IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Sa Tan* v. *Government of the Yukon Territory, et al.,* 2006 YKSC 45

Date: 20060707
Docket No.: S.C. No.: 04-A0215
Registry: Whitehorse

BETWEEN:

SA TAN

PLAINTIFF

AND:

GOVERNMENT OF THE YUKON TERRITORY, LAWRIE CRAWFORD, LISA WYKES, BRIAN FARRELL AND PATRICIA DAWS

DEFENDANTS

Before: Mr. Justice L.F. Gower

Appearances:

Zeb Brown	For the Applicant Defendants
Sa Tan	For the Respondent Plaintiff

RULING

INTRODUCTION

[1] This is an application by the defendants for an order that:

1. The plaintiff's claims in defamation and civil conspiracy be struck out, or alternatively dismissed;
2. That the defendants Crawford, Wykes, Farrell and Daws be removed as parties;
3. That the plaintiff attend in Whitehorse for examination for discovery by the government, without the payment of the proper witness fees;

4. That the plaintiff conduct himself in accordance with the normal civility expected of counsel; and
5. The costs of this motion, in any event of the cause.

[2] In response to this application, the plaintiff filed written argument on May 11, 2006. In that written argument, the plaintiff refers to submissions allegedly made to the Yukon Human Rights Commission in connection with a complaint arising from the same alleged circumstances that gave rise to this action. Counsel for the defendants objects to those references for two reasons:

1. They are not relevant to the within action;
2. They are part of a separate adjudication process and the submissions were made in confidence that they would only be used within that process.

I agree. Accordingly, I advised the plaintiff at the hearing of this application that I would not take into consideration any reference to the Yukon Human Rights Commission proceedings in deciding this application.

[3] The plaintiff's written argument also contains references to documents he has obtained using the Yukon *Access to Information and Protection of Privacy Act*, R.S.Y. 2002, c. 1. Although I don't recall counsel for the defendants specifically objecting to that information, I rule that it is not properly before me, as it has not been submitted in affidavit form. Accordingly, in deciding this application I have similarly disregarded those references.

ANALYSIS

Issue 1: Should the plaintiff's claims in defamation and civil conspiracy be struck out or dismissed?

a) *The Defamation Claim Re: Pat Daws' E-mail of March 10, 2005*

[4] In his Amended Statement of Claim filed December 12, 2005, the plaintiff alleged, at paras. 45 and 46, that the defendant Daws sent an e-mail to him and Laurie Butterworth on March 10, 2005, which included the sentence "This lack of candour in dealing with a future employer in itself makes you unsuitable for a position in the public service, and particularly unsuitable for this position." The plaintiff says this statement was false and defamatory in its natural and ordinary meaning. He also says the statement was intended to mean that the plaintiff is a fundamentally dishonest individual who should never be considered for employment with the government, either in a full-time capacity or on a contract basis.

[5] The defendants' counsel says that Ms. Daws, as the Public Service Commissioner, had a duty to copy the e-mail to the plaintiff's alleged union representative, and that Mr. Butterworth, as that alleged union representative, had an interest in receiving it. Therefore, says counsel, even if the communication is false and capable of being construed as defamatory, and he says it is not, qualified privilege applies and neutralizes the plaintiff's claim, in the absence of malice. Further, malice has not been pleaded, nor have any facts or circumstances upon which malice can be inferred.

[6] The plaintiff's position is that, if "the point" of the e-mail was solely to explain to Mr. Butterworth that the government was not going to recognize the plaintiff as a member of the union's bargaining unit, then there was absolutely no need to

communicate to the union that the government's official position was that the plaintiff's alleged lack of candour made him unsuitable for a position in the public service. Therefore, says the plaintiff, Ms. Daws went further than she needed to by raising the issue of the plaintiff's "lack of candour" and that is evidence of malice. Finally, the fact that malice has not been expressly pled should be taken in context. When the plaintiff originally prepared his draft Writ of Summons (attached as Exhibit "B" to his affidavit filed March 29, 2005 in Supreme Court File No. 04-A0216), he pled that this communication was made with "the utmost malice". However, for some unexplained reason, that language was not retained in the Amended Statement of Claim.

