SUPREME COURT OF YUKON

Citation: *B.D.C. v. B.J.B.*, 2012 YKSC 64

Date: 20120727
S.C. No. 08-B0048
Registry: Whitehorse

Between:

B.D.C.

Plaintiff

And

B.J.B.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Kathleen Kinchen — Counsel for the Plaintiff
Brook Land-Murphy — Counsel for the Defendant

REASONS FOR JUDGMENT
(Recording Conversations)

INTRODUCTION

[1] The father has been exercising unsupervised access to the child E., age 5, for approximately one week per month since 2010, when I ordered interim joint custody of E. to the mother and father.

[2] The unsupervised access in the 2010 Order has now come up for review and the mother applied to formalize the child support and access which I set out in my judgment cited as *B.D.C. v. B.J.B.*, 2012 YKSC 27, and entered as an order dated April 4, 2012.

[3] The father is concerned about negative comments that the mother has been making to the child about the father during telephone calls to the child while the father is

exercising access. In order to establish the mother's negative influence on the child, the father made audio and video recordings of the mother's conversations with the child during these calls. The recording was without the mother's knowledge or consent.

[4] Counsel for the father specifically requested that a transcript of the recording be considered as part of his case. For the reasons that follow, I find that this recording is not admissible.

The Evidence

[5] The father deposed the following in his affidavit dated March 19, 2012:

> 47. Telephone access has been a major issue between B. and me. The telephone calls which B. makes to E. when E. is in my care have been extremely disruptive for E., M., and me. My practice is to put the phone on speaker when B. calls and put it in front of E. Often the calls come in at dinner time but if the call is at another time I ensure that the television is off and that E. is not playing with something so that he can give his full attention to the call.
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> 48. E. generally has little to say to B. when she calls. He obediently answers her questions of do you live and do you miss you. [as written] Sometimes I have to prompt him to tell his mom what we have been doing.
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> 49. B. goes on at great length about how much she loves and misses E. and repeatedly asks him if he loves and misses her. During one conversation E. said no and B. told him she realizes he is "being manipulated pretty hard core there." While talking to E. B. has made the following statements: "B. and M. are mean and won't let me talk to you." "I bet you are going to be so happy to come home where things are normal and you can say and do what you want." "I'm sad. Do you want to come home and make me better." "I hope you are allowed to come home". "You sound a little coached."

[6] The mother denies having made these comments.

[7] The recording was made by the plaintiff while E. was speaking with the defendant on the speaker phone. The mother was aware that she was on speaker phone and that the father was in the room. The mother was not aware that there was a video recorder operating and taping audio and video of the conversation. The father has prepared a transcript of the mother's conversation with the child. A court reporter has sworn that the transcript is a true and accurate reproduction of the mother's conversation with the child.

THE LAW

[8] The question of whether a tape recording of a person without their consent is admissible as evidence requires a determination of relevance and a finding that its probative value outweighs its prejudicial effect.

[9] The case of *Mathews v. Mathews*, 2007 BCSC 1825, was relied upon by counsel for the father to admit the surreptitious tape recording. The case is somewhat distinguishable on the facts, as the dispute there related to two documents. The first was the diary of the mother and the second was a letter in a birthday card written by a friend of the mother's. Both the diary and the card were kept in a locked box in the mother's bedroom. The trial judge found that the father obtained the diary and the card in what amounted to an invasion of the mother's privacy, however he ruled that the documents were relevant and the probative value outweighed the prejudicial effect.

[10] There was little doubt that the contents of the documents were relevant. The identity of the author known and the contents were trustworthy. The trial judge found that there was "limited discretion to exclude relevant evidence in this context" (para. 43). He also found that the documents had significant probative value, as they indicated the

intention of the mother to leave the father and take the children from Australia to Canada without telling the father, all in the context of an argument about parental alienation and inappropriate pressure on the children.

[11] Barrow J. considered the potential prejudicial effect from several perspectives.

1. Prejudice to the party opposing the admission of the evidence: Prejudice may be found if the evidence is of uncertain provenance, is incomplete or capable of manipulation. This concern did not arise on the facts.
2. Prejudice to the trial process: Prejudice may be found where the cost of admitting the evidence is out of proportion to its probative value. In two precedent cases, the sheer volume of recorded material made the taped evidence inadmissible (i.e. 20 hours of tape recording in *Seddon v. Seddon*, [1994] B.C.J. No. 1729 (S.C.), and recordings made over a period of three and a half years in *Rawlek v. Rawlek*, [2003] B.C.J. No. 2231 (S.C.)).
3. Prejudice to the administration of justice: Where, for example, the secret interception of a private communication is a criminal offence. Section 184(1) of the *Criminal Code* makes it an indictable offence to intercept a private communication “by means of any electro-magnetic, acoustic, mechanical or other device.” In *Mathews*, the diary and card were not obtained in a manner that constituted a criminal offence. Indeed, the diary and the card would have been required to be produced in a List of Documents or on request at an examination for discovery.

