SUPREME COURT OF YUKON

Citation: *Connective Support Society v Melew*, 2024 YKSC 15

Date: 20240409
S.C. No.24-A0036
Registry: Whitehorse

BETWEEN:

CONNECTIVE SUPPORT SOCIETY

Plaintiff

AND

YONIS MELEW

Defendant

Before Chief Justice S.M. Duncan

Counsel for Connective Support Society — James R. Tucker

No one appearing for defendant

REASONS FOR DECISION

[1] Mr. Yonis Melew has been posting comments on the Facebook page that he operates, Canadiansforfairtreatment, about Connective Support Society ("Connective"). It is a community-based social services non-profit society that, among other things, manages and operates the emergency shelter program at 405 Alexander Street in Whitehorse. The posted comments, numbering over 80, according to counsel for the plaintiff, since the summer of 2023 repeatedly contain descriptions of Connective as

"black-hater", "racist", "phony" and "drug dealing" in the context of its operation of 405 Alexander Street.

[2] Connective commenced an action in defamation and libel against Mr. Melew on March 19, 2024. Relief sought includes a declaration that the statements constitute libel and that Mr. Melew defamed Connective; a permanent injunction preventing Mr. Melew from further similar publications; an apology to be posted on social media; and damages. No statement of defence has been filed.

[3] This is an application for an interlocutory injunction to prevent Mr. Melew from publishing, distributing or disseminating defamatory statements in any form or through any medium against Connective and its directors, officers, employees or agents by name, pseudonym, address, photograph, or other means of identity.

[4] The issues are:

a) the applicable test for an interlocutory injunction in the context of a claim in defamation; and

b) whether the applicant has met the test for an interlocutory injunction in this case.

[5] This application is similar to those brought in the other two actions by two employees of Connective (S*purvey v Melew*, 2024 YKSC 6). The explanation of the applicable law below is therefore similar to the explanation set out in the decision on those earlier applications.

Preliminary Issue

[6] Mr. Melew is self-represented. He was substitutionally served with this application by email, as permitted by the Court order made on March 22, 2024. In

addition, hard copies of the application materials were left at his apartment door, as noted in the filed affidavit of service of the Deputy Sheriff. Counsel for Connective also called Mr. Melew to advise him of the application and the return date, and offered to provide him with a hard copy of the materials if he came to counsel's downtown Whitehorse office. Mr. Melew did not do so, nor did he acknowledge receipt of the material.

[7] On the date of the hearing, March 26, 2024, Mr. Melew was not present. The Court clerk paged him without success. The clerk then called Mr. Melew's phone number and left a message for him to call or appear in court as the hearing was about to commence. Approximately 15 minutes after the scheduled time for the application, the Court began to hear the plaintiff's arguments. After approximately one hour of argument, the phone rang in the courtroom. Mr. Melew was on the line. He explained he was at the hospital because he was sick and requested an adjournment of this application. The Court granted an adjournment until Friday, April 5, 2024 at 11 a.m. and advised Mr. Melew of this date and time on the phone. He was further advised that counsel for Connective would provide a summary of his argument orally at that time and Mr. Melew would have the chance to respond. Mr. Melew hung up the phone before the Court had finished speaking with him, but after he had been given the date and time for the hearing resumption.

[8] On Friday, April 5, the Court was also scheduled to hear a contempt motion against Mr. Melew arising from the Court Orders made in the related applications. That morning at approximately 10 a.m. the Court received a typewritten note dated April 4, 2024, and signed by Mr. Melew, advising he had to fly out of the Yukon to Ethiopia

because his grandfather's illness had become emergent. Counsel for Connective did not have a copy of the note from Mr. Melew.

[9] The note further stated Mr. Melew's friend Brandon would appear in court to explain the situation. At approximately 11:25 a.m., before the hearing began, Brandon was paged by the Sheriff but did not appear.

[10] I decided to proceed with the completion of this application on April 5, given the two opportunities provided to Mr. Melew to respond, and the last minute notice he provided to the Court on April 5 of his intended absence.

Background

[11] Connective is a non-profit society based in British Columbia. It operates and manages facilities throughout British Columbia and the Yukon that provide housing to adults experiencing or at risk of homelessness, who often require mental health or substance use supports.

[12] In the Yukon, many employees of Connective come from diverse backgrounds and are from the BIPOC (Black Indigenous People Of Colour) community.

[13] A three-week inquest is scheduled to start in Whitehorse on April 8, 2024, into the deaths of four Indigenous women that occurred at the emergency shelter at 405 Alexander Street.

[14] Mr. Melew is a Black man who was employed at Connective and whose employment at Connective appears to have been terminated for reasons unknown to the Court.

