# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kennedy v. Snowwater Heli-Skiing Inc.*, 2024 BCSC 1626

Date: 20240904
Docket: S20960
Registry: Nelson

Between:

**Jeffrey Daniel Kennedy**

Plaintiff

And:

**Snowwater Heli-Skiing Inc. and Patric William Maloney**

Defendants

Before: The Honourable Madam Justice Lyster

## Reasons for Judgment

| | |
|---|---|
| Counsel for Plaintiff: | D. Crossley |
| Counsel for Defendants: | J. Gelber |
| Place and Date of Trial/Hearing: | Rossland, B.C.<br>June 27, 2024 |
| Place and Date of Judgment: | Nelson, B.C.<br>September 4, 2024 |

## Introduction

[1] This decision addresses two cross-applications arising out of the wrongful dismissal action filed by Jeffrey Kennedy against Snowwater Heli-Skiing Inc. (“Snowwater”) and Patric Maloney, a principal of Snowwater. In his amended notice of civil claim, Mr. Kennedy pleads that he was fired without cause and that the defendants defamed him by alleging that he had fabricated a story about Mr. Maloney having sexual relations with two female employees of Snowwater.

[2] Mr. Kennedy, by application filed May 28, 2024, seeks two orders. First, he applies for leave to further amend his amended notice of civil claim to provide further particulars of the alleged defamation. Second, he seeks disclosure of a long list of documents and information requested at examinations for discovery.

[3] The defendants, by application filed June 13, 2024, also seek two orders. First, they apply to strike the parts of the amended notice of civil claim and, relatedly, they object to Mr. Kennedy being given leave to file the proposed further amended notice of civil claim, with respect to defamation. Second, they seek an order for security for costs.

## Factual Background

[4] These applications arise within a fraught factual context. In reviewing the factual background I am not making any findings of fact.

[5] Mr. Kennedy was employed by Snowwater. Snowwater operates a backcountry ski lodge and provides lodging and backcountry skiing experiences to its clients. Mr. Maloney is one of the owners and principals of Snowwater. Mr. Maloney says that he formed this company with his business partner over 25 years ago under a predecessor name. Maria Grant is Mr. Maloney's spouse and is also an owner and principal of Snowwater. Valhalla Powdercats ("Valhalla") was an asset division of Snowwater which Snowwater was in the process of selling during the time that Mr. Kennedy was employed at Snowwater.

[6] Mr. Kennedy began working for Snowwater in or about 2017. The parties variously describe his position as dispatcher, bookings coordinator and office manager.

[7] Snowwater terminated Mr. Kennedy's employment on January 16, 2019. The defendants say that they did so due to his insubordination and disrespectful conduct, alleging that he participated in trying to undermine the authority of management and turn staff loyalty against management. More specifically, the defendants say that, among other things, Mr. Kennedy fabricated a story that Mr. Maloney had sexual relations with two female employees at the same time. I will refer at times to the allegedly fabricated story as "the rumour".

[8] Mr. Maloney sent an email to Mr. Kennedy, copied to Ms. Grant, Alexandra Steele, Snowwater's financial administrator, and Benjamin Whitton, Snowwater's general manager on January 16, 2019, advising Mr. Kennedy that his employment was terminated (the "Email"). The Email reads as follows:

> Jeff,
>
> Please accept this [as] written notice of [your] employment with Snowwater Heli Skiing Inc.
>
> Although we believe we have grounds for rightful dismissal without compensation we have not chosen this route.
>
> For your role in perpetuating an unfound and untrue rumour and creating a negative work environment. Our lawyer is preparing a cease and assist order that will be name you and Callum regarding this defamation of character and blatant disregard for the company's well being.

> Your final pay cheque and 2 weeks legal compensation for time worked with the company will be forwarded to you by the end of today.
>
> [Yours] truly,
>
> **Patric Maloney**
> President

[9] The "Callum" referred to in the Email was Callum Rafferty, another Snowwater employee who was fired on or about January 1, 2019.

[10] Mr. Kennedy alleges that the Email was libellous. He further alleges that Mr. Maloney slandered him in various other conversations, including with potential employers, such as Simon Hanbury of Baldface Lodge. The defendants deny defaming Mr. Kennedy, maintaining that all communications relating to Mr. Kennedy and his termination were true, and further that they were made upon occasions of qualified privilege.

[11] The defendants allege, in addition to the reasons they fired Mr. Kennedy in the first place, that they have learned of other misconduct on his part constituting after-acquired cause. As set out in Mr. Maloney's affidavit, some of the alleged after-acquired cause was learned after Mr. Kennedy's termination and some was learned during his examination for discovery. In summary, the alleged after-acquired cause includes: Mr. Kennedy stealing sensitive Snowwater documents that he listed on his list of documents; Mr. Kennedy admitting at his examination for discovery that he trafficked cocaine; and Mr. Kennedy colluding with other employees and ex-employees in a variety of ways intended to undermine management authority.

## Relevant Procedural History

[12] Mr. Kennedy filed the original notice of civil claim on June 28, 2019. The defendants filed their response to civil claim on July 23, 2019.

[13] On January 13, 2020, Mr. Kennedy delivered his list of documents to the defendants.

[14] On February 5, 2020, the defendants delivered their list of documents. It contained six documents.

[15] On April 9, 2020, Mr. Kennedy delivered a demand letter to the defendants, requesting additional documents or categories of documents. The defendants have not provided any documents to date in response.

[16] On September 10, 2020, the plaintiff conducted an examination for discovery of Mr. Maloney, and an examination of Ms. Grant as representative of Snowwater. On September 11, 2020, the defendants conducted an examination for discovery of Mr. Kennedy.

[17] On March 9, 2021, Mr. Kennedy requested responses to information and document requests made during the defendants' examinations for discovery.

[18] On March 15, 2021, Mr. Kennedy filed his amended notice of civil claim. The amendments included pleading implied terms of the employment contract related to reasonable notice and good faith, as well as some details of the alleged defamation. They also included pleading that Mr. Maloney committed independent torts by inducing Snowwater to breach the contract of employment, interfering with contractual relations between Mr. Kennedy and Snowwater, and defaming Mr. Kennedy.

