such evidence showed that a publication ban or anonymity order by the Court would be of limited benefit. The Court in *Galloway* noted that these would only be relevant if they were linked to the plaintiff, and this determination was a matter for trial. The Court in *Galloway* relied on the reasoning in *R. v. Pickton*, 2010 BCSC 1198, in which "a publication ban over the name of an individual who gave evidence at the preliminary inquiry and whose name was referred to in other evidence at trial" was ordered "even though it was possible to find old media reports that would reveal her name, and the ban would not provide perfect anonymity" (para. 41, *Galloway*).

[33] Based on these decisions, and on the evidence in this application, I find that the potential of pre-publication does not reduce the benefit of an order granted at this stage of the litigation. Like the Court in *Galloway*, I am of the view that on the evidence in this

case, the plaintiff's "name, image and other identifying information is not widely known in relation to this proceeding" (*Galloway*, para. 42).

[34] Following the decisions in *Bragg*; *A.B. v. Canada (Minister of Citizenship and Immigration)*; *W.(C). v. M.(L.G.)*; and *Galloway*, I find that the privacy interest of an alleged sexual assault victim who is participating in the justice system is a sufficiently significant interest to restrict the open court principle.

[35] I find the evidence of the defendant in this case meets the standard sufficient to support the following restrictions on the open court principle:

1) anonymizing the pleadings to replace her name with a pseudonym;
2) prohibiting any publication, broadcasting or transmittal of any information that could identify the defendant as a party to the proceeding, including any links to publications revealing the defendant's identity that were published before this order was granted; and
3) requiring any information identifying the defendant be redacted from the public record both in the existing court file and in future filings up to the date of trial.

The reason for the additional protection in the third point is to ensure no one who searches the court files out of interest is able to see the defendant's name in the application materials filed and then be able to refer to her in social media posts. As noted by the Court in *Galloway* at para. 35:

> … While the mainstream media may be trusted to comply with [a publication ban], the evidence establishes the potential for intense social media interest in this case. The application of a publication ban in this context without a sealing order may simply be ineffective, leaving trusted

> media sources unable to report what anonymous internet sources report widely. …

[36] Similarly, in this case, from the evidence of the on-line comments on the articles already published, there is the potential for significant social media interest in this case. A redaction order of parts of documents that reveal the defendant's identity is required.

(ii) Minimal Impairment Test

[37] The restrictions on the open court principle requested in this case meet the minimal impairment test. As confirmed by the Supreme Court of Canada in *N.(F.) (Re)*, [2000] 1 S.C.R. 880, para. 12, knowledge of a person's identity in the context of Young Offenders legislation was referred to as merely a "sliver of information". This phrase was referred to and relied on by the Court in *Bragg* who noted the relative unimportance of the identity of a sexual assault victim in the exercise of press freedom or the open court principle (para. 29) and in *G.(B.) v. British Columbia*, 2004 BCCA 345 (para. 26). Replacement of the names of parties with initials has been found to be a minimal impairment of the openness of judicial proceedings (*G.(B.)*; *N.(F.) (Re)*; and *Galloway*, para. 43). It is noteworthy that in the case at bar no reasonable alternative measures were proposed and, like the Court in *Galloway*, I find that there are none that would address the risks identified.

(iii) Proportionality Test

[38] The proportionality test is met because the benefits of restrictions that protect the defendant's identity outweigh their negative impact on the open court principle. The benefits of the order are that the defendant will be protected from harm to her mental health, up to and including the risk of suicide, and from social stigma.

[39] Counsel for the plaintiff stated in oral argument that there is no prejudice to the plaintiff through the order sought. There is no evidence that the protection of the defendant's identity will impair the plaintiff's ability to prosecute the action, nor will it impair this Court's ability to achieve just results between the parties (see *W.(C.) v. M.(L.G.)*, para. 26).

