SUPREME COURT OF YUKON

Citation: *Spurvey v Melew*, 2024 YKSC 6

Date: 20240301
S.C. No. 23-A0156
Registry: Whitehorse

BETWEEN:

KAITLYN SPURVEY

Plaintiff

AND

YONIS MELEW

Defendant

AND

S.C. No. 24-A0005
Registry: Whitehorse

BETWEEN:

GEORGINA McKEE

Plaintiff

AND

YONIS MELEW

Defendant

Before Chief Justice S.M. Duncan

Counsel for Kaitlyn Spurvey
Counsel for Georgina McKee — James R. Tucker

Appearing on his own behalf — Yonis Melew

This decision was delivered in the form of Oral Reasons on March 1, 2024. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] DUNCAN C.J. (Oral): Since the summer of 2023, Mr. Yonis Melew has been posting comments on the Facebook page that he operates, Canadiansforfairtreatment,

about Kaitlyn Spurvey and Georgina (“Gigi”) McKee, respectively, the manager and director at Connective. Connective is an agency that, among other things, operates the emergency shelter at 405 Alexander Street in Whitehorse. The posted comments repeatedly contained statements, such as “Black-Hater cold-blooded racist” to describe Ms. Spurvey and Ms. McKee.

[2] Ms. McKee and Ms. Spurvey have each commenced an action in defamation against Mr. Melew. The plaintiffs are represented by the same counsel. An order consolidating the two actions was made at the outset of the hearing of these applications, meaning that the actions will not only be heard together but their procedural steps will also continue in tandem.

[3] Each plaintiff brings an application for an interlocutory injunction in their own action to prevent Mr. Melew from publishing or causing to be published any defamatory statement referring in any way to Ms. Kaitlyn Spurvey and Ms. Georgina McKee by name, pseudonym, address, photograph, or other means of identity. The factual context of these applications is identical and the substance of each is very similar, the response of Mr. Melew to the applications is the same, and the applicable law in each application is the same. I will therefore be providing one decision highlighting any material factual differences, if necessary and where appropriate, that applies to both applications.

[4] The issues to be decided are, first, what is the applicable test for an interim or interlocutory injunction in this context; and second, whether the applicants have met this test for an interlocutory injunction.

[5] The defendant, Mr. Melew, has published and continues to publish posts about the plaintiffs on his Facebook page, as I have said, entitled “Canadiansforfairtreatment”. Mr. Melew has admitted that all of the posts at issue were made by him.

[6] Examples of the statements that repeatedly appeared in these posts are as follows:

- January 2: “Black-Hater cold-blooded racist phony Manager Kaitlyn Spurvey took order from her Manipulating boss racist Gigi McKee and cooked up a phony reason to practice racism on taxpayers dime.”
- January 2: “Black-Hater cold-blooded racist Gigi McKee took an order from YG racist employees and viciously targed [as written] black employee.”
- January 4: “The incident was reported to black-hater cold-blooded racist phony manager Kaitlyn Spurvey and she covered up for him.”
- December 25, 2023: “Black-Hater and cold-blooded racist Gigi McKee (pictured here) cooked up a fake email inserted false statements with malicious intent and conspired with Diana Lerner.”

[7] The posts included photographs of the plaintiffs, their full names, and where they work.

[8] As of January 31, 2024, the date of Ms. Spurvey’s affidavit, she deposes that there have been more than 28 posts about her since August 2023. Ms. McKee, in her affidavit, deposes that there have been more than 36 posts about her, identifying her by name, since August 2023.

[9] The most recent affidavit filed in these applications by the plaintiffs attaches posts made on February 22, the day of the hearing of these applications, and it attaches screenshots of nine posts made between February 14 and February 21, 2024. All but one of these posts contains the same descriptions of Kaitlyn Spurvey and Georgina McKee with their pictures, again calling them “Black-Hater cold-blooded racists”. The only one in that bundle of material that does not say this says instead “[t]he Phony Shelter aka drug distribution center and its incompetent racist Connective Management is sucking up 14 million dollars of taxpayers money”, and it also contains pictures of Ms. Spurvey and Ms. McKee.