[7] The flaw in the plaintiff's argument is that the e-mail by Ms. Daws was written *to the plaintiff* and not to Mr. Butterworth, although copied to the latter, and was further to the plaintiff's application for the position of Communications Manager and his recent meeting with Ms. Daws about that application. The second and third paragraphs of the e-mail are as follows:

> "Although negotiations with a view to concluding a contract of employment with you had been commenced, no such contract was ever concluded. Unfortunately, it turned out that you had not disclosed in either the application or the interview process that you were using an assumed name and that your legal name is in fact Sa tan [as written]. Your fax yesterday however confirmed your earlier verbal advice that although you call yourself Brian Salmi you are "legally known as Sa tan" [as written].
>
> This lack of candour in dealing with a future employer in itself makes you unsuitable for a position in the public service, and particularly unsuitable for this position."

The e-mail continued that Ms. Daws did not agree that Mr. Salmi was a member of the collective bargaining unit, but that she would forward a copy of the e-mail to Mr. Butterworth so that he would be aware of the government's position in that regard.

[8] Qualified privilege arises where a person who makes a communication has a legal or moral duty to make that communication to the person to whom it is made and the person to whom it is made has a corresponding interest or duty to receive it. The defendant's counsel has provided a number of authorities where communications by an employer to an employee's union representative, which include references to the employee's inappropriate conduct on the job, have been held to be within the scope of qualified privilege: *Hanly* v. *Pisces Productions Inc.*, [1980] B.C.J. No. 1803 (S.C.); *Silbernagel* v. *Empire Stevedoring Co.*, [1979] B.C.J. No. 890 (S.C.); *Rajakaruna* v. *Purdie*, [1984] S.J. No. 533 (Q.B.); *Bancroft* v. *C.P.R. Co.* (1920), 53 D.L.R. 272 (Man. C.A.). I agree that those cases are generally applicable to the case at bar.

[9] In *Silbernagel*, the employer wrote to the employee's union complaining about his performance as a longshoreman and a mechanic. The letter included the following language:

> "This man is absolutely incompetent as a mechanic. He hardly knows what day it is, let alone mechanical work."

Wallace J. of the British Columbia Supreme Court, as he was then, had no difficulty finding that the letter was written within the scope of qualified privilege. Therefore, the onus was on the plaintiff to establish malice and to refute the presumed good faith of the employer (para. 20). He went on, at para. 32, to detail what the plaintiff had to prove in that case:

> "In my opinion, because of the absence of any extrinsic evidence from which express malice can be inferred, for the plaintiff to succeed he must establish that the words used, by reason of their exaggerated, intemperate nature, indicate they were written maliciously with an improper motive or alternatively, the author has written the words recklessly not caring whether they were true to accomplish some indirect motive.
>
> I gave considerable attention to this submission and concluded that, while the words used "He hardly knows what day it is, let alone mechanical work" constitute an embellishment that was not necessary for the occasion protected by privilege, the use of such an idiom among the dockyard and union administrators could not be considered sufficiently extreme to support an inference of express malice or wrong-doing or rebut the presumption of bona fides. …"

[10] At para. 35, Wallace J. quoted *Gatley on Libel and Slander*, 7th ed., at para. 1270:

> "If once the privilege be established, unless there be extrinsic evidence of malice, there must be something so extreme in the words used as to rebut the presumption of innocence and to afford evidence that there was a wrong or direct motive prompting the publication …"

[11] Accordingly, Wallace J. held that the words used were at least equally consistent with the absence of malice as they were with its presence and, as a consequence, no proper inference of malice could be drawn to rebut the presumption of good faith.

[12] I find that there is no evidence of malice in the March 10th e-mail by Ms. Daws to the plaintiff. As stated by R.E. Brown, in the text *The Law of Defamation in Canada* (Toronto: Carswell, 1987), at p. 16-102 and 105, there is a "strong presumption" of good faith in such circumstances and the plaintiff bears the burden of proving actual or express malice on a balance of probabilities. He has failed to do so.

