

CANADA / JUDGMENT

Mann v. Elphick

2015 BCSC 1853

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Supreme Court of British Columbia

DECIDED

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2015 BCSC 1853 Mann v. Elphick

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mann v. Elphick,

2015 BCSC 1853

Date: 20151013

Docket: M147697

Registry: Vancouver

Between:

Amarjit Singh Mann

Plaintiff

And

Ryan Elphick and Sunny Lee-Anne Elphick

Defendants

Before: The Honourable Madam Justice Maisonville

Reasons for Judgment

Counsel for the Plaintiff:

T.A. Hakemi

Defendants, Ryan Elphick and Sunny Lee-Anne Elphick:

No appearance

Counsel for the Application Respondent, Great-West Life Assurance Company:

E.B. Lyall, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

September 28, 2015

Place and Date of Judgment:

Vancouver, B.C.

October 13, 2015

introduction

- [1] The plaintiff, Amarjit Singh Mann brings an application that he be granted leave to use certain documents revealed during the course of this litigation which have an implied undertaking that these documents not be used except for the purposes of this litigation.
- [2] Mr. Mann had been in a motor vehicle accident. He had started an action and was, as well, receiving disability benefits from his insurer, Great-West Life Assurance Company ("GWL"). A settlement offer had been made by the Insurance Corporation of British Columbia ("ICBC") on behalf of the defendants. Suddenly, his disability benefits ceased and the settlement offer was withdrawn.
- [3] Mr. Mann sought production of his claim file from the application respondent, GWL. This file was produced to him in a redacted form so as not to disclose the identity of an anonymous third party who had sent certain information to GWL.
- [4] A complaint was filed with the Office of the Information Commissioner for British Columbia ("OIPC") to obtain unredacted copies of those documents. The OIPC confirmed the redactions as an unredacted version of the documents would tend to disclose the third party.
- [5] An order was then granted by Justice Burnyeat on July 31, 2015 that GWL produce to counsel for the plaintiff a copy of their unredacted file pertaining to the plaintiff which contains certain information and documentation GWL had received from an anonymous third party, and which GWL had in turn disclosed to the ICBC (the "GWL documents"). The implied undertaking attaches to these documents.
- [6] The plaintiff seeks leave to use the information for three reasons:
 - i) to commence an action in the British Columbia Supreme Courts against Karinder Badyal and two unknown persons for defamation;
 - ii) to disclose to Pfirst Pharma Inc., Candrug Pharmacy Inc., Annacis Capital Corp., and BMG Merchant Services Inc.;

iii) for use in the mediation arbitration proceedings ("med/arb proceedings") involving the plaintiff and his two partners, Sukhwinder Grewal and Navtej Bains, which is presently proceeding before the Honourable Wallace T. Oppal, Q.C.

Background

- [7] The plaintiff was involved in a motor vehicle accident and is seeking damages from the defendants, Ryan Elphick and Sunny Lee-Anne Elphick in this action.
- [8] On April 3, 2014, an anonymous person using the name "John Alein" emailed an adjuster at GWL in which he claimed to know the plaintiff very well and provided to the adjuster the plaintiff's address, social insurance number, date of birth, and passport number. The allegations were that the plaintiff was a fraud and was defrauding GWL and ICBC.
- [9] GWL is Mr. Mann's insurer and Mr. Mann has made a claim for disability benefits from his insurer following the motor vehicle accident. Upon request by the plaintiff, GWL provided redacted copies of certain documents. The plaintiff claims this email is defamatory.
- [10] The allegations made to GWL also claimed that a company called Candrug Pharmacy Inc. paid the plaintiff a monthly management fee of \$15,000 through Mr. Mann's company, ASM Bio-ventures, and that Mr. Mann subsequently diverted his salary from a company called Calibro to his wife so that he could make a claim for loss of income.
- [11] A second email which the plaintiff claims is defamatory was received by the adjuster at GWL on April 8, 2014, again purporting to be from Mr. Alein. He claimed to be someone close to the plaintiff and stated that the plaintiff was no longer able to work as a pharmacist, not because of the motor vehicle accident, but rather due to a knee injury that he had sustained while playing soccer, and that the disability insurance policy was Mr. Mann's retirement plan and this pre-existing injury had been hidden by Mr. Mann from GWL by providing incomplete medical records with the assistance of his best friend Dr. Singh.
- [12] The third matter that the plaintiff claims to be defamatory is that on June 23, 2014, someone who provided the name "Carm Badyal" with a phone number given to GWL, telephoned Paul Jones, a senior investigator with GWL, in which she indicated that the plaintiff had terminated her employment because she was pregnant. "Carm" also said that she had emails provided by Mr. Mann which detailed communications he had with the physiotherapist and that that physiotherapist had told the plaintiff what to put on the claim forms in order to ensure a claim.
- [13] The plaintiff is claiming this is defamatory because of subsequent email the investigator Paul Jones sent to Shannon Buoncore, a senior claims specialist at GWL on June 23, 2014 in respect of the phone call he received from "Carm Badyal" respecting the plaintiff. In that email, Mr. Jones provided to Ms. Buoncore a synopsis of the phone call he received which included that "she said she has e-mails which she has obtained from a "partner" of the company".