(iv) Yukon Cases

[40] The Yukon decisions of *J. W. v. Van Bibber* and *Wood v. Van Bibber* (same action, different decisions) described above, can be distinguished from the case at bar. Those decisions focused on the inadequacy of the evidence rather than the substantive analysis. In *J.W. v. Van Bibber*, the Court found that the expert medical opinion of the risk of emotional harm to the degree required depended on evidence of intense media harassment that was not provided. In this case, I have found that the two reports already in the newspaper at a very early stage of the litigation and the number of online comments on these reports support the defendant's contention that there will be interest in this case. The treating therapist's opinion in this case does not rely exclusively on the assumption of "persistent, insistent and incessant" (para. 19, *J.W. v. Van Bibber*) efforts by the media to invade the defendant's privacy. Mere reporting in a mainstream newspaper is enough to cause concern about harm in this case.

[41] In *Wood v. Van Bibber*, unlike this case, the Court found that the applicant had not demonstrated an interest beyond her personal emotional distress and embarrassment, which was insufficient to meet the test required to restrict the open court principle.

[42] The decision here follows *X. v. Y.* which counsel agree is the leading case in the Yukon. Initials were permitted to be used in the litigation, because the serious interest of protecting the privacy interests of sexual assault victims was found to be a necessary restriction of the open court principle. Further, judicial notice of the harms occurring to victims of sexual assault was taken.

Plaintiff's conditional consent

[43] The plaintiff's counsel advocated in oral argument that he would consent to the order sought by the defendant if the same order were granted to the plaintiff. His argument was based on "fairness", "*quid pro quo*" and *X. v. Y.* He did not provide any other reasons or explain how the plaintiff met the legal and evidentiary tests described above. He stated that the plaintiff would not have brought an application such as this on his own.

[44] In *X. v. Y.*, the Court granted permission to both parties to use initials because of the close family connection between the parties and the concern that revealing the names of one party would reveal the names of the other who was seeking protection from the harms of publicity. This concern does not exist in the case at bar.

[45] Given the importance of the open court principle, and the absence of principled legal reasons supported by evidence for the plaintiff's position, I decline to provide the same order to him.

[46] I also note that a plaintiff in an action in defamation generally is seeking vindication or restoration of reputation. To seek anonymity in this kind of an action seems to defeat that purpose.

[47] I therefore grant the order sought by the defendant as it is in the interests of the administration of justice.

[48] Specifically:

(i) The style of cause and all pleadings of Supreme Court file No.: 18-A0102 shall be amended to replace the defendant's name with Jane Doe.

(ii) No one shall publish any document or broadcast or transmit in any way information, including any evidence, submissions, information or materials in relation to court file 18-A0102, that could identify the defendant as a party to this proceeding, including any links to publications revealing the defendant's identity that were published before this Order was granted.

(iii) In any material filed in court file 18-A0102 up to and including the first day of trial of this matter, the defendant shall be referred to as Jane Doe.

(iv) Any material already filed or to be filed in court file 18-A0102 that contains information that could identify the defendant shall be redacted by the party filing the material and file both the redacted and un-redacted versions. Un-redacted versions shall only be released to the party and their counsel, and Supreme Court of Yukon staff and Judges.

(v) This Order shall take effect immediately.

(vi) The anonymity and publication ban Orders (i, ii, iii) shall remain in effect until further Order of this Court and any person affected by this Order may apply to the Court to set aside or vary the Order upon notice.

(vii) The partial sealing Order (iv) shall apply to all materials filed up to and including the first day of trial.

(viii) This Order shall not preclude reference to the defendant's former status as a student at Yukon College.

II. SECURITY FOR COSTS

(i) Introduction

[49] The defendant seeks an order for security for costs from the plaintiff on two grounds:

1) there is evidence that she will not be able to recover costs if successful in the litigation; and

2) security for costs is necessary to protect the defendant from abuse of process; that is, the plaintiff's claim is without merit and is brought to punish the defendant financially and deter her from prosecuting her lawsuit.

[50] The plaintiff argues that an application for security for costs must be brought in a timely way. He says a delay of 185 days since the commencement of the action is too long. Further, the plaintiff says he has exigible assets in the Yukon in the form of joint ownership of a residential property. The plaintiff provides no evidence of his financial position. He does not address the abuse of process argument directly, except to assert that his claim has merit, and to note the weaknesses in the defendant's evidence in support of her application.