4. Prejudice that would arise by excluding the evidence: As Barrow J. stated at para. 56, there is little doubt that the exclusion of evidence that is reliable and shows physical abuse of a child, for example, would harm the reputation of the administration of justice. Thus, the best interests of the child test can militate in favour of the admission of evidence that reveals seriously alienating behaviour of a parent.

[12] Barrow J. concluded:

> 57 In the present circumstances, the evidence might be interpreted as showing a calculated decision by Ms. Mathews to withhold from Mr. Mathews her decision to leave the marriage. It might be interpreted that she did this in an effort to secure Mr. Mathews consent to the children leaving Australia. If that is so, then to exclude the evidence may result in the objects of the *Convention* being thwarted by subterfuge. When the prejudice worked by admitting the evidence is pitted against the possible prejudice that excluding it might cause, the result is clear in my view.
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> 58 I am satisfied the evidence has significant probative value which outweighs any prejudice caused by its admission. Further, the prejudice that would inure from its exclusion is significant. In the result I find the evidence admissible.

[13] The trial judge declined to apply a *Charter* analysis to the admission of the two documents.

ANALYSIS

[14] I find that there is a significant factual distinction between the case at bar and *Mathews*. In the case at bar, the recording of the conversation of the mother and her child was made without the consent of the mother and is therefore a criminal offence. In *Mathews*, the documents obtained by the father from the bedroom of the mother were

certainly a gross invasion of her privacy but not a criminal offence. The documents should have been the subject of production required in civil litigation.

[15] The evidence is obviously relevant to a determination of child support and access. It is also highly probative to the extent that it confirms the mother's blatant attempt to manipulate the child.

[16] Nevertheless, I find there is significant prejudice in admitting the recordings, primarily because it would bring the administration of justice into disrepute to permit evidence obtained by the commission of a criminal offence to be admitted. In this case, there would not only be prejudice to the administration of justice but also to the best interests of the child to have unrecorded private conversations with a parent. There may be circumstances where it is appropriate for the court to impose a recording condition, i.e. allowing conversations to be recorded where there is a real risk of harm to a child by an emotionally abusive parent in a supervised access situation. But that is a far cry from condoning the criminal and intrusive act of recording a parent-child communication for use in a custody dispute. Condoning such a practice would only encourage parents to tape record each other's conversations and conversations between a parent and child. I prefer the view of Thackray J., as he then was, in *Seddon,* where he said at para. 25:

> I am of the opinion that it is not desirable to encourage the surreptitious recording of household conversations, particularly so when it is done in the family home and the conversations are between family members. This is an odious practice. …

[17] I am also of the view that the *Charter* privacy right in s. 8 is engaged here. Section 8 reads:

> Everyone has the right to be secure against unreasonable search or seizure.

In *A.M. v. Ryan*, [1997] 1 S.C.R. 157 at para. 22, the Supreme Court of Canada stated that “it is important to bear in mind the distinction drawn by this Court between actually applying the *Charter* to the common law, on the one hand, and ensuring that the common law reflects *Charter* values, on the other.”

[18] In *Seddon*, cited above, Thackray J. refused to admit tape recordings on a *Charter* analysis at para. 23:

> If the onus is on the applicant petitioner to show that the interception was lawfully made, then he has failed to do so. Pursuant to sections 184 and 189 of the Criminal Code and pursuant to section 24 of the Charter, I am of the opinion that to admit such evidence would clearly bring the administration of justice into disrepute. …

[19] While the direct application of a s. 24 *Charter* analysis is probably not appropriate, the view that the common law should reflect *Charter* values has been supported recently by the Ontario Court of Appeal in *Jones v. Tsige*, 2012 ONCA 32. The Court explicitly recognized the common law tort of “intrusion upon seclusion” as follows:

> 45. While the *Charter* does not apply to common law disputes between private individuals, the Supreme Court has acted on several occasions to develop the common law in a manner consistent with *Charter* values: see *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2.S.C.R. 573 at 603; *R. v. Salituro*, [1991] 3 S.C.R. 654, at pp. 666 and 675; *Hill v. Scientology* at p. 1169; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.,* 2002 SCC 8, [2002] 1 S.C.R. 156; *Grant v. Torstar Corp.,* 2009 SCC 61, [2009] 3 S.C.R. 640.
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> 46 The explicit recognition of a right to privacy as underlying specific *Charter* rights and freedoms, and the principle that the common law should be developed in a manner consistent with *Charter* values, supports the recognition of a civil action for damages for intrusion upon the plaintiff's seclusion: see John D.R. Craig, "Invasion of

Privacy and *Charter* Values: The Common Law Tort Awakens" (1997), 42 McGill L.J. 355.

CONCLUSION

[20] To conclude, the tape recording of the mother and child phone conversation without consent in this case is inadmissible, as its prejudicial effect exceeds its probative value. It creates a disproportionate prejudice to the administration of justice and the mother's and child's privacy rights.

VEALE J.