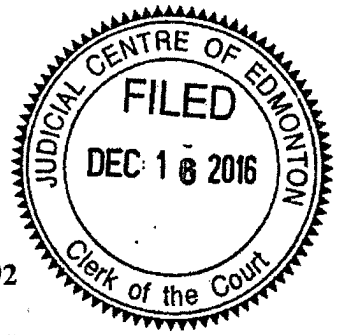

Court of Queen's Bench of Alberta

Citation: Stringam Denecky LLP v Sun Media Corporation, 2016 ABQB 692

Date: 20161208
Docket: 1403 13657
Registry: Edmonton

Between:

Stringam Denecky LLP

Plaintiff

- and -

Sun Media Corporation, Kevin Thornton and Mary-Ann Kostiuk

Defendants

Corrected judgment: A corrigendum was issued on December 16, 2016; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of
W.S. Schlosser, a Master of the Court of Queen's Bench of Alberta

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[1] This is the Plaintiff's application to compel a journalist to reveal his confidential source. It comes by way of an application to compel answers at Questioning.

[2] There are two central questions to be answered. First, whether the questions meet the threshold for relevance and materiality under the *Rules* and, second, whether the importance of disclosure to the administration of justice outweighs the public interest in maintaining the confidentiality.

List of Authorities

Applicant's Authorities

1. ***R v National Post***, 2010 1 SCR 477;
2. ***Globe and Mail v Canada (Attorney General)***, 2010 SCC 41;
3. ***Kwok v Canada (Natural Sciences and Engineering Research Council***, 2013 ABQB 395;

4. ***Bouaziz v Ouston***, 2002 BCSC 1297;
5. Raymond E Brown. *Brown on Defamation*, 2nd ed, volume 5 (Toronto: Thomson Reuters Canada, 2016);
6. ***Hodgson v Canadian Newspapers Co***, 2000 CarswellOnt 2164 (CA), leave to appeal denied, [2000] SCCA No 465;
7. ***Grant v Torstar Corp***, 2009 SCC 61;
8. ***1654776 Ontario Limited v Stewart***, 2013 ONCA 184.

Respondent's Authorities

9. ***Dow Chemical Canada Inc v Nova Chemicals Corp***, 2014 ABCA 244;
10. ***Kwok v Canada (Natural Sciences and Engineering Research Council***, 2013 ABQB 395;
11. ***Globe and Mail v Canada (Attorney General)***, 2010 SCC 41;
12. ***Canwest Publishing Inc v Wilson***, 2012 BCCA 181;
13. ***Saggu v Canwest Publishing Inc***, 2009 BCSC 362;
14. ***R v National Post***, 2010 SCC 16;
15. ***St Elizabeth Home Society v Hamilton (City)***, 2008 ONCA 182.

By the Court

16. ***M (A) v Ryan***, [1997] 1 SCR 157;
17. ***Berlinic v Peace Hills General Insurance Company***, 2016 ABQB 104 (at para 18 and following);
18. ***Lougheed Estate v Wilson***, 2012 BCCA 181.

Facts

[3] The Plaintiff represented a client in a family law matter. It involved a difficult custody dispute spanning two jurisdictions.

[4] The total of all the lawyer's bills approached $70,000. The client applied for all of the accounts to be reviewed by the Assessment Officer, a court official with expertise and experience in reviewing lawyer's bills.

[5] The client wanted *all* of the lawyer's bills reviewed, not just the ones in the preceding six months as the *Rules* permit. She took out an affidavit in support of her application. The Court permitted all the accounts to be reviewed (reported at 2013 ABQB 372, per Burrows, J).

[6] In the meantime, the client's affidavit was given to the Defendant, Kevin Thornton, by a confidential source. Mr. Thornton wrote three columns about the lawyer's bills. It was his intention to comment on the high cost of legal representation in family law matters; though some of his comments seemed to take up the client's cause against her lawyers. The articles were published in the Fort McMurray Today and, later, uploaded to Mr. Thornton's blog. He posted a hyperlink to the third article on Twitter.

[7] When the matter was reviewed by the Assessment Officer, the lawyer's bills were cut in half. The law firm appealed to a Judge. Mr. Justice Brown (before he went to the Court of Appeal and thence to the Supreme Court of Canada) restored the bill in full.

Issues Raising in the Pleadings

[8] The Statement of Claim attaches the articles as a schedule. The pleading covers all of the bases; alleging malice, improper purpose and a reckless and willful indifference to the truth.

[9] The Statement of Defence responds in kind. It is a compendium of defences available to the print media. It pleads justification, fair comment; or responsible communication on a matter of public interest, qualified privilege, and the *Charter* right to free speech. It alleges a higher purpose and that there was no malice, recklessness or impropriety. The lawsuit is mainly about the Journalist's opinion, not the underlying facts.