[13] Three further points need to be disposed of. First, the plaintiff says that he originally pled malice in his draft Writ of Summons. That is correct as far as it goes,

however, the communication which the plaintiff was there referring to was not the March 10th e-mail. Rather, in the draft Writ of Summons the plaintiff pled that the defendants were alleging that he was lying about having a contract with the government by denying that such a contract had been completed. There was no reference whatsoever in that draft Writ of Summons to the “lack of candour” statement.

[14] Second, the plaintiff has already had an opportunity to amend his Statement of Claim to provide further and better particulars in support of this particular claim, as well as his other alleged causes of action. Indeed, at a hearing before me on August 12, 2005, I warned the plaintiff that the defendants’ counsel was seeking particulars of his various claims and that if he continued to maintain causes of action without pleading the underlying material facts, he risked having those causes of action struck out. I even went so far as to provide the parties with a memorandum on August 19, 2005, which suggested to the plaintiff what he should include as particulars for each alleged tort.

[15] Third, Rule 19(12)(a) says that the plaintiff “shall give particulars of the facts and matters on which the plaintiff relies in support of” an allegation that the words or matter complained of were used in a derogatory sense other than their ordinary meaning. The plaintiff has failed to do so. I recognize the plaintiff’s point that Rule 19(23) further provides that “it is sufficient to allege malice … without setting out the circumstances from which it is to be inferred”. However, even if the plaintiff simply alleged malice without more, which he has not done, that subrule is a general one applying to circumstances where malice, fraudulent intention, knowledge or other conditions of the mind of a person are alleged as facts. In such circumstances, particulars may not be possible precisely because the allegation involves a state of mind. However, Rule

19(12)(a) is more specifically applicable to allegations of defamation and it supersedes Rule 19(23) where a pleading alleges defamation.

[16] The defendants' application is primarily under Rule 19(24)(a), which authorizes the court to strike out any part of a pleading if it discloses no reasonable claim. The test for applying that subrule assumes that the facts as stated in the Statement of Claim can be proved and if it is nevertheless "plain and obvious" that the claim discloses no reasonable cause of action, the pleading may be struck: *Hunt* v. *Carey Canada Inc.*, [1990] 2 S.C.R. 959, at para. 33.

[17] Assuming that the fact of the March 10th e-mail from Ms. Daws can be proven, I am satisfied that it is plain and obvious that the plaintiff's defamation claim arising from that e-mail discloses no reasonable cause of action. Accordingly, I order that those parts of the plaintiff's Amended Statement of Claim be struck out, including paras. 45, 46 and 47 and those portions of his prayer for relief which refer to damages for the defendant Daws.

[18] In the alternative, to the extent that I have taken into account affidavit evidence on this aspect of the application by the defendants, I would dismiss the plaintiff's defamation claim arising from Ms. Daws' e-mail and grant judgment to the defendants on that portion of the plaintiff's overall claim, pursuant to Rule 18A of the *Rules of Court*.

b) *The Defamation Claim Re: CBC Report of April 8, 2005*

[19] The plaintiff pled at paras. 37 and 48 of the Amended Statement of Claim that on April 8, 2005, he heard a CBC radio report which stated that the government denied it ever offered the plaintiff employment. At para. 49, the plaintiff said that this was a libellous statement, inferentially coming from someone within government, and was

understood to mean that the plaintiff was a confidence man who was fundamentally dishonest and was engaging in a frivolous and vexatious lawsuit against the public purse.

[20] Counsel for the defendants argues that it is important to remember the history of this matter. Following the events between the plaintiff and the government, which are the subject of this litigation, the plaintiff brought applications for indigency status on two potential claims he wished to file with this Court. One named the Government of the Yukon Territory as the defendant and was assigned a Supreme Court file number of 04-A0215. The other claim named the defendants Crawford, Wykes, Daws and Farrell and was assigned file number 04-A0216. On August 12, 2005, I ordered that both actions be consolidated within file number 04-A0215.

