Court of Queen's Bench of Alberta

Citation: Kent v. Martin, 2010 ABQB 479

Date: 20100805
Docket: 0801 08414, 0901 16638
Registry: Calgary

Between:

Arthur Kent

Plaintiff

- and -

Don Martin, the National Post Company, Canwest Publishing Inc. National Post Holdings Ltd. and Canwest Media Works Inc.

Defendants

Between: 0901 16638

Arthur Kent

Plaintiff

- and -

Kristine Robidoux, Q.C. and Does 1 - 10

Defendants

Reasons for Judgment of the Honourable Mr. Justice R. Paul Belzil

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Part 1 The Applications

[1] Kristine Robidoux, Q.C. a defendant in action 0901 16638, seeks an order striking out all or most of the allegations against her.

[2] The plaintiff, Arthur Kent, has filed a cross-application for an order *nunc pro tunc* granting him leave to continue with this action and to permit him to use certain information obtained in action 0801 08414 for the purposes of the action against Robidoux.

[3] The cross-application is opposed by Robidoux and the defendants in action 0801 08414.
[4] These applications engage the implied undertaking rule and to what extent, if any, relief should be granted from its application.

Part 2 The Facts

[5] Arthur Kent ran as the candidate for the Progressive Conservative Party of Alberta in the riding of Calgary-Currie in the provincial general election which was held on March 3, 2008.

[6] The National Post Company, Canwest Publishing Inc., National Post Holdings Ltd. and Canwest Media Works Inc. publish the National Post and Calgary Herald newspapers. Don Martin is a journalist employed by the corporations whose articles are published in these newspapers.

[7] On February 12 & 13, 2008 an article written by Martin, which was critical of Kent's campaign and Kent personally, was published in the National Post and Calgary Herald newspapers and in an online version of the National Post as well as in other Canwest owned newspapers throughout Canada.

[8] On July 15, 2008 Kent issued a Statement of Claim against Martin and the corporations in action 0801 08414 alleging that the publication of the article defamed him (Canwest Action).

[9] Martin was examined for discovery on July 14, 2009 during which he disclosed that in writing the article he relied on information obtained from a confidential source.

[10] Prior to the examination for discovery a meeting took place between representatives of the corporate defendants, Martin and the confidential source where it was confirmed that the confidential source had been provided with an assurance that her identity would not be disclosed. It was agreed that for the purposes of the Examination for Discovery only, Martin would reveal that his confidential source was Kristine Robidoux, Q.C. who was Kent's official agent during the election campaign.

[11] On the day following the Examination for Discovery, counsel for the defendants in the Canwest Action forwarded a letter to Kent's then counsel which reads as follows:

> July 15, 2009
>
> May Jensen Shawa Solomon LLP
> Barristers & Solicitors
> 800, 304 - 8th Avenue SW
> Calgary, AB T2P 1C2
>
> Attention: Sabri M. Shawa

> Dear Sir:
>
> RE: Arthur Kent v. Calgary Herald et al
>
> As discussed on Tuesday July 14th at your office, given your client's practice of discussing this case on his blogs, I urge you to advise him about the implied undertaking of confidentiality. My clients and some people that I have discussed this case with may have some interest in enforcing that undertaking.

[12] Prior to Martin's disclosure that Robidoux was his confidential source, Kent was unaware that she had provided information to Martin which he used to write the article.

[13] On November 4, 2009 Kent, without seeking leave of the court, issued a Statement of Claim against Robidoux and Does 1-10 alleging that she breached fiduciary duties owed to him and defamed him by her comments to Martin (Robidoux Action).

[14] On February 2, 2010 counsel for Robidoux filed a Notice of Motion seeking to strike out all or, alternatively, the bulk of the Statement of Claim pursuant to Rule 129(d) as being an abuse of process. That is, an action commenced based on information obtained by Kent in the Canwest Action thus in breach of the implied undertaking not to use such information for purposes outside of that action.

