

CANADA / JUDGMENT

Galloway v. A.B.

2021 BCSC 320

COURT

Supreme Court of British Columbia

DECIDED

25 February 2021

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2021 BCSC 320 Galloway v. A.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Galloway v. A.B.,

2021 BCSC 320

Date: 20210225

Docket: S1811588

Registry: Vancouver

Between:

Steven Galloway

Plaintiff

And

A.B., Keith Maillard, Annabel Lyon, Chelsea Rooney, Alicia Elliot, Brit Bachmann, Mandi Gray, Theresa Smalec, Glynnis Kirchmeier, Kiera Anderson, Emily Kellogg, Mada Chouain, Adeline York, Arielle Rombough, John Bell, Bethany Killen, Dana Kagis, Wendel Schwab, Marcelle Kosman, Alasdair Rees, Suziebedbug, John Doe, Jane Doe, and Jill Roe

Defendants

Restriction on publication: A publication ban has been imposed by an order of this Court restricting the publication, broadcast or transmission in any way of information or evidence that could identify the defendant referred to in these proceedings as "A.B.". This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

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K.R. Zimmer

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Counsel for the Defendant A.B.:

S. Chang

Counsel for the Defendant Glynnis Kirchmeier:

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Counsel for the Defendant Chelsea Rooney:

L. Guest

S. Whitmore

Place and Date of Hearing:

Vancouver, B.C.

February 11, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 25, 2021

- [1] This case arises from a complaint made against the plaintiff by A.B., a former student at the University of British Columbia ("UBC").
- [2] Following A.B.'s complaint, and others, to UBC that the plaintiff had sexually harassed and sexually assaulted her, the plaintiff was suspended and his position was eventually terminated by UBC.
- [3] The plaintiff sued the defendants, for defamation.
- [4] The matter before me consists of four applications for document production, in advance of a hearing sought by the defendants to have the defamation claim dismissed against them under s. 4 of the Protection of Public Participation Act, S.B.C. 2019, c. 3 [PPPA]. The hearing is scheduled for April 2021.

Background

- [5] The plaintiff's allegations against A.B. arise from her statements alleged to have been made in November 2015, to certain individuals, including those in leadership positions at UBC. She is alleged to have said that she had been sexually harassed and sexually assaulted by the plaintiff when she was a student at UBC. At the time of the alleged sexual assaults and sexual harassment, the plaintiff was A.B.'s professor in UBC's Creative Writing Program.
- [6] The defendants include Chelsea Rooney (a friend of A.B.); Keith Maillard (a UBC professor and A.B.'s former thesis supervisor; and Annabel Lynn (a UBC professor and acting chair of A.B.'s program), and others. I shall refer to Keith Maillard and Annabel Lyon as "the Professors" in these reasons for judgment.
- [7] UBC commenced an investigation and appointed the Honourable Mary Ellen Boyd as its investigator in response to A.B.'s allegations of sexual assaults and sexual harassment.
- [8] Ms. Boyd produced a report setting out her findings.
- [9] The plaintiff is or was a member of the UBC Faculty Association. His Association engaged in an arbitration process with UBC on his behalf.
- [10] The resulting arbitration award states, in part, that:

Finally, in accordance with the Consent Order dated March 23, 2017, the entirety of the proceeding before continues to be strictly confidential and will not be disclosed unless required by law, except for matters recorded in this award. Consistent with that Order, no party will comment on the proceeding or the reasons for the Grievor's dismissal. Should any party intend to make a public disclosure which might be contrary to the confidentiality terms, it will provide reasonable advance notice to the other parties and any disagreement will be referred to me for a binding determination before the disclosure is made public.

- [11] At para. 9 of his amended notice of civil claim, the plaintiff alleges that:

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.

- [12] On April 9, 2019, A.B. filed her response to the amended notice of civil claim, which raised defences including:

- (a) a limitations defence;
 - (b) absolute privilege;
 - (c) qualified privilege;
 - (d) "Wigmore" privilege;
 - (e) truth (or justification);
 - (f) fair comment;
 - (g) a defence based on the BC Labour Relations Code and the decision in *Weber v. Ontario Hydro*, 1995 CanLI1108 (SCC), [1995] 2 S.C.R. 929; and
 - (h) responsible communication on the matter of public interest.
- [13] A.B. and ten other defendants brought applications, often referred to as anti-Strategic Litigation Against Public Participation (colloquially referred to as anti-SLAPP applications) under s. 4 of the PPPA to have the plaintiff's action against them dismissed.
- [14] At the request of counsel for the plaintiff, the parties have agreed that the eleven anti-SLAPP Applications should be heard together.
- [15] After the anti-SLAPP applications were filed, the plaintiff exercised his right to cross-examine A.B. and the other defendants on their affidavits in support of their applications, pursuant to s. 9(5) of the PPPA. During the course of cross-examination, he requested production of several documents, which A.B. and the other defendants opposed. The plaintiff then made an application for orders that A.B. and the other defendants produce the requested documents.
- [16] The application was heard by Madam Justice Murray on August 22, 2019. In reasons for judgment indexed at 2019 BCSC 1417, Murray J. granted the plaintiff's application, ordering production of many, but not all, of the documents requested. This decision by Murray J. was appealed. In reasons indexed at 2020 BCCA 106, Chief Justice Bauman, for the unanimous Court, upheld the decision of Murray J., albeit on other grounds.
- [17] Thereafter, many of the parties conducted cross-examinations on the plaintiff's affidavits filed in response to the applications to have the action against them dismissed under the PPPA. These cross-examinations led to various applications for the production of documents, and to compel answers to questions that were objected to during the cross-examinations.

