

CANADA / JUDGMENT

Galloway v. A.B.

2020 BCCA 106

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 106 Galloway v. A.B.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Galloway v. A.B.,

2020 BCCA 106

Date: 20200408

Docket: CA46380

Between:

Steven Galloway

Respondent

(Plaintiff)

And

A.B.

Appellant

(Defendant)

Sealed File: The order of Justice Dickson dated October 3, 2019 restricts the release of any materials filed that could identify the respondent in this appeal.

Restriction on Publication: An order has been imposed by this Court on

October 3, 2019 restricting the publication, broadcasting or transmission in any way of information that could identify the Appellant, referred to by the initials A.B.

This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia,
dated August 22, 2019 (Galloway v. A.B., 2019 BCSC 1417,
Vancouver Docket S1811588).

Counsel for the Appellant:

D.K. Wotherspoon

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D.H. Coles

Place and Date of Hearing:

Vancouver, British Columbia

January 7, 2020

Place and Date of Judgment:

Vancouver, British Columbia

April 8, 2020

Written Reasons by:

The Honourable Chief Justice Bauman

Concurred in by:

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Abrioux

Summary:

A.B. appeals from an order directing her to produce certain documents relevant to her allegations against Steven Galloway of physical and sexual assault. The order was made in s. 4 dismissal proceedings taken pursuant to the Protection of Public Participation Act. Held: Appeal dismissed. In the circumstances the documents were relevant and the prejudice to A.B. in their disclosure was out-weighed by the interests the respondent seeks to advance. While the

chambers judge made some errors in describing the impact and effects of the statutory scheme, the order was nevertheless appropriate on a fresh exercise of the discretion to order production.

Reasons for Judgment of the Honourable Chief Justice Bauman:

I. Overview

- [1] This appeal is from an order to produce documents made in the course of an application by a defendant in defamation proceedings commenced by Steven Galloway.
- [2] These proceedings arise out of notorious events alleged to have occurred at the University of British Columbia where then-Professor Galloway previously taught.
- [3] The defamatory statements are said to be allegations of physical and sexual assault by Steven Galloway made by his then-graduate student, A.B.
- [4] The document production order was made in furtherance of applications by various of the defendants pursuant to s. 4 of the Protection of Public Participation Act, S.B.C. 2019, c. 3 ["PPPA"]. That Act came into force on 25 March 2019 and it applies to this litigation. The PPPA is colloquially referred to as anti-SLAPP legislation; the acronym stands for "Strategic Litigation Against Public Participation".
- [5] In furtherance of the "anti" aspect of the legislation, s. 4 permits defendants who allege the litigation stifles expression relating to matters of public interest to bring on an application to summarily dismiss the action at any point in the proceedings.
- [6] While the application and the litigation touch on a number of very important and sensitive issues in our society today, in my view the case comes down to relatively straightforward questions of the existence of a judicial discretion to order the production of the documents and the appropriateness of its exercise in the particular circumstances here.
- [7] For the reasons that follow, I would affirm the decision of the chambers judge to order production: 2019 BCSC 1417.

II. Background

- [8] The essential claim advanced by Steven Galloway is set out in para. 9 of his amended notice of civil claim so:

The plaintiff was defamed by false accusations of rape, sexual assault and physical assault. The defamation began with false statements by A.B. to several other defendants, who recklessly repeated and asserted the truth of the accusations both within UBC and publicly on the internet, including on Twitter. The defendants have continued to publish the allegations despite a finding by a former Justice of the B.C. Supreme Court who, after interviewing A.B. and numerous others, concluded the allegations of rape, sexual assault and assault were unsubstantiated. The defamatory statements were devastating to the plaintiff both personally and in his professional career. He claims general, special, aggravated and punitive damages against the defendants.

Wherever a defamatory statement particularized herein refers to A.B., the actual defamatory statement used A.B.'s name.

[9] While the order for production extended to certain of the other defendants, only the order in respect of the principal defendant, A.B., is before us on appeal.