[10] Turning to the law that applies in this matter, injunctions before trial can be brought under either s. 26 of the *Judicature Act*, RSY 2002, c 128, or the *Rules of Court*, Rule 51(1).

[11] The three-part test for interim injunctions set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 S.C.R. 311 (“*RJR-MacDonald*”), has been for some years generally accepted as the applicable test for a successful interlocutory injunction: first, that there is a serious issue to be tried; second, that the applicant will suffer irreparable harm if the application is refused; and third, that the balance of convenience favours the applicant.

[12] But the legal test is different, however, in the context of defamation claims. This test is more stringent for the granting of an interlocutory injunction to restrain defamatory speech before trial. This is because of the court’s recognition of the important public interest in free speech.

[13] As was stated by the British Columbia Court of Appeal in the case of *Yu v 16 Pet Food & Supplies Inc*, 2023 BCCA 397 ("*Yu*"):

> [56] … Canadian law has long recognized the inherent good associated with free speech to advance: (1) democratic discourse; (2) the search for the truth; and (3) [to enhance] the self-realization of speakers and listeners. …
>
> [57] On the other hand, Canadian law has also long recognized the importance of a person's reputation to their dignity, self-image, sense of self-worth, ability to interact with others and, in some cases, ability to earn a livelihood. … One person's right to free expression has never conferred a licence to defame another person … [citations omitted]

[14] Restraining free speech is a serious matter, especially before a judge or a jury has found that that speech is defamatory. The granting of interim injunctions must be done cautiously.

[15] In the very old case of *Bonnard v Perryman*, [1891] 2 Ch. 269, the court wrote that the jurisdiction to issue interlocutory injunctions must only be exercised in the clearest cases, where, if the jury did not say that the matter complained of was libellous, the court would set aside that verdict as unreasonable. This stringent test has been adopted by the British Columbia Court of Appeal with some modifications. I will now go on to explain that modified test from the case of *Yu.*

[16] In that case, the Court of Appeal explained the test as follows:

> 1. The applicant must demonstrate that the impugned words are manifestly defamatory such that a jury finding otherwise would be considered perverse. …

— That is the *Bonnard* test —

> … To do so, the applicant must establish that:
>
> a. the impugned words refer to them, have been published, and would tend to lower their

reputation in the eyes of a reasonable observer; and

b. it is beyond doubt that any defence raised by the respondent is not sustainable.

2. If the first element has been made out, the court should ask itself whether there is any reason to decline to exercise its discretion in favour of restraining the respondent's speech pending trial.

[17] For this second part of the test, the full context of the case needs to be considered. A non-exhaustive list of factors to be considered at this second stage include:

i) the credibility of the words at issue;

ii) the existing reputation of the applicant;

iii) whether the applicant will suffer irreparable harm; and

iv) whether the respondent is likely to continue to publish the words at issue.

[18] I accept this test and will apply it to these applications.

[19] Applying this test to the facts of this case, first, are the words used manifestly defamatory?

[20] Counsel for the plaintiffs advised that they are focused on the words "Black-Hater" and "cold-blooded racist" to describe the plaintiffs in almost every post. The question is whether these words are manifestly defamatory, such that a jury's verdict finding otherwise would be perverse. It is clear, applying the test that I just read, that the words refer to the plaintiffs. The plaintiffs' photographs and their names are included in almost every post, and those words appear in almost every post. Being described as a "cold-blooded racist and Black-Hater" would lower the plaintiffs' reputation in the eyes of a reasonable observer.

[21] The next question required by the test is whether any defence raised by Mr. Melew can be sustainable beyond a doubt.