The Protection of Public Participation Act

[18] Sections 4, 5 and 9 of the PPPA provide:

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.

5(1) Subject to subsection (2), if an applicant serves on a respondent an application for a dismissal order under section 4, no party may take further steps in the proceeding until the application, including any appeals, has been finally resolved.

- (2) Subsection (1) does not apply to an application for an injunction.

[]

9(1) Subject to this Act, an application for a dismissal order under section 4 must be made in accordance with the Supreme Court Civil Rules.

- (2) An application for a dismissal order under section 4 may be made at any time after the proceeding has commenced.
- (3) An application for a dismissal order under section 4 must be heard as soon as practicable.
- (4) Subject to subsections (5) and (6) of this section, on an application for a dismissal order under section 4, evidence must be given by affidavit.
- (5) An applicant or respondent may, before the hearing of the application,
 - (a) call, out of court before an official reporter, the witness who swore or affirmed the affidavit for cross-examination on the witness's affidavit, and
 - (b) cross-examine the witness on the witness's affidavit, provided that
 - (i) the total period of cross-examination of all applicants in the proceeding does not exceed 7 hours in duration, and
 - (ii) the total period of cross-examination of all respondents in the proceeding does not exceed 7 hours in duration.

- [6] The court may extend the period permitted for cross-examination under subsection (5) if the court considers it necessary in the interests of justice.

The Scope of the Disclosure Required pursuant to the PPPA

- [19] In her reasons for judgment at para. 40, Murray J. found:

The question is how much disclosure to order. I am of the view that the disclosure that may be ordered on a dismissal application is confined to matters that relate to that application only.

- [20] In reasons for judgment for the Court of Appeal, Chief Justice Bauman, wrote at para. 51 that:

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".

- [21] How deeply a motions judge is to venture in order to assess the evidence under a PPPA application was settled by the Supreme Court of Canada considering near-identically formulated legislation in Ontario: 1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 [Pointes], and in a companion defamation case; Bent v. Platnick, 2020 SCC 23 [Bent].

- [22] The plaintiff argues that Pointes emphasizes that the court is not to allow the motion to become a summary trial, and not to take a "deep dive" into the evidence, and "should engage in only limited weighing of the evidence": at para. 52.

- [23] At paras. 86-88, the Court in Bent summarized:

86 Since Ms. Bent has met her burden on the threshold question, the burden now shifts to Dr. Platnick to show that there are grounds to believe that his defamation proceeding has substantial merit and that Ms. Bent has no valid defence to it.

87 In Pointes Protection, this Court clarifies the fact that unlike s. 137.1(3), which requires a showing on a balance of probabilities, s. 137.1(4)(a) expressly contemplates a "grounds to believe" standard instead: para. 35. This requires a basis in the record and the law -- taking into account the stage of the litigation -- for finding that the underlying proceeding has substantial merit and that there is no valid defence: para. 39.

- [88] I elaborate here that, in effect, this means that any basis in the record and the law will be sufficient. By definition, "a basis" will exist if there is a single basis in the record and the law to support a finding of substantial merit and the absence of a valid defence. That basis must of course be legally tenable and reasonably capable of belief. But the "crux of the inquiry" is found, after all, in s. 137.1(4)(b), which also serves as a "robust backstop" for protecting freedom of expression: Pointes Protection, at paras. 48 and 53.

The Present Applications

[24] On February 11, 2021, I heard the four applications for document production from: Chelsea Rooney, the plaintiff, A.B., and the Professors. I will deal with each in turn.

(i) Ms. Rooney's Application

[25] Firstly, Ms. Rooney's application was unopposed, and the relief she sought to redact certain information from specific documents was granted, so her application will not be further addressed in these reasons for judgment, but the relief that I granted on her application will form a part of the order that Mr. Burnett will prepare relating to the other applications that I heard.

(ii) The Plaintiff's Application

[26] The plaintiff's application was initially for document production from a variety of defendants and included requests that:

- a) The defendant AB produce complete and unredacted copies of all redacted documents disclosed under the order of Madam Justice Murray pronounced August 22, 2019 or if the court so rules, to the court for inspection and ruling;
- b) The defendant Kirchmeier produce complete and unredacted copies of the redacted document disclosed under the said order of Madam Justice Murray or if the court so rules, to the court for inspection and ruling;
- f) The defendant Lyon produce:
 - i) An unredacted copy of Exhibit 1 of her cross examination;
- ii) The email to AB saying Professor Lyon would be reading AB's thesis.
- g) The defendant Maillard produce:
 - i) The notes of Madam Justice Boyd that Professor Maillard used to refresh his memory to prepare his affidavit.
- ii) The Twitter analytics for his tweets pleaded to be defamatory.
- i) The defendant Rooney produce:
 - i) Any email, messages or other documents whereby she arranged her phone calls in mid-November 2015 to people with possible complaints against Steven Galloway;
- ii) Her notes of the conversations she had in mid-November 2015 with people with possible complaints against Steven Galloway.

