QB File No. CI 12-01-79879

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

MARTIN GREEN,

plaintiff,

- and -

HIEP TRAM, ARLENE SKULL, DEB WOLOSHYN, WALLY STEWART, JOHN ANCHAN, AND THE UNIVERSITY OF WINNIPEG.

defendants.

BRIEF of MARTIN GREEN

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Brief of the Plaintiff

On the Motion for Exclusion of Parties

REASONS FOR THE MOTION

1. In the present litigation, the plaintiff is making two claims: first, that the defendants took concerted and coordinated actions which brought him to misfortune; and second, that those actions were motivated by malice. These are the elements of an illegal conspiracy which the plaintiff must establish. While there may be situations where acts of a conspiratorial nature can be proven from documentary evidence, it is more often the case that those actions are taken behind closed doors, without independent witnesses and can therefore only be inferred by circumstantial evidence and discrepancies in direct testimony. It is natural for the defendants to deny any actions for which there is not independent proof, and the plaintiff faces a difficult challenge in overcoming such denials. The challenge is even more difficult when it comes to the

question of malice. While the plaintiff must argue that there is no reasonable explanation for the actions of the defendants other than malice, the defendants are entitled to argue, even in the face of the most suspicious circumstances, that despite outward appearances their hearts were pure, and their actions, in the present case, were motivated only for sincere concern over the welfare of the students for whom they were responsible.

2. In the present case, the defendants will be relying on a narrative of events which portrays the plaintiff as manifestly unfit for the teaching profession, and in support of that narrative they will rely on the claim that the plaintiff's failings were observed and identified by numerous independent witnesses. This narrative is clearly established in the Report of the Registrar of January 20th 2012 listing the reasons for the plaintiff's expulsion (Item 13-INBOX(p) from the plaintiff's Affidavit of Documents) and supported by the pleadings of both groups of defendants (para. 25, U of W et al and paras. 10b and 11d, Tram and Skull).

3. The plaintiff, on the other hand, will argue that this body of evidence was constructed falsely and maliciously, and will use the discovery process to attempt to expose inconsistencies which will raise doubt about the veracity of the defendants' narrative. As an example, the plaintiff will attempt to establish exactly when the two groups of defendants first communicated their concerns (about the plaintiff) with each other: an earlier date supporting the plaintiff's narrative, and a later date the defendants'. If the defendants are being truthful, their stories ought to line up whether or not they are present for the examinations of their co-defendants. They will therefore suffer no prejudice if the present motion is allowed. But if they are attempting to conceal their conspiratorial communications, their task will be much simplified if they are present to hear both the plaintiff's line of questioning and the responses of their co-defendants. Given these circumstances, the plaintiff's right to effective discovery will be severely compromised if the present motion is denied.

4. Does the plaintiff have any cogent evidence to establish the likelihood that the defendants would be inclined to tailor their testimony? Indeed, the plaintiff intends

introduce documentary evidence which will clearly demonstrate the propensity on the part of the defendants to mold their narrative so as to effect the maximum prejudice against the plaintiff. As one example, the plaintiff would cite Item 54 from his Affidavit of Documents, the FIPPA Correspondence containing the diaries of the defendant TRAM and the communications of the defendant SKULL and WOLOSHYN. Where TRAM reports to SKULL that the plaintiff “tapped a student on the shoulder”, SKULL subsequently reports to WOLOSHYN that the plaintiff “grabbed a student by the shoulder”. This example clearly illustrates the willingness of the defendants to adjust the narrative to suit their purposes.

5. Even in making the present argument, the plaintiff is forced to relinquish the element of surprise, to which he would otherwise be entitled, by revealing at least two avenues of questioning that he intends to pursue on discovery. It is to be expected that having been so forewarned, the defendants will take the opportunity to harmonize their testimony, at least on these particular questions, in advance of their examinations. It is the plaintiff’s contention that just as it would be unfair to require him at this time to provide additional examples of the way in which he plans to challenge the defendants’ narrative, it would be manifestly unfair to grant the defendants the further advantage of being present to hear the testimony of their co-defendants. The plaintiff is here relying on the hope that no matter how much advance preparation the defendants are allowed in harmonizing their testimony, they will ultimately be brought down by the principle best expressed in the old adage:

“Oh, what a tangled web we weave
When first we practise to deceive.”

6. The plaintiff argues that the rights of the defendants will not be unduly compromised by an order of exclusion because:

a) The defendants have a shared interest in maintaining a common narrative of the events in dispute;
b) The examinations of the various co-defendants are anticipated to cover verbal communications between those defandants of which there is no written record;

c) Much of the evidence necessary to support the claim of conspiracy can only be obtained through verbal evidence disclosing the substance of those communications; and,
d) In any event the co-defendants will have ample opportunity to confer with each other and counsel before and after the completion of examinations.