[15] Mr. Melew admitted in the related court actions for defamation that he operates the Facebook page entitled "Canadiansforfairtreatment". In the other actions he also

admitted he created all the posts in issue. The posts in issue in this action are the same as those in the other actions. The focus in this case is on the comments related to Connective as an organization, rather than those related to individual employees. The posts about Connective as an organization began in August 2023.

[16] On March 1, 2024, this Court granted interlocutory injunctions in the other two actions brought by Connective employees, preventing Mr. Melew from publishing any posts about them containing the words racist, black-hating, or fascist. Since that injunction was granted, Mr. Melew has continued to publish posts about Connective, calling them black-hating and racist, among other things.

[17] Examples of the statements that repeatedly appeared in the posts are:

- August 26, 2023 – “Alcohol and drugs all day at the phony Whitehorse Emergency Shelter run by black-haters racists of Connective which is sucking up taxpayers hard-earned money”.
- December 30, 2023 – “The black-hater cold-blooded racist Connective hired a Vancouver Lawyer to attack Freedom of Speech guaranteed under Charters Rights but after they heard the real story, they backed off”.
- January 10, 2024 – Black-Hater cold-blooded racist Phony Connective us [as written] Vancouver-based company run by Mark Miller. He was made aware of the drug distribution and alcohol and rape at the Shelter”.
- January 15, 2024 – “WE WILL DEFEAT RACIST CONNECTIVE IN THE COURT OF LAW. RACISM WILL BE DEFEATED”.

- January 15, 2024 – Black-Hater cold-blooded racists Gigi McKee and Kaitlyn Spurvey are running a phony Shelter aka drug distribution center [as written] at the expense of taxpayers hard-earned money".
- January 19, 2024 – "There will be more deaths under incompetent phony Connective Management. Time to fire blood-sucker racist Connective and hand the "Shelter" over to Salvation Army".
- February 4, 2024 – "Frustration, death at the phony Whitehorse Emergency Shelter run by black-haters racists".
- February 21, 2024 – "The Phony Shelter aka drug distribution center [as written] and its incompetent racist Connective Management is sucking up 14 million dollars of taxpayers money".
- March 5, 2024 – "Connective is a black-hater cold-blooded racist employer that is sucking up 14 million dollars of taxpayers money while indigenouse [as written] people are dying from overdose".
- March 6, 2024 – "Apply for these positions at Racist Connective of [as written] you are desperate with only temporary work permit".

Law

[18] Injunctions before trial can be brought under s. 26 of the *Judicature Act*, RSY 2002, c 128, or the *Rules of Court* of the Supreme Court of Yukon, Rule 51(1). The three-part test for interlocutory injunctions set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 ("*RJR-MacDonald*"), for some years has been 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.

[19] However, the legal test for an interlocutory injunction to restrain defamatory speech before trial is more strict because of recognition by the courts of the important public interest in free speech. The Court of Appeal for British Columbia in the case of *Yu v 16 Pet Food & Supplies Inc*, 2023 BCCA 397 ("*Yu*") described the competing principles underlying interlocutory injunctions in defamation cases in this way:

> [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]

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

[21] 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 of 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 Court of Appeal for British Columbia in *Yu* with some modifications. It described the test as follows at para. 71:

> 1. The applicant must demonstrate that the impugned words are manifestly defamatory such that a jury

finding otherwise would be considered perverse. 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.

[22] 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.

Application of the law to the facts

1a) Are the words manifestly defamatory such that a jury's verdict finding otherwise would be perverse?

[23] It is clear from the posts that the words refer to the plaintiff, as the name Connective appears in every post, and reference to the shelter or Whitehorse Emergency Shelter and to Connective as the employer is included in almost every post on the Facebook page.

[24] The Facebook posts on the public site Canadiansforfairtreatment constitute publication.

[25] The description of a non-profit support society as racist, black-hating, phony and a drug distributor lowers Connective's reputation in the eyes of a reasonable observer. The words racist and black-hating on their face are negative judgments or opinions. To call an institution phony is to say it is not genuine, or false, according to the dictionary definition (Merriam Webster). The use of the word phony to describe Connective suggests that the organization does not do what it is meant to do, which is to provide housing and other supports to vulnerable individuals. This lowers Connective's reputation in the eyes of observers. Finally, a logical inference of the meaning of the phrase "drug-distribution center" [as written] in the context of the posts is the selling or facilitating the consumption of illegal drugs, an activity that is contrary to Connective's purpose and would lower its reputation.

1b) Can any defence raised be sustainable beyond doubt?