[10] A.B.'s response to the claim raises these defences:

- a limitations defence;
- absolute privilege;
- qualified privilege;
- "Wigmore" privilege;
- truth (or justification);
- fair comment;
- a defence based on the BC Labour Relations Code and the decision in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; and
- responsible communication on the matter of public interest.

[11] Section 4 of the PPPA establishes a two-stage test for dismissal applications:

4 (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that

- (a) the proceeding arises from an expression made by the applicant, and
- (b) the expression relates to a matter of public interest.

(2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that

- (a) there are grounds to believe that
 - (i) the proceeding has substantial merit, and
 - (ii) the applicant has no valid defence in the proceeding, and
- (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[12] At the first stage the defendant/applicant must satisfy the court that the proceeding arises from an expression made by the applicant relating to a matter of public interest. At the second stage the plaintiff/respondent must satisfy the court of the three requirements set out in s. 4(2).

- [13] Upon service of the dismissal application and pursuant to s. 5(1) "no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved".
- [14] Section 9 of the PPPA deals with the procedure on a dismissal application. Three aspects of the procedure should be noted. First, the dismissal application must be made in accordance with the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [15] Second, the evidence on the application must be given by affidavit.
- [16] And third, either party to the application may cross-examine any affiant for up to seven hours (in total for all applicants and a similar period for all respondents). The right of cross-examination distinguishes PPPA s. 4 applications from regular chambers proceedings.
- [17] A.B.'s dismissal application was thus supported in part by an affidavit. A.B.'s notice of application sets out as its factual basis that the proceeding concerns two allegedly defamatory "Expressions" by A.B., as those were termed and categorized in Steven Galloway's notice of civil claim.
- [18] Expression 1 includes allegations that A.B. was sexually harassed and assaulted by Steven Galloway, which A.B. states were confidentially shared with three co-defendants: Chelsea Rooney, a trusted friend; Keith Maillard, her thesis supervisor and a UBC professor; and Annabel Lyon, a UBC professor and the acting chair of A.B.'s program (at para. 8).
- [19] Expression 2 is described as an art exhibit, displayed in New York City and executed by A.B., "about the universal experience of sexual harassment and sexual assault of women by men in positions of power" (at para. 14).
- [20] Under Part 3 "Legal Basis" of her application A.B. outlines her defences to the action (at paras. 52-53):
52. With respect to Expression 1, Applicant relies on the following defences to the claim: justification; fair comment; qualified privilege; absolute privilege; responsible communication on a matter of public interest; Wigmore privilege; limitations defence; and the Weber defence.
53. With respect to Expression 2, the Applicant relies on the following defences to the claim: consent; justification; fair comment; and responsible communication on a matter of public interest.
- [21] A.B. states (at para. 51) that "[a] fulsome Response to Amended Civil Claim detailing the Applicant's defences has been filed".
- [22] In her affidavit in support of the application A.B. deposes as follows (at paras. 12-14):