[22] In this case, Mr. Melew agrees with counsel for the plaintiffs' conclusion that his defence to the allegation of defamation is the fair comment defence.

[23] The test for the fair comment defence was summarized by the Supreme Court of Canada in the case of *WIC Radio Ltd v Simpson*, 2008 SCC 40 ("*Simpson v Mair*") at para. 28:

> (a) the comment must be on a matter of public interest;
>
> (b) the comment must be based on fact;
>
> (c) the comment, though it can include inferences of fact, must be recognisable as comment;
>
> (d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?
>
> (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice. …

[24] A comment is a matter of opinion. It is generally considered incapable of proof. It is like a criticism, a judgment, an inference, or an observation. In order to have a successful fair comment defence, the author of the alleged defamatory statement must show that their words are not fact but comment. If they cannot establish that the words are comment, then it may be considered an assertion of fact and that assertion of fact cannot be protected by the fair comment defence.

[25] For example, if words are stated that a person is hated or has conducted themselves disgracefully but there are no facts to support those statements then they will be considered as fact and not protected by the fair comment defence.

[26] The Supreme Court of Canada in *Simpson v Mair* described this same concept as the requirement that a "comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made." This is because the audience must have the facts so that they can make up their own minds about the comment. If the factual foundation is not there, it is unstated or it is unknown or it turns out to be untrue, then the fair comment defence is not available.

[27] Here, counsel for the plaintiffs says first, calling someone a "cold-blooded racist and Black-Hater" are comments, not facts that can be proved. Counsel says that there are no facts in the posts to explain why the comments were made or provide a context for them. The other parts of some posts, while critical of the plaintiffs' workplace, which was also the defendant's workplace, provide no helpful factual context which a person may use to assess the comment.

[28] At the hearing of these applications, Mr. Melew disputed counsel for the plaintiffs' assertion on this point. He said that counsel for the plaintiffs was selective about the posts that he copied and provided to the Court. Mr. Melew said that there were many examples of posts in which factual explanations were provided in order to be able to assess the comments. However, he had not brought any examples with him to court. I gave him until the end of the following day to file by affidavit examples of posts containing factual context, which he did.

[29] I have reviewed that affidavit filed by Mr. Melew on February 22 and I have reviewed each of the examples. None of the information in the posts relates to the comment, or explains the basis for the descriptions of Ms. Spurvey and Ms. McKee as "Black-Haters and cold-blooded racists". It is also not clear from the copies provided —

which I believe were screenshots, but I am not sure — whether the factual background was published at the same time as the comment, but I have given Mr. Melew the benefit of the doubt that they were.

[30] Going through each of the examples that Mr. Melew provided, the first one was dated April 8, 2023. There is no comment about Ms. McKee or Ms. Spurvey in that post. It is only an email, it appears, from a Marilyn Thomas to Yonis Melew referencing a case note. The email is cut off on the copy that I have so I cannot read the whole thing, but it refers to a case note, a member writing report section, and something about "they are hard to hear and frustrating". I do not find that this is at all relevant to the applications at issue.

[31] The second example provided by Mr. Melew does have a comment. It was dated January 10. It starts "Black-Hater cold-blooded racist Phony Connective us Vancouver-based company run by Mark Miller" and goes on from there. In that example, Mr. Melew includes an email, it appears, from Mark Miller dated June 28, 2023. That email is a message about the process for employees to file a grievance or complaint. It also references medical leave and the fact that there is an active investigation process occurring being led by the HR department (called the "People, Culture and Equity Team"). Again, this does not contain any reference to the names of Ms. Spurvey and Ms. McKee, and I do not find it relevant to this application.

[32] The third example is dated January 2, no year, and it has a comment: "Black-Hater cold-blooded racist phony Manager Kaitlyn Spurvey took order from her Manipulating boss racist Gigi McKee and cooked up a phony reason to practice racism on taxpayers dime". Attached to that comment is an email from Kaitlyn Spurvey to Yonis

Melew, dated May 11, 2023 — so about eight months before the post — and it states, "Thank you for meeting with us today. Please find the letter attached outlining the outcome discussed. Please let me know if you have any questions." I do not find that that email has any connection to the comment.