[15] On June 18, 2010 counsel for Kent filed a Notice of Motion seeking leave of the court *nunc pro tunc* to use certain information in the Canwest Action in the Robidoux Action.

Part 3 The Implied Undertaking Rule

[16] In ***Juman v. Doucette*** 2008 SCC 8, the Supreme Court of Canada confirmed the existence of the implied undertaking rule under which evidence compelled during pre-trial discovery from a party to civil litigation can be used by the parties only for the purpose of the litigation in which it was obtained.

[17] Binnie J. writing for a unanimous court at paras. 23 - 28, observed that there are two rationales for the rule. Firstly, it is recognized that the compelling of information from a litigant is a breach of privacy, which privacy rights are trumped by the public interest in getting at the truth. The invasion of privacy is thus legally limited to the level of disclosure necessary to satisfy that purpose and that purpose alone.

[18] Secondly, litigants will provide more complete discovery if given the assurance that disclosure will not be used for collateral purposes.

[19] Significantly, the undertaking is to the court and as noted in para. 29 a breach of the undertaking may be remedied:

> **29** Breach of the undertaking may be remedied by a variety of means including a stay or dismissal of the proceeding, or striking a defence, or, in the absence of a less drastic remedy, contempt proceedings for breach of the undertaking owed to the court.

[20] The implied undertaking rule is not absolute and absent the consent of the party being discovered, a party bound by the undertaking may apply to the court for leave to use the information otherwise than in the action.

[21] At para. 32 the burden of proof placed on an applicant seeking such an order is described in the following terms:

> **32** An application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation. . . What is important in each case is to recognize that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose.

[22] The following passages at paras. 35, 36 and 38 are instructive:

> **35** The case law provides some guidance to the exercise of the court's discretion. For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted.
>
> **36** On the other hand, courts have generally not favoured attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest. . .

[23] The court did not conclude that it is possible to conclusively delineate what constitutes superior public interest, but clearly signalled at para. 38 that this concept will be narrowly defined in the balancing of interests:

> (i) <u>The Balancing of Interests</u>
>
> **38** As stated, the onus in each case will be on the applicant to demonstrate a superior public interest in disclosure, and the court will be mindful that an

> undertaking should only be set aside in exceptional circumstances. In what follows I do not mean to suggest that the categories of superior public interest are fixed. My purpose is illustrative rather than exhaustive. However, to repeat, an undertaking designed in part to encourage open and generous discovery by assuring parties being discovered of confidentiality will not achieve its objective if the confidentiality is seen by reluctant litigants to be too readily set aside.

[24] The court then identified three examples of what might constitute superior public interest: statutory exceptions, public safety concerns and impeaching inconsistent testimony, none of which have any application on these facts.

Part 4 Discussion

[25] Kent argues that the Canwest and Robidoux actions significantly overlap and that there is a public interest in having both actions proceed.

[26] Paragraph 27 of the Supplemental Brief filed on Kent's behalf summarizes his position:

> 27) Kent conceives that a full airing of the issues in the inter-related Canwest Action and Robidoux Action is profoundly in the public interest in promoting a truly free, independent press and preserving vital relationships of confidence between clients and their lawyers which may be the last bulwark safeguarding individual liberty against the powers of the state.

[27] Counsel for the defendants in the Canwest Action argues that relieving Kent from the implied undertaking would prejudice these defendants in that the action engages broad media issues. He argues that interfering with confidential sources could have a chilling effect which would have an impact far beyond the parameters of the Canwest Action.

[28] Counsel for Robidoux argues that the issuance of the Statement of Claim against her in November 2009 was a flagrant breach of the implied undertaking and that the rationales for the implied undertaking rule are clearly engaged in this factual situation wherein Kent had no independent knowledge with which to found a cause of action against Robidoux prior to the disclosure made by Martin in July of 2009.

[29] He further argues that there is no legal nexus between the defendants in the Canwest Action and Robidoux other than the fact that she provided some information in confidence to Martin.