[19] Mr. Kennedy submits that the first set of amendments to his notice of civil claim were made in response to information learned at Mr. Maloney's examination for discovery about aspects of the defamation claim.

[20] On April 6, 2021, the defendants sent a letter to Mr. Kennedy, dated March 29, 2021, requesting reasons why the additional documents sought should be disclosed, and asserting that the amended notice of civil claim failed to conform with Rule 3-7(21) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, as it failed to specify the nature of the defamation alleged, and the specific words used. The defendants asked that these defects be remedied and stated that they would provide an amended response to civil claim once that had occurred.

[21] On April 29, 2021, Mr. Kennedy replied, explaining why, in his counsel's view, it was not necessary to plead the exact words in the circumstances of this case.

[22] On June 29, 2021, the defendants requested additional documents or classes of documents.

[23] On September 2, 2022, Mr. Kennedy answered the defendants' June 29, 2021 requests and delivered an amended list of documents.

[24] On July 14, 2023, Mr. Kennedy responded to the defendants' March 29, 2021 letter, stating why the documents and information requested are relevant and should be disclosed. In a covering email, Mr. Kennedy asked whether the defendants would be providing the documents requested or would continue to object, necessitating an application.

[25] On August 10, 2023, the defendants indicated they were working on the outstanding requests for documents and information.

[26] On November 23, 2023, Mr. Kennedy followed up on the outstanding requests. No reply was received.

**Application to strike amended notice of civil claim and application for leave to apply to file further amended notice of civil claim**

[27] Mr. Kennedy seeks leave to file a further amended notice of civil claim. The new amendments include the text of the January 16, 2019 Email from Mr. Maloney, which Mr. Kennedy pleads was libellous. They also include further pleadings with respect to the nature of the defamation alleged, and the damage allegedly caused by that defamation.

[28] The defendants oppose leave being granted to further amend the notice of civil claim. They also apply to strike the amended notice of civil claim. They submit that the defamation claims are bound to fail because the communications in question are obviously covered by qualified privilege and the contents of the communications are true. They submit that the court ought not to grant leave to file amendments

which disclose no reasonable claim, relying on *Shaw Cablesystems Ltd. v. Concord Pacific Group Inc*., 2009 BCSC 203 at para. 8.

[29] There is no dispute about the law applicable to amending a notice of civil claim. Rule 6-1 governs the amendment of pleadings. Mr. Kennedy refers to the decision of the Court of Appeal in *Kwikwetlem First Nation v. British Columbia (Attorney General)*, 2021 BCCA 311 [*Kwikwetlem*] at para. 166 for the applicable principles:

> (a) amendments should be permitted as are necessary to determine the real question in issue between the parties.
>
> …
>
> (b) the court will not give its sanction to amendments which violate the rules that govern pleadings, including the prohibition of pleadings which disclose no reasonable claim. In considering this question, the court will apply the same tests and considerations as applicable on an application to strike claims already pleaded…
>
> (c) a party is not required to adduce evidence in support of a pleading before trial…
>
> (d) on an application to amend the facts alleged are taken as established…
>
> (e) the discretion is to be exercised judicially, in accordance with the evidence adduced and the guidelines of the authorities. Factors to be considered include: the extent of delay, the reasons for delay, any explanation put forward to account for the delay, the degree of prejudice caused by the delay, the extent of the connection between the existing claims and a proposed new cause of action. The over-riding consideration is what is just and convenient….

[30] In the present case, the defendants rely on para. 166(b) of *Kwikwetlem*, submitting that the defamation pleadings in both the amended notice of civil claim and proposed further amended notice of civil claim disclose no reasonable claim. In their response to application, the defendants had also submitted that the amendments sought were statute barred, but they abandoned that argument at hearing.

[31] Ultimately, the issue boils down to whether Mr. Kennedy should be permitted to pursue his defamation claims against the defendants. Mr. Kennedy is not required

to adduce evidence to support his defamation claims at this stage. The facts he has alleged and seeks to allege are to be taken as established.

[32] In support of their position that Mr. Kennedy should not be permitted to pursue his defamation claims, the defendants submit that the Email; the communications with potential employers, in particular Mr. Hanbury of Baldface Lodge; and to the employment insurance adjudicator, were all made on occasions of qualified privilege. They rely on *Cimolai v. Hall*, 2005 BCSC 31 at para. 41, and submit that a reasonable person would have felt compelled by a duty to make the communications in issue. They note that Mr. Kennedy has not alleged malice, which, if proven, would defeat a claim of qualified privilege.

[33] In my view, it is not appropriate for the court, on what amounts to an application to strike, to enter into an analysis of whether the allegedly defamatory communications by Mr. Maloney were true, or whether they were made on an occasion of qualified privilege and, if they were, whether the privilege was defeated by malice. That would require the court to enter into a fact-finding exercise, which the decision in *Kwikwetlem* makes clear is not proper on an application such as this. As stated by MacNaughton J. in *Richter & Associates, Inc. v. 1075 Nelson Development,* 2022 BCSC 592 [*Richter*] at para. 63, a claim will be struck under Rule 9-5(1)(a) only if it is plain and obvious, assuming the facts pleaded in the notice of civil claim to be true, that the pleadings disclose no reasonable cause of action. It may be that the defendants will ultimately be able to establish that one or more of the allegedly defamatory communications in issue were true, or that they were made on an occasion of qualified privilege, and that the communications did not go beyond that occasion, but the court cannot make that determination on the pleadings before me.

[34] The defendants also submit that the defamation pleadings should be struck on the basis that they are brought for an improper or collateral purpose and, therefore, constitute an abuse of process under Rule 9-5(1)(d). The court may

consider the evidence under Rule 9-5(1)(d) to determine if the claim is an abuse of process: *Richter* at para. 64.

[35] In support of their submission that the defamation claims are an abuse of process, the defendants rely on two emails from counsel for Mr. Kennedy. In the first, dated May 9, 2019, Mr. Pearkes wrote to Mr. Gelber, referring to a previous letter, stating “the offer has expired, but the courtesy we extended of communicating in advance of issuing a notice of civil claim was intended to give your client and Mr. Maloney the opportunity to avoid the unseemly airing of this dirty laundry”.