- [27] Prior to the hearing of this application some of those matters were resolved. Counsel for the defendant Glynnis Kirchmeier provided documents to counsel for the plaintiff before his application with respect to her was heard, and in the result that part of his application referred to as 1(b) did not proceed. Similarly, the relief sought against Ms. Rooney was resolved before the hearing.
- [28] Before me the plaintiff only sought orders against A.B.
- [29] The plaintiff had previously received some documents that were partially or completely redacted by A.B.'s counsel. On the evening prior to the hearing of his application, the plaintiff was provided with a further number of un-redacted pages of documents by counsel for A.B., so he proceeded only with respect to the remainder of the redacted pages referred to as 1(a) in his notice of application. These were pages numbered 2, 4-7, 9, 11, 18, 19, 22, 26, and 28-33 as listed in affidavit #3 of Cathy Carmichael.
- [30] I reviewed each of these documents, and found that the redactions proposed for documents number 2, 4, 6, 9, 11, 26, 28 and 29 should be permitted, but that parts of the redactions in the rest of the documents should not.
- [31] I will leave it to counsel to decide if these redactions permitted and/or not permitted need to be enumerated or further identified in the order that will be drawn by Mr. Burnett.

(iii) A.B.'s Application

- [32] The plaintiff's affidavit sworn on October 28, 2020 raised the issue of the extent to which he became aware of A.B.'s 2015 allegations through the grievance process, the Boyd investigation and the arbitration process. He swore that:
29. The only defamatory publications pleaded in my claim which I knew of before Oct 26, 2016 (the date two years prior to my filing of this action) were those which had been specifically revealed in the Boyd investigation and report. That report was issued April 25, 2016. Statements of evidence in the investigation came in from December 2015 forward and I saw some of them in early 2016.
32. I did not learn until 2017 or later that Rooney ... Nor did I learn until 2017 or later what specifically AB or Rooney had said to Lyon and Maillard or that Lyon and Maillard repeated those accusations to others. Nor did I learn until 2017 or later that AB had also made those defamatory statements to others.
- [33] On January 21, 2020, A.B.'s counsel cross-examined the plaintiff on his affidavits filed in response to her application. She seeks an order to compel the plaintiff to produce documents and information sought by way of requests left at her counsel's cross-examination of the plaintiff which she contends are necessary and relevant to the hearing and determination of her anti-SLAPP application.
- [34] Specifically, A.B.'s application seeks:

1. An Order that the following documents and information be produced by the plaintiff within seven (7) days of the pronouncement of this Order:
 - (a) All documents including, emails, notes, letters or other information in Mr. Galloway's possession on or before October 26, 2016, with respect to the alleged defamation by A.B., including any and all documents that relate to the allegation that A.B. defamed the Plaintiff in speaking to Professors Maillard and Lyon, Chelsea Rooney, Paul Krause, and any other persons about her allegations of sexual assault and sexual harassment and/or permitted or encouraged others to repeat her allegations;
 - (b) Unredacted copies of all pages of the Boyd Report previously disclosed to A.B. in redacted form;
 - (c) Any and all documents relating to the scope of the grievances pursued by the UBC Faculty Association on behalf of Mr. Galloway, including copies in Mr. Galloway's possession of the opening and closing statements made by the parties in the grievance arbitration, written submissions to the Arbitrator, and any releases signed as between UBC and the Faculty Association;
 - (d) Any and all documentation relating to the Plaintiff's termination by UBC, including the reasons therefore; and,
 - (e) Any and all written communications to the Globe and Mail, the National Post, and the Walrus that Mr. Galloway had regarding any concern or dissatisfaction about articles that they published, including but not limited to a copy of an e-mail Mr. Galloway sent to Shelley Ambrose regarding a correction in the Zoe Whittall article left as an outstanding request in the cross-examination of Mr. Galloway conducted on January 21, 2021.
 2. The Plaintiff shall re-attend cross-examination to answer any questions arising with respect to the further documents produced pursuant to paragraph 1.
 - (a) Documents including, emails, notes, letters or other information in the plaintiff's possession on or before October 26, 2016 regarding the alleged defamation by A.B.
- [35] The plaintiff contends that the documents sought under this rubric are really in the nature of discovery and, given the breadth of material already in evidence and cross-examinations, are unnecessary for the disposition of the PPPA applications.
- [36] I have been unable to discern just what is sought under this part of A.B.'s application. The plaintiff says that he has already provided the information sought under this rubric; the notes from a UBC faculty meeting of November 15, 2015. When examined on his affidavit by counsel for A.B., the plaintiff advised that he probably came into possession of those notes in mid-December of 2015.