- [14] Apparently, this "partner" has supplied "Carm" with the e-mails which she says contain details communication between the Physio and Mann in which the Physio advises Mann what to put on the claim forms in respect of his health issues. It appears that "Carm" knows Mann. According to "Carm", Mann uses the gym and lifts weights.
- [15] Karminder Badyal is in fact a former employee of Pfirst Pharma Inc. She was terminated in September 2013, and on September 11, 2013, she entered into an confidentiality agreement with Pfirst Pharma Inc. in which she indicated that she would not at any time, directly or indirectly, by any means whatsoever, divulge, furnish, provide access to, or use for any purpose any confidential information she obtained in the course of her employment with Pfirst Pharma Inc. or its related companies, Candrug Pharmacy at Inc., Annacis Capital Corp. and BMG Merchant services Inc.
- [16] The plaintiff here was aware that something was amiss as an earlier offer of settlement had been removed on June 20, 2014. Ms. Buoncore had in fact spoken to ICBC earlier and on June 20, 2014 had forwarded the emails to its adjuster, Nancy Goodman.
- [17] In summary, the plaintiff claims:
- that the GWL documents clearly set out that "John Alein" defamed the plaintiff in the two emails purportedly authored by him;
 - that Karminder Badyal defamed the plaintiff in the phone call;
 - that Karminder Baydal also breached the confidentiality agreement with Pfirst Pharma Inc and its related companies; and
 - that one of the plaintiff's business partners wrongfully provided confidential information to "John Alein" or Ms. Badyal or both.
- [18] The plaintiff also claims that the information from John Alein or Ms. Badyal or both of them could be from one of the business partners who wrongfully provided confidential information to either "John Alein or Ms. Badyal or both" and in so doing, committed:
- i) the tort of breach of confidence;
 - ii) breach of fiduciary duty owed to the plaintiff;
 - iii) the statutory tort created by the Privacy Act, R.S.B.C. 1996, c. 73.
- [19] These documents as noted were provided in a redacted form during the discovery process. Accordingly, except for under limited circumstances, documentary and oral information obtained on discovery cannot be used by the other parties except for the purposes of the litigation, unless or until the scope of the undertaking is varied by a court order - there is an implied undertaking: see *Juman v. Doucette*, 2008 SCC 8 at para. 4:

- [4] Thus the rule is that both documentary and oral information obtained on discovery, including information thought by one of the parties to disclose some sort of criminal conduct, is subject to the implied undertaking. It is not to be used by the other parties except for the purpose of that litigation, unless and until the scope of the undertaking is varied by a court order or other judicial order or a situation of immediate and serious danger emerges.
- [20] Juman sets out the public interest in maintaining the implied undertaking: see paras. 24 and 25:
- [24] In the first place, pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable. Thus, rule 27(22) of the B.C. Rules of Court compels a litigant to answer all relevant questions posed on an examination for discovery. Failure to do so can result in punishment by way of imprisonment or fine pursuant to rules 56(1), 56(4) and 2(5). In some provinces, the rules of practice provide that individuals who are not even parties can be ordered to submit to examination for discovery on issues relevant to a dispute in which they may have no direct interest. It is not uncommon for plaintiff's counsel aggressively to "sue everyone in sight" not with any realistic hope of recovery but to "get discovery". Thus, for the out-of-pocket cost of issuing a statement of claim or other process, the gate is swung open to investigate the private information and perhaps highly confidential documents of the examinee in pursuit of allegations that might in the end be found to be without any merit at all.
- [25] The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.

Accordingly, a judicial order must be obtained to reveal that which is learned and obtained through the discovery process.

- [21] Additionally, in *Juman*, the Supreme Court of Canada set out that a litigant must have some assurance that answers and documents used on the discovery will not be used for collateral purpose. This will achieve the goal of a more candid discovery. It is only if the interests of justice and disclosure outweigh the potential prejudice that would result to the party disclosing the evidence that the court may order that the implied undertaking not to apply. This may be on such terms as are just.
- [22] The onus is on the applicant to satisfy the court on a balance of probabilities that the interest to be advanced through the sought-after disclosure is greater than the values that underpin the rationale for the implied undertaking. The material must also be relevant to the issues in action in which the disclosure sought: see *British Columbia v. Tekavec*, 2012 BCSC 1348 at para. 13.
- [23] At para. 14 of *Tekavec*, Mr. Justice Williams states:
- [14] In *Juman*, at paragraph 34, the Court set out the applicable test, the test that has been formulated in those Canadian jurisdictions which have enacted rules governing applications to alleviate the restrictions of the implied undertaking and which generally reflects the common law position:

If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that [the implied or "deemed" undertaking] does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

[24] At para. 17 Williams J. summarizes that:

- [17] the test will require that the applicant demonstrate that the evidence is relevant and that any prejudice to be suffered by the examinee is clearly outweighed by the legitimate interest in disclosure.

discussion

Issues of prejudice

Prejudice to the plaintiff

- [25] The court will consider if there will be significant prejudice to the plaintiff were there be a failure to lift an implied undertaking, and whether that would cause the preemption of a legitimate tort claim: see *Southpaw Credit Opportunity Master Fund LP v. Asian Coast Development (Canada) Ltd.*, 2012 BCSC 14 at paras. 17 and 20:

- [17] Southpaw submits that the Tort Claim is one in which the parties are the same and there is substantial overlap in the issues. The proceedings can be said to be related. Southpaw argues that the balancing of prejudice favors the petitioners in that there is much greater prejudice to them in pre-empting a meritorious claim than there is in requiring Harbinger to defend the claim on the merits.
- [20] The proposed Tort Claim arises from the same transactions occurring between the same parties. I agree with the submission of Southpaw that there is substantial overlap and that the proceedings are related. Apart from a concern with respect to procedure, ACDL has identified no prejudice that it would suffer if Southpaw is given leave to use its documents as proposed. In my view, there is no strong policy interest against the proposed use of the documents and the balancing of prejudice favors granting Southpaw leave to use the documents as proposed.
- [26] The plaintiff submits that the GWL documents are highly relevant as they relate to the plaintiff's claim in respect of damages for tortious conduct. The plaintiff also wishes to show that his personal information has been wrongfully used by a person close to him. They are relevant to the med/arb proceedings because that proceedings concerns misuse of confidential documents relating to the plaintiff by his business partner. They are also relevant to the Pfirst Pharma Inc., Candrug Pharmacy Inc., Annacis Capital Corp., and BMG Merchant Services Inc. because the GWL documents would allow those companies to determine whether Karminster Baydal has complied with her confidentiality obligations in her contract that was entered into upon her termination from Pfirst Pharma Inc.
- [27] Furthermore, in respect of prejudice, the plaintiff submits that if he is not allowed to use the GWL documents, his claims which he submits have merit, will be preempted. The plaintiff further submits that he will not be able to obtain an order that his confidential papers be returned to him and he will be at risk if the proposed defendants continue to defame him and misuse his confidential papers in the future.

