SUPREME COURT OF YUKON

Citation: *GJS v NIA*,
2024 YKSC 38

Date: 20240801
S.C. No. 22-D5473
Registry: Whitehorse

BETWEEN:

G.J.S.

PLAINTIFF

AND

N.I.A.

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff — André Roothman

Counsel for the Defendant — Joselynn Fember (by videoconference)

This decision was delivered in the form of Oral Reasons on August 1, 2024. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): This is a ruling on the admissibility of the material in Exhibit L. to Affidavit #2 of N.I.A., dated July 25, 2024. I note that, because of the late date that this issue was discovered, there is limited evidence and legal argument for me to base this ruling on; and I appreciate that the defendant did not have the chance to file a reply affidavit, given that the plaintiff's affidavit was filed yesterday. However, I am prepared to make a ruling.

[2] Exhibit L. relates to or consists of text messages from the plaintiff to third parties. They are related to a non-disclosure of assets, which the defendant says will have an impact on his income. The defendant admits that she accessed the text messages through the iPad of the parties' 12-year-old son, J. The iPad was given to him by the plaintiff in 2023. The iPad was synced with the plaintiff's phone. It is not entirely clear why that was the case, but one reason provided was that so the plaintiff could see games that J. was potentially buying online and monitor them. The result was that all of the plaintiff's text messages were accessible on J.'s iPad. Possibly there were email messages as well that were accessible, though that is not clear from the evidence in the exhibit. All that is clear is text messages were accessible.

[3] The plaintiff says that the defendant's access to his text messages was a breach of his privacy and also potentially a breach of solicitor-client privilege because his lawyer, Mr. Roothman, and G.J.S., the plaintiff, were texting about this application and trial and discussing litigation strategy.

[4] I agree with the defendant's counsel that for the plaintiff to have synced his phone and allowed access by his son to all his text messages was not an exercise in good judgment. Even if he thinks J. was not interested in looking at these text messages, he could be mistaken and that could also change over time or at any time.

[5] The letter from the defendant's counsel of December 19, 2023, to the plaintiff's counsel expressed concern — about what J. was accessing on his iPad. This should have alerted the plaintiff that the defendant had access to the iPad in some way. The defendant provided examples of the types of things that J. was accessing on his iPad

and through this the plaintiff should have known that the defendant had access to it in some way.

[6] However, just because someone has the potential to access someone's private information when they should not have does not mean that they should access it or use it for any purpose — especially to their advantage. The plaintiff gave the iPad to J. — not to the defendant — for J.'s use. There was a password protecting J.'s access, which the plaintiff did not share with the defendant. The text messages accessed by the defendant were not for the defendant's eyes; they were between the plaintiff and third parties. Until this court hearing, the plaintiff had no idea that the defendant had the potential to or was accessing his text messages through J.'s iPad.

[7] In all of these circumstances, I find that the plaintiff has an expectation of privacy in his text messages and that privacy was breached by the defendant. The prejudicial effect is out of proportion to any probative value of that evidence, so it is not admissible. Exhibit L. is therefore not admissible.

[8] Dealing with the privilege issue, the defendant says through her counsel that she did not access any solicitor-client privileged information. The plaintiff has no evidence that she did so. He is only speculating at this stage. The plaintiff asks at this stage that the ruling be on the admissibility of Exhibit L. only and that any further arguments or remedy on potential privilege issues be left for trial.

[9] That is the approach that will be taken here today.

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DUNCAN C.J.