- [37] In the same cross-examination, the plaintiff said that he knew of A.B.'s disclosure of information to Professor Lyon in January of 2016, and of contact between one Paul Krause and Professor Maillard about A.B.'s allegations by that time as well. In the same cross-examination, the plaintiff stated that he was aware that A.B. had reported the assaults she alleged by him to Ms. Rooney by at least March of 2016 and received emails between A.B. and the Professors sometime in 2017.
- [38] If other items generally described as documents, notes, letters or information exist, have not been produced, and are relevant to the limitation defence pleaded by A.B., they should be disclosed and produced. The exception to this obligation is if they are the subject of some claim of privilege. If some sort of privilege is claimed for any such items, the items should be identified in reasonable detail, and the privilege claimed with respect thereto should be clearly explained.
- (b) Un-redacted copies of all pages of the Boyd Report
- [39] A.B. contends that having already shared un-redacted copies of the Boyd report, and some of the Faculty Association documents with third parties, there is no prejudice to the plaintiff to disclose un-redacted copies of such documents to her.
- [40] This submission is inconsistent with A.B.'s position, in which she has been at least partially successful before me, that she was entitled to redact portions of documents that she produced pursuant to her PPPA application for relevance and other reasons.
- [41] The plaintiff contends that A.B.'s notice of application badly misstates the claim against her, and in doing so, sets a false basis for documents sought. He points out that her notice of application states:
26. The plaintiffs claim alleged that two "expressions" by A.B. are defamatory:
- (a) 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; and,
- (b) A.B.'s public art exhibit regarding the universal experience of sexual harassment and sexual assault of women by men in positions of power.
- [42] The plaintiff says the only claims in defamation regard publications and statements made by the defendants, known to the plaintiff at the time the claim was filed, in relation to rape, sexual assault and physical assault, as set out in para. 11 above.
- [43] The rule in defamation cases is that a defendant must defend the stings sued over, not other alleged misconduct. In *Manno v. Henry*, 2008 BCSC 738, Mr. Justice Grauer summarized the rule at para. 131, describing limitations on the evidence a defendant may tender if they plead bad reputation:

According to Brown, loc. cit. supra, such evidence is to be limited to the plaintiff's general reputation in the community. It may not include evidence of particular acts of misconduct or of rumours and suspicions of like effect.

- [44] The plaintiff asserts that the redacted version of the Boyd report that A.B. already has, contains those parts of the report that deal with the defamations sued over. He maintains that the remainder of the report deals with other non-physical complaints by ancillary complainants and A.B., none of which is relevant to or form any defence to the matters pleaded. He asserts that if the un-redacted version is disclosed, that would both violate the law in defamation cases against introducing evidence of other alleged conduct not sued over, and would significantly and prejudicially widen this litigation.
- [45] I am unable to resolve this aspect of A.B.'s application without reviewing both a redacted and an unredacted version of the Boyd report. I therefore direct that the plaintiff forthwith provide both a redacted and an unredacted version of the Boyd report in a sealed envelope to the Vancouver Registry of this court, marked for my attention only. Once I have had the opportunity to review the two versions, I will advise counsel, through the Registry of my disposition of this aspect of A.B.'s application.
- (c) Any and all documents relating to the scope of the grievances pursued by the UBC Faculty Association
- [46] In the plaintiff's cross-examination on his affidavits, he could not recall whether the scope of the grievance included the issue of whether he did or did not sexually harass A.B. during the period of October 2010 to the spring of 2011.
- [47] A.B. has raised a defence pursuant to the BC Labour Relations Code and the decision in *Weber v. Ontario Hydro*, 1995 CanLI1108 (SCC), [1995] 2 S.C.R. 929 that the labour union regime has sole jurisdiction over the plaintiff's claims, and seeks production of any and all documents relating to the scope of the grievances pursued by the UBC Faculty Association on behalf of the plaintiff, in support of this assertion.
- [48] A.B. contends that the requested documents are relevant to her Weber defence, as well as qualified privilege; absolute privilege; responsible communication on a matter of public interest; and Wigmore privilege.
- [49] The plaintiff argues that the two grievance letters by the Faculty Association regarding him are already in evidence and that he has been cross-examined on them. He contends that going further on a matter which is not a defamation claim against A.B., but a grievance against UBC over the collective agreement is not justified under the limited discretion to order documents and scope of the issues on the PPPA.

- [50] The plaintiff contends that his defamation action is about the publications by A.B. and the other defendants of these defamations, whereas the grievance, as shown by the grievance letters and by definition, is about a breach of the collective agreement by UBC in its handling of the matter, not about any publication by A.B. or any other defendants. Further, the generalized statement that the documents are relevant to a shopping list of defences does not survive scrutiny on any one of them.
- [51] As I have already noted, the plaintiff asserts that he has not made any defamation claim over alleged harassment. He says that his claim is confined to the statements that he committed rape, sexual assault and physical assault.
- [52] I find that a "dive" into the grievance process beyond the two grievance letters already produced would be one deeper than that contemplated in Pointes and dismiss that part of A.B.'s application.
- (d) Any and all documentation relating to the Plaintiff's termination by UBC
- [53] At para. 3 of his affidavit of June 18, 2019, the plaintiff affirmed that:
- ... my career as a novelist and professor abruptly ended when defamations herein began, leading to national media stories in November and December 2015. I remain unable to return to those careers as the defamations continue to this day.
- [54] At paras. 22 to 29 of that affidavit, he alleged the particular losses suffered as a result of the defamations at issue in this litigation.
- [55] The plaintiff confirmed that he received a termination letter from UBC on or about June 22, 2016 which he maintains referenced a record of misconduct that resulted in an irreparable breach of trust placed on the faculty members by UBC and students and the general public.
- [56] A.B. contends that in light of these assertions, documentation relating to the plaintiff's termination by UBC, including the reasons therefore, are relevant and producible.
- [57] The plaintiff says that the document releasing UBC and others has already been produced to all parties, and need not be addressed further.
- [58] The plaintiff argues that he has no written opening and closing statements for the arbitration, nor does he recall there being any transcript of the arbitration.
- [59] As with A.B.'s application for documents relating to the scope of the grievances pursued by the UBC Faculty Association, I find that A.B.'s application for further documentation of the plaintiff's termination to be a "deeper dive" into the plaintiff's termination than that contemplated in Pointes, and dismiss that part of her application.
- (e) Any and all written communications to the Globe and Mail, the National Post, and the Walrus by the Plaintiff

