SUPREME COURT OF YUKON

Citation: *J.W. v. Van Bibber et. al.*, 2012 YKSC 63

Date: 20120723
S.C. No. 09-A0031
Registry: Whitehorse

Between:

J.W.

Plaintiff

And

ADAM VAN BIBBER, AUDREY BAKER, DARIN ISAAC
and SELKIRK FIRST NATION

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

Carrie E. Burbidge — Counsel for the Plaintiff
Debra L. Fendrick — Counsel for the Defendants

REASONS FOR JUDGMENT
(Vary Publication Ban)

INTRODUCTION

[1] Counsel for the Defendants applies to vary a publication ban granted in this matter on June 10, 2009.

[2] The issue is whether the publication ban should be varied to permit the individual defendants and their counsel to disclose the Plaintiff's name for the purpose of interviewing and subpoenaing witnesses and carrying out investigations necessary for the defence of the case. Counsel for the Plaintiff does not oppose the variation except that she submits only the counsel for the Defendants should be excluded from the publication ban.

[3] The application to vary was granted on July 9, 2012 for the reasons that follow.

BACKGROUND

[4] The Plaintiff commenced her court action on June 5, 2009. On application of counsel for the Plaintiff, without a hearing or notice to the Defendants, the following order was granted:

1. The following documents be sealed from public view and access be restricted to counsel of record in this matter:
    a. Writ of Summons and Statement of Claim, filed June 5, 2009.
    b. The Requisition, filed June 5, 2009.
    c. The Affidavit #1 of André W.L. Roothman, filed June 5, 2009.
2. The identity of the Plaintiff and any information that could disclose her identity shall not be published or broadcast in any way.
3. The Defendants may apply to vary or set aside this Order on 7 days notice to the Plaintiff.
4. The media may apply for standing to bring an application to set aside this Order on notice to the parties.

[5] Since that time, Statements of Defence have been filed denying the allegations of the Plaintiff. None of the Statements of Defence which reveal aspects of the Plaintiff's claim have been sealed.

[6] The trial has been set for May 6 – 10 and May 13 – 17, 2013.

[7] No evidence has been filed relating to this application apart from an affidavit indicating that counsel for the Defendants initially requested a consent order from counsel for the Plaintiff. Counsel for the Plaintiff would not consent to the order unless

the variation allowing publication of names etc. is restricted to counsel for the Defendants.

The Open Court Principle

[8] In the case of *X. v. Y.,* 2004 YKSC 45, this Court refused to seal a court file that raised allegations of sexual assault but granted a publication ban on the names of the individual Plaintiff and Defendants who were then referred to as X., Y., and Z. The order also prohibited the disclosure of any information that could disclose their identities, including the use of their actual initials.

[9] The open court principle was summarized as follow in *X. v. Y*. at para. 6:

> 1. The open court principle is a hallmark of a democratic society and applies to all judicial proceedings.
>
> 2. The open court principle has long been recognized as a cornerstone of the common law.
>
> 3. The open court principle maintains the independence and impartiality of the courts and is integral to the public confidence in the justice system.
>
> 4. Put another way, openness is a principal component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of the court.
>
> 5. The open court principle is vital to the freedom of the press to report on judicial proceedings and thus inform the public about the operation of the courts.

[10] The two-part Dagenais/Mentuck test to determine when a publication ban is appropriate is set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76:

> 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. (see *X. v. Y.*, para. 8)

[11] The reasons for and against publication bans were summarized in para. 12 of *X. v. Y.*:

> In the *Dagenais* case, Lamer C.J., at pages 882 - 884 set out many of the reasons for and against publication bans. The reasons for such bans involve protecting vulnerable witnesses, encouraging the reporting of sexual offences and protecting vulnerable witnesses such as child witnesses, police informants and alleged victims of sexual offences. The reasons for not ordering bans include protecting freedom of expression, preventing perjury by placing witnesses under public scrutiny and promoting public discussion of important issues.

[12] The burden of displacing the open court principle is on the applicant.

[13] As stated in *X. v. Y*, an order to seal a court file should only issue in extreme circumstances. Allegations of sexual assault, despite the resulting trauma, do not generally amount to such circumstances, absent unique factors.

[14] In the more recent case of *R.B.L. v. British Columbia*, 2005 BCSC 1068, Fraser J. refused to impose a publication ban in a civil sexual assault proceeding although the plaintiff was referred to by initials as a result of an interlocutory ruling by the Court of Appeal.