7. The plaintiff claims that in evaluating the commonality of interest among the defendants SKULL and TRAM he is entitled to draw inference from the fact that they are represented by the same counsel.

8. The plaintiff claims that in evaluating the commonality of interest among the defendants WOLOSHYN, ANCHAN and STEWART he is entitled to draw inference from the fact that they are represented by the same counsel.

9. The plaintiff claims that in evaluating the commonality of interest between the two groups of co-defendants represented by separate counsel, he is entitled to draw inference from the broad agreement with resepect to the overall narrative of events as expressed in the respective Statements of Defence of the two groups, in contrast to the alternate narrative as expressed in the plaintiff's Statement of Claim.

10. The plaintiff concludes that since the co-defendants have disclosed no adverse interests amongst themselves, there is no need for them to attend each others' discovery.

CASE LAW SUPPORTING THE MOTION

9. A review of available case law suggests that while exclusion of co-parties from examination for discovery is the exception, it is by no means unheard of. The question is considered in a number of cases which we have listed in our Notice of Motion. In these cases, a number issues are identified which ought to be considered regarding applications of this type. On all of these issues there is a spectrum of opinion available in the case law; however, it may be observed that in general:

1. The right of parties to be present at all stages of a proceeding is not absolute

but merely *prima facie*, and must be weighed against the examining party's right to attempt to obtain admissions that are helpful to his cause. The weighing of these conflicting rights may vary depending on which stage (discovery or trial) is being considered.

2. The onus is on the applicant to show that the putative prejudice to his legitimate interests is greater than the prejudice to the rights of the parties he seeks to exclude.

3. Factors which would tend to support a motion for exclusion include whether the credibility of the respondents will be a major factor in deciding the action, and whether there is a reasonable apprehension that the respondents may take advantage of the opportunity to harmonize and tailor their evidence if not excluded from each others' examinations.

4. Factors which would lessen the prejudice suffered by the excluded parties include the degree of commonality of interest among those parties, and the extent to which the examination of those parties would cover similar or identical ground.

10. The greatest divergence of opinion among cited authorities seems to center on the extent to which the applicant must go in order to establish that issues of credibility and reasonable apprehension are sufficiently present. A thorough analysis of this question Is found in LAMBERT V LONGMORE, with the majority (BERGER) holding the applicant to a more stringent burden, and FRASER arguing in dissent for a lesser burden. I have not enclosed a copy of that case, but instead I am attaching a copy of DIGNAZIO V WEIZMANN (1), wherein the Master COOPER extensively quotes the opinions of both sides in LAMBERT, and at the same time adds in his own commentary.

11. Most significant is the divergence of opinion on the need to establish likelihood of tailoring. BERGER holds that the "reasonable apprehension" of tailoring ought to be supported by "cogent evidence" (para. 30), while FRASER finds this requirement unduly burdensome (para. 35). Master COOPER clearly leans towards FRASER's more liberal

interpretation (para. 37).

12. It is interesting that despite the clear sympathy towards the applicant in the matter of establishing reasonable apprehension, COOPER nevertheless denies the sought-after relief on the grounds that the issue of credibility was not sufficiently established. And in 290933 MANITOBA LTD V 616768 SASKATCHEWAN (2), the same COOPER again finds that the applicants fail to sufficiently establish credibility as an issue. I finally enclose the case of CHALMERS V CHALMERS ESTATE (3) to show that the granting of an exclusionary order, while out of the ordinary, is by no means unheard of.

13. The plaintiff intends to argue that in the present case, he meets all the grounds necessary to establish the case for exclusion, even the more onerous threshold of BERGER. A the same time he argues that he ought to be held to the lesser threshold argued by FRASER.

14. The plaintiff concludes that given the circumstances in the present action, the Court ought to use its discretion, as established in CHALMERS, to order the exclusion of individual co-defendants from each others' examinations.

IMPLEMENTATION OF THE MOTION

14. The plaintiff requests that if the court agrees to the present motion, it will further instruct the defendants that they ought not to communicate with each other, either directly or through the intermediary of counsel, any information revealing the subject matter of the examinations between the commencement of the examination of the first co-defendant and the completion of the examination of the last co-defendant.

15. The plaintiff requests further requests that the Court establish fair and appropriate time limits for the completion of the examinations so that the effectiveness of the exclusion order is not compromised by undue delays.

15. The plaintiff seeks to apply the order for exclusion only upon the individual co-defendants, and not upon the examination of the University of Winnipeg.