[51] Although most jurisdictions now have rules or legislation for security for costs, the Yukon has no rules for seeking security for costs in non-family law proceedings, and the only relevant legislative provision applies to corporations, not individuals (s. 254 of the *Business Corporations Act*, R.S.Y. 2002, c. 20). The Court must rely on its inherent

jurisdiction at common law to consider an order for security for costs. The jurisdiction is discretionary.

(ii) Delay

[52] I will first address the plaintiff's argument of delay. Although it is still true that an application for security for costs should be brought promptly (see *Wall v. Wells*, 37 B.C.R. 445 (B.C.C.A.)), delay alone is not sufficient to defeat an application. "The circumstances must be considered including the consideration of whether the [plaintiffs] have been lulled into some false sense of security" (para. 5, *Tordoff v. Canada Life Assurance Co.*, 64 B.C.L.R. 46).

[53] I find that the timing of the application in this case does not amount to an undue delay. This litigation is still in its early stages. Pleadings have closed; some documentary disclosure and written interrogatories have occurred; and preliminary applications have been brought. At the date of this hearing, oral discoveries had not yet occurred. I also observe that the defendant's current counsel assumed carriage of the file on February 27, 2019 after the initial pleadings were exchanged, interrogatories provided and shortly before initiating these applications. This is not a case where an application for security for costs is being brought for the first time close to the date of trial, or several years after the commencement of the litigation. The plaintiff has not been lulled into a false sense of security. I decline to dismiss the application for delay.

(iii) Legal Principles

[54] The Yukon Court decisions on security for costs have been guided primarily by the decisions of the Supreme Court of British Columbia. That Court also relies on its inherent jurisdiction in the absence of a Rule of Court in British Columbia applicable to

orders sought against individuals. The principles applying to orders for security for costs against individuals emerging from the case law were aptly summarized by the Court in *Han v. Cho*, 2008 BCSC 1229 ("*Han*") and followed in *Iwasaki v. Redford*, 2016 BCSC 504 (para. 56). I have quoted the relevant portions below:

> - In exercising the discretion to order security for costs, a distinction is drawn between individual plaintiffs and corporate plaintiffs.
>
> …
>
> - In the case of an individual plaintiff, the court must balance the risk that a successful defendant will be unable to recover costs against the possibility of stifling a legitimate claim. Because of the longstanding principle that poverty is not a bar to access to the courts, a concern that a legitimate claim could be stifled by an order for security for costs will almost always override a concern that a successful defendant will be unable to recover costs if security is not ordered.
> - "The power to order security for costs against an individual is to be exercised cautiously, sparingly, and only under special circumstances, sometimes described as egregious circumstances": *Han* at para. 27.
> - In the case of an individual plaintiff, it is not enough for the applicant to establish that an individual plaintiff resides out of the jurisdiction and has no assets in it…
> - The authorities do not establish an exhaustive list of the circumstances that would be special enough or egregious enough to justify an order for security for costs. As Madam Justice Dillon noted in *Han*, if the plaintiff is impecunious, the fact that the plaintiff's claim is weak or that the plaintiff has failed to pay a costs award in the past, might tip the balance in favour of granting the order.
> - … [W]here an order for security for costs would preclude an individual plaintiff's right of access to the

> courts, it will not be made "except in egregious circumstances amounting to a likely abuse of the court's jurisdiction". [*Fraser v. Houston*, [1997] B.C.J. No. 1537 at para. 11].

[55] To summarize, the defendant must show that they will be unlikely to recover costs from the individual plaintiff. If that is demonstrated, then the Court must consider whether an order for security for costs will preclude the plaintiff from pursuing their claim. If that is the likely outcome, then the defendant must persuade the court there are egregious circumstances amounting to a likely abuse of the court's process.

(iv) Application of Principles to this Case

[56] In support of her argument that she is unlikely to recover costs, the defendant relies on the plaintiff's loss of employment at Yukon College, and his claims in the statement of claim that he has lost wages and benefits, has been seriously injured and suffered losses. She also relies on the fact that his residential property is jointly owned and subject to a $200,000 mortgage with no information about the equity in the property.