[33] There is also another message on that page that appears to be a letter or some kind of message from Kaitlyn Spurvey to Yonis Melew saying, "Thank you for taking the time to meet yesterday" and then, again, the rest of it is cut off but it refers to a March 13 meeting. And, again, I do not find any connection between those emails and letters to the comment that was made and posted on January 2nd.

[34] The next example is, again, another post of January 2nd, no year, "Black-Hater cold-blooded racist Gigi McKee took an order from YG racist employees and viciously targed [as written] black employee". Beside Ms. McKee's photograph, there are two, it appears, emails. It is unclear what date they are and the recipient's name is blacked out, so I do not know if it was sent to Mr. Melew or not. The first email talks about an investigation of allegations concerning employees and says, "You continue to have our support as a valued member of our organization. If any credible evidence is [found], we will … share … and you will have [a] full opportunity to respond …". Again, I do not see any connection between that letter or email and the comment.

[35] The second email relates to clarifications about the nature of criminal charges. Again, it is not clear to whom it refers, and I do not find any connection between that and the comment.

[36] The next example is a post dated January 4, and it has a comment, "[t]he incident was reported to black-hater, cold-blooded racist phony manager Kaitlyn

Spurvey and she covered up for him". It seems to state that Ms. Spurvey covered up for another person who brought alcohol to the shelter and that she deleted a case note related to a rape allegation. Once again, there is no connection between that explanation or the reference to those incidents and the allegation of racism.

[37] The next example is dated December 25, 2023. The comment is "Black-Hater and cold-blooded racist Gigi McKee (pictured here) cooked up a fake email inserted false statements with malicious intent and conspired …". In the explanatory portion of the post, Mr. Melew has included, it appears, an email from Diana Lerner to him — so not from Ms. McKee — and that email refers to a phone call and a misunderstanding that he attended for training and was told to leave because he was not required to be there until they received his medical clearance that he was able to return to work. Due to the misunderstanding, they would compensate him for the day. I do not find that that letter has any connection with the comment made in the post.

[38] The second explanation for that post appears to be a message of some kind — email or text — from Ms. McKee to Yonis Melew. It thanks him for dropping off the letter containing email correspondence from an RCMP officer, and it says, "As you are aware, information given to me from you is shared with People & Culture, so I will share this [email] with them via email. I look forward to a time that works for you to connect". Again, I do not see any relationship or connection between the comment and that message.

[39] The next example is a comment made and posted on December 7, 2023, "Black-Hater cold-blooded racist Gigi McKee orchestrated a Fascist attack on a black man after receiving a call from racist YG employee". It contains two pictures of

Ms. McKee. In that explanation, there is a message from Gigi McKee to Yonis Melew, asking to set up a time to discuss some information that came to her attention regarding current court information, saying that she would like to set up a meeting to have his perspective “and to clarify any misunderstanding that I” — meaning Gigi McKee — “might have. Please provide me a few options of when the best time is to meet”. Once again, I do not see any connection between that message and the comment stated in the post.

[40] The final example is a post of December 9, 2023, that states: “Black-Hater cold-blooded racist Gigi McKee with the help of YG racist employees viciously attacks black employee's integrity. She will be held accountable in the Court of Law and be famous on social media platforms. BLM is working on it”. Again, there is a picture of Gigi McKee and another person. In the explanation provided by Mr. Melew — it is again a message from Gigi McKee to him asking to set up a time to discuss information that came to her attention regarding current court information. It is the same message that I just referred to that was attached to the previous post, and I do not see any connection between that message and the post of December 9, 2023.