[21] In his affidavit filed in support of his indigency application on file number 04-A0215, the plaintiff deposed that he had been offered the position of Communications Manager with the government and that he accepted that offer. He attached as exhibits a number of e-mails to support that proposition. At para. 8 of the affidavit, he deposed that he asked the Public Service Commissioner to explain the government's version of the events documented in the e-mails. At para. 9, he deposed as follows:

> "A representative of the Public Service Commission has replied to that request by stating that the facts of the matter, which are clearly laid out in exhibits "A" through "H", are denied by the Commission (Exhibit "J")." (emphasis added)

And later, at para. 12, he deposed:

> "In order for the territorial government to deny the facts of the matter, as clearly laid out in Exhibits "A" through "H", one or more of the defendants would have to be lying." (emphasis added)

[22] I granted the applications for indigency status and filed a Memorandum of Ruling on April 6, 2005, setting out my reasons for doing so in *Tan* v. *Yukon (Government)*, 2005 YKSC 19. In considering whether the plaintiff's claims were proper and sufficiently meritorious to justify an order exempting him from paying filing fees, I said as follows, at para. 18:

> "… Mr. Tan essentially alleges the four individual defendants are defaming his character by denying that there has been a breach of contract. He intends to plead that by denying the existence of the contract, those individuals, who Mr. Tan apparently believes are government employees, are effectively alleging that he is lying about 'the facts'."

[23] The news report on CBC radio followed on April 8, 2005. A transcript of that report is attached as Exhibit "A" to the second affidavit of Lisa Patterson. The relevant portion of the transcript of this report is as follows:

> "… [The plaintiff has] filed correspondence and e-mails from the government and the government workers' union to back up his claims but the government denies it ever offered him the job. He's asking the court to rule that four government employees have defamed him by denying the job offer was ever made. He says they've publicly suggested he's a liar, making it tough for him to get another job. …"

[24] Counsel for the defendants argues that the plaintiff's allegation of defamation in his Amended Statement of Claim is supported by nothing more than a media report of the plaintiff's own earlier alleged statements of fact, including the allegation that the government denied that he had a job with it. In other words, the plaintiff's argument is circular. He made allegations in his affidavits in support of his indigency applications that the Public Service Commission, the territorial government and/or the individual defendants denied "the facts of the matter", which the plaintiff said were that he was offered a job and that he accepted that offer. Further, he deposed that this denial of the

“facts of the matter” is equivalent to a statement that the plaintiff was lying about those facts and that such a statement is capable of being defamatory. Therefore, when the CBC reported about the matter following my ruling on April 6, 2005, they were only reporting what the plaintiff himself had originally alleged.

[25] Further, the defendants’ counsel says that the Amended Statement of Claim does not specify the defamatory words, does not identify which of the defendants published the words or caused them to be broadcast, and does not provide any other particulars as to the time, place or manner of the defamation. At the hearing on August 12, 2005, the plaintiff was warned that such particulars would be required, and my memorandum to the parties specifically suggested to the plaintiff that such particulars be included in any further amendment of his Statement of Claim.

[26] The plaintiff’s principal argument on this point is that the inference is inescapable that a professional CBC journalist would never broadcast a story stating “the government denies it ever offered him the job” without having heard such a denial directly from a government representative. Further, he says that a government representative telling a member of the press that no job was ever offered to him would be defamatory, as it implies that the plaintiff is being dishonest about having been offered the job. Finally, he says that the CBC report was not a fair and accurate report of the judicial proceeding resulting in my ruling of April 6, 2005. He says that a fair and accurate report of that proceeding would have said “The plaintiff alleges the government is denying ever offering him the job”, or something to that effect.

[27] In this hearing, the plaintiff conceded that he has never made any effort to check with the CBC or their reporters as to the source of this story.

[28] I agree with the defendants' counsel that, looking carefully at the language used in the CBC report of April 8th, it is easy to infer that the reporter was referring not only to the statements made in the plaintiff's own affidavits in support of his indigency applications, but also quite probably, my Memorandum of Ruling of April 6, 2005. The parallels in the language of the report and para. 18 of my ruling, quoted above, seem obvious.