[57] The plaintiff has provided no evidence of his financial position beyond the acknowledgement of his joint ownership as a joint tenant of a residential property in Whitehorse. There is no clear evidence of his current place of residence. Documents in the record from 2018 show his residence at Finch Crescent in Whitehorse. His affidavit of documents, sworn on January 11, 2019 states that he is of Paulatuk, Northwest Territories. No additional residential information was provided. There is also no evidence in this application of the plaintiff's current employment status, his assets, or his debts. Finally, there is also no evidence of any previous failure to pay costs, any attempts to avoid creditors, or of impecuniosity.

[58] I find that the plaintiff's joint ownership as a joint tenant (meaning each tenant owns an equal share) of a residential property in Whitehorse is evidence in support of the defendant's ability to recover costs if she is successful. The additional fact that there is no evidence of him ignoring or avoiding creditors, and the principle that an order that an individual provide security for costs is to be exercised cautiously and sparingly, are sufficient to deny the application for security for costs. Following the principles set out in *Han*, the fact that he may currently be resident in the Northwest Territories is not enough to grant an order for security for costs, especially where he owns exigible property in the Yukon.

[59] As a result of the defendant's failure to establish on a balance of probabilities a likelihood that she will be unable to recover costs from the plaintiff, it is not necessary for me to assess the risk of a legitimate claim being stifled and the existence of any egregious circumstances such as abuse of process. It is also unnecessary for me to address the plaintiff's hearsay evidence objection as I have not considered that evidence for the purpose of this decision.

[60] Although I have found that a security for costs order is not justified on the evidence currently before me, I do note from the material the significant amount of procedural wrangling and protracted contentious communications between counsel. The acrimony is also evident during the in-person attendances at court by counsel. All of this contributes to increasing legal expenses to the individual parties. I encourage both counsel to find ways to reduce the conflict on procedural matters so that the real issues may be addressed in a more cost effective and efficient way.

III. PRODUCTION OF DOCUMENT FROM THIRD PARTY

[61] The parties consented to this application. Counsel agreed that the unredacted version of the investigator's report as well as any existing investigator's notes, witness statements, and any other related material prepared for Yukon College in response to the complaint made by the defendant about the plaintiff's conduct is relevant to the litigation.

[62] Yukon College counsel advised counsel for the defendant in writing that the College would not voluntarily release the information requested by him even with the authorization of the parties because of privacy concerns related to information in the documents about third parties. Further, according to counsel, the College appears to have a policy that it does not voluntarily disclose information about current or former employees and students. Yukon College counsel did however state that the College would comply with a court order compelling disclosure.

[63] Rule 25(25) provides:

> The court may, on the application of a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged, where the court is satisfied that (a) the document is relevant to a material issue in the action and, (b) it would be unfair to require the applicant to proceed to trial without having discovery of the document.

[64] Yukon College has not claimed privilege over the material requested. They have raised privacy concerns, without identifying them beyond saying they are related to third parties. Yukon College is defined as a public body under the *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1. Section 36(e) of that *Act* provides that a public body may disclose personal information "for the purpose of complying with a

subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information."

[65] I find that the materials requested are relevant to a material issue in this action – that is the nature of the occurrences between the parties on the evening of October 14, 2017 as well as findings about the nature of the relationship between the parties before and after that evening. I agree that it would be unfair to require the defendant or the plaintiff to proceed to trial without having these documents.

[66] I order production from Yukon College of the unredacted investigator's report, any existing investigator's notes, witness statements and any other material related to the investigation in the possession of Yukon College to counsel for the defendant, who will then provide a full copy of all the material to counsel for the plaintiff.

IV. STRIKING OF INTERROGATORIES

[67] This application is to strike all of the interrogatories on the basis that they are voluminous, irrelevant and "akin to a strategy of harassment", *Fine Gold Resources, Ltd. v. 46205 Yukon Inc.*, 2016 YKSC 67 at para. 47 ("*Fine Gold*"). In the alternative, it is an application for a declaration that the defendant is not required to respond to interrogatories because she is an individual and not associated with a corporation. On this interpretation of Rule 29(1) of the *Rules of Court*, only a director, officer, partner, agent, employee or external auditor of a party can be compelled to answer interrogatories. The defendant does not concede that any of the interrogatories are proper and on both arguments seeks that all of them be struck.