[36] In the second email, dated April 29, 2021, Mr. Pearkes wrote Mr. Gelber about the outstanding requests from the examinations for discovery. He wrote that if the defendants refused to provide the outstanding information, they would need to make an application, and that “by making the application, the sordid story will be entirely on the public record. Please confirm with your clients that they wish that to happen before we march down that path”. Mr. Gelber replied, stating that he would order the transcript from the examination and once he had reviewed it he would respond in detail.

[37] The defendants submit that Mr. Kennedy’s defamation claims are nothing more than an effort to put into the court record the details of Mr. Maloney and Ms. Grant’s sex lives as far back as 2014.

[38] There is no doubt that a substantial amount of “dirty laundry” has been aired in this application process. As I will address below in dealing with Mr. Kennedy’s disclosure requests, some of his requests do stray beyond the realms of relevance into what would appear, to mix my metaphors, to be a fishing expedition into the defendants’ dirty laundry. However, I do not find that the defamation claims themselves are an abuse of process that the court should strike or refuse to permit to proceed. The evidence indicates that Mr. Maloney has accused Mr. Kennedy of spreading falsehoods and rumours. Such accusations would tend to lower Mr. Kennedy’s reputation in the minds of reasonable people. Mr. Maloney has made such comments in the Email to Ms. Grant, Ms. Steele and Mr. Whitten. He has done

so to Mr. Hanbury. It would appear he has also done so to the employment insurance adjudicator. Mr. Maloney may ultimately be able to defend his comments, either on the basis of truth or qualified privilege. But I am not able to come to those conclusions on the basis of the evidence before me on this application.

[39] I will comment further on the defendants' submission that Mr. Kennedy has admitted to the conduct that Mr. Maloney made the allegedly defamatory comments about. They rely on evidence given by Mr. Kennedy at his examination for discovery where he stated that Mr. Rafferty spoke to him about what he had seen and suspected; that it caused him concern for the safety of employees, in particular Heather; that he spoke to Mr. Rafferty about it; and that he went to see if anybody else knew about it and whether what Mr. Rafferty had said was true. From that evidence, it is clear that Mr. Kennedy spoke with Mr. Rafferty and others about what Mr. Rafferty had reported. That may or may not ultimately be shown on a full review of the evidence at trial to constitute spreading falsehoods and rumours. I cannot come to that conclusion on the basis of transcripts from examinations for discovery.

[40] The emails from counsel that the defendants rely upon do not establish that the defamation claims are an abuse of process. It is not uncommon for litigation to lay bare the details of people's private lives. It is also not uncommon for matters to settle because parties would prefer to keep their private lives private. I am not prepared to find that counsel's references to "dirty laundry" and "the sordid story" establish that the defamation claims are brought for an improper or collateral purpose.

[41] As noted by the defendants, Mr. Kennedy does not specifically plead malice. However, the substance of his amended notice of civil claim is such that it is clear that he does assert that any privilege relied upon by the defendants would be defeated by malice. On an application such as this, the court should permit such amendments as are necessary to determine the real question in issue between the parties. That will include in this case permitting Mr. Kennedy to plead malice.

[42] I, therefore, decline to strike the amended notice of civil claim and I grant Mr. Kennedy leave to file the further amended notice of civil claim, including an additional amendment to plead malice.

**Disclosure Requests**

[43] Mr. Kennedy applies for disclosure of eight categories of documentation requested by him in his April 9, 2020 letter. He also applies for an order requiring Ms. Grant to disclose 20 documents, categories of documents, or information, itemized in his March 9, 2021 letter, arising from requests made at her examination for discovery. Similarly, he applies for an order requiring Mr. Maloney to disclose 19 documents, categories of documents, or information, also itemized in his March 9, 2021 letter, and arising from requests made at his examination for discovery.

[44] I shall deal with each request in turn. Some requests have been refined in the course of this application. There is also some overlap and duplication between the requests, which I will identify in the course of my analysis.

[45] Mr. Kennedy is seeking both further discovery of documents and information arising from the defendants' examinations for discovery. The former is governed by Rule 7-1 and the latter by Rule 7-2, as explained by Master Taylor in *Revolution Infrastructure Inc. v. Pacific Substrate Ltd.* 2021 BCSC 888 at paras. 27–42. So far as documents are concerned, the parties are at the second tier of disclosure provided for under Rule 7-1(10)-(14). As explained at para. 31 of *Revolution Infrastructure*, citing *Chen v. Obisidian Advisory Group Inc.*, 2020 BCSC 1482, the test for disclosure at the second tier is wider than under Rule 7-1(1). The test is

> …whether the document or class of documents can reasonably be expected to contain information which may enable the party requiring the document to either advance their own case or damage their opponent's case, or which may fairly lead the requesting party to a train of inquiry in relation to either of those consequences.

[46] Beyond this basic test, Mr. Kennedy submits, relying on *Whitcombe v. Avec Insurance Managers Inc.*, 2011 BCSC 204 at paras. 10–11, that because his reputation is at stake, proportionality should be interpreted to allow the parties wider,

more Peruvian Guano-type disclosure. The defendants, by contrast, relying on *Desgagne v. Yuen*, 2006 BCSC 955 at paras. 34–41, submit that the probative value of some of the disclosure sought is so marginal that the value of its disclosure is outweighed by the defendants' privacy interests. I will refer to these principles as necessary in the course of dealing with the individual requests.

***April 9, 2020 requests***

***1.1 Electronic copies of the contents of Snowwater Heli-Skiing Inc.'s ("Snowwater") FaceBook pages and direct messages (DM), including deleted material, and including all text, GIF's, images and videos***

***1.2 Electronic copies of Mr. Maloney's (Mr. Maloney") FaceBook pages and direct messages (DM), including deleted material, which in any way relate to sexually suggestive activities at the business venues or communications with present and former employees and contract workers of the business, and including all text, GIF's, images and videos***

[47] The defendants have advised that they do not have access to deleted FaceBook material, and Mr. Kennedy no longer seeks disclosure of deleted material. He continues to seek Snowwater's and Mr. Maloney's FaceBook content related to sexually suggestive activity of guests, contractors, employees and others.