[29] Whether the CBC report was "fair and accurate", is a matter that the plaintiff should take up with CBC and not with the defendants in the within action. In any event, the plaintiff said in his affidavit in file number 04-A0215, that the "facts of the matter" as laid out in the exhibits which he says document the offer of the job and the acceptance of that offer, "are denied by the Commission". He further referred to the government as denying the facts of the matter. In his affidavit on file number 04-A0216, filed March 29, 2005, he attached a draft Writ of Summons which said that the individual defendants were "denying that a contract was completed". The CBC report says "the government denies it ever offered him the job". I fail to see any significant difference between what is in the report and what the plaintiff himself alleges.

[30] Therefore, pursuant to Rule 19(24)(a), I find it to be plain and obvious that this portion of the plaintiff's claim cannot succeed either, even on the assumption that all the facts relating to the CBC report pleaded by the plaintiff are true. Specifically, I find that those portions of the plaintiff's Amended Statement of Claim alleging defamation from the CBC report of April 8, 2005 disclose no reasonable claim and I direct that they be struck out. I am including here paras. 37, 49, and 50, as well as those portions of the prayer for relief which refer to the "second libel".

[31] In the event that I am in error in making the finding I did under Rule 19(24)(a), having taken into account some of the affidavit material relevant to this question, I would summarily dismiss the plaintiff's defamation claim relating to the CBC report and grant judgment in favour of the defendants on that portion of the Amended Statement of Claim, pursuant to Rule 18(a) of the *Rules of Court*.

c) *Claim of Civil Conspiracy*

[32] The plaintiff has alleged in his Amended Statement of Claim, at paras. 30 through 40, that the defendants were involved in a conspiracy to dismiss him wrongfully and in bad faith. Interestingly, for reasons which will shortly become obvious, the subtitle to that portion of the Amended Statement of Claim reads "Conspiracy to dismiss employee wrongfully and bad faith breach of contract". In general, the plaintiff alleges there were various communications between the individual defendants, a deputy minister, another government employee, representatives of the government employees' union, counsel for the government and the plaintiff himself, all of which were designed to breach the employment contract the plaintiff says he had with the government.

[33] I agree with the defendants' counsel that the Amended Statement of Claim does not allege *unlawful* actions within the alleged civil conspiracy. Rather, it appears that what various players were doing, in exchanging the alleged communications surrounding the issue of the plaintiff's employment with the government, was entirely lawful and within their respective duties and terms of employment.

[34] Further, the defendants' counsel submits that, to prove a civil conspiracy based upon *lawful* actions, the plaintiff must establish that:

1. The defendants *intended* to act in combination;

2. The defendants in fact *did act* in combination; and
3. The defendants acted as such *with the predominant purpose* of injuring the plaintiff.

Indeed, that appears to be the law as set out in the Supreme Court of Canada case of *Hunt* v. *Carey*, cited above, at para. 35.

[35] Counsel also cited the case of *Kuhn* v. *American Credit Indemnity Co.*, [1992] B.C.J. No. 953, where Master Joyce of the British Columbia Supreme Court held, at page 58 of 89 of the Quicklaw report, that the essential elements of the tort of conspiracy which must be pled and proven by the plaintiff are:

1. An agreement, in the sense of a joint plan or common intention on the part of the defendants, to do the act which is the object of the alleged conspiracy.
2. An overt act or acts consequent upon the agreement.
3. Resulting damage to the plaintiff.

Once again, the defendants must have intentionally participated in the act or acts for the purpose of furthering their common intention.

[36] Finally, the defendants' counsel says that the most that can be said of the plaintiff's claims in this area are that the individually named defendants conspired with each other and with others *to breach the alleged contract* the plaintiff claims to have had with the government. However, the plaintiff has failed to show that the conspiracy involved actions that were wrongful or tortious in and of themselves.