(i) Strike interrogatories on the basis of the *Fine Gold* decision

[68] Rule 29(2) provides that a party can serve written interrogatories relating to a matter in question in the action as a matter of right. The purpose of written interrogatories is "to obtain evidence in a timely and cost effective manner and reduce or eliminate the need of or time required for oral examination for discovery" (Rule 29 (1)). An application to strike under the Rule can be based on an objection that it is not necessary for disposing fairly of the action or the costs of answering would be unreasonable. In considering whether to grant an application to strike, a court may take into account any offer to make admissions, produce documents or give oral discovery in lieu of answering written interrogatories (Rule 29(8)). The onus is on the party objecting to the interrogatories to persuade the court that they should be struck.

[69] One of the few decisions of the Supreme Court of Yukon on the propriety of interrogatories is *Ross River Dena Council v. Canada (Attorney General)*, 2011 YKSC 56. The Court reviewed the following summary of principles governing interrogatories set out in *Tse-Ching v. Wesbild Holdings Ltd.*, (1994), 98 B.C.L.R. (2d) 92 (B.C.S.C.) ("*Tse-Ching*"):

> a) Interrogatories must be relevant to a matter in issue in the action.
> b) Interrogatories are not to be in the nature of cross-examination.
> c) Interrogatories should not include a demand for discovery of documents.
> d) Interrogatories should not duplicate particulars.
> e) Interrogatories should not be used to obtain the names of witnesses.
> f) Interrogatories are narrower in scope than examination for discovery.
> g) The purpose of interrogatories is to enable the party delivering them to obtain admissions of fact in order to establish his case and to provide a foundation upon

which cross-examination can proceed when examinations for discovery are held.

h) Interrogatories are only one means of discovery. The court may permit the party interrogated to defer its response until other discovery processes have been completed, including examination for discovery.

[70] These principles were also referred to in *Fine Gold* at para. 33. The Court confirmed that in the Yukon, asking for the name of a relevant witness in an interrogatory is not objectionable (para. 35). The Court in *Fine Gold* noted that the interrogatory rules in British Columbia before 2010 were similar to the current Yukon Rule, although the equivalent of Rule 29(1) does not appear in the former British Columbia Rules. The case law from British Columbia before 2010 is nonetheless instructive, especially given the small number of cases related to interrogatories in the Yukon jurisdiction.

[71] The defendant's counsel relies on the similarity between the timing, number and nature of the questions here and those questions in *Fine Gold*, which were struck because they were premature, not cost effective and offered no assurance of reducing or eliminating oral discovery at that stage of the proceeding. Counsel states the interrogatories in this case are a "clear illustration of the "avalanche" metaphor" (*Fine Gold*, para. 47) because of their volume and irrelevance. He also noted that many of the answers are already available in the investigation report into the alleged assault prepared by Yukon College. Counsel for the defendant says that the interrogatories are not meant to replace oral examination for discovery and the parties have already agreed that oral examinations will be conducted. He argues that these questions are more appropriate for oral examination. Combined with the unrealistic deadlines initially sought

by plaintiff's counsel from the defendant's previous counsel, the use of these interrogatories is akin to a "strategy of harassment".

[72] The plaintiff's counsel says that *Fine Gold* is distinguishable on its facts. The Court there found that the interrogatories were objectionable because: a) questions were premature in that they required specific answers before a necessary legal determination had been made; b) many detailed questions were directed inappropriately to an individual defendant peripheral to the dispute, and who was later struck as a party; c) many questions were in the nature of cross-examination on collateral issues. Counsel for the plaintiff says that the material in the investigation report from the Yukon College does not answer his questions sufficiently and is not evidence. He says if he had received particulars of the defence and counterclaim he may not have needed as many answers to interrogatories. The plaintiff's counsel relies on academic writings and earlier case law to support his argument that in the views of some, interrogatories are not used enough in civil actions and can and should be used more often to reduce oral discovery time (*Silvaggio v. Adamson*, 27 B.C.L.R. (2d) 182); as a "basis for further investigation of the case and in preparing for oral examination"; and to provide answers to more detailed and technical questions *(Spurr v. Brawn*, 2005 BCSC 1663, para. 12*).*

[73] On review of the interrogatories served in this action, I find that they do not constitute an avalanche; nor are they "akin to a strategy of harassment". While I do agree that many or even most of the questions could be asked on oral discovery, the fact that they are being asked now should substantially shorten the oral discovery. It is ultimately a question of strategy selected by counsel in each case as to when and how to use interrogatories and other available tools for discovery. As long as the strategy

selected is compliant with the Rules and common law principles, it is not for the Court to second guess or criticize that strategy.