12. In response to the Action, I have advanced several defences: The first is justification. I was sexually assaulted and sexually harassed by the Plaintiff at UBC when I was a student and he was my professor.
13. My confidential disclosures to Chelsea Rooney, Keith Maillard, and Annabel Lyon were personal expressions and confidential disclosures relating to the sexual assault and sexual harassment of a student by a professor at a public university. With respect to this expression, I have advanced the following defences in addition to justification: fair comment, qualified privilege, absolute privilege, responsible communication on a matter of public interest, Wigmore privilege, limitations defence, and the defence that my disclosures to UBC are within the exclusive jurisdiction of the labour arbitrator pursuant to the terms of the collective agreement between UBC and the UBC Faculty Association.
14. My therapeutic art exhibit, the [redacted] was a personal expression regarding a matter of broad public importance and interest. The [redacted] relates to the #MeToo movement. It explores the experience of sexualized violence and the barriers to reporting. With respect to this expression, I have advanced the following defences in addition to justification: consent, fair comment, and responsible communication on a matter of public Interest.
- [23] On 17 June 2019, A.B. was cross-examined by counsel for Steven Galloway in the context of the dismissal application.
- [24] Counsel explored with A.B. what she said to the various parties to whom she disclosed the alleged harassment and assaults. I will deal with each exchange because they led to counsel's request for the documents that are at issue before this Court.
- [25] A.B. confirmed that she wrote a letter to Martha Piper (the then-president of UBC) in November 2015 disclosing the alleged assaults and harassment by Steven Galloway. She could not remember if she received a written response or if she was told what department of the university she should deal with in relation to her complaints.
- [26] A.B. was asked about her conversations with Chelsea Rooney, referred to at para. 5 of her affidavit. A.B. remembered "very little about the conversation". A.B. did not remember disclosing details of the alleged assaults to her.
- [27] A.B. did remember email and verbal discussions with Keith Maillard in November 2015 (the chambers judge dismissed the application for production in respect of Keith Maillard).
- [28] A.B. was asked about disclosing to Annabel Lyon in November 2015. She did not remember anything of her discussions with Ms. Lyon.
- [29] A.B. was asked generally about people to whom she disclosed between November 2015 and October 2018. She recalled disclosing details of the alleged assaults with a number of people, including Mandi Gray, Glynnis Kirchmeier, and Paul Krause. She could not remember the names of all of those to whom she had disclosed. The chambers judge denied the disclosure of the names of those she could not remember at the time of the cross-examination.

- [30] A.B. was asked and recalled some details of her conversation with a journalist from the Fifth Estate. She indicated she had spoken to this journalist off the record about her experience reporting sexual assault to UBC's Equity and Inclusion office.
- [31] A.B. was asked about her discussions and correspondence concerning the alleged assaults with UBC's Equity and Inclusion office. She indicated that she did not think she had ever been given a document by the office reflecting that they had opened a file for her, and did not know if she had possession and control of other documents "that reflect[ed] [her] report in July 2013 and emails back and forth with the people with the Equity and Inclusion office".
- [32] A.B. was asked about details of documentation she gave to Professors Maillard and Lyon for dissemination at an off-campus meeting concerning her allegations. A.B. said in part "I don't remember much about that time".
- [33] A.B. was asked about the New York art gallery exhibit she said was about her experiences of sexual violence, which used material from statements she gave to an investigation into her allegations against Steven Galloway. In particular counsel raised issues concerning the gallery's website write-up for the exhibition. A.B. said that she saw a draft of the write-up before it was posted, "[p]robably" over email.
- [34] A.B. was asked about a reporter, Theresa Smalec, she had spoken to about her art exhibit. She said she had given permission to Ms. Smalec to post images of the show, and had seen a draft of the article Ms. Smalec wrote before it was posted.
- [35] A.B. was asked about being part of a collective agreement while at UBC. She said she did not know if she was part of such an agreement.
- [36] The cross-examination lasted about one hour and 30 minutes and it was adjourned by counsel for Steven Galloway subject to disclosure of the documents requested by counsel during this examination.

III. The Chambers Judgment

- [37] The parties disagreed on the compellability of A.B. to disclose the requested documents. Steven Galloway brought an application for that disclosure on 27 June 2019. The application was heard on 12 July 2019 and judgment was pronounced 22 August 2019.
- [38] The chambers judge ordered production of the following documents by A.B.:
2. A.B. produce to the Plaintiff as soon as is practicable copies of:
 - (a) correspondence between A.B. and Martha Piper;
 - (b) emails to Chelsea Rooney in November 2015 regarding the plaintiff;
 - (c) A.B.'s email communication with Annabel Lyon in November 2015 regarding the plaintiff;

- (d) all communications between A.B. and the Equity and Inclusion Office at UBC as well as any documentation A.B. provided the Equity and Inclusion Office at UBC in July 2013;
 - (e) any documentation A.B. gave to Keith Maillard or Annabel Lyon to disseminate or read at the off-campus meeting with other faculty;
 - (f) any email communications that A.B. had with Mandi Gray, Glynnis Kirchmeier, and Paul Krause regarding the plaintiff at or around the time she disclosed to them;
 - (g) emails between A.B. and the owner of the High Noon Gallery regarding the website write-up on A.B.'s exhibit; and
 - (h) emails between A.B. and Theresa Smalec.
3. A.B. disclose to the plaintiff whether she was part of a collective agreement at UBC and if so, provide to the plaintiff a copy of the collective agreement.