[37] In *Napoleone* v. *Baraldi*, 2004 BCSC 1065, Pitfield J. of the British Columbia Supreme Court was dealing with a claim of wrongful dismissal, where the plaintiff pled,

in the alternative, the tort of conspiracy to cause financial harm to him. At para. 9, he said as follows:

> "In my opinion, it is 'plain and obvious' that the tort of conspiracy alleged in general terms against [the defendants] in relation to wrongful dismissal cannot succeed. Any decision to dismiss a company's employee must be made by those responsible for the operations of the company. At no point does the plaintiff plead that [the defendants] were acting beyond the scope of their authority in making the decision to dismiss him. …" (emphasis added)

Later, at para. 11, Pitfield J. applied the concept of merger and said:

> "… The harm that results from the decision or agreement of corporate officers or directors to dismiss is reflected in the loss of employment that gives rise to a cause of action for breach of contract. No facts are pleaded in support of any independent harm flowing from the wrongful dismissal that would give credence to a claim in conspiracy. In the circumstances, all of the allegations of conspiracy are merged in the claim of wrongful dismissal." (emphasis added)

[38] I would make the same finding in the case before me. All of the allegations of conspiracy by the plaintiff are merged in his claim of breach of contract. No facts are pleaded in support of any *independent harm* flowing from that breach of contract.

[39] In any event, there is no suggestion that any of the individually named defendants were acting outside the scope of their office or employment. Thus, as was the case in *Kuhn* v. *American*, cited above, the actions complained of by the plaintiff are not actionable in their own right.

[40] As a result, pursuant to Rule 19(24) of the *Rules of Court*, I am satisfied that the plaintiff's allegations of civil conspiracy in the Amended Statement of Claim disclose no reasonable claim and they are hereby struck out. In addition, those portions of the

prayer for relief which refer to “damages for conspiracy” are struck out for the same reason.

Issue 2: Should the individually named defendants be removed as parties?

[41] The submission of the defendants’ counsel here is understandably brief. Essentially, he says that if the plaintiff’s claims for defamation and civil conspiracy are struck out or dismissed, his remaining causes of action are breach of contract and breaches of *Charter* rights. I agree that those causes of action cannot lie against the individual defendants, but only against the government. Therefore, the individual defendants are no longer necessary parties and they should be removed. In any event, I note that the plaintiff has not sought any damages from the defendants Farrell, Wykes or Crawford.

[42] The defendants’ counsel also submitted the case of *Edwards* v. *British Columbia, et al.,* 2006 BCSC 710. That was a case in which the plaintiff sued the province and individual defendants based on various torts. The government conceded that at all material times the individual defendants were acting within the scope and course of their employment in relation to the events in issue. The British Columbia Supreme Court held that an admission of vicarious liability by the government did not negate the action against the individual defendants, nor did it amount to a compelling rationale justifying their removal as parties.

[43] In the case before me, the defendants’ counsel said that we have the converse of the situation in *Edwards*. Since I have struck out the plaintiff’s claims for defamation and conspiracy, there is no longer any remaining tort alleged against the individual defendants, and consequently there is no further basis for them to remain as parties.

[44] The defendants' counsel has indicated that individual defendants can still be produced for examination for discovery by the plaintiff, if they are required.

[45] Pursuant to Rule 15(5)(a)(i), I order that the individual defendants, Lawrie Crawford, Lisa Wykes, Brian Farrell and Patricia Daws cease to be parties to this action on the basis that they are no longer necessary parties.

Issue 3: Examination for Discovery of the Plaintiff

[46] Counsel for the defendants submitted here that he e-mailed the plaintiff on February 3, 2006, stating that it may be possible to conduct the examination for discovery of the plaintiff in Montreal between February 18 and 28. The plaintiff responded on February 4th stating, "Let me know when you're going to be in the area and I'll see if I'm available." Counsel for the defendants e-mailed the plaintiff again on February 15, 2006, to ask if the examination could be scheduled on February 27th in Montreal. Counsel then obtained authorization to travel to Montreal for a nominal sum, since he was already scheduled to be in Toronto on other matters. He e-mailed the plaintiff on February 17th to advise that his travel plans had been finalized and that he wished to confirm the plaintiff's availability. In that e-mail, he stated, "We are unlikely to have another opportunity to conduct the examination without incurring the full costs of cross-country travel, so this opportunity should not be missed even if it creates some inconvenience". The plaintiff responded by e-mail on February 19th stating, "Sorry, counsellor, but I will not be available." He offered no explanation, no alternative dates or other suggestions on how to proceed. When the defendants' counsel informed the plaintiff that he considered his response to be uncooperative, the plaintiff responded on March 20th as follows:

> "For the record, I have not failed to cooperate in the exercise of your discovery rights. You asked if I was available for examination for discovery. I was not available on the date you requested to examine me."