[48] In the course of submissions, Mr. Kennedy also conceded that 1.1, as framed, is overbroad and he abandoned that relief. He continues to seek the documents sought in 1.2. In support of the relevance of these documents he relies on paragraphs 8–10 of the response to amended notice of civil claim, in which the defendants plead in response to paragraph 14 of the amended notice of civil claim that Mr. Kennedy engaged in destructive office gossip and disrespectful comments to supervisors and staff and spread falsehoods and rumours to the effect that Mr. Maloney had engaged in discreditable conduct of a sexual nature with female employees. Mr. Kennedy emphasizes that these are broad allegations, and that they referred to falsehoods and rumours in the plural, not a single rumour. He submits the defendants' FaceBook content related to sexually suggestive activity is relevant to the truth of the defendants' broad allegations against Mr. Kennedy. He says that if

there are texts or other electronic messages of a sexual nature to employees it would be relevant to his defence to the allegation that he spread falsehoods and rumours.

[49] In my view, the documents sought at 1.2 are overbroad. The presence or absence of content related to sexually suggestive activity on the defendants' FaceBook pages would not tend to prove or disprove the truth of any question in issue in this action

> ***1.3 Electronic copies of all email correspondence between the defendant Mr. Maloney and any person, including Maria Maloney ("Ms. Grant"), relating to or in connection with alleged or actual extra-marital sexual relations between Mr. Maloney and any person who has been employed by, or provided contract services to, Snowwater or Valhalla Powdercats Inc. (Valhalla) since operations commenced***
>
> ***1.4 Time stamped copies of texts, direct messages on all other social media platforms or chat platforms between Mr. Maloney and any person, including Ms. Grant, relating to or in connection with alleged or actual extra-marital sexual relations between Mr. Maloney and any person who has been employed by, or provided contract services to, Snowwater or Valhalla since operations commenced***

[50] Mr. Kennedy submits email and other electronic correspondence between Mr. Maloney and anyone, including Ms. Grant, relating to Mr. Maloney's alleged or actual extra-marital sexual relations with employees of Snowwater is relevant. In support of this position, he points to Mr. Maloney's affidavit, where he says that Mr. Kennedy pleaded with him to re-hire Mr. Rafferty after he fired him. Mr. Maloney further says that when he refused to do so Mr. Kennedy talked to other staff about Mr. Maloney's sex life, and queried other staff about the private lives of him, Ms. Grant and Ms. Steele. Mr. Maloney says that when he learned about this alleged conduct on Mr. Kennedy's part, he fired him.

[51] Mr. Kennedy also relies upon Mr. Maloney's examination for discovery. Mr. Maloney was questioned about a rumour that he had a threesome with two employees, Tara and Heather, during party night guide training in the winter of 2018.

The gist of Mr. Maloney's testimony was that this was the one rumour that he fired Mr. Kennedy for spreading.

[52] Mr. Kennedy submits that if staff members generally were discussing this rumour, and in particular if Mr. Maloney was discussing it, it is relevant. In particular, he submits that it would be relevant if the rumour about the alleged threesome was in fact true, or even that it was true that Mr. Maloney was engaging in sexual relations with staff more generally, as it would mean that Mr. Kennedy could not have defamed Mr. Maloney by talking about the rumour, as it would be consistent with his behaviour generally.

[53] I accept that documents relating to the alleged threesome and the rumour about it are relevant. I do not accept that documents relating to other sexual activity of Mr. Maloney is relevant. If he engaged in sexual relations with other staff members that would not make it more likely that he engaged in the threesome. Nor would evidence that he engaged in sexual relations with other staff members mean that Mr. Kennedy could not have defamed him by spreading the specific rumour in issue in this case. If such documents were relevant, their probative value would be so marginal that, when considered in relation to the impact of disclosure on the privacy interests of Mr. Maloney and others, I would decline to order their disclosure.

### *1.5 Copies of video, photographic or digital images of employees or contract workers at the Snowwater lodge or other places of business depicting content of a sexual nature, topless women, scantily clad women on the ice bar, mud wrestling and other activities of this nature*

[54] In support of the relevance of this category of documents, Mr. Kennedy relies on paragraph 14 of the amended notice of civil claim, in which he pleads:

> 14. The plaintiff did not defame or circulate false statements about Mr. Maloney. Mr. Maloney defamed the plaintiff and knowingly made false allegations to deflect his own bad behaviour. Snowwater's corporate culture was offensive, out of step with social norms and abusive. The plaintiff attempted throughout his employment to contribute to improving that culture for staff, guests and the success of the business.

[55] Mr. Kennedy submits that evidence of women being degraded is relevant. In this connection, he refers to one of the examples of alleged after-acquired cause referred to by Mr. Maloney in his affidavit, in which Mr. Maloney alleged that Mr. Kennedy coached a fellow employee, Nicole Rock, to write communications that were highly critical of Snowwater. In response to this allegation, Mr. Kennedy exhibited to his affidavit a copy of an email from Ms. Rock to him, in which she asked for his comments on a draft email to Mr. Maloney and Ms. Grant. In the draft email, Ms. Rock made negative comments about Snowwater culture, including stating that how women are treated there is “disgusting”. Mr. Kennedy submits that the culture at Snowwater, and in particular how women are treated there, is relevant, given this allegation of after-acquired cause.

[56] The defendants say that any documents meeting this description have already been produced.

[57] The relevance of documents in the class is limited, and relates solely to the defendants’ allegation of after-acquired cause related to Mr. Kennedy coaching Ms. Rock. Except insofar as documents may throw light on the contents of Ms. Rock’s letter, and Mr. Kennedy’s role in its drafting, I fail to see how documents generally relating to the allegedly offensive corporate culture or Snowwater being out of step with social norms or abusive would tend to advance Mr. Kennedy’s wrongful dismissal cause of action or his defamation cause of action.

> ***1.6 All documentation relating to or arising out of any former employee or contract worker who has ever made an allegation, complaint or raised a concern with respect to inappropriate conduct of a sexual nature in the workplace***
>
> ***1.7 The names and last known contact information for any present or former employee or contract worker who has ever made an allegation, complaint or raised a concern with respect to inappropriate conduct of a sexual nature in the workplace***
>
> ***1.8 Copies of all documents, communications, memoranda, letters, recordings, or other forms of record, physical or electronic, relating to any incident or suspected occurrence of sexual conduct in the workplace***

[58] Mr. Kennedy submits that documents relating to employee allegations of sexual misconduct at Snowwater are relevant, again relying on paragraph 14 of the amended notice of civil claim. He says the documents and related information sought go to whether he could have defamed Mr. Maloney by spreading the threesome rumour and the nature of the workplace environment.