[39] The chambers judge specifically noted s. 9(1) of the PPPA and stressed the fact that the dismissal application "must be made in accordance with the Supreme Court Civil Rules" (at para. 7 [emphasis removed]). She then noted as "[r]elevant to this application" Rule 22-1(4)(c) (at para. 8). That rule applies, in its entirety, to evidence on a chambers application in these terms:

- (4) On a chambers proceeding, evidence must be given by affidavit, but the court may
 - (a) order the attendance for cross-examination of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,
 - (b) order the examination of a party or witness, either before the court or before another person as the court directs,
 - (c) give directions required for the discovery, inspection or production of a document or copy of that document,
 - (d) order an inquiry, assessment or accounting under Rule 18-1, and
 - (e) receive other forms of evidence.

[40] The chambers judge discussed s. 4 of the PPPA and the onus on a plaintiff responding to a dismissal application once the applicant has met her burden under s. 4(1). The judge quoted s. 4(2) and stated (at para. 22):

The words indicate the high bar the plaintiff must meet in order to keep his/her action alive. The court is required to dismiss a plaintiff's action if the plaintiff is unable to satisfy it of all three of the branches of the test, including that the defences put forth are not valid.

- [41] The chambers judge found significant guidance in the Ontario jurisprudence considering near-identically formulated legislation in that province. The seminal authority in a line of Ontario cases is 1704604 Ontario Ltd. v. Pointes Protection Association, 2018 ONCA 685 (appealed to the Supreme Court of Canada, SCC Docket No. 38376, and under reserve at this time).
- [42] The judge addressed the argument advanced by A.B. and the other PPPA applicants that s. 5(1) of the PPPA precluded disclosure under Rule 22-1(4)(c) as this was a "further step" in the proceeding. The chambers judge adopted the distinction drawn in United Soils Management Ltd. v. Mohammed, 2017 ONSC 904 at para. 20 between steps in the proceeding and steps in the application (for dismissal) and, stating it held "that the latter is permitted while the former is not" (at para. 34).
- [43] The judge continued to discuss the burden on a plaintiff on a dismissal application, and a significant concession made by counsel for two of the other applicants:
- [35] There is a clear tension in the Act between having a quick summary dismissal application heard with less than full evidence and the dismissal of the plaintiff's action. This application highlights the difficulty with it in some cases. With every imaginable defence being claimed it would be reckless for a plaintiff to not address each one. The downside is too great. The application judge has no discretion - they must dismiss the action.
- [36] To illustrate this point counsel for Ms. Smalec and Ms. Kirchmeier conceded that as his clients have raised the defence of fair comment the only way the plaintiff can address it is to show malice and that without full disclosure that "would cause problems for him". I take that to mean that the plaintiff will not be able to satisfy his onus on the dismissal application without the disclosure sought.
- [44] Finally, motivating the chambers judge was her conclusion at para. 38 immediately before she made her orders for disclosure:
- [38] While I appreciate that the aim of the Act is to provide defendants in SLAPP actions a timely and expedient process to have unmeritorious actions dismissed, the flip side cannot be to deprive a plaintiff with a valid cause of action the ability to proceed. Section 4 places a burden on the plaintiff. An unusually onerous burden of proving not only that they have a case but that the defendants do not. To have to do that in a vacuum would be unjust and contrary to R. 22-1(4)(c).

IV. Analysis

- [45] A.B.'s opening statement on appeal helpfully outlines her essential submission:

The PPPA, which expressly provides for dismissal of even meritorious claims, places a modest onus on the plaintiff, not to prove a successful case for trial, but to show there are reasonable grounds to believe that the claim is meritorious considering the claim and the defences, and that the alleged harm to the plaintiff outweighs the public interest in protecting the expression.