[10] When this lawsuit proceeded to Questioning, there was a blanket refusal to answer any questions relating to the source. There are a number of email communications related to the source in the Affidavit of Records. Production is refused based on 'journalistic source privilege'.

[11] After questioning, Mr. Thornton revealed some information about the source in an affidavit, though it gives us only a taste, and it is on his terms. This evidence has not been tested on cross-examination.

[12] This application is to compel answers to questions about the source, including the source's identity.

Rule 5.2

[13] The first question is whether this line of inquiry meets the threshold for relevance and materiality under the *Rules*. Rule 5.2 provides:

> **When something is relevant and material**
>
> 5.2(1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.
>
> (2) The disclosure or production of a record under this Division is not, by reason of that fact alone, to be considered as an agreement or acknowledgment that the record is admissible or relevant and material.

[14] The Court of Appeal in ***Dow Chemical*** (at paras 17 and following) details an approach; saying that we are to reject lines of inquiry that are 'unrealistic, speculative or without any air of reality'.

[15] The starting point is to identify the issue raised in the pleadings that the evidence would significantly help resolve (eg ***Berlinic*** at paras 18 and following). In this case, the issues are malice, recklessness or improper purpose. The evidence might well be of significant assistance in determining the motive for the columns. But we won't really know how valuable it will be until we find out.

[16] Let us say, for the sake of argument, that the source was partial or had an interest in the outcome; for example, a disgruntled ex-client of the Plaintiff firm, or even opposing counsel in the assessment proceedings. While I acknowledge that the motive (or ill intent) of the source is not the motive or intent of the Journalist: (***Hodgson*** (at para 35), ***Saggu*** (at para 45), ***Lougheed Estate*** at (para 56)), partiality might at least suggest greater caution, or that more investigation was required.

[17] The circumstances are unusual and invite explanation. Mr. Thornton says in his affidavit:

> 5. Following my conversation with Jon Tupper [the source's initial contact], I subsequently contacted the source who provided me with the filed court document upon which I based my articles. *Prior to providing me with any information that led to the delivery of the court document that I reviewed for my articles, the source specifically requested confidentiality and was clear that if his/her name or any information relating to him/her was going to be included in the articles, he/she was not willing to speak to me whatsoever. Confidentiality was essential to my relationship with the source and to my ability to obtain the court document that led to the preparation of my articles.* I promised the source that I would keep his/her identity confidential and would not disclose his/her identity in my articles or otherwise.
>
> 8. The source informed me in our conversation that the story related to a matter before the Court. As I was not familiar with how obtain Court documentation, the source agreed to have Court documents dropped off to my office. At some point thereafter, Tanya Thistle's sworn and filed Affidavit and Exhibits before the Court were provided to my office. This was the only involvement the source had in my articles.
>
> (emphasis added)

[18] The affidavit was a public document, available to anyone who cared to go to the Clerk's counter at the Courthouse. It is not clear how confidentiality is central to the production of this public record. It is not difficult to see why someone might want to keep their name out of the paper but there is a gap between this request and blanket protection claimed. It is not clear that what the Journalist promised (and now claims) is more than was requested. There must be more to the story.

[19] The line of questioning is not purely speculative and it goes to more than one issue identified in the pleadings. In my view, there is enough here that this line of questioning meets the rule 5.2 threshold. This would make the evidence coming from this line of inquiry presumptively admissible, either to exonerate the Defendant or to assist the Plaintiff in proving recklessness or ill intent.

The Four Wigmore Factors

[20] Even though a question might be relevant and material, the answer might still be protected. The most familiar example is lawyer-client communications. For other types of relationship, the Court is obliged to consider the four Wigmore Factors on a case-by-case basis. We are not yet at the stage where there is a class-based privilege for journalists and their confidential sources (***Globe***, para 20). The factors are as follows:

> (1) The relationship must originate in a confidence that the source's identity will not be disclosed;
>
> (2) anonymity must be essential to the relationship in which the communication arises;
>
> (3) the relationship must be one that should be sedulously fostered in the public interest;
>
> (4) the public interest served by protecting the identity of the informant must outweigh the public interest in getting at the truth. [Citations omitted.]

[21] Wigmore wrote his ten volume treatise on evidence in Chicago at the turn of the 20th Century. The four-part test for determining whether confidential information should be protected has since been almost universally adopted in the common law world.

[22] The persuasive onus remains on the journalist to meet all four criteria in order to preserve the confidence (***National Post*** at paras 60 and 69).

