SUPREME COURT OF YUKON

Citation: *J.W. v. Van Bibber*, 2013 YKSC 58

Date: 20130613
S.C. No. 09-A0031
Registry: Whitehorse

Between:

J.W.

Plaintiff

And

Adam Van Bibber, Betty Baptiste and Selkirk First Nation

Defendants

Publication of information that could disclose the identity of the plaintiff has been prohibited by court order.

Before: Mr. Justice L. F. Gower

Appearances:

Carrie Burbidge — Counsel for the Plaintiff
Debra L. Fendrick — Counsel for the Defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is a defamation action. A defamatory statement is one whose publication tends to lower the reputation of the plaintiff in the estimation of other right-thinking members of society*: MacDonald v. Tamitik Status of Women Assn.*, [1998] B.C.J. No. 2709 (BCSC).

[2] The plaintiff, J.W., a Yukon Government ("YG") employee, was under one year contract to serve as the Executive Director for the Selkirk First Nation ("SFN") until

November 18, 2008, with an option to renew for a further year. The contract was referred to by the parties as a "Temporary Assignment Agreement" between YG and SFN.

[3] During the term of the Temporary Assignment, the plaintiff had dealings with Adam Van Bibber ("Van Bibber"), an Operations and Maintenance worker employed by SFN. Van Bibber made a complaint of sexual harassment against the plaintiff to SFN. When the plaintiff learned of this complaint, she confronted Van Bibber about it at a meeting with an SFN band councillor on October 27, 2008. The plaintiff claims that Van Bibber defamed her by telling the councillor that she had sexually harassed him. After this meeting, the plaintiff decided not to seek renewal of her contract. However, a few days later she changed her mind and sought to extend it. For the purpose of discussing the extension of the contract, the YG Public Service Representative overseeing the contract, Marge Baufeld ("Baufeld"), and the YG Human Resources Manager, Melanie Harris ("Harris"), separately contacted the SFN Personnel Officer, Betty Baptiste ("Baptiste"). During those conversations, Baptiste informed the YG officers of the sexual harassment allegations and other matters, which the plaintiff now claims also to be defamatory statements.

[4] The plaintiff commenced her action on June 5, 2009 naming Van Bibber, an SFN band councillor, the SFN Chief and SFN as defendants. On January 4, 2011, the plaintiff amended her statement of claim, adding a claim of intentional infliction of mental distress, and also adding as defendants YG and the YG Assistant Deputy Minister of the plaintiff's department. On April 4, 2013, the plaintiff filed her second amended statement of claim, based in part on some recent disclosure from her YG personnel file resulting from a request under Yukon's *Access to Information and Protection of Privacy* ("ATIPP")

legislation. In the second amended statement of claim, the plaintiff added Baptiste as a defendant and removed YG and the Assistant Deputy Minister as defendants. On May 6, 2013, the eve of the trial, the plaintiff discontinued this proceeding against the SFN Chief and band councillor, and also retracted several of her previous allegations, including her claims for intentional infliction of mental distress and aggravated damages.

[5] In the result, the plaintiff now seeks to prove defamation by each of Van Bibber and Baptiste, general and punitive damages, and vicarious liability against SFN.

[6] Although the defendants reserved their right to argue that the claim against Baptiste was made beyond the limitation period under s. 2 of the *Limitation of Actions Act*, R.S.Y. 2002, c. 139, no such argument was made during the final submissions. In any event, I accept the plaintiff's argument that the information giving rise to the claim against Baptiste was not reasonably discoverable until the results of the ATIPP request were made available on March 5, 2013.

[7] Further, the defendants raised the defence of "fair comment" in addition to the other defences set out below. However, for reasons which will soon become obvious, it is not necessary for me to consider that defence.

ISSUES

[8] Because there are separate claims of defamation against each of Van Bibber and Baptiste, based upon separate allegations, I propose to deal with each claim in turn. Thus, the issues, as I see them, can be broken down as follows:

Van Bibber

1) Did Van Bibber make a defamatory statement?

2) If he did, does the defence of justification apply, i.e. was the statement true?

3) If not, does the defence of qualified privilege apply?

4) If it does, is the defence defeated by either:

    a) malice; or

    b) by exceeding the limits of the duty or interest giving rise to the privilege?

Baptiste

5) Did Baptiste make defamatory statements?

6) If she did, does the defence of qualified privilege apply?

7) If it does, is the defence defeated by either:

    a) malice; or

    b) by exceeding the limits of the duty or interest giving rise to the privilege?

SFN

8) If either Van Bibber or Baptiste defamed the plaintiff, is SFN vicariously liable for that defamation?

Damages

9) If there is no defence to either or both of the alleged defamation claims, what is the appropriate measure of damages?

CREDIBILITY AND RELIABILITY

[9] The issues in this case turn, in part, on an assessment of the credibility and reliability of the various parties and witnesses. It is important to keep the distinction between those two terms in mind. Credibility has to do with a witness's veracity and sincerity, whereas reliability has to do with the accuracy of their testimony and engages a consideration of their ability to accurately observe, recall and recount the events at issue. Sincere witnesses can be mistaken. Significant inconsistencies and conflicting evidence on the record can impact both credibility and reliability: *R. v. Joudrie* (1997) 100 O.A.C. 25, at para. 28.

[10] I find that the plaintiff's credibility has been seriously compromised during the course of this proceeding. My reasons are as follows:

1) On November 22, 2012, she falsely affirmed an affidavit of documents.

In that affidavit, the plaintiff deposed, among other things:

> "This affidavit discloses… all documents relating to any matter in issue in this action…
> …
> I have never had in my possession, control or power any document relating to any matter in issue in this action other than those listed in Schedules A, B, and C."

The affidavit included a "Lawyer's Certificate" in which the plaintiff's trial counsel certified that she had explained to the plaintiff:

> "(a) the necessity of making full disclosure of all documents relating to any matter in issue in the action; and
> (b) what kinds of documents are likely to be relevant to the allegations made in the pleadings."

In Schedule A, the plaintiff listed documents in her possession which she did not object to producing. The Schedule included a reference to her medical records from June 30, 2005 to October 28, 2011. Further, the affidavit of documents was affirmed by the plaintiff after her examination for discovery on July 15, 2011. At that examination for discovery, defendant's counsel raised a concern about some "confusion" with the medical records that had been disclosed to that point, because it appeared that there were some missing entries[1]. Indeed, a formal request was made of the plaintiff to provide a complete copy of her medical records following the discovery. In addition, the plaintiff was asked several times whether she took counselling after her secondment to SFN under the one-year contract.

Notwithstanding all of these circumstances, the medical records disclosed by the plaintiff following her affidavit of documents were incomplete. This is because she redacted several passages relating to her daily marijuana usage, the referrals by her consulting psychologist and family doctor to a psychiatrist, and a five-page psychiatric report dated July 28, 2009.

It is important to keep in mind that at the time the plaintiff produced these redacted medical records, her claim