The Chambers Judge erred in her interpretation of the PPPA by characterizing the burden on the plaintiff in a dismissal application as "unusually onerous". She further erred in her interpretation of the PPPA by stating its "aim" is to provide a mechanism for the dismissal of only unmeritorious claims. On the back of these two errors of law, the Chambers Judge made orders to assist the plaintiff in proving his case in a dismissal application, which is not the test under the PPPA. The orders below reverse the onus in the legislation by requiring that defendants assist a plaintiff prove that the claim has a strong chance of success. Such an order is antithetical to the purposes of the PPPA, and is in error.

The Chambers Judge's erroneous interpretation of the PPPA led her to exercise her discretion on an incorrect understanding of the law and thus on wrong principle, and make discovery orders which are beyond the discretion of the Court given the legislative stay under the PPPA. The orders should be set aside as a result.

- [46] At the threshold is the question of the court's authority to contemplate the making of document disclosure orders as part of the process leading to the hearing and disposition of a dismissal application under s. 4 of the PPPA.
- [47] That authority cannot be doubted. It is expressly conferred by Rule 22-1(4)(c). It is an independent discretion to order production whether or not it is requested in the context of a cross-examination on a deponent's affidavit.
- [48] This is important to note because A.B. stresses the jurisprudence in this province prescribing a limited jurisdiction for ordering production of documents on the cross-examination of an affiant: *Kapelus v. U.B.C.*, 2002 BCSC 741 at para. 29, cited in *Casavant v. Cash Money Cheque Cashing Inc.*, 2008 BCSC 1556; and *Cantile v. Canadian Heating Products Inc.*, 2016 BCSC 660.
- [49] These cases do not discuss the independent authority for the court to require the production of documents on an interlocutory application given by Rule 22-1(4)(c).
- [50] That rule (as A.B. does point out) was considered by Master Grist in *Wilkie Garment Company Ltd. v. Interlock Holdings Ltd.*, [1993] B.C.J. No. 2604. This has been recognized as the "leading case" on the rule: *Royal Bank of Canada v. British Columbia*, 2016 BCSC 2195 at para. 46. Master Grist (as he then was) said this at para. 9 of Rule 52(8)(c), now Rule 22-1(4)(c):

Rule 52(8)(c) has particular relevance to this application. The Rule is discretionary and should be applied weighing the degree of relevance to the issues arising on the application and factors of comparative prejudice. In the context of the continuing proceedings under the *Mareva* injunction, the issues arising would seem to be the likelihood of removal of exigible assets from the jurisdiction, the sufficiency of security and the prejudice to the defendant through the freezing of assets. In my view full disclosure of material is necessary to permit the full cross-examination ordered by the Chief Justice. The material can be made available with little prejudice to the defendants and accordingly the order should be allowed.