[59] The defendants deny that these documents and related information are relevant to any pleaded claims. I agree with them. This is an action based on Mr. Kennedy's pleas that he was wrongfully dismissed and defamed. It is not a springboard for a general inquiry into Snowwater culture or Mr. Maloney's or other's alleged past misdeeds.

**March 9, 2021 requests**

**Ms. Grant**

***2.1 Provide a screenshot of the Thunderbird folder system***

[60] This request is agreed to by Snowwater.

***2.2 Produce every email in the Thunderbird system that relates to Jeff Kennedy, not only addressed to or from, but any email that relates to him where he is either a recipient, a sender, the subject of the email or referred to in the email***

[61] This request was agreed to by Snowwater in part. Specifically, Snowwater agreed to provide any emails that relate to pleaded issues.

[62] Any emails relating to Mr. Kennedy that do not relate to pleaded issues would be irrelevant. Snowwater is required to disclose any emails relating to Mr. Kennedy that relate to any of the issues pleaded by the parties.

***2.3 Advise as to whether the dabbling with an open marriage was over by the summer of 2015 and, if not, advise of the date it was over***

***2.4 With regard to the Plaintiff's Document 1 (listed document), produce all of the email correspondence relating to Mr. Maloney's long-term affair exchanged between Ms. Grant and her husband,***

***exchanged between her husband and Julia or anyone else from the Snowwater accounts***

[63] Ms. Grant had testified at her examination for discovery about an affair Mr. Maloney had in or about 2014, and their having explored having an open marriage. This related to document #1 on the plaintiff's list of documents, an email from Mr. Maloney to Julia., an employee he had had a relationship with. Mr. Kennedy sought further information about this evidence, and submitted it was relevant to credibility.

[64] I am not persuaded that there is a legal basis for these information requests. Mr. Kennedy could not point to any relevance of this evidence beyond credibility. *Ellis v. Ellis,* 2018 BCSC 510 at para. 33 makes clear that credibility alone is not a basis on which document disclosure will be granted. Mr. Kennedy was not employed by Snowwater until 2017, after the events testified to by Ms. Grant. The previous history of Mr. Maloney's and Ms. Grant's relationship, and their relationships with others, prior to Mr. Kennedy's employment, are not relevant to this action. Any probative value to such evidence would in any event be outweighed by Ms. Grant's and Mr. Maloney's and others' privacy interests.

***2.5 For Ms. Grant to inform herself from her records as to where she was on September 7, 2017***

[65] Ms. Grant testified at her examination for discovery about Mr. Maloney denying having sexual relations with Ms. Steele except while the three of them were together. Document #3 on the plaintiff's list of documents allegedly suggests this was not true and that Mr. Maloney was with Ms. Steele on September 7, 2017. Mr. Kennedy submits that this information is relevant as it goes to credibility.

[66] I am not persuaded there is a legal basis for this information request. Once again, the request appears to be directed solely to credibility on a collateral issue, which is not a basis for document disclosure or further information to be provided. The information sought is not relevant to any matter in issue in this action, and its probative value, if any, would be so marginal that it would be outweighed by Ms. Grant's, Ms. Steele's and Mr. Maloney's privacy interests.

***2.6 Produce a copy of the letter from Dana Powers explaining the reasons why she was quitting***

[67] Ms. Grant testified at examination for discovery about Dana Powers, an employee who quit working for Snowwater. She was questioned about whether Ms. Powers expressed any concerns about the work environment, and denied that Ms. Powers did so. Mr. Kennedy submits that Ms. Powers' resignation letter would indicate whether Ms. Powers had any concerns about the work environment.

[68] In my view, this is little more than a fishing expedition. There is no evidence before the court that Ms. Powers expressed any concerns about the work environment when she quit, and Ms. Grant denied that she did so. There is no evidence as to when Ms. Powers quit. Mr. Kennedy has failed to show that her resignation letter is relevant to any matter in issue in this action.

***2.7 Produce what Ms. Grant received from Nicole Rock and anything the company received in addition to what Ms. Grant received, whether addressed to Mr. Maloney, to Ms. Grant or to another email account, anything that Nicole Rock did in fact send with respect to her quitting***

***2.8 Determine whether or not Ms. Grant sent Ms. Rock an email after receiving her communication with respect to quitting and, if so, produce it along with any follow up communications from Ms. Rock after Ms. Grant's outreach***

***2.9 Advise whether or not Ms. Grant discussed the contents of Nicole's email regarding quitting with anyone in the company other than Mr. Maloney***

***2.10 Inquire of Alex whether or not Ms. Grant discussed Nicole's communication regarding quitting with her***

[69] It will be recalled that Mr. Kennedy disclosed a draft resignation letter from Ms. Rock to Ms. Grant, that Ms. Rock sent to him on January 11, 2019 asking for his feedback. It will further be recalled that Mr. Maloney's evidence is that he learned at Mr. Kennedy's examination for discovery that he had coached Ms. Rock to write communications that were highly critical of Snowwater, and that if he had known

about this prior to terminating Mr. Kennedy's employment, he would have fired him on that basis.

[70] Given that the defendants rely upon Mr. Kennedy's alleged coaching of Ms. Rock as after-acquired cause, I accept that any documents the defendants or Ms. Grant received from Ms. Rock about her resignation are relevant, as are any documents they sent Ms. Rock in reply. I also accept that communications between Ms. Grant, Mr. Maloney and Ms. Steele about Ms. Rock's communications regarding her resignation are relevant, and order Ms. Grant to make the inquiries listed above.

> ***2.11 For Ms. Grant to inform herself as to the date, time and length of the call to Callum in which it is alleged that he initially repeatedly denied, but eventually admitted to, starting the threesome rumour and for Ms. Grant to provide redacted phone bills showing the date, time and the length of the call to Callum's phone number***

[71] Ms. Grant testified at examination for discovery that Callum made up the rumour about the alleged threesome, and that he admitted that he had done so in a phone call with her after he was fired.