[74] I agree with counsel for the plaintiff that the facts in *Fine Gold* make the finding in that case distinguishable from this one. There is no issue of prematurity with the questions in this case. There is only one defendant and so there is no issue of unfairness to a peripheral defendant being required to answer detailed lengthy questions. Almost all of the questions in this case are open-ended- beginning with who, what, when, why, how- and are not in the nature of cross-examination. While there is significant repetition, plaintiff's counsel clarified that the same questions were being asked based on the defence and the counterclaim, in case one or part of a pleading is struck, and the answer to one would suffice for both. Thus although there are approximately 220 questions listed, the actual number to be answered is approximately just over half of that. I also note that though the defendant's counsel argues that all of the interrogatories should be struck on the basis of relevance, at the same time he points out that many of the answers are available in the investigation report prepared for the College, a relevant document in this proceeding. This seems to undercut his objection on relevance.

[75] The defendant's counsel has raised concerns in paragraph 90 of his Outline about the following questions: details of the domestic abuse suffered by the defendant, the circumstances of an ex-boyfriend's arrest along with his name and phone number, the names of every course taken at Yukon College and her instructors, the dates her semesters began and ended, and all the facts that one of her Facebook friends knew in relation to the matter in issue. The defendant made no specific submissions about any

of these questions as to the reasons for their inappropriateness other than to say that some were irrelevant to the matters at issue in the action, others were answered in the investigation report, and they are analogous to those asked in *Fine Gold* that were struck.

[76] The defendant's counsel has tools available to him in the Rules and at common law in responding to interrogatories that he thinks are inappropriate or untimely, other than asking for all of them to be struck. Rule 29(6) allows for objection in an affidavit to answering an interrogatory on the ground of privilege or on the ground that it does not relate to a matter in question in the action. Although Rule 29 does not specifically provide for this, Yukon Courts have adopted the principles (with the exception of permitting the asking for names of witnesses) set out in *Tse-Ching*, which include deferring a response to an interrogatory until other discovery processes have been completed. Further, if on oral discovery plaintiff's counsel is asking the same questions that have already been asked and answered in the written interrogatories, the defendant should not be required to answer again, as that would defeat the purpose of the written interrogatories. Finally, in a case such as this with some personally sensitive aspects to it, as noted earlier in these reasons, it may be easier for the defendant to work with her own lawyer to answer these questions in writing, rather than doing so in person.

[77] I also agree that the plaintiff is entitled to have the defendant's direct evidence in answer to these questions, rather than relying on the findings in the investigator's report prepared for Yukon College. I have not reviewed the report but there may be differences in the way questions were asked and answered there, and the information sought to be obtained through interrogatories. If there is background information that is available in

the report and that same information assists in providing answers to the interrogatories, then the defendant and her counsel can use that information, which will shorten the time required for them to provide the answers to interrogatories.

[78] I also want to address the matter raised by defendant's counsel of the pressure placed on former counsel for the defendant to provide answers in an unrealistic time frame. While I do not agree that this amounted to a strategy "akin to harassment", as ultimately an extension of time was granted, I observe that plaintiff's counsel's insistence on strict adherence to timelines under the Rules in circumstances that call out for the exercise of discretion (such as Christmas holidays, physical relocation of the defendant) was not appropriate. Without a demonstration of urgency, which did not exist in this case, it was unnecessary for the plaintiff's counsel to insist on strict timeline compliance.

