IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *X.* v. *Y. et al.,* 2004 YKSC 45

Date: 20040702
Docket No.: 04-A0058
Registry: Whitehorse

Between:

X.

Plaintiff

And

Y., Z.,
HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by HER MINISTER OF INDIAN
AFFAIRS AND NORTHERN DEVELOPMENT,
THE COMMISSIONER OF YUKON,
JOHN DOE and JANE DOE

Defendants

The identity of X., Y. and Z. and any information that could disclose their identity including the use of their actual initials, shall not be published or broadcast in any way.

Before: Mr. Justice R. S. Veale

Appearances:
Daniel S. Shier For the Plaintiff

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the plaintiff X., without notice to the other parties, for the use of initials to describe the plaintiff and two of the defendants Y. and Z. in the context of a claim for alleged sexual assaults. X. also seeks an order that the court file be sealed

from public view and that access to it be restricted to counsel of record. Alternatively, X. seeks a publication ban prohibiting the publication of the names and actual initials of X., Y. and Z. Because of the publication ban set out below, the initials used in this judgment are not the actual initials in the style of cause.

FACTS ALLEGED

[2] X. filed a Writ of Summons and Statement of Claim on June 25, 2004, alleging that Y. and Z. sexually assaulted X. separately and at different times in the late 1970's and early 1980's. No appearances have been filed.

[3] X. claims that as a result of the repeated sexual assaults, he has suffered:

a) severe post-traumatic stress disorder;

b) suicidal ideation leading to several suicide attempts;

c) loss of self esteem;

d) inability to form healthy emotional attachments with others, particularly with women;

e) alcohol and drug abuse; and

f) impaired ability to complete an education and to obtain and maintain gainful employment.

[4] Through his counsel, X. advises that these experiences have been and are extremely painful to him. He says that if the proceedings were made public, he would not be able to face his friends or other members of the community.

[5] I am also informed by his counsel that even the publication of the initials would lead to identification as the Yukon is a relatively small community with a population of

approximately 30,000 people. I am advised by counsel that there may be a relationship that would be revealed by publication of the initials.

THE LAW

[6] The recent Supreme Court of Canada decision entitled *Vancouver Sun (Re)*, [2004] S.C.J. No. 41, discussed the parameters of the open court principle, albeit in the context of judicial investigative hearings of alleged terrorism offences. The following principles are drawn from paragraphs 23 through 31 of that case:

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.

[7] In order to balance the freedom of expression right that is an essential part of open court principle, and other important privacy and security interests, the Supreme Court has developed a two-part test to determine when a publication ban should be

ordered. The test is referred to as the *Dagenais/Mentuck* test referring to the two cases cited as *Dagenais* v. *Canadian Broadcasting Corp.,* [1994] 3.S.C.R. 835 and *R.* v. *Mentuck,* [2001) 3 S.C.R. 442, 2001 SCC 76.

[8] The *Dagenais/Mentuck* test states that a publication ban should only be ordered when:

> 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.

[9] As stated in the *Vancouver Sun* case, at paragraph 30, the first part of the test describes the minimal impairment requirement - that the publication ban is necessary to prevent a risk and reasonable alternative measures would not prevent the risk.

[10] The second part of the test refers to what is called the proportionality requirement - that the benefit of the publication ban should outweigh the negative effects on the open court principle.

[11] Finally, the burden of displacing the general rule of openness is on the party making the application.

[12] 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.

[13] The British Columbia Court of Appeal recently supported the use of initials in a residential school case as being a minimal impairment to the openness of judicial proceedings. See *B.G. et al* v. *H.M.T.Q. in Right of B.C.,* [*2004*] B.C.J. 1235 at paragraph 26.

ANALYSIS

[14] I should say at the outset that I see no difficulty with the use of initials. There is a practice of doing so in this jurisdiction and others, particularly in cases involving sexual assaults where the reputations of both plaintiff and defendant can be adversely affected merely by the filing of the claim.

[15] Although no findings of fact have been made, the court takes judicial notice of the extremely sensitive nature of cases involving allegations of sexual assault.

[16] The allegations of the plaintiff indicate a person suffering from serious psychological trauma accompanied with suicidal ideation. This court does not wish to become a factor in the trauma alleged and is prepared to consider some steps to reduce that potential concern. Failure to address this concern could result in a failure to bring civil sexual assault claims to court or further damage to already traumatized individuals. It must be recognized that bringing any case to court involves a certain amount of stress

and anxiety and care must be taken to humanize the court process without sacrificing the benefits of the open court principle.

[17] The remedy of a sealed court file, in my view, creates more problems than it solves. It leaves the public completely in the dark about the nature of court case and raises all those concerns about judicial independence and impartiality which the open court principle alleviates.

[18] While there may be extreme circumstances that give rise to the sealing of a court file, I do not find this to be such a case.

[19] I have indicated that a practice exists in this court to permit the use of initials where psychological or other harm may occur to the parties concerned.

[20] There is also a policy to not allow the general public to review court files in family law matters, without approval of the court. However, this case is one of an alleged tort and also involves the governments of Canada and Yukon as additional defendants. It is therefore different from a purely family law matter. Thus, I do not consider it appropriate to limit access to the file.

[21] On the other hand, in addition to the remedy of permitting the use of initials for the individuals involved, counsel submits that a publication ban on the use of the initials would be appropriate. In my view, this would be a minimal impairment to the open court principle. It would be no different than the use of a publication ban on the identity of a complainant or witness and any information that could disclose the identity of a complainant or witness, routinely granted in sexual assault cases under the *Criminal Code of Canada*. It is also important to point out that the proposed ban includes the

individual defendants, as the identification of them could disclose the identity of the plaintiff. This aspect is also not unusual in criminal sexual assault cases.

[22] I therefore order that initials may be used on all court documents to refer to the plaintiff X. and the two individual defendants Y. and Z. I direct counsel to prepare an order to this effect without using the actual names.

[23] I also order that the identity of X., Y. and Z. and any information that could disclose their identity including the use of their actual initials, shall not be published or broadcast in any way.

[24] I further order that the praecipe, affidavit of Daniel Shier and draft order, all filed on June 25, 2004, be sealed, as these documents disclose the actual names of the parties. Counsel for the parties to the litigation are permitted to review and take photocopies of documents but are, of course, subject to the publication ban.

[25] As this application has been made without notice to the other defendants, those defendants are at liberty to apply to set this order aside on giving seven days notice to the plaintiff. The media may also apply for standing to bring such an application.

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VEALE J.