1. The communication originates in confidence.

[23] In this case, the Journalist promised the source confidentiality; though, as mentioned, it is not clear whether the promise referred to in the affidavit was wider than the request. I note that neither the Journalist nor the source 'owns' the privilege, as would a client in a lawyer-client communication (***National Post*** at para 63). One or the other can choose to give it up. The Court has an overriding power to require disclosure.

[24] In this case, the first criterion is met, if we accept the Journalist's evidence at face value.

2. Anonymity must be essential to the relationship.

[25] This is the puzzling aspect of the case. It is not clear why anonymity should be essential to the 'disclosure' of a public document to a journalist. It is easy to see how this would apply to other information in other circumstances but, here, the implication is that the source has something at stake, or something that he or she did not want to make public.

[26] I concede I have some doubts about this point (as noted above) but I am willing to accept the Journalist's evidence (again) at face value and accept, at least for the sake of argument, that the Journalist has met this second criterion.

3. The relationship must be one that should be sedulously fostered.

[27] The relationship between a journalist and a confidential source is a relationship that the Court recognizes ought, in most cases, to be zealously protected in the interests of exposing the truth.

[28] Owing to the great diversity of media and modes of publication, the status of the person doing the reporting might make a difference. Binnie J, in ***National Post*** at para 57 observes that the relationship between 'source and blogger' or 'source and journalist' might be weighed differently, and that this, itself, invites a case-by-case analysis. There are different types of journalist just as there are different types of blogger. A celebrity blogger might not be in the same category as a legal blogger, for example.

[29] Mr. Thornton tended to discount his status at the Questioning; emphasising that he was a 'columnist' rather than a journalist. But in his affidavit (perhaps recognizing that minimizing his

status might be counterproductive) he acknowledged that: 'as a columnist he was bound by the same ethical principles as a journalist'.

[30] Like many other things, it is the substance not the form that counts. In my view, Mr. Thornton's relationship with his source, at least on the face of it, is one that ought to be sedulously fostered. Wigmore's third criterion is met in this case.

4. Balancing protection with finding the truth.

[31] This is where the analysis gets more involved. By this above heading, I do not mean journalistic truth but dispositional truth.

[32] Two decided cases in particular show us the approach that should be taken: ***National Post*** and ***Globe and Mail***. The ***Globe and Mail*** case followed ***National Post*** by about four months in the Supreme Court of Canada in 2009. ***Globe and Mail*** was about testimonial compulsion in civil litigation. ***National Post*** was about the production of physical evidence in a criminal context. Mindful of the difference between testimonial immunity and the suppression of physical evidence, there are nine factors that come out of these two cases that will affect the application of Wigmore's fourth criterion:

1. **The nature of the information sought.** This factor permits distinguishing between ***National Post*** and ***Globe and Mail*** scenarios.
2. **The probative value of the evidence.** At a minimum, the Applicant has to get over the rule 5.2 threshold, or its equivalent (***Globe and Mail,*** para 56), even to engage this analysis. Beyond that, evidence that might be of slight probative value or little weight (eg ***Dow***, para 21) may not be sufficient to tip the scale towards disclosure.
3. **The centrality of the issue to the proceedings** (***Globe and Mail***, para 58). This dovetails with the preceding factor.
4. **The stage of the proceedings In *Globe and Mail*** (at para 58) we find:

   > [58] The first two considerations are related: the stage of the proceedings, and the centrality of the issue to the dispute between the parties. With respect to the stage of the proceedings, several points may be observed. On the one hand, the early stage of the proceedings — such as the examination for discovery stage in this case — might militate in favour of recognizing the privilege. The case will be at its preliminary stages only, and will yet to have reached the stage of determining the liability or the rights of the parties. This is a variation on the U.K. "newspaper rule" (Attorney-General v. Mulholland, [1963] 2 Q.B. 477), whereby journalists are allowed to protect their sources during the discovery stage, because at this point the procedural equities do not outweigh the freedom of the press, but may be required to disclose at trial. On the other hand, given the overall exploratory aims of examinations for discovery and the confidentiality with which they are cloaked, in principle, the testimony may be capable of providing a more complete picture of the case and have the potential to resolve certain issues prior to going to trial.

5. **Whether the journalist is a witness or a party** (***Globe and Mail***, para 61).
6. **Whether the facts, information or testimony are available by other means** (***Globe and Mail***, para 62).
7. **The degree of public importance of the story** (***Globe and Mail***, para 64).

8. **Whether the story has already been published and is in the public domain (*Globe and Mail*, para 64).**
9. **Generally, the public interest in protecting the particular journalist-source relationship.** This, to a certain extent, is really a reconsideration of the third Wigmore factor in the context of the fourth criterion.