- [60] A.B. contends that these documents are relevant to the question of whether litigation is being used to unduly limit expression, and are producible.
- [61] At the plaintiff's cross-examination, he deposed, "I've never taken any steps to correct any media about me", except for a conversation with respect to a Zoe Whittall article published in The Walrus, and to Marsha Lederman and the public editor at the Globe and Mail regarding articles that they published.
- [62] The plaintiff says that any written communication to three media outlets about any concerns he had regarding any articles, is irrelevant or insufficiently relevant under the test set out above.
- [63] The plaintiff contends that whether he complained about any publications is irrelevant to the question of whether the different publications sued over are actionable.
- [64] He contends that the proposition that a complaint or not over different publications saying a different collection of things about him constitutes evidence going to the litigation purpose of this action has no logical basis.
- [65] I agree, and dismiss this part of A.B.'s application.

(iv) The Professors' Application

- [66] The plaintiff's claim against the Professors alleges that:
- (a) As against Professor Maillard, that he on or about November 13, 2015 spoke to unspecified colleagues in the Program that the Plaintiff "raped A.B.", "sexually assaulted A.B.", and "physically assaulted A.B". The Plaintiff refers to this allegation as the "Maillard Defamation 1" (para. 19 of Part 1 of the Amended Notice of Civil Claim);
 - (b) As against the Professors, for words allegedly spoken at the November 15, 2015 Meeting (the "Faculty Meeting").
 - (c) As against the Professors, that they made defamatory comments to the Defendant Rooney. In particular:
 - (i) As against Professor Lyon, that she repeated Maillard Defamation 1 to the Defendant Rooney "and others known to her" between November 12 and 18, 2015 (para. 31 of Part 1 of the Amended Notice of Civil Claim); and
 - (ii) As against Professor Maillard, that he repeated Maillard Defamation 1 to the Defendant Rooney "and others known to him" between November 12 and 18, 2015 (para. 22 of Part 1 of the Amended Notice of Civil Claim).
- [67] In addition, Professor Maillard is alleged to have defamed the plaintiff by publishing the following brief statements:

- (a) a Twitter post on February 11, 2018 stating "The original [Walrus Article] read: 'While Galloway has claimed he had a consensual affair with A.B. at UBC, she has stated her assault accusations were not about an affair after all.' The fact that should not have been removed. Shame on you Walrus" (para. 23 of Part 1 of the Amended Notice of Civil Claim and paragraph 58-59 of the Response to Amended Notice of Civil Claim) (the "2018 Twitter Post");
- (b) an essay titled "Burn" in September 2018 stating "I have received express permission from the Main Complainant to disclose that she has told me her story. I believe her" (para. 24 of Part 1 of the Amended Notice Civil Claim) (the "Burn Essay"); and
- (c) a Twitter post on December 12, 2016 stating "The allegations that were investigated... included that Mr. Galloway... sexually assaulted MC" (para. 25 of Part 1 of the Amended Notice of Civil Claim) (the "2016 Twitter Post").

[68] The basis upon which the Professors seek disclosure of the documents was described by their counsel in the following manner:

- 14. The Plaintiff gave evidence at cross-examination as to the reasons provided in the Termination Letter for the termination for cause. The Plaintiff gave evidence that the Termination Letter referenced: (a) a finding in the Boyd Report that the Plaintiff had engaged in sexual harassment of AB (Q: 190); (2) an inappropriate sexual relationship with another student that lead to him having to take Equity Training (Q: 191; Q38-46; Q184); and, (3) and some reference to his current wife, Katie Wagner, and the Plaintiff's violation of the conflict of interest policy as a result of the Plaintiff not disclosing that they were in a relationship (Q: 192).
- 15. The Plaintiff further gave evidence that although a second grievance was commenced alleging that his termination constituted excessive discipline, and disputing that he engaged in gross misconduct, that the claims for reinstatement and for compensation for loss of income and benefits were later withdrawn. By doing so, he admitted that he was no longer contesting whether the University had grounds for the dismissal.

