

CANADA / JUDGMENT

Ching v. Young

2020 BCSC 1284

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1284 Ching v. Young

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ching v. Young,

2020 BCSC 1284

Date: 20200831

Docket: S173995

Registry: Vancouver

Between:

Michael Mo Yeung Ching

Plaintiff

And

Ian Young and South China Morning Post

Publishers Limited

Defendants

Before: The Honourable Madam Justice E. McDonald

Reasons for Judgment

Counsel for the Plaintiff:

D.F. Sutherland, Q.C.

Counsel for the Defendant:

S. Dawson,

J. Yamashita

Place and Date of Hearing:

Vancouver, B.C.

July 29 - 31, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 31, 2020

INTRODUCTION

- [1] This is an application to compel responses to examination for discovery questions where the defendants declined to answer. The defendants assert journalist-source privilege.
- [2] For the reasons that follow, I have decided to adjourn this application to the trial of this action on November 16, 2020.
- [3] The plaintiff, Michael Mo Yeung Ching, is a businessperson residing in British Columbia. Prior to moving to Canada, the plaintiff lived in China.
- [4] In 2017, the plaintiff commenced an action alleging that the defendants maliciously, recklessly and irresponsibly published false and defamatory statements of and pertaining to him (the "Defamation Action"). The defendants are Ian Young, a journalist, and the South China Morning Post Publishers Limited, the corporation that publishes the South China Morning Post. The South China Morning Post is a newspaper published in Hong Kong.
- [5] In the Defamation Action, the plaintiff alleges that the defendants made imputations in 14 articles published in the South China Morning Post on various dates from April 29, 2015 to October 1, 2015, that the plaintiff:
 - a) committed crimes of graft and corruption in China;
 - b) is a fugitive from justice;
 - c) was, by the Canadian government, proclaimed to the public to be a criminal fraudster and a corruption fugitive;
 - d) has a family history of corrupt political practices in China and Canada;
 - e) by threat or intimidation caused the Canadian government to retract the proclamation or falsely claim that it was not made; and
 - f) had used his daughter as a front to funnel and launder the proceeds of crime.

THE APPLICATION

- [6] The plaintiff seeks a decision on the validity of the defendants' objections and he relies mainly on Rule 7-2(25), as well as Rules 1-3(1) and 8-1 of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [7] Rule 7-2(25) provides as follows:
- (25) If a person under examination objects to answering a question put to him or her, the question and the objection must be taken down by the official reporter and the court may
- (a) decide the validity of the objection, and
- (b) order the person to submit to further examination and set a maximum duration for that further examination.
- [8] According to the Notice of Application, the plaintiff requests that I order the defendants to produce the names and all available contact information of the confidential sources of the defendants' articles about the plaintiff.
- [9] The plaintiff also seeks "consequential production" from the defendants, including:
- a) Full responses and documents to the outstanding requests numbered 11 and 13, left at the examination for discovery of Mr. Young on June 17, 2019;
- b) Entire non-redacted copy of the audio recording of the interviews being defendants' document numbers 1.86, 1.88, 1.89 and an entire non-redacted copy of the defendants' document numbers 1.159, 1.160 and 1.175;
- c) Full response to questions numbered 540-543 asked at the examination for discovery of Mr. Young;
- d) The name and all available contact information for the confidential source referred to at question 551 asked at the examination for discovery of Mr. Young;
- e) The name and all available contact information for the person using the pseudonym "Snow White", if and when those facts become available to the defendants;
- f) The entire non-redacted copy of the Snow White email.
- [10] At the hearing, the plaintiff withdrew his request for a non-redacted copy of document 1.79 and the contact information of Gregg Schneider. According to counsel for the defendants, document 1.79 is the redacted audio recording of Mr. Young's interview of Mr. Schneider.

BACKGROUND TO THE APPLICATION

- [11] On June 17, 2019 and February 27, 2020, Mr. Young attended for examination for discovery. During his examination on June 17, 2019, Mr. Young declined to answer certain questions put to him.

- [12] On August 21, 2019, the defendants declined to answer requests numbered 11 and 13 left at Mr. Young's examination for discovery. The central point is that the defendants have declined to provide answers that reveal the identities of Mr. Young's sources.
- [13] The defendants have listed and produced documents. Also at issue in this application is defendants' document 4.20. The defendants listed document 4.20 in Part 4 of their list as a document for which privilege from production is claimed. The defendants' specifically claim journalist-source privilege.
- [14] The defendants describe document 4.20 as the redacted portions of documents 1.79, 1.86, 1.88, 1.89, 1.159, 1.160 and 1.175. The defendants listed documents 1.79, 1.86, 1.88, 1.89, 1.159, 1.160 and 1.175 in Part 1 of their list as documents that could be used by any party at trial to prove or disprove a material fact.
- [15] Defendants' documents 1.79, 1.86, 1.88 and 1.89 are audio recordings of Mr. Young's interviews of confidential sources and documents 1.159, 1.160 and 1.175 are Mr. Young's interview notes. The defendants have produced redacted copies of these notes and audio recordings but the plaintiff seeks full copies, i.e., disclosure of document 4.20.
- [16] In his affidavit sworn March 3, 2020, Mr. Young refers to his confidential sources as "CS 1", "CS 2", "CS 3" and "CS 4". Mr. Schneider is "CS 3". Therefore, only the identities of "CS 1", "CS 2" and "CS 4" are at issue in this application (the "Confidential Sources").