[26] The onus of proof to establish a defence is on the defendant. In the absence of Mr. Melew, plaintiff's counsel reviewed the law for each of the possible defences to allegations of defamation and their applicability in this context. The defences are fair comment, truth or justification, absolute privilege, qualified privilege, and responsible communication on matters of public interest. I agree with counsel for the plaintiff that the sustainability of these defences beyond doubt for the use of the words black-hating, racist, phony in the posts about Connective is not possible, as outlined below. There may be sustainable defences for the use of the phrase "drug-distribution" centre.

Fair Comment

[27] 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*") 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. … [emphasis removed]]

[28] 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.

[29] 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.

[30] The Supreme Court of Canada in *Simpson* described this 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" (para. 31). 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, it is unknown or it turns out to be untrue, then the fair comment defence is not available.

[31] Here, using the words racist, black-hating, and phony to describe Connective are on their face not facts. They are opinions of the author, in the same vein as a criticism, a judgment or an observation. Thus they qualify as comments, subject to the fair comment defence. However, if there are no facts provided on which the comments may be based, so that a person could honestly express that opinion on the proved facts, the fair comment defence will not be available.

[32] Nothing in the posts explains why the comments were made or provides a context for them. While Mr. Melew references in many of the posts the deaths of four Indigenous women at the shelter, in some cases referring to them as caused by overdoses, there is no factual connection made between their deaths and the statements of Connective being racist, black-hating, and phony. There is no factual base for the comments to allow an audience to make up their own minds about the comment. Without a factual foundation, the words are presented as assertions or facts, so they cannot be subject to the fair comment defence.

Truth as justification

[33] The comments of racist, black-hating, and phony are subjective assessments, on their own not capable of proof. As noted above, no facts have been provided in the posts to support these assertions. The defence of truth as justification is not available or sustainable, beyond doubt.

[34] The use of the phrase “drug distribution center” [as written] to describe Connective is not an opinion or a subjective assessment in the same sense as the other

words noted above, but is closer to an allegedly factual description. As noted above, in the context of the other information in the posts, the phrase implies the availability of drugs at 405 Alexander, provided by Connective. Connective is not a pharmacy, so the further implication is that Connective distributes or facilitates the distribution of illegal drugs.

[35] Counsel for Connective advised that employees at 405 Alexander maintain prescription medication for clients for safekeeping and distribute to clients when required. These facts are not set out anywhere in the defendant's Facebook page posts.

[36] However, as a result of this possible interpretation, I find it is not beyond doubt that the defence of truth as justification is not sustainable for the use of the phrase drug distribution centre.

Absolute privilege

[37] This defence reflects an acknowledgement that in some circumstances and environments, a higher value is placed upon unfettered communications because "common convenience and welfare of society" (*Grant v Torstar Corp*., 2009 SCC 61 ("*Grant*") at para. 30) requires it. Unaffected communications could contribute to desirable social ends in certain circumstances, more so than the harms that may be caused by false or defamatory expressions. It is not the content of the communication on which the existence of a privilege generally depends, but rather on the circumstances under which the communication is occurring. For example, absolute privilege extends to the publication of statements made in the course of judicial or quasi-judicial proceedings, for statements made in the course of proceedings in

Parliament and its committees, and for certain statements made by senior government officials to each other in the course of performing their duties (*Grant* at para. 30).

[38] In this case, the defendant's Facebook posts are not circumstances or an occasion that would attract immunity from liability for defamation through an absolute privilege such as Parliament or a judicial proceeding. This defence is not sustainable.

Qualified privilege

[39] Courts have recognized a "qualified" privilege in certain circumstances which do not warrant complete immunity. It exists if the defendant can prove they made the statement while performing a social, moral, or legal duty where there was a reciprocal interest shared by the people making and receiving the statement. For example, qualified privilege has been recognized for a report of theft made by a store owner to the police, for statements of an employee to his superiors about the conduct of another employee harmful to the company, and for a parent expressing concerns to educational authorities about the treatment her child received from a teacher. If the plaintiff establishes that the defendant acted with malice, a qualified privilege (once established) is defeated.

[40] Here there is no identifiable reciprocal duty arising from the comments of racist, black-hating, and phony used to describe Connective made by Mr. Melew on a public Facebook page. While assertions that a non-profit supportive society that assists vulnerable people is racist, black-hating, and phony may be a matter of interest in some contexts, such as a human rights complaint against the organization, or when a funding agreement is reviewed or renewed, a general public posting is not a circumstance in which such a duty arises. Moreover, in those contexts the assertions would require

some factual basis. Even if a reciprocal duty could be identified, it is possible that the defence of qualified privilege may not be available due to the comments being actuated by express malice. The defence of qualified privilege is not sustainable in this case.