[41] The posts provided by counsel for the plaintiffs contain no factual context whatsoever. It is beyond doubt that there could be no justification or defence to these comments. Mr. Melew has failed to show a factual background or context on which the comments were based to allow for an audience to make up their own minds about the comment. The words are presented as facts, so they cannot be subject to the fair comment defence.

[42] Turning to the second element of the test, whether there is any reason for a court not to exercise its discretion in favour of restraining Mr. Melew's speech pending the trial.

[43] I have considered the whole context of this case, which includes the fact that Mr. Melew is a Black man, who was employed at Connective, supervised by Ms. Spurvey, and who, in turn, answers to the Director, Ms. McKee. Mr. Melew's employment at Connective appears to have been terminated for reasons that I do not know.

[44] I have also considered the factors set out by the British Columbia Court of Appeal in the *Yu* decision.

[45] First of all, credibility of the impugned words. Given Mr. Melew's employment at the same place as the plaintiffs and that he is a Black man, these words may be considered by some to have credibility.

[46] Second factor, existing reputation of Ms. McKee and Ms. Spurvey, the plaintiffs. There is no information or basis to believe that the reputations of the plaintiffs in the community is negative or tarnished already.

[47] Third factor, whether the plaintiffs will suffer irreparable harm. Counsel for the plaintiffs submitted affidavit evidence from both of them explaining harms that they have suffered and continue to suffer.

[48] For example, Ms. McKee deposed in her affidavit that these allegations and these posts have had a significant impact on her professional life as Director at Connective. She oversees a large staff and for those who do not know her personally, she is concerned that they may believe the posts and her reputation will be damaged.

She deposes that she feels publicly humiliated, that her motivation and focus are decreased, that she has anxiety and fear, and she feels isolated and unsafe. It has affected her daily activities, as the fears and discomfort she feels as a result of the posts have caused her to work from home and not socialize as much.

[49] Ms. Spurvey deposes that she has felt and continues to feel fear and anxiety, that she has sleepless nights, that she has implemented safety plans when she leaves her house, that she has been working predominantly from home, that she is scared to socialize because she feels targeted, and that she feels affected at her work because she has concerns that her staff perceive her as racist or fascist.

[50] These descriptions in sworn affidavit form set out the effects of the posts on the plaintiffs and are sufficient to establish irreparable harm.

[51] The final factor suggested by the British Columbia Court of Appeal is whether it is likely that the respondent will stop posting or not. Mr. Melew has been very clear; he does not intend to stop posting. He demonstrated this by continuing to post the same type of comment on the Facebook page up to the morning of the hearing of these applications. In his statement of defence, he states at para. 17(b) of the defence to Ms. Spurvey's action and 15(b) in the defence to Ms. McKee's Action, that "I will not apologize nor retreat my posts." And at para. 10, in the defence to Ms. Spurvey's action, "Yes, the posts will remain on Facebook as long as Facebook Company allows it and finds it reasonable". And paras. 10 and 13 of the defence to Ms. McKee's action, "[t]he statements are FACTS and I will NOT shut up because white people are 'offended'".

[52] All of this suggests a clear intention of Mr. Melew to continue with the posts.

[53] Having considered the full context of these applications, including whether there are any specific factors that would support this Court not exercising its discretion to issue an interlocutory injunction, I find there are no reasons not to do so.

[54] In considering this, I recognize that issuing an interim injunction in this non-commercial context is rare and exceptional. I have also recognized the significant value that society, upheld by courts, places on free speech. Free speech is not absolute, however. As the British Columbia Court of Appeal said in *Yu*, a person's right to free expression does not give them permission to defame another person.

[55] I find that the test for an interim injunction in both of these cases has been met.

[56] The remedy is as follows. An order will be granted enjoining the defendant, his agents and servants or other from publishing or causing to be published by any means any defamatory statement referring to the plaintiffs, pseudonym, address, photograph, or other means of identity that includes a reference to Black hating, racism, or fascism.

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DUNCAN C.J.