[72] I accept that the information and documents requested about Ms. Grant's telephone call with Callum are relevant given the defendants' position that they fired Mr. Kennedy for spreading this rumour. Ms. Grant is to inform herself about the date, time and length of the telephone call, and to disclose the redacted telephone bills requested.

> ***2.12 For Ms. Grant to advise whether Jeremy and Tara, the two sous-chefs, Callum, Heather, Sara, Patric or herself were not present during the mid-December 2018 guide training week***
>
> ***2.13 Advise of the date that the decision was implemented to move Heather to the Smokehouse***

[73] The December 2018 guide training week is when the alleged threesome giving rise to the rumour is alleged to have occurred. Mr. Kennedy seeks information about which employees were not present during that week, and submits that it is relevant to who may have witnessed the events in question.

[74] Heather is one of the two employees who were implicated in the rumour, and Ms. Grant's evidence was that Heather was moved to a different location, the Smokehouse, sometime that winter due to performance concerns. Mr. Kennedy submits that Heather may have been constructively dismissed, because following the rumour she was moved. He submits that this information is relevant to determining the timeline of events.

[75] I accept that information with respect to who was present during the guide training week is relevant, and order Ms. Grant to inform herself about that information. It is speculative whether Heather was constructively dismissed, and in any event whether she was constructively dismissed is not an issue raised on the pleadings. I do not accept that the date Heather was moved to the Smokehouse is relevant to any matter at issue in this action.

> ***2.14 Provide Heather's phone number used to communicate with her when she was an employee and any forwarding address, such as the address to which she was sent her ROE***
>
> ***2.15 Provide Sara Ellis' address to which her ROE was sent, the telephone number Ms. Grant had for her during her employment and any updated information as a result of her re-applying for the subsequent year, any current information***
>
> ***2.16 Provide Al Reid's contact information***

[76] The defendants agree to provide the requested information about Heather, Sara and Al Reid's contact information.

> ***2.17 For Ms. Grant to advise as to which employees she was told were topless and provide their contact information***

[77] Mr. Kennedy is no longer seeking this information.

> ***2.18 Provide Robyn Stack's contact information***

[78] Robyn Stack was employed at Snowwater at the same time as Mr. Kennedy. Ms. Grant testified at her examination for discovery about a thirtieth birthday party at the lodge in which Ms. Stack and some guests were involved with sex toys. She

testified that Mr. Maloney and her met with Ms. Stack about this incident and she did not do it again.

[79] The defendants say they do not have Ms. Stack's contact information. Mr. Kennedy says that they could provide the information they did have at the time she was employed.

[80] While I accept that the defendants could provide whatever contact information they had for Ms. Stack when she left their employment, I fail to see how any evidence she might have about these events would be relevant to any matter in issue in this action. I decline to order the defendants to provide Ms. Stack's contact information.

> ***2.19 Provide all of the late payment particulars for the season in which Mr. Kennedy was terminated***

[81] Ms. Grant testified that Mr. Kennedy failed to take payments on time, and that she brought that to his attention but the problem went uncorrected. The reasons for termination pleaded in the response to amended notice of civil claim include insubordination, failure to follow directions and incompetence.

[82] Given Ms. Grant's evidence and the defendants' pleadings, I accept that documents related to Mr. Kennedy or others failing to take payments on time during the season he was terminated are relevant, and order the defendants to produce same.

> ***2.20 Provide all communications which refer to or relate to Jeff Kennedy, are addressed to or received from or c.c.'ed or b.c.c.'ed to Jeff Kennedy or circumstances relating to his firing, including the alleged rumours, obviously except communications with counsel, between Ms. Grant and anyone, staff, former staff, Mr. Maloney, guests, friends, family. Communications may be in the form of texts, emails, FaceBook direct messages, other social media messages, letters, cards, faxes***

[83] This request substantially overlaps with 2.2. Any such communications relating to Mr. Kennedy that relate to the pleadings in this matter are relevant and must be produced.

***2.20(b) Produce the company's written Human Resources policies***

[84] This request was mistakenly omitted from the notice of application, but was included in the March 9, 2021 letter. Snowwater's Human Resources policies are clearly relevant to this action, and must be produced.

***Mr. Maloney***

***2.21 Provide a contact number for Jesse Mote***

***2.22 Provide the day Mr. Maloney had the first conversation with Jesse with respect to the rumoured threesome***

[85] Mr. Maloney's evidence was that he first heard of the threesome rumour from Jesse Mote. The defendants agree to provide his contact number.

[86] Given that the defendants' position is that they fired Mr. Kennedy for spreading this rumour, the timeline of when, how and from whom Mr. Maloney learned of it is relevant. I order Mr. Maloney to inform himself of what day Mr. Mote told him about the rumour and to provide that information.

***2.23 Produce Mr. Maloney's text message history with Alex relating to what she heard Callum say surrounding the rumoured threesome between Patric, Tara and Heather***

***2.24 For Mr. Maloney to search his photo history for January, late December, 2018, January 2019, and see if he's got a screenshot of Alex's text, referenced in the previous request, and produce it***

[87] Mr. Maloney's testimony at examination for discovery was that Ms. Steele texted him to tell him what Callum had said about the alleged threesome. He also testified that he deleted his texts virtually every day, and that he believed he did show Callum the text.

[88] If Mr. Maloney has any texts with Ms. Steele relating to what Callum said about the rumour, or if he has a screenshot of her text to him, they are obviously relevant, and must be disclosed.

***2.25 Produce a copy of Julia McAdam's letter stating what happened in her perspective, with respect to the rumoured threesome***

[89] Mr. Maloney testified that he attempted to obtain a will-say statement from Ms. McAdam, but she did not provide one at the time. She later gave him a letter stating what happened "in her perspective". This is the letter Mr. Kennedy requests. It is clearly relevant, and must be produced.

***2.26 Provide the day that Mr. Maloney terminated Callum***

***2.27 For Mr. Maloney to do his best to indicate when the meetings with Mr. Kennedy were between the date that he had the first conversation with Jesse Mote and the date that he terminated Callum***

[90] The defendants agreed to provide the day that Mr. Maloney terminated Callum. The dates of meetings with Mr. Kennedy in this period are relevant, and Mr. Maloney must inform himself of same and provide that information.