Prejudice to GWL

- [28] The plaintiff submits that if the plaintiff is permitted to use the GWL documents, prejudice to GWL is minimal because there is no suggestion that the plaintiff will obtain a tactical advantage in this action with respect to GWL and GWL has a reduced privacy interest in the GWL documents because those documents must be provided to the plaintiff in any event in accordance with s. 24 of the Personal Information Protection Act, S.B.C. 2000, c. 63 ("PIPA"), which states:

24 (1) An individual may request an organization to correct an error or omission in the personal information that is

- (a) about the individual, and
- (b) under the control of the organization.

- (2) If an organization is satisfied on reasonable grounds that a request made under subsection (1) should be implemented, the organization must
 - (a) correct the personal information as soon as reasonably possible, and
 - (b) send the corrected personal information to each organization to which the personal information was disclosed by the organization during the year before the date the correction was made.
 - (3) If no correction is made under subsection (2), the organization must annotate the personal information under its control with the correction that was requested but not made.
 - (4) When an organization is notified under subsection (2) of a correction of personal information, the organization must correct the personal information under its control.
- [29] GWL received this information in an unsolicited fashion and did not agree to maintain the confidentiality of the information or to preserve the anonymity of the persons who provided that information.
- [30] It is important to note that there is a confidentiality agreement in the med/arb proceedings. That confidentiality agreement in those proceedings as well will prevent the GWL documents from being distributed any further.
- [31] The plaintiff could bring a defamation action against GWL directly and if the plaintiff were to do so, then GWL will be obliged to disclose the GWL documents in that defamation action. The plaintiff could then take steps to add Mr. Alein, Ms. Badyal and the partner who was being an anonymous person as defendants in that action.
- [32] It is submitted on behalf of the plaintiff, however, that this would be an inefficient and expensive process, wasting the court's time leading to essentially the same action proceedings that the plaintiff now seeks leave to use the documents for.
- [33] As an aside I note that there was an issue respecting the lack of service on Ms. Badyal. Ordinarily, by Rule 22-7 an application must be served on every person who may be affected by the order. However, in *Bodnar v. Cash Store Inc.*, 2010 BCSC 660 at para. 50, Justice Griffin noted it is clear that the only party with an interest in the implied undertaking of the documents at issue is the court itself:
- [50] The Cash Store has a preliminary objection. It argues that the plaintiffs have failed to give notice to all parties who might be affected by the application. In this regard, the Cash Store refers to some parties who may be affected in the *Tschritter* Action if the plaintiffs are released from their undertaking and the documents are used in the Alberta proceeding. I do not consider this a valid objection. The only parties with an interest in the implied undertaking in this case are the parties who produced the documents at issue and the court itself. This is because the undertaking is an undertaking to the court, based on policies that serve to promote full discovery by the parties to the action. The party that produced the documents on discovery, the court, and the party seeking leave are the interested parties.

These are the parties present on this application.

See also paras. 21 and 22:

- [21] A party to a civil proceeding is under compulsion to produce information in order to comply with discovery rules. The implied undertaking of confidentiality provides some protection of privacy by assuring the litigant that the information will not be used for a collateral purpose outside the litigation. This encourages the litigant to live up to his or her wide discovery obligations and so indirectly aids in getting at the truth in a civil action.
- [22] For this reason, the undertaking is an undertaking to the court. In return for the benefit of the use of the court's process to obtain information on discovery, the party who receives the information gives a binding undertaking not to use the information for any purpose other than the civil litigation in which it is produced. The seriousness of the undertaking is underscored by the fact that breach of it can give rise to the striking of a party's claim or contempt proceedings: *Juman*, at para. 29.
- [34] GWL takes no position on this application. However, it is pointed out that Mr. Mann seeks to be relieved from the implied undertaking of confidentiality, but in so doing, has disclosed unredacted copies of the documents in this application, thereby breaching the implied undertaking confidentiality.
- [35] Justice Griffin noted this situation in *Bodnar* at para. 41:
- [41] Requiring leave for relief from the implied undertaking to use materials filed in court on an interim application will not restrict the openness of the court. The public will have access to the documents in the court file regardless of the fact that a litigant may be precluded from using them outside the litigation. Public access to documents in the court file will remain the rule. Public access to the court file is subject only to a litigant applying for and meeting the onerous test for sealing the court file from the public: *Orr v. Sojitz Tungsten Resources Inc.*, 2009 BCSC 1635; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522.
- [36] *Orr* was a case in which Justice Kelleher was considering commercial interests but it was noted that any such application engages the open court principle and Charter values of freedom of expression.
- [37] I had been asked to outline a procedure for bringing these applications for relief of an implied undertaking. It is important to note that the application before me was brought in the context of a busy chambers list and counsel had not put their mind to a procedure.

[38] I find that one suggested course of action could be for the party seeking to be relieved of the implied undertaking to seek an order sealing the affidavit materials containing the documents to which the implied undertaking attaches. At that application, notice should be given to all persons who would be effected by the order and argument could be made at that time, balancing the interests at play. Following that ruling, the party would then bring the application to be relieved from the implied undertaking.

Whether the plaintiff should be relieved from his implied undertaking?

[39] In *Ochitwa v. Bomnino*, [1997] A.J. No. 1157(A.B.Q.B.), Justice Coutu for the court quoted with approval at para. 20 from the *Carbone v. De La Rocha* (1993), 13 O.R. (3d) 355 case in which the court noted that the implied undertaking rules was still being developed.

[40] *Ochitwa* also referred to the decision of now Chief Justice MacLachlan at *Kyuquot Logging Ltd. v. British Columbia Forest Products Ltd.*, (1986) 5 B.C.L.R. (2d) 1 (C.A.), where the court held that the party obtaining discovery could use the documents in similar litigation. However, in *Hunt v. and Atlas Turner Inc.*, [1995] 5 W.W.R. 518 (B.C.C.A.), the BC Court of Appeal overruled *Kyuquot Logging Ltd.*, holding that the party obtaining discovery of documents must first obtain the court's leave to use the documents other than in the proceeding for which they were produced.

[41] Further in *Ochitwa*, paras. 23 and 24, Coutu J. held:

[23] *Hunt v. T & N plc* [1995] 5 W.W.R. 518 the B.C. (C.A.) held that there was an implied undertaking rule in B.C., overruling its previous decision in *Kyuguot Logging v. B.C. Forest Products Ltd.* In *Hunt* the court held that the party obtaining discovery of documents must obtain the court's leave to use the documents other than in the proceedings in which they were produced.

[24] When the B.C. Court of Appeal in the *Kyuquot* decision held that there was no implied undertaking it commented under what circumstance a court would grant an order limiting the use of discovery. At page 505 Justice McLachlin stated:

"(3) The onus is on the person seeking to limit the use of discovery to apply to court for an order so stating or to obtain an undertaking to the same effect from the person to whom the discovery is made. This applies both to oral and documentary discovery. Such an order might be justified by a wide variety of circumstances, including avoidance of publication of trade secrets or sensitive personal information and protection of the public's interest in a fair trial. In each case, the judge must balance the factors favouring disclosure against those favouring keeping the discovery in question confidential. The order should be tailored to achieve the fairest balance between the competing interests in the particular circumstances of the case. An order will generally not be granted in the following cases: (1) to prevent the use of discovery in related actions; (2) cases where the public interest requires disclosure; (3) cases where the information discloses wrongdoing in the nature of fraud." [Emphasis added]