[15] Fraser J. set out two premises for a publication ban in a civil case at para. 67, however he considered neither to engage legal principles:

> Claims for a publication ban in a civil case involving allegations of sexual assault rest on two premises:
>
> (1) that potential claimants will be discouraged from bringing their civil claims to the Court because of the fear

> that it may become known that they were victims of sexual assault;
>
> (2) that it is desirable that persons alleging that they are victims of sexual assault be encouraged to bring actions for damages.

[16] In *A.B. v. Bragg Communication Inc.*, 2011 NSCA 26, the Court of Appeal refused to permit the use of a pseudonym by a teenager bringing a defamation case for on-line bullying. The Court also declined to impose a publication ban. The Court stated at para. 85:

> In conclusion, on this issue, A.B., through her guardian, has instigated these proceedings, thereby choosing to participate in a public forum where the trial may be attended by an interested public, and reported on by a free and independent press. Restrictions which might otherwise apply in family law, or crimes of a sexual nature, have no application here. I agree with Ms. Rubin's very persuasive submission that it would be contrary to the public interest in a case of this kind to permit a plaintiff who had initiated such an action, to then pursue her claim anonymously, with her identity kept secret.

[17] As stated in *X. v. Y.,* it is the policy of this Court to not allow the general public to review family law files without approval of the Court. This is not a universally-accepted approach, as indicated by the recent decision in *M.E.H. v. Williams*, 2012 ONCA 35, where the spouse of a serial sex offender and murderer requested a publication ban on her divorce proceedings, based on a real and substantial risk to her mental wellbeing. In that case, the Court of Appeal set out three factors required by the first “necessity” branch of the Dagenais/Mentuck test:

1. There must be a public interest at stake such that, because of physical and/or emotional consequences, the courtroom door may close to a litigant and there is no reasonable alternative way to limit the openness of the courts (para. 27).

2. The necessity branch requires that the applicant show there will be a serious risk to the proper administration of justice without the protective order sought (para. 32).
3. There is a significant legal and evidentiary burden on a party seeking to limit freedom of expression and the openness of the courts (para. 34).

[18] As noted, the applicant wife in *Williams* had argued that there was a real and substantial risk to her mental wellbeing if the publication ban and sealing orders were not granted. This assertion was based on evidence in affidavits from her treating psychiatrist. Although the Court did not rule out the possibility that in some circumstances a party could experience debilitating physical and emotional harm that would effectively prevent recourse to the courts in the absence of a publication ban or sealing order, the wife did not meet that threshold. The Court of Appeal characterized the opinion evidence of the psychiatrist “as speculation and assumption” (para. 53) in the absence of any evidence directly from the applicant.

[19] The Court of Appeal concluded at para. 57:

> Assuming that Dr. Quan's opinion goes so far as to assert a real risk that the respondent would suffer the degree of emotional harm required to engage the public interest in maintaining access to the courts, that opinion rests entirely on his assumption that the respondent would be subject to media harassment occasioned by "persistent, insistent and incessant" efforts to invade her privacy. These assumptions have no foundation in the evidence. Consequently, Dr. Quan's opinion cannot be said to provide the kind of convincing evidence needed to meet the rigorous standard demanded by the necessity branch of the *Dagenais Mentuck* test.

ANALYSIS

[20] This application has proceeded without any evidence from the Plaintiff to support the without-notice order made on June 10, 2009. On that basis alone, I would have varied the order substantially, but that remedy was not sought and counsel did not make submissions on *Williams*.

[21] In the circumstances, the application to vary will be granted as applied for.

[22] It is also fair to say that the *Williams* precedent sets a very high bar for applicants seeking publication bans or sealing orders. I note that the *Williams* case uses the wife's initials, and it does not appear that that aspect of the motion's judge's order was appealed. There was also no challenge to the non-publication order as it related to the applicant's social insurance number, date of birth, bank account numbers or medical information.

[23] In my view, in the future, this Court should not impose publication bans or sealing orders without evidence from the applicant and submissions from the Defendant. The practice of applying for use of initials may continue but will now also require direct evidence from the applicant and not submissions from counsel. Initials will continue to be used in family law cases involving children and other civil cases where appropriate

VEALE J.