[69] Specifically, the Professors seek orders that:

- 1. The Plaintiff shall produce within seven (7) days of the pronouncement of this Order the following documents demanded by counsel for the Professors both before and during the cross-examination of the Plaintiff held on January 13, 2021:
 - (a) a copy of the letter sent to the Plaintiff from the University of British Columbia (the "University") on or about June 22, 2016 terminating for cause the Plaintiff's position with the University (the "Termination Letter");
 - (b) with respect to the Professors' estoppel defence, a copy of the Mutual Release entered into by the Plaintiff, the University and the Faculty Association;

- (c) with respect to the Professors' limitation defence, any document, statement, emails, notes of telephone calls (or other discussions) or other information that the Plaintiff had in his possession by October 26, 2016, including but not limited to through the Boyd investigation and report and arbitration proceeding, which in any way refers to or is relevant to the 2015 allegations of slander against the Professors.
- 2. The Plaintiff shall re-attend cross-examination to answer any questions arising with respect to the further documents produced pursuant to paragraph 1;
- 3. The Plaintiff shall re-attend cross-examination to answer questions objected to in relation to whether a third party is providing the Plaintiff with financial support to fund his legal costs and disbursements with respect to the action herein. In particular, the Plaintiff shall:
 - (a) answer questions regarding the following issues:
 - (i) whether there are any third parties who are providing financial support with respect to the Plaintiff's legal costs and disbursement with respect to the action herein;
 - (ii) if so, the identity of the persons or entities who are providing legal support for the action herein, and for each person or entity questions regarding the extent of the support available;
 - (iii) whether a third party has agreed to provide financial support to the Plaintiff to assist the Plaintiff in covering any cost award made against him in favour of any of the defendants in this action.
 - (b) within seven days of the pronouncement of this Order, and in advance of the continuation of the cross-examination of the Plaintiff, the Plaintiff shall produce to the Defendants any agreement, communications or other document which evidences any arrangement in place with respect to financial support being offered to the Plaintiff with respect to the legal costs and disbursements incurred herein.
- [70] The plaintiff says that the release document pertaining to UBC has already been produced, leaving only the termination letter under part 1(a) and the items listed under part 1(c) and 3 of the Professors' application to be dealt with.
 - (a) The Termination Letter
- [71] The Professors have pleaded estoppel with respect to the 2015 allegations of defamation against them. The plaintiff provided evidence at his cross-examination by counsel for the Professors that he had signed a Mutual Release as among UBC, the Faculty Association and the plaintiff. This Release was first demanded February 15, 2019, and then in further follow-up correspondence, and during the cross-examination of the plaintiff.

[72] The plaintiff contends that the termination letter does not address the matters sued upon, namely accusations of rape, sexual assault and physical assault, as those were found by the Boyd investigation, not to have been made out. Thus, he argues that the termination letter raises other matters which are not relevant, pointing out that a defendant in a defamation case must defend the statements sued over, and cannot do so by evidence or allegations of different alleged misconduct.

[73] As I have determined with respect to A.B.'s application for further documentation of the plaintiff's termination, I find that the Professor's application for this information to be an attempt at a "deeper dive" into the plaintiff's termination than that contemplated in Pointes, and dismiss that part of their application.

(b) Other Documents under Part 1(c) of the Professor's Application

[74] Both before and during the cross-examination of the plaintiff, counsel for the Professors demanded production of any document, statement, notes of telephone calls or other discussions the plaintiff had, or emails the plaintiff had in his possession by October 26, 2016, including through the Boyd investigation and report or arbitration proceeding, which in any way refers to or is relevant to the 2015 allegations of slander against the Professors.

[75] The plaintiff argues that the documents sought in item 1(c) are really two categories, the first being the un-redacted Boyd report, and the second aspect of item (c) is a generalized application for any material the plaintiff has or had which bears upon the limitation defence by showing when the plaintiff learned of their November 15, 2015 defamations.

(c) The Boyd Report

[76] As with A.B.'s application for an unredacted copy of this report, I am unable to resolve this aspect of the Professors' application without reviewing an unredacted version of the Boyd report, and make the same direction with respect to the Professors' application for this report as I did with respect to A.B.'s application; that the plaintiff forthwith provide a redacted and an unredacted version of the Boyd report on the terms set out above.

(d) Documents that Relate to the Limitation Defence

[77] The plaintiff contends that the documents sought under this rubric are really in the nature of discovery and, given the breadth of material already in evidence and cross-examinations, are unnecessary for the disposition of the PPPA applications.

[78] The plaintiff points out that counsel for A.B. conducted a thorough examination of him. Counsel questioned him about when he learned of the November 2015 defamations by the Professors, when he learned of the basis for his allegations against them, on the receipt of his grievance letters in December 2015 and July 2016, and when he received the notes of the November 15, 2015 meeting and other Boyd investigation documents, and exhibits attached to those documents.

[79] I have been unable to discern just what is sought under this part of the Professors' application. In paras. 36 -37 above, I set out the plaintiff's evidence on his cross-examination by counsel for A.B., so I will not repeat it here.

[80] As I have already addressed the items generally described as documents, notes, letters or information at para. 38 above, and my conclusions there will apply equally to the Professors' application for these items.

(e) Litigation Funding

[81] The professors also seek orders that the plaintiff answer questions about whether a third party is involved in the plaintiff's funding of this litigation. Privilege has been asserted with respect to all aspects of the plaintiff's retainer arrangements including whether or not those arrangements involve any third party. The plaintiff contends that the information in the orders sought is not relevant or necessary to the issues on the PPPA application, and does not arise from anything in the plaintiff's affidavits he was cross-examined upon.