- [51] So there is discretion to order production of documents in the context of the dismissal application and I agree that it should be exercised "weighing the degree of relevance to the issues arising on the application and factors of comparative prejudice".
- [52] In assessing prejudice to Steven Galloway, A.B. submits that the reasoning of the trial judge on the burden the plaintiff faces on a dismissal application clearly affected her exercise of the discretion.
- [53] It is then said that the chambers judge erred in saying that s. 4(2) of the PPPA set "the high bar the plaintiff must meet in order to keep his/her action alive" (at para. 22).
- [54] At para. 38 of the judge's reasons, the appellant says the judge erred in saying that the plaintiff faces the burden of "proving that the defendants do not [have a case]". On the contrary, the PPPA only requires the plaintiff to show "grounds to believe" that defences to their claim will not succeed.
- [55] It is said that the judge further erred by stating in the same paragraph that "the flip side [of the PPPA's aim] cannot be to deprive a plaintiff with a valid cause of action the ability to proceed". To the contrary, the PPPA can deprive a plaintiff with a valid cause of action of the ability to proceed with their suit. This is one of the outcomes contemplated by the statute in its aim, in appropriate cases, of protecting public expression from suppression. Section 4(2) (b) of the PPPA contemplates that an action, even one with merit and no defences, may be dismissed where the public interest in protecting the form of expression outweighs the public interest in the proceeding continuing.
- [56] With the exception of the error alleged in characterizing the plaintiff's burden as "onerous" or "a high bar", I do not disagree with the appellant's observations. The chambers judge erred in overlooking or misstating these nuances to the legislation.
- [57] As for the "high bar" complaint, it is of little moment in my mind. While the Ontario Court of Appeal in *Pointes* was at some pains to characterize the plaintiff's burden on a dismissal application in less demanding terms, I have no doubt that s. 4 places a not insignificant burden on a plaintiff. Section 4 is extraordinary in our scheme of civil litigation at least to the extent that it contemplates the dismissal of an otherwise meritorious claim in certain circumstances and in the burden it places on a plaintiff with respect to defences advanced by the defendants. Calling the bar "high" or the burden "unusually onerous" does not, in my view, represent error vitiating the exercise of the chambers judge's discretion.
- [58] But the other errors identified are ones of principle and in my view they tainted the chambers judge's exercise of her discretion. That being so the deference otherwise owed the exercise of that discretion is attenuated: *Strohmaier v. K.S.*, 2019 BCCA 388 at para. 21.
- [59] However, even approaching the matter afresh, I would not exercise the discretion differently.

- [60] The document production orders, while not pinpoint in their particularity, are certainly not "broad and sweeping" as the submissions before us would suggest.
- [61] The requested documents relate to issues raised in the response to civil claim filed by A.B. in the proceeding and to issues and exchanges with individuals deposed to by A.B. in her affidavit filed in support of the dismissal application.
- [62] The chambers judge's reasons for ordering disclosure in some instances is suspect. For example, it is difficult to see how the possible instructions of Martha Piper to A.B. can assist in the defence of justification, that is "truth". However that exchange would assist in possibly advancing Steven Galloway's answer to the defence of qualified privilege.
- [63] The fact is that A.B. has admitted to speaking to sundry individuals about her allegations and she has advanced, I would suggest, every conceivable defence in respect of those communications. In respect of those defences Steven Galloway bears the persuasive burden described in the Ontario cases (in particular Pointes at para. 83):
- that there are reasonable grounds to believe that none of the defences put in play are valid.
- [64] That is not a light burden. The tenor of the submissions before us would suggest that it is not a difficult task to meet that burden where a defendant advances bald, non-particularized defences. That may be so. But it is unfair to require a plaintiff to run the risk of being non-suited for failure to meet the "no valid" defence requirement (even on the reasonable grounds threshold).
- [65] It is unfair to deny a plaintiff limited production of relevant documents where a defendant, when asked about specific conversations she admits to but defends on broad grounds, replies that "I can't remember". The dismissal application is a summary procedure. It takes place early in the progress of the litigation; it is not a summary trial application; it cannot be turned into an occasion for abuse by a plaintiff - another opportunity to discourage public participation in matters of public interest. Equally, however, it cannot become a procedure that denies a plaintiff a proportional response to the challenges they face on the application. A fair balance must be struck between the competing interests of the parties to this type of litigation.
- [66] In my view the disclosure here is measured in scope and justified on grounds of relevance.
- [67] There is, of course, prejudice to A.B. in disclosure to the extent that she is being required to produce documents that may have been thought to be private when created. I do not trivialize that prejudice; it unfortunately arises in other litigation involving highly personal matters. But there is on the other hand the reputational interests of Steven Galloway that he seeks to advance.

[68] In my view in the circumstances here, the prejudice to A.B. is out-weighed by these countervailing interests and the potential prejudice to Steven Galloway if denied the document disclosure he seeks on the dismissal application. I say this, of course, only in the context of this application. The final assessment of harm under s. 4(2)(b) of the PPPA is for the judge hearing the merits of the dismissal application and I mean in no way to prejudge that assessment.

[69] I would dismiss the appeal.

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Mr. Justice Abrioux"

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