Responsible Communication

[41] This defence has two elements: 1) the publication must be on a matter of public interest; and 2) the defendant must show the publication was responsible in that they were diligent in trying to verify the allegation(s), in all the relevant circumstances. There is no separate inquiry into malice, once the responsible communication defence is made out.

[42] In determining whether a communication was responsible, the Supreme Court of Canada in *Grant* (at para. 126) provided the following illustrative but non-exhaustive set of factors to consider:

> (a) the seriousness of the allegation;
>
> (b) the public importance of the matter;
>
> (c) the urgency of the matter;
>
> (d) the status and reliability of the source;
>
> (e) whether the plaintiff's side of the story was sought and accurately reported;
>
> (f) whether the inclusion of the defamatory statement was justifiable;
>
> (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth("reportage"); and
>
> (h) any other relevant circumstances.

[43] Here, the allegations are serious and are of public importance, given the role of Connective in the community. Urgency is not apparent. However, due to the absence of factual grounding or context, Mr. Melew provides no reliable source. Certainly Connective's 'side of the story' was not sought. The statements are comment so not justifiable. There is no public interest in the making of these statements without factual basis or grounding in truth. As a result, there is no doubt that the defence of responsible communication is not sustainable in this case.

2) Is there any reason to decline to exercise discretion in favour of restraining the respondent's speech pending trial

[44] As noted above, there are four non-exhaustive factors to consider in deciding whether to decline to exercise discretion restrain the defendant's speech on an interim basis:

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.

i) The credibility of the words at issue

[45] Given Mr. Melew's previous employment at Connective and that he is a Black man, the words he has used to describe Connective may be considered by some to have credibility.

ii) the existing reputation of the applicant

[46] There is no information before the Court that the reputation of Connective in the community is negative or tarnished.

iii) whether the applicant will suffer irreparable harm

[47] Counsel for Connective provided affidavit evidence from the Chief Administrative Officer of Connective responsible for human resources, payroll, property, and information technology. He deposed about the damages the references to black-haters and racists have caused to Connective and its employees.

[48] Specifically he deposed:

> [24] The Defendant's targeted attacks on Connective and its employees have caused the employees to experience fear and anxiety. I and the senior management of Connective are very concerned that there will come a point where the valued employees targeted by the Defendant may quit their employment to escape the attacks of the Defendant.
>
> [25] The staff of Connective who have not yet been targeted by the Defendant have expressed to the management of Connective that they are also fearful that they too may be made the victims of salacious comments on the Page.
>
> [26] … I and the senior management of Connective are extremely concerned that the Posts will be interpreted by the Public and the jury at the inquest [into the death of four Indigenous women at the shelter] to mean that 'Connective is a racist organization with racist employees and permits indigenous people to die at 405 Alexander'.
>
> [27] I and the senior management at Connective fear that the statements made by the Defendant in the Posts and on the Page will negatively influence or impact the Inquest and cause irreparable damage to Connective and the work it is trying to do in Yukon.

[49] This affidavit evidence is sufficient to establish irreparable harm at this time.

iv) is it likely that the respondent will stop posting?

[50] To date through his actions, Mr. Melew has shown he does not intend to stop posting. He demonstrated this by continuing to post the same type of comments about

Connective on the Facebook page after receiving a letter from counsel for Connective requesting that he cease, and after receiving Orders from this Court enjoining him from posting similar comments about specific Connective employees in the other related actions.

Conclusion

[51] Having considered the full context of this application, 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.

[52] In considering this, I recognize that issuing an interlocutory 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 Court of Appeal for British Columbia said in *Yu*, a person's right to free expression does not give them permission to defame another person.

[53] I find that the test for an interlocutory injunction has been met.

[54] The remedy is as follows. An interlocutory order will be granted enjoining the defendant, Yonis Melew and his agents and servants or any others, from continuing to publish, publishing, or causing to be published by any means, and from broadcasting or causing to be broadcast by any means, defamatory statements containing the words Black-hating/hater, racist, and/or phony, referring to Connective Support Society, its directors, employees, or agents by name, pseudonym, address, photograph, reference to facilities they operate or work in, or by any other means of identifying any or all of them.

[55] The defendant, Yonis Melew, shall remove from any social media pages he

controls, including but not limited to Facebook pages, any defamatory statement containing the words Black-hating/hater, racist, and/or phony, referring to Connective Support Society, its directors, employees, or agents by name pseudonym, address, photograph, reference to facilities they operate or work in, or by any other means of identifying any or all of them.

[56] The defendant may apply to have the order set aside on 10 days' notice in writing to the plaintiff.

[57] The requirement for the defendant, Yonis Melew, to sign the order is waived.

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DUNCAN C.J.