[82] During the plaintiff's cross-examination by Ms. Whitmore, he expressed that it was difficult for him to spend \$5,000 on legal fees for a cease and desist letter to Ms. Rooney.

[83] At Ms. Laskin's cross-examination of the plaintiff on January 15, 2021, after expressing that he did not care about the fact that Ms. Laskin's client makes around \$10,000 a year, the plaintiff was asked questions with respect to whether he is paying for his case entirely on his own, but those questions were objected to.

[84] The Professors assert that the jurisprudence is clear that requiring a person to reveal whether a third party is paying their legal fees is not a breach of solicitor-client privilege. They rely upon decisions of the Labour Relations Board in *Certain Employees of Starbucks Corporation v. Starbucks Corporation*, 2003 CanLII 62637 (BCLRB), at para. 26; and *Certain Employees of G.I. Harper Scrap Metal and Demolition Ltd. and G.I. Harper Scrap Metal and Demolition Ltd.*, Re, [2004] CarswellBC 4371 (BCLRB), at para. 67.

[85] In the former case, the hearing panel observed:

In our view, the cases cited by *Certain Employees* (e.g., *Nathawad v. Canada* (Minister of National Revenue), [1998] BCJ No. 3283 (SC) and *Stevens v. Canada* (Prime Minister), 1998 CanLII 9075 (FCA), [1998] 4 F.C. 89 (CA)), establish that details of the retainer such as the amount of legal fees paid may be privileged. However, in our view, they do not establish that requiring a person to reveal nothing more than whether a third party is paying their legal fees is a breach of solicitor-client privilege.

[86] The Professors also rely upon *Adams v. Norcen Energy Resources Limited*, 1999 ABQB 840 [Adams], where Chief Justice Moore wrote at para. 5:

As held in *Ontario (Securities Commission) v. Greymac Credit Corp.* (1983), 146 D.L.R. (3d) 73 (Ont. Div. Ct.), solicitor-client privilege applies to communications; facts that exist independent of a communication may be disclosed in certain circumstances. The source of payment of legal fees is such a fact.

- [87] The Professors submit that the issue of whether someone is assisting the plaintiff in paying for this litigation is directly relevant to the issues that this Court is to consider when deciding the Anti-SLAPP applications. In particular, they contend that the Supreme Court of Canada in *Pointes* made clear that a "financial or power imbalance that strongly favours the Plaintiff can be an indicium of a SLAPP suit and should be considered as part of the public interest weighing exercise":
- [78] I outline below some further factors that may bear on the public interest weighing exercise under s. 137.1 (4)(b). I note that in *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60 (Ont. C.A.), at para. 99, Doherty J.A. made reference to recognized "indicia of a SLAPP suit" (emphasis omitted). He recognized four indicia in particular: (1) "a history of the plaintiff using litigation or the threat of litigation to silence critics"; (2) "a financial or power imbalance that strongly favours the plaintiff"; (3) "a punitive or retributory purpose animating the plaintiffs bringing of the claim"; and (4) "minimal or nominal damages suffered by the plaintiff" (para. 99). Doherty J.A. found that where these indicia are present, the weighing exercise favours granting the s. 137.1 motion and dismissing the underlying proceeding. The Court of Appeal for Ontario has since applied these indicia in a number of cases (see, e.g., *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, 144 O.R. (3d) 211 (Ont. C.A.)).
- [88] The Professors say that the details and terms of litigation funding are not covered by solicitor-client privilege, and that in a circumstance that solicitor-client privilege may extend to the terms of a third-party funding agreement, any such privilege is waived, relying upon *Fehr v. Sun Life Assurance Company of Canada*, 2012 ONSC 2715 [Fehr], where, at para. 121, Mr. Justice Perell observed:
- [121] In *Fairview Donut Inc. v. The TDL Group Corp.*, 2012 ONSC 152, in the context of a certification motion, Justice Strathy held that disclosing details of who is funding the class action and on what terms does not involve solicitor-client communications. At 360-363, Justice Strathy stated:
360. The plaintiffs rely on *Descoteaux v. Mierzwinski*, ... which deals with the confidentiality of solicitor and client communications and *Stevens v. Canada (Prime Minister)* ... which dealt with the question of whether a lawyer's billing records are protected by solicitor-client privilege. The issue in this case is not about communications between the plaintiff and their counsel - it is about who is paying for the lawsuit and whether a third party is providing an indemnity for fees. The answer to that question does not require the disclosure of solicitor-client communications.
- [89] At paras. 140-141, Perell J. concluded:

[140] In my opinion, a defendant is affected by a third party funding agreement and fairness demands that any privilege associated with the agreement is waived. This conclusion is also consistent with the practice of disclosing the support of the Class Proceedings Fund to the defendant.

[141] Thus, on grounds of precedent, policy, and fairness, I prefer the Canadian arguments to the Australian position, which leads to the conclusion that that a third party funding agreement is not privileged or if it is privileged, then the privilege is waived.