THE LAW

- [17] The parties are in general agreement as to the relevant legal principles that apply to this application and to a claim for journalist-source privilege.
- [18] The plaintiff, as the requesting party, bears the initial onus to establish the relevance of the questions and requested information that will disclose the identity of the Confidential Sources: *Globe and Mail v. Canada (Attorney General)*, 2010 SCC 41 at para. 65.
- [19] If relevance is established, the court then considers, on a case-by-case basis, the Wigmore criteria in order to determine whether journalist-source privilege should be recognized. Further, if relevance is established, the party asserting the privilege bears the onus to demonstrate that the privilege should be recognized: *Globe and Mail*, *ibid*.
- [20] In *R. v. National Post*, 2010 SCC 16 [*National Post*], at para. 53, Justice Binnie described the Wigmore criteria as follows:
- [53] The "Wigmore criteria" consist of four elements which may be expressed for present purposes as follows. First, the communication must originate in a confidence that the identity of the informant will not be disclosed. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good ("Sedulous[ly]" being defined in the *New Shorter Oxford English Dictionary on Historical Principles* (6th ed. 2007), vol. 2, at p.

2755, as "diligent[ly] . . . deliberately and consciously"). Finally, if all of these requirements are met, the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth. See Wigmore on Evidence (McNaughton Rev. 1961), vol. 8, at § 2285; Sopinka, Lederman & Bryant: The Law of Evidence in Canada (3rd ed. 2009), at paras. 14.19 et seq.; D. M. Paciocco and L. Stuesser, The Law of Evidence (5th ed. 2008), at pp. 254-59. Further, as Lamer C.J. commented in Gruenke:

This is not to say that the Wigmore criteria are now "carved in stone", but rather that these considerations provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court. [p. 290]

ANALYSIS

- [21] The requirement for relevance performs a crucial gatekeeping function. If the plaintiff, who in this case is seeking disclosure, fails to show that the identities of the Confidential Sources are relevant, that will end the matter. There will be no need to consider whether the journalist-source privilege exists: *Globe and Mail*, paras. 56 and 65.
- [22] The plaintiff submits that the identities of the Confidential Sources are relevant because Mr. Young relied upon the information imparted to publish defamatory articles about the plaintiff and the information imparted concerns the very stings alleged in the Defamation Action. This submission makes clear that the plaintiff already knows the information that the Confidential Sources imparted.
- [23] The plaintiff also submits that he is entitled to disclosure of the identities of the Confidential Sources because that information is relevant due to the defences raised. He further submits that the defendants' cannot succeed in establishing journalist-source privilege over the identities of the Confidential Sources.
- [24] According to the plaintiff, the reliability of the Confidential Sources and the exact information that they imparted, together with all the indications of reliability or unreliability, is the true battleground of the Defamation Action. The defences put Mr. Young's state of mind into issue and the plaintiff must know the identities to investigate whether the Confidential Sources are reliable or motivated by malice. Status and reliability goes to the defence of responsible communication. Less trustworthy sources may increase the need to use other sources to verify the information: *Grant v. Torstar Corp.*, 2009 SCC 61, at para. 114.