(ii) Individuals not required to answer interrogatories under Rule 29

[79] Counsel for the defendant argues in the alternative that the defendant is not required to answer the interrogatories because Rule 29 only applies to individuals with a role in a business. Rule 29(2) states as follows:

> A party to an action may serve on any other party, who is or has been a director, officer, partner, agent, employee or external auditor of a party, interrogatories in Form 26 relating to a matter in question in the action, and the person to whom the interrogatories are directed shall, within 21 days, deliver an answer on affidavit to the interrogatories. The party serving the interrogatories shall serve all other parties of record.

[80] The defendant interprets Rule 29(2) to mean that only a party who is or has been a director, officer, partner, agent, employee or external auditor of a party is required to answer interrogatories.

[81] The defendant notes that Rule 29 was almost identical to the British Columbia rule that was in effect at the time it was introduced (2008) with two differences. First, Rule 29(1) was added to the Yukon Rules, setting out the purpose of the interrogatories as above (to obtain evidence in a timely and cost effective manner and reduce or eliminate the need or time required for oral examination or discovery). Second, defendant's counsel states that a deliberate change was made to Rule 29(2) – from the British Columbia equivalent which stated "A party to an action may serve on any other party, **or on** a director, officer, partner, agent, employee or external auditor of a party" to "A party to an action may serve on any other party, **who is** a director, officer, partner, agent, employee or external auditor of a party" (emphasis added).

[82] Counsel for the defendant says that this choice of words in the Yukon Rules is intentional. Interrogatories were never intended to be served on or answered by individuals in an action in which they are a party, unless the individual holds one of these specified roles with a business or company. He says this is consistent with a more cautious and restrictive approach to the use of interrogatories, evident from the wording in Rule 29(1).

[83] Counsel for the plaintiff states that the wording in Rule 29(2) is an error. He notes that in *Fine Gold,* interrogatories were served on one individual who did not hold a corporate position (Richard Fanslow) and neither counsel nor the Court raised a concern about the impropriety of directing interrogatories to him on the basis of the wording in Rule 29(2).

[84] Since 2008, when this rule was introduced, there have not been any reported legal challenges to the serving of interrogatories on individuals. It appears to be

generally accepted in the jurisdiction that individuals can be compelled to answer interrogatories.

[85] I also note that the current wording of Rule 29(2) is not logical. The use of the phrase "may serve on **any other party**" combined with "who is or has been a director, officer etc**. of a party**" does not make sense. There is no need to state any other party, if in the next phrase that party is limited to those roles or positions that are set out. If the defendant's interpretation is correct, then Rule 29(2) would only need to say "a party to an action may serve on a director, officer etc. of a party, interrogatories in Form 26." The fact that the Rule still contains the phrase "on any other party" suggests that the Rule is meant to apply to a party **or** a director, officer etc. of a party (emphasis added).

[86] In my view the current wording of Rule 29(2) is an error. Interrogatories are not meant only to apply to individuals holding a certain position at a company or business. However, the wording on its face precludes this interpretation.

[87] As counsel for the plaintiff has pointed out, Rule 1(14) (waiver of rule) allows for the court on its own motion to order that any provision of the Rules does not apply to the proceeding.

[88] The purpose of Rule 1(14) is to ensure maximum flexibility on the facts of each case to allow for the just, speedy and inexpensive determination of every proceeding on its merits and to ensure that the amount of time and process involved in resolving the proceeding and the expenses incurred by the parties in resolving the proceeding are proportionate to the court's assessment of the dollar amount involved; the importance of the issues in dispute to the jurisprudence of the Yukon and to the public interest; and the complexity of the proceeding.

[89] In this case, despite defendant's counsel's protest that the interrogatories will be more costly and are disproportionate, it is my view that the answers provided will serve to shorten or at least focus oral discoveries and may also help to prepare the defendant for those discoveries.

[90] As a result, I will order that the restrictive interpretation of Rule 29(2) preventing interrogatories from being served on an individual party to an action is not applicable to this proceeding. The plaintiff and defendant, who are individuals, may serve interrogatories on each other.

[91] For all of the above reasons, I deny the application by the defendant for an order to strike all of the interrogatories on the basis of the *Fine Gold* decision or for an order not requiring her to answer the interrogatories on the basis of the wording in Rule 29(2).

V. COSTS

[92] As success on these applications has been divided, I make no order as to costs.

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DUNCAN J.