[30] Bearing in mind the principles articulated in ***Juman***, I have concluded that Kent cannot meet the burden of establishing that a superior public interest exists which justifies granting relief from the implied undertaking in the Canwest Action respecting Martin's evidence identifying Robidoux as his confidential source.

[31] His subjective belief in the importance of both actions being pursued cannot be determinative of whether a superior public interest exists. Rather, the court must make an objective determination of this issue based on all the circumstances. If Kent's argument were accepted, virtually any litigant who believed that an action would promote media freedom or preserve confidential relationships between clients and lawyers would attempt to seek relief from the implied undertaking.

[32] This is not consistent with the conclusion in ***Juman*** that relief against the implied undertaking will only be granted in exceptional circumstances.

[33] The Canwest and Robidoux actions have a common plaintiff, but unrelated defendants. The Canwest Action is purely a defamation claim, whereas the Robidoux Action is primarily based on alleged breaches of fiduciary duties coupled with a claim in defamation.

[34] Moreover, unlike the situation of the cases referenced at para. 35 of ***Juman***, substantial prejudice to the examinee Martin and the corporate defendants in the Canwest Action would arise if the implied undertaking on Martin's evidence were released.

[35] Martin promised Robidoux that her information would remain confidential. I accept the argument made on behalf of the Canwest defendants and Martin that granting relief from the implied undertaking on Martin's evidence would have a substantial chilling effect, not only on Martin as a reporter, but on the corporate defendants in a broader sense, not to mention a broader impact on the media generally.

[36] Reduced to its essence, this is a factual situation wherein Robidoux could only have been identified as a potential defendant based on Martin's evidence, thus the filing of the action against her, without leave of the court, was a breach of the implied undertaking as Kent acknowledges having no other evidence to sustain a claim against her.

[37] In these circumstances Kent is unable to establish on a balance of probabilities the existence of a public interest which outweighs the values underpinning the implied undertaking. Mindful of the concerns expressed by Binnie J. in ***Juman*** that confidentiality not be too readily set aside, to set aside the implied undertaking *nunc pro tunc* on this evidence would be tantamount to emasculating the rule.

Part 5 What is the appropriate remedy for breach of the implied undertaking?

[38] As noted in ***Juman***, a court faced with a breach of the implied undertaking can remedy the breach in a number of ways, including a stay, a dismissal of the action or a contempt proceeding.

[39] I have concluded that the filing of the Robidoux Action, without seeking leave of the court, was deliberate and not inadvertent and that the action was commenced after counsel for the defendants in the Canwest Action had forwarded a letter to Kent's prior counsel expressly reminding him of the existence of the implied undertaking.

[40] Moreover, the Robidoux Action was filed more than a year following the release of ***Juman***, which decision gave clear, unequivocal direction that leave of the court must be sought to seek relief from the implied undertaking.

[41] Significantly, it is clear that but for the breach of the implied undertaking, the action against Robidoux could not have been filed as Kent and his then counsel had no knowledge from any other source that Robidoux was Martin's confidential informant.

[42] In these circumstances the appropriate remedy for this flagrant breach of the implied undertaking is to dismiss the Robidoux Action in its entirety.

Part 6 Conclusion and Order

[43] The application *nunc pro tunc* seeking relief from the implied undertaking in the Canwest Action is dismissed. None of the evidence produced in the Canwest Action may be used for any purpose outside of that action. The Robidoux Action is struck out against Kristine Robidoux, Q.C. Costs may be spoken to.

Heard on the 6th day of July, 2010.
Dated at the City of Edmonton, Alberta this 3rd day of August, 2010.

R. Paul Belzil
J.C.Q.B.A.

Appearances:

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Zinner Law Office
and
Roger D. McConchie
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for the Plaintiff

Scott Watson
Parlee McLaws LLP
for the Defendants in Action No. 0801 08414

David Pick
Scott Hall LLP
for the Defendant Robidoux