***2.28 For Mr. Maloney to instruct his counsel to sign a consent order for FaceBook to produce what they can recover from Mr. Maloney's personal FaceBook account***

[91] Mr. Kennedy is no longer seeking this order.

***2.29 For Mr. Maloney to look at his calendar to see where he was and what he was doing on September 7th, 2017, and advise***

[92] It will be recalled that Ms. Grant testified at her examination for discovery that Mr. Maloney denied sleeping with Ms. Steele outside of the times the three of them were together. The court is advised that plaintiff's document #3 suggests that Ms. Steele was at Mr. Maloney and Ms. Grant's home on September 7, 2017. Mr. Maloney testified that he had sexual relations with Ms. Steele at a number of locations. Mr. Kennedy submits that information about where Mr. Maloney was on

September 7, 2017 would assist in determining whether he was telling the truth to Ms. Grant.

[93] This is nothing but a fishing expedition. The details of Mr. Maloney, Ms. Grant's and Ms. Steele's relationships, and whether Mr. Maloney told Ms. Grant the truth about them, are not relevant to any matter in issue in this action.

> ***2.30 Produce emails documenting Mr. Kennedy's alleged breaches of employment conditions, such as issuing refunds instead of credits, contradicting terms and conditions, etc.***
>
> ***2.31 Produce any documentation to support Mr. Kennedy's alleged incompetence***

[94] The defendants say that they have produced all documents falling within these two categories. Mr. Kennedy is not seeking anything further.

> ***2.32 Inform as to everything Mr. Maloney can remember attributing to the staff member of what he says Mr. Kennedy had gossiped about and the disrespectful comments that he had made both to supervisors and staff, to exhaust his ability to inform himself of specific examples of what's alleged there, such as spread falsehoods and rumours, etc.***

[95] Mr. Kennedy is asking that Mr. Maloney be required to inform himself of everything anyone told him about Mr. Kennedy spreading rumours. Given the defendants' position regarding the reasons Mr. Kennedy was fired, this information is relevant, and Mr. Maloney must take steps to inform himself and provide that information.

> ***2.33 For Mr. Maloney to do his best to reconstruct the dates of the meetings with Mr. Kennedy, with respect to the rumoured threesome and in relation to when he was terminated***

[96] This request overlaps with and has already been addressed at 2.27 above.

> ***2.34 For Mr. Maloney to inform himself whether he or anybody on his behalf or the company's behalf communicated with the E.I. adjudicator to suggest that Mr. Kennedy was not entitled to benefits because he was terminated for cause and had defamed his supervisor***

[97] In his affidavit, Mr. Maloney lists a number of people he spoke to about Mr. Kennedy's termination. He does not include the employment insurance officer who adjudicated Mr. Kennedy's claim for benefits. Mr. Kennedy has exhibited to his affidavit a Supplementary Record of Claim from Service Canada relating to his employment insurance claim. It indicates that the officer, Ms. Urrea, spoke with Mr. Maloney on February 14, 2019. Reportedly, Mr. Maloney told the officer that Mr. Kennedy was dismissed due to misconduct, in particular his involvement in the rumour, which was stated to have defamed a couple of employees and one of the owners. Mr. Maloney is reported as having said that the behaviour could be described as bullying and shaming others.

[98] Given that Mr. Kennedy pleads in the further amended notice of civil claim that Mr. Maloney intervened in his employment insurance claim and defamed him, any communications of Mr. Maloney with the adjudicator are clearly relevant. Mr. Maloney is required to inform himself about his communications and those of anyone else on behalf of Snowwater with the adjudicator which suggested that Mr. Kennedy was terminated for cause and defamed an owner, and is to provide that information.

> ***2.35 Produce the long record of communication with Simon and Jeff from Baldface relating to Mr. Kennedy's conduct and termination, and for Mr. Maloney to inform himself if the communication was in writing or by telephone***

[99] In the further amended notice of civil claim, Mr. Kennedy pleads that Mr. Maloney defamed him and caused him damage in his employment and the industry in which he works. More specifically, he pleads that Mr. Maloney discussed the allegation that Mr. Kennedy fabricated the rumour about the threesome with Mr. Hanbury of Baldface Lodge.

[100] In his affidavit, Mr. Maloney says that as part of the corporate due diligence preceding the sale of Valhalla, he was required to provide the details of this action to purchasers, and that he did so by telephone with Mr. Hanbury in 2019. Mr. Maloney

says he told Mr. Hanbury why he fired Mr. Kennedy, consistent with the facts pleaded in the defendants' response to civil claim.

[101] In his examination for discovery, Mr. Maloney testified that there was a "long record of communication" with Simon and Jeff from Baldface Lodge about Mr. Kennedy's conduct and termination.

[102] Mr. Maloney takes the position that the communications with Simon and Jeff are protected under qualified privilege. The court may or may not ultimately conclude that is so, but the claim of qualified privilege cannot be assessed by Mr. Kennedy, or ultimately the court, without the communications in question being disclosed.

[103] Mr. Maloney's communications with the Baldface Lodge representatives about Mr. Kennedy are clearly relevant both to Mr. Kennedy's defamation claim, and the question of whether he mitigated his damages. Mr. Maloney must disclose the long record of communication he referred to in his examination for discovery.

> ***2.36 Advise as to how it happened that witness statements from Ben, Alex, and Jesse Mote were arranged***
>
> ***2.37 Provide the contact information for Ben, Alex, and Jesse Mote***

[104] The defendants obtained witness statements from Mr. Whitton, Ms. Steele and Mr. Mote, all dated April 18, 2019, and all of which are included on their list of documents.

[105] Mr. Kennedy says that two of the witness statements use the same phrase, "said rumour", and submits that this request is relevant as it goes to whether Mr. Maloney had an opportunity to influence the three witness statements.

[106] In my view, information with respect to how the witness statements were obtained is relevant and Mr. Maloney is, therefore, required to inform himself and provide that information.

[107] The defendants agreed to provide contact information for the three persons in question.