[90] In *Telus v. Telecommunications Workers Union*, 2008 BCCA 144, the Court of Appeal considered the order of the trial judge that two contemnors pay party and party costs, and nine others pay special costs to the respondents as a result of their conduct during a protracted labour dispute.

[91] At paras. 27 and 28, the Court of Appeal determined that:

27 The mere possibility that members of the union or others might interpret the payment of costs by the TWU as condoning the appellants' contumacious conduct in the face of the TWU's stated position otherwise was not a proper basis for imposing the impugned terms. Such a perception could arise in any case where it is apparent that someone is providing financial assistance to a party involved in litigation, including assistance in paying costs. Apart from situations such as those in which there is an allegation that someone is officiously intermeddling in litigation so as to give rise to the tort of maintenance (as was unsuccessfully alleged, for example, in *Young v. Young*, [1993] 4 S.C.R. 3, varying (1990), 50 B.C.L.R. (2d) 1 (C.A.), rev'g (1999), 24 R.F.L. (3d) 193 (B.C.S.C.)), it is rare for the court to direct inquiries to counsel as to who is funding the litigation, including costs. In most cases, that will be confidential, if not privileged, information of no concern to the court. In this case, the fact that counsel for the TWU disclosed that information in response to questions from the court could not, in our view, give rise to a reasoned perception that the TWU was condoning the appellants' contempt, particularly where, as here, the TWU specifically stated otherwise and the trial judge did not reject its statement. There may be many reasons why a non-party might pay, or assist a party in paying, special costs which have nothing to do with sanctioning that party's reprehensible conduct.

28 Nor are we persuaded that the order was justified on the basis that the majority of the union might not approve of using union funds in payment of the appellants' costs. In our view, that is a matter best left to members of the union and its executive. In any event, there was no evidence of the "majority view" of the union membership. If the membership is unhappy with this or any other action of its executive, we have no doubt it will make its views known. Again, the mere possibility that the majority of the membership might be opposed to the union paying the appellants' costs is not a principled basis for imposing the impugned terms.

[92] The plaintiff points out that the trial level decisions relied upon by the Professors are distinguishable from the circumstances in this case. He says that *Adams* was a case where the plaintiffs had been terminated and there was an issue over their entitlement to share in the pension plan. Thus, the question posed was whether the defendant employers were

funding their defence of the action out of the same pension plan funds. Chief Justice Moore acknowledged that ordering such information can come dangerously close to privilege, in a portion not quoted by the applicant:

- [6] I recognize the concern associated with disclosing matters ancillary to privileged advice, as stated in Sopinka, J., Lederman & Bryant in *The Law of Evidence in Canada* (Markham Ont.: Butterworths, 1992) at p. 642:

"The distinction between 'fact' and 'communication' is often a difficult one and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated."

- [93] The plaintiff contends that Fehr was a class action where third party funding approval arose, and as Madam Justice Griffin pointed out in *Plimmer v. Google, Inc.*, 2013 BCSC 681 at paras. 105-106, Fehr was really a case of waiver upon bringing a motion for funding approval.
- [94] The jurisprudence cautions against diving too deeply into the "balancing" test; whether there is an apparent imbalance in economic power, or any other area. If the court does so, all sides, including the very public "go fund me" campaigns that the plaintiff contends that some of the defendants have used to raise money, would need to be examined.
- [95] I inquired of counsel whether the financial circumstances of each party would be relevant to the resolution of this aspect of the PPPA application, and expressed concern that this would simply open a can of worms, to no apparent benefit.
- [96] I find that the concern over financial advantage or disadvantage arises when a large corporate entity, or perhaps a union, is pitted against a private citizen, but is not intended to create an avenue of inquiry where individual citizens are facing other individual citizens.
- [97] I therefore dismiss the Professors' application to question the plaintiff about whether a third party is involved in the plaintiff's funding of this litigation.

Conclusion

- [98] Ms. Rooney's application to redact certain information from the documents that she has produced is granted.
- [99] The plaintiff's application for the production of unredacted copies of documents produced to him in a redacted form is allowed, in part.
- [100] A.B.'s application for documents including emails, notes, letters or other information in the plaintiff's possession on or before October 26, 2016 is allowed, in part. Her application for an unredacted copy of the Boyd report will be determined after I have had the opportunity to review a redacted and unredacted copy of that report.

- [101] A.B.'s applications for further documents relating to the grievances pursued by the UBC Faculty Association, the plaintiff's termination by UBC, and with respect to communications by the plaintiff to the Globe and Mail, the National Post, and the Walrus are dismissed.
- [102] The Professors' application for documents including emails, notes, letters or other information in the plaintiff's possession on or before October 26, 2016 is allowed, in part. Their application for an unredacted copy of the Boyd report will be determined after I have had the opportunity to review a redacted and unredacted copy of that report.
- [103] The Professors' applications for documents relating to the plaintiff's termination by UBC, and for information pertaining to the funding of the plaintiff's action are dismissed.
- [104] Following the production, if any, of documents including emails, notes, letters or other information in the plaintiff's possession on or before October 26, 2016, and the resolution of the production of further parts of the Boyd report, the Professors and A.B. are at liberty to renew their application for further cross-examination of the plaintiff.

"The Honourable Chief Justice Hinkson"

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