- [25] In support of ordering the defendants to answer the questions, the plaintiff referred me to *Bouaziz v. Ouston*, 2002 BCSC 1297. *Bouaziz* involved a journalist, Mr. Ouston, who promised a source that he would not disclose her name if she gave him information that concerned complaints about the alleged competence of the plaintiff, Dr. Bouaziz. The source in question was a nurse. The nurse was concerned that if her identity was revealed she would lose her job.
- [26] In *Bouaziz*, unlike the present case, it appears no party suggested that the identity of the source was not relevant. Rather, the defendants took the position that the name of the particular nurse would not advance the plaintiff's case. The defendants also stated, unlike the present case, that they were likely to call the nurse to testify at trial: *Bouaziz*, para. 12.
- [27] In considering whether privilege applied, the court concluded that in the weighing exercise at the final stage of the Wigmore criteria that the court was bound to apply legal principles and follow precedent. The court ordered the defendants to disclose the identity of the nurse on the condition that the plaintiff not disclose the information to any person other than his counsel: *Bouaziz*, para. 43. I agree with the defendants that *Bouaziz* should be read in light of subsequent authorities such as *Globe and Mail* and *National Post*.
- [28] The defendants submit that the Confidential Sources' identities are not relevant and they deny the Confidential Sources supplied information that concerned the stings alleged in the Defamation Action. The defendants point to authorities, such as *Globe and Mail*, para. 63, stating that forcing a journalist to reveal the identities of a confidential source is a last resort. They allege the plaintiff has taken no steps to identify or contact the Confidential Sources despite suspecting that he already may know the identity of "CS 1" or "CS 2".
- [29] The defendants further submit that if there is any doubt regarding the relevance of the identities of the Confidential Sources, then I ought to adjourn the application to the trial because the trial judge will be better placed to decide the issue. The defendants rely on *Canwest Publishing Inc. v. Wilson*, 2012 BCCA 181 and *Parlett v. Robinson*, 1983 CarswellBC 1827 (S.C.) as authority for adjourning the application to trial.
- [30] In *Canwest*, the chambers judge concluded that the defendant, Ms. O'Connor, a journalist, was not entitled to refuse to answer an interrogatory requiring her to reveal identity of her source. The defendants in *Canwest* included Ms. O'Connor and a newspaper, but also other non-media defendants who might have known the identity of the confidential source.
- [31] On appeal, Ryan J.A. concluded that the motives of an informant had little to do with the concept of journalist-source privilege and that the identity of the source was not central to the dispute between the appellants (i.e. the defendants, Ms. O'Connor and the newspaper) and the plaintiff, Mr. Wilson: *Canwest*, paras. 58 and 60. On the other hand, the source's identity was potentially relevant to the dispute between the plaintiff and the other defendants. However, Ryan J.A. reiterated that requiring a journalist to breach a confidentiality undertaking with a source was a last resort: *Canwest*, at para. 61, citing *Globe and Mail*, at para. 63.

- [32] In allowing the appeal, Ryan J.A. noted that even though it might have been expedient at the procedural stage to require disclosure of the source's identity immediately, the plaintiff ought to first exhaust the discovery process: *Canwest*, paras. 61 and 62.
- [33] In *Parlett*, Gould J. considered the defendant, Mr. Robinson's, refusal to answer discovery questions put to him in a defamation action. The refusal related to protecting the identity of a confidential source. Mr. Robinson, a Member of Parliament, quoted the source at a press conference during which the plaintiff alleged Mr. Robinson made defamatory statements.
- [34] The plaintiff in *Parlett*, at para. 12, posed the question on the application in a similar fashion to the plaintiff in the present case: "How can we find out if there is malice if we can't find out his source?"
- [35] In deciding not to compel answers, Gould J. considered how much damage would be done to the action if the questions posed at discovery were unanswered. Ultimately, Gould J. came down in favour of protecting the identity of the source on discovery: *Parlett*, paras. 13 and 17. Gould J. noted that the trial judge could compel the answers and in the circumstances, there was no overwhelming importance for the plaintiff to have the answers immediately: *Parlett*, paras. 15 and 16.

CONCLUSION

- [36] The plaintiff has submitted that the identities of the Confidential Sources are highly relevant to establishing Mr. Young's state of mind and to demonstrating that there was malice. In contrast, the defendants have submitted that a careful analysis of the articles sued upon, the imputations alleged, the information supplied by the Confidential Sources and the timing of Mr. Young's contacts with the Confidential Sources shows that the identities are not relevant.
- [37] Referring to Mr. Young's examination for discovery evidence, the plaintiff is critical of Mr. Young for having failed to make contemporaneous records related to assurances of confidentiality. The plaintiff urges me to give no weight to Mr. Young's March 3, 2020 affidavit because it is an attempt to improve, or expand upon, the evidence that he gave during his examination for discovery. In my view, Mr. Young's March 3, 2020 affidavit contains evidence going to the matters raised on this application.
- [38] The plaintiff further submits that Mr. Young's March 3, 2020 affidavit is not clear regarding the timing of his contacts with "CS 1" and "CS 2". Timing matters because the plaintiff alleges that the defendants relied on the information the Confidential Sources imparted to publish the defamatory articles. In addition to pointing to a conflict or lack of clarity in the evidence, the plaintiff is effectively arguing that Mr. Young lacks credibility.
- [39] In my view, with a fulsome evidentiary record and submissions, the trial judge will be much better placed to answer the issues raised. For example, with the benefit of viva voce evidence from Mr. Young, the trial judge may assess both the relevance question and, if relevance is established, whether the defendants can establish a valid claim for journalist-

source privilege. For me to do so on a record with an unresolved challenge on the evidence regarding timing and with a challenge to Mr. Young's credibility, could very well defeat the privilege.

[40] Therefore, after considering the submissions and the authorities, including Canwest and Parlett, I have decided to adjourn the plaintiff's application to trial.

"E. McDonald, J."

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