- [42] Ultimately, the court held in *Ochitwa* at para. 34 that it was within the court's inherent jurisdiction of controlling its own practices that it could order that an implied undertaking with respect to a document or other evidence be removed in whole or in part: see also *Ed Miller Sales and Rentals Ltd. v. Caterpillar Tractor Co.*, (1986), 43 Alta. L.R. (2d) 299.
- [43] In *Ochitwa*, the court granted relief to the plaintiff for the following reasons set out in para. 45:
- [45] I grant relief to the Plaintiff from the implied undertaking for the following reasons:
1. In this case, the Bombino's are third parties and one of the policy reasons for the implied undertaking rule, i.e. the rule against self-incrimination, would not be applicable to the Bombino's. This is not to say that there should be a rigid rule that the implied undertaking rule is not applicable to third parties. Rather, it is a consideration which I take into account in deciding whether relief should be granted from the implied undertaking rule.
 2. The proceedings against the Bombino's are connected with the proceedings in which the disclosure was made. The proceedings involve similar parties and issues. The Plaintiff could have sued Alberta Blue Cross for wrongful dismissal and the Bombinos for defamation in the same action if the identity of the Bombino's was known earlier. Alternatively, if the Plaintiff had not settled with Blue Cross the Plaintiff could have applied to add the Bombino's into the action once their identity was known, as was done in the *B.E. Chandler Co. Ltd.* case. The fact that Blue Cross chose not to disclose who had lodged the complaint without court compulsion should not prevent the Plaintiff from seeking justice.
 3. The Court should grant relief from the undertaking on the basis of the test that it should tolerate some injustice to the discovered party if it is outweighed by a greater injustice to the discovering party if she cannot make use of the discovered documents. *B.E. Chandler Co. Ltd.*, *supra*. In this case because Alberta Blue Cross has already settled its action it cannot show substantial prejudice. On the other hand, if the Plaintiff cannot use the documents, she suffers the deprivation of being unable to advance a case which may (or may not) have merit.
 4. The public interest favors disclosure as the Defendants, if they have defamed the Plaintiff, should not be permitted to hide their defamation behind the protection of the implied undertaking rule. A rule set up to protect the administration of justice should not be permitted to be used to subvert the ends of justice and prevent those defamed from seeking justice.
 5. The Plaintiff did not 'discover' a cause of action from documents produced. The Plaintiff was aware a complaint was made and that documents existed as the Plaintiff's dismissal letter and the Defendants' defence raised this information. The Plaintiff only discovered the name of the complainant through the discovery process.

6. Confidentiality of the identity of Blue Cross informants is not mandated by any public interest. *G.(P.I.) v. Brandt B.C.* Supreme Court May 27, 1994, 25 C.P.C. (3d) page 383.
7. The Plaintiff could have obtained the information by other means. The Plaintiff alleges that the information was not published solely to Alberta Blue Cross but was discussed with Mr. Brauner, an acquaintance of the Bombinos and the co-defendant and perhaps other neighbours.
- [44] In the case at bar, similarly, the proceedings are connected in the manner in which the disclosure was made. Additionally, that the court should tolerate some injustice to the discovered party if it is outweighed by a greater injustice to the discovering party who would be unable to use the documents and here, the plaintiff would be deprived and unable to advance a case, which may or may not have merit. As in *Ochitwa*, there is the issue of defamation and the public interest would favour disclosure as the defamer should not be permitted to hide behind the protection of an implied undertaking rule. Confidentiality here is not mandated by any public interest. As noted earlier, the documents could have been obtained by other means.
- [45] I find in the circumstances of this case, given the potential of prejudice to the plaintiff, that he should be relieved from his implied undertaking in respect of the documents that were given unsolicited to GWL.
- [46] The plaintiff, accordingly, is granted leave to use the GWL documents for the three reasons as outlined earlier:
- i) to commence an action in the British Columbia Supreme Courts against Karminder Badyal and two unknown persons;
 - ii) to disclose the information to Pfirst Pharma Inc., Candrug Pharmacy Inc., Annacis Capital Corp., and BMG Merchant Services Inc.;
 - iii) for use in the mediation arbitration proceedings involving the plaintiff and his two partners, Sukhwinder Grewal and Navtej Bains, which is presently proceeding before the Honourable Wallace T. Oppal, Q.C.

"Maisonville J."

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