[47] In his written argument, the plaintiff explained that he was unavailable on February 27th because he had to go to work in order to pay his rent which was due two days later. He did not think it was incumbent on him to provide the reasons for his unavailability. As for alternatives to the examination for discovery in Montreal, the plaintiff says that he suggested earlier to counsel the possibility of doing a discovery over the telephone. At the hearing, the possibilities of discovery by videoconference or webcam were also discussed. However, counsel for the defendants is not content to discover the plaintiff by telephone, videoconference or webcam. He quite properly relies on his right to examine the plaintiff in person. He says the dynamics of an in-person cross-examination simply can't be replicated by either of those alternate methods, particularly where the plaintiff's credibility is likely to be a central issue in this litigation.

[48] The defendants' counsel provided numerous cases in which the parties seeking to conduct an examination for discovery were relieved of the duty to pay the usual witness fees, including travel expenses, of the party to be discovered: *Pacific Engineering Ltd.* v. *Pine Point Investment Ltd., and Northwest Trust Company* (1969), 66 W.W.R. 244 (N.W.T.T.C.); *Laliberte* v. *Rodenbush,* [1995] S.J. No. 771 (Q.B.); *Gone Hollywood Video Ltd.* v. *Skrabek*, [1997] A.J. No. 538 (Q.B.); *Burton* v. *Rosenberg* (1986), 15 C.P.C. (2d) 273 (Man. Q.B.); and *Lapierre Estate* v. *Fort Simpson Hospital*, 2004 NWTSC 7. I find all these cases persuasive and in support of the application by the defendants.

[49] However, there is a unique circumstance in this situation which distinguishes the plaintiff's case from those others. The plaintiff has been found from the outset of this litigation to be an impecunious litigant, pursuant to S1 of Appendix "C", Schedule 1 of the *Rules of Court*: *Tan* v. *Yukon (Government of)*, cited above. While it is open to the defendants, on application, to seek the Court's review of that order, no such application has been made to date, notwithstanding the plaintiff's move to Montreal, and some vague references to the plaintiff having employment in that city.

[50] Were I to order that the defendants are not required to pay the usual witness fees (pursuant to Schedule 3, of Appendix C of the *Rules of* Court) to the plaintiff in order to procure his attendance for an examination for discovery, whether that be in Whitehorse, or in any other convenient location in southern Canada, this litigation would effectively be held in limbo indefinitely. The plaintiff most certainly has indicated his inability to cover even a portion of such expenses in order for him to travel to the venue of the discovery. He submitted that such a notion is "preposterous". Thus, the very reason the plaintiff was granted indigency status, which is to allow him access to justice notwithstanding his impecuniosity, continues to be in play here.

[51] As was noted by Richard J. of the Northwest Territories Supreme Court in *Lapierre Estate*, cited above, at para. 12, the Court in such circumstances is to determine what is fair and convenient, not just for one party but for *both* parties: "There is no definitive rule – what is fair in one case may not be fair in another."

[52] While I have a fair degree of sympathy for the efforts made by counsel for the defendants to arrange for the discovery of the plaintiff in Montreal, I wouldn't go so far as to agree with his submission that the plaintiff was "dismissive and uncooperative".

Having said that, in retrospect, it would have been advisable and indeed in the plaintiff's own interest for him to have explained to counsel that the reason he could not attend on the scheduled day was because he needed to work to pay his bills.

[53] In any event, on balance and considering all of the circumstances, I am persuaded that the government should continue to comply with the *Rules of Court* in procuring the plaintiff's attendance for an examination for discovery. While that may involve a relatively significant sum, because of the travel costs involved, the amount could be mitigated if another location closer to Montreal can be arranged, subject to the convenience of counsel. Had it not been for the possibility of this discovery taking place unexpectedly in Montreal on February 27, 2006, the defendant government would have had to incur this expense in any event. Clearly, the government is in a position to afford such an expense and that, it seems to me, is preferable to the alternative of denying the plaintiff access to justice by granting the order sought.