> ***2.38 Produce the email that Julia provided in response to Mr. Maloney's question as to if she would be willing to give a statement***
>
> ***2.39 Provide a copy of the email from Julia dated January 15th, which is marked as Exhibit 1 (in Mr. Maloney's discovery transcript)***

[108] A partial email from Julia was marked as an exhibit at Mr. Maloney's examination for discovery. As I understand it, Mr. Kennedy is seeking a complete copy of that email, and confirmation as to whether it is the same email Mr. Maloney testified Julia sent him. I have not seen the partial email marked as an exhibit, but I understand that it contains communications between Mr. Maloney and Julia regarding Mr. Kennedy's termination. As such, it is relevant to matters at issue in this action. Mr. Maloney is to provide the complete email, and advise as to whether it is the same email he referred to in his examination for discovery.

## Security for Costs

[109] The defendants apply for security for costs in the amount of $47,500.

[110] In his affidavit, Mr. Maloney describes his concerns about the possibility of obtaining a dry costs judgment against Mr. Kennedy. He states that he is unaware of Mr. Kennedy owning any assets other than a Jeep motor vehicle. He says that Snowwater has already spent in excess of $15,000 defending this action, and that he believes that if it goes to trial at least ten court days will be required. He says that his counsel tells him that Snowwater's additional costs and disbursements could easily exceed $50,000. He knows of no way that the defendants will be able to recover any costs should they succeed at trial.

[111] Mr. Kennedy replies to these assertions in his affidavit. He is self-employed as a realtor and has a second job. In 2023, his line 150 income was $28,387.10. He has earned $57,506.29 to date in 2024. He owns a vehicle worth about $10,000 and

has no other assets. Mr. Kennedy says that if he is required to pay $47,500 as security for costs he will not be able to prosecute his claim.

[112] The court has inherent jurisdiction to order security for costs against a person ordinarily resident in the jurisdiction: *Tordoff v. Canada Life Assurance Co.*, [1985] B.C.J. No. 2800 (BCSC). The Court of Appeal set out the applicable legal principles as follows in *Kropp v. Swaneset Bay Golf Course Ltd.* (1997), 29 B.C.L.R. (3d) 252 at para. 17:

> [17] In *Keary Development v. Tarmac Construction*, [1995] 3 All E.R. 534, the English Court of Appeal considered s. 726(1) of the Companies Act 1985, reviewed a number of authorities applying that provision or its predecessors, and then set out the principles which emerged from those cases. The principles are stated at pp. 539-542, and may be summarized in this way:
>
> 1. The court has a complete discretion whether to order security, and will act in light of all the relevant circumstances;
> 2. The possibility or probability that the plaintiff company will be deterred from pursuing its claim is not without more sufficient reason for not ordering security;
> 3. The court must attempt to balance injustices arising from use of security as an instrument of oppression to stifle a legitimate claim on the one hand, and use of impecuniosity as a means of putting unfair pressure on a defendant on the other;
> 4. The court may have regard to the merits of the action, but should avoid going into detail on the merits unless success or failure appears obvious;
> 5. The court can order any amount of security up to the full amount claimed, as long as the amount is more than nominal;
> 6. Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled; and
> 7. The lateness of the application for security is a circumstance which can properly be taken into account.

[113] In response, Mr. Kennedy relies on *Bronson v. Hewitt*, 2007 BCSC 1751 at para. 26, where Mr. Justice Goepel, as he then was, after referring to *Kropp*, noted that:

> [26] Historically, a much different approach was taken in regards to natural litigants. In *Cowell v. Taylor* (1885), 31 Ch. D. 34 (C.A.), Lord Bowen declared that “from time immemorial” the general rule has been that poverty

is no bar to a litigant (my emphasis). In *Pearson*, Megarry V.C noted at p. 533:

> The basic rule that a natural person who sues will not be ordered to give security for costs, however poor he is, is ancient and well established.



[114] At para. 32, Goepel J. referred to the decision of Mr. Justice Shaw in *Fraser v. Houston*, (1997) 36 B.C.L.R. (3d) 118 (S.C.) at paras. 11–12 for the following proposition:

> 11. The conclusion I draw from the foregoing authorities is that while the court must have jurisdiction to do what is necessary to prevent its jurisdiction from being abused, the court exercising this power must weigh carefully the right of our citizens to have access to the courts. In my view, the court should not make an order which would preclude the right of access except in egregious circumstances amounting to a likely abuse of the court's jurisdiction.
>
> 12. In an ordinary case where a resident plaintiff is not sufficiently wealthy to be able to pay the costs of a defendant if the plaintiff loses the lawsuit, that, in itself, would not justify an order for security for costs being made. The bringing of a lawsuit without sufficient funds to pay loser's costs would clearly not be an abuse of the court's jurisdiction. The public would simply be seeking recourse to the courts which must be available to all members of the public whether they are wealthy or poor.

[115] The defendants recognize that Mr. Kennedy should be allowed his day in court on his wrongful dismissal claim but rely on his defamation claims in support of their application for security for costs. I have already addressed the defendants' submission that the defamation claim is an abuse of process, and found that I cannot come to that conclusion on the evidence before me. It is clear that Mr. Kennedy will be prevented from pursuing this action if security for costs is ordered, at least in the amount requested by the defendants. I recognize that that alone is not sufficient to refuse to order security. By the same token, the fact that the defendants may not be able to recover their costs is not itself sufficient to justify making an order for security for costs. I note that the defendants have not provided a draft bill of costs, and the amount they say they will likely incur is largely speculative.

[116] Considering all the factors, I have come to the conclusion that I should not make an order for security for costs at this time. The success of this action is not certain, but neither is it certain that it will not succeed. Much will depend on the court's assessment of the credibility and reliability of the parties and the witnesses they call. Ordinary citizens of modest means, such as Mr. Kennedy, are entitled to access to the court to seek redress. An order for security for costs would almost certainly stifle his means to do so.

[117] The defendants' application for security for costs is dismissed.

## Conclusion

[118] I have granted Mr. Kennedy's application for leave to file a further amended notice of civil claim. I have granted some, but not all, of his requests for further disclosure.

[119] I have dismissed the defendants' application to strike the amended notice of civil claim. I have also dismissed their application for security for costs.

[120] Should the parties be unable to agree on costs, they may contact Supreme Court Scheduling within 30 days of the date of this decision to request to appear before me to make brief submissions on costs.

"L.M. Lyster J."

LYSTER J.