[33] In my view, there is also a tenth factor. It is a consideration of where the onus lies. At the risk of sounding cynical, it is easier to keep a source confidential if it is at somebody else's expense. Both self-interest and an adherence to higher principle are then aligned. It may be relevant whether protection in the public interest will mean that the Plaintiff loses the power to prove its case, or whether a defense of the person asserting the confidentiality is impaired.

[34] If we apply these factors: First, this is a case of testimonial compulsion rather than the production of physical evidence. Second, the evidence sought is relevant material and potentially probative on at least one issue raised in the pleadings. Third, these issues are central to the liability of the Defendant. Fourth, though this case is at the discovery stage, it is ready for trial (or summary determination), but for this issue. I am mindful of the UK rule (referred to above) but in this case the timing favours disclosure. The affidavit indicates that the Journalist was introduced to the source by a mutual friend. The Plaintiffs have apparently tried to follow this up but to no avail. The evidence (fifth) is apparently not available by any other means. Sixth, the degree of public importance of the articles will largely be a balancing exercise for trial. In this case, the issue will be whether or not the Journalist was advocating for one, or illuminating an issue of common interest. Seventh, the stories have been published in more than one form.

[35] Onus is the last point. In rough terms, the burden begins with the Plaintiff. Once the Plaintiff shows that the words are defamatory in their natural and ordinary sense, malice is inferred. The burden then falls to the Defendant to show fair comment or the elements of, 'public interest responsible communication' (ie ***Grant***, at para 126 per McLachlin CJ), for example, or qualified privilege. If any of these defenses are made out, the claim will fail unless the Plaintiff shows improper, purpose or motive. Malice or recklessness on the part of the Journalist takes the publication outside of protection. It is a balancing act; malice cannot be consistent with acting responsibly.

[36] Malice, motive, or recklessness, are central to the Plaintiff's case and it will fall to the Plaintiff to prove this. Information about the source may be central to the Plaintiff discharging its burden.

[37] Binnie J recognized the potential effect of malice in ***National Post*** saying:

> [69] The bottom line is that no journalist can give a source a total assurance of confidentiality. All such arrangements necessarily carry an element of risk that the source's identity will eventually be revealed. In the end, the extent of the risk will only become apparent when all the circumstances in existence at the time the claim for privilege is asserted are known and can be weighed up in the balance. What this means, amongst other things, is that a source who uses anonymity to put information into the public domain maliciously may not in the end avoid a measure of accountability.

[38] The Defendants will have a personal interest in keeping this evidence out if it means that the Plaintiff cannot discharge its burden. This is not the ordinary situation where the Court would

be comfortable in drawing an adverse inference. The promise of confidentiality provides an excuse that might nullify the inference.

[39] I note the compelling disclosure based on common law principles is not inconsistent with the operation of s 2(b) of the *Charter* (***National Post***, para 41), so we do not need to engage in a separate *Charter* analysis.

[40] Accordingly, the foregoing considerations favour disclosure.

[41] Disclosure is not qualified. First of all it is subject to the express undertaking in rule 5.33. Second, the disclosure is only to the Plaintiff and its counsel and not to the public at large (Cf ***A(M) v Ryan***). Third, the right of the Defendant's to object to the admissibility of this evidence is reserved (eg ***Globe and Mail***, paras 50, 59 and rule5.2(2)).

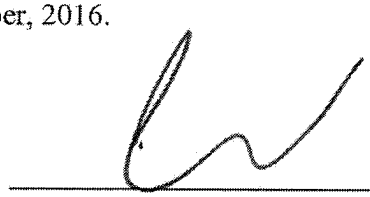
[42] This is not a case that would permit the Court to look at some evidence (ie the name of the source) and decide whether the confidence should be maintained. Counsel should be permitted to explore the identity and the situation of the source, given the centrality of the issue to their case and the circumstances of the promised confidentiality.

[43] In appropriate circumstances there should be built-in consequences for the failure to respond to this questioning. Normally, there would be a contempt remedy available for the breach of a Court Order. But here, given the onus, the Defendant may wish to adhere to higher principles by maintaining the confidence. In those circumstances, the consequence should be either to strike those portions of the defense relating to qualified privilege, or responsible comment or, alternately, to impose a deemed admission of malice, improper motive or recklessness.

Disposition

[44] The Plaintiff's application is permitted. I am grateful to counsel. This is a weighty issue, nicely argued. Costs are in the cause.

Heard on the 3rd day of November, 2016.
Dated at Edmonton, Alberta this 8th day of December, 2016.



W.S. Schlosser
M.C.C.Q.B.A.

Appearances:

James Heelan, Q.C.
Bennett Jones LLP
for the Plaintiff

Sara Hart
Dentons Canada LLP
for the Defendants

Corrigendum of the Reasons for Decision
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Reference to citation added to paragraph 5.