Issue 4: Civility

[54] Although the application by the defendants' counsel seeks an order that the plaintiff conduct himself in accordance with established norms of civility for lawyers, at the hearing of this application, he retreated from that position. Rather, he simply wants the plaintiff to observe elementary rules of courtesy, whether that be pursuant to a direction of the Court or otherwise.

[55] Nevertheless, the materials filed by the defendants' counsel on this issue purport to document a series of examples of communications by the plaintiff, which counsel says are discourteous, insulting, vulgar and unnecessary. He also referred to some background materials involving the plaintiff in other actions, where the defendants'

counsel says the plaintiff has made disrespectful comments about other courts, including this Court.

[56] The plaintiff similarly went on at length in his written argument to point out that he is a professional writer and communicator. However, he submits that there is no need to show a great amount of civility to those whom he believes have wronged him. A good deal of the plaintiff's submissions on this point centre around his right to free speech. In particular, in his response to the defendants' counsel citing certain conduct and statements made by the plaintiff in an earlier and unrelated proceeding before me in 2004, the plaintiff acknowledged that his expectations of the judicial process may have been unreasonable due to his own ignorance and he apologized.

[57] After hearing the submissions of counsel and the plaintiff on this point, I concluded at the time that there was no need to make a direction or an order. I noted that the plaintiff has generally been respectful to this Court and counsel during the applications and case management conferences where the plaintiff has participated both in person and by telephone. I simply asked the plaintiff to make his best efforts to communicate in a similar fashion with the defendants' counsel in the future and to avoid the gratuitous and unnecessary use of profanity.

Issue 5: Costs

[58] Prior to the consolidation of the two actions separately commenced by the plaintiff in this matter, the defendants filed an application on June 8, 2005, seeking to dismiss the actions or have them stayed pending the filing of a Statement of Claim in compliance with the *Rules of Court*. Those applications were heard on August 12, 2005. During that hearing, counsel for the defendants put the plaintiff on notice that costs would be sought

if it was necessary to bring another application to strike his pleadings, particularly if he continued to plead defamation without providing particulars (transcript of proceedings, August 12, 2005, p. 10, lines 2-22). As I have previously indicated, following that hearing, I sent a memorandum to the plaintiff and counsel for the defendants confirming my comments at the hearing. In particular, I noted that the plaintiff had provided no particulars regarding his allegations of defamation. At that time, as I recall, he had not yet pled the cause of action of civil conspiracy. In any event, I clearly suggested to the plaintiff that he should include particulars for each alleged tort of those details within his knowledge, including:

a) Dates (when);

b) Places (where);

c) Persons (who);

d) Content of communication or type of conduct (what); and

e) How such communications or conduct was made (by what means).

Unfortunately, the Amended Statement of Claim filed by the plaintiff continued to be deficient in many of those respects and this necessitated the defendants' present application to strike out portions of that Amended Statement of Claim.

[59] Ordinarily, with that background, I would have no hesitation in ordering that the defendants receive their costs for this application, since they have been largely successful, in any event of the cause. That would mean that the plaintiff would be obliged to pay such costs regardless of whether he is ultimately successful following a trial of this action. However, an award that the plaintiff pay the costs of this application in any event of the cause would, I assume, be an empty remedy for the defendants in

practical terms, as the plaintiff apparently continues to be impecunious. I am also concerned that the defendants could take steps to effectively thwart the plaintiff's access to justice in this litigation, in the event he was to fail to pay such an award of costs. In short, for reasons which are virtually the same as on the issue of the examination for discovery, while I would ordinarily be inclined to award the defendants their costs in any event of the cause, I am not persuaded that to do so in this case would be fair and just in all of the circumstances. Rather, I am limiting the defendants to their costs in the cause. For the plaintiff's benefit, that means that if the defendants are successful following the trial of this action, then the costs of this particular application will be added to the overall costs to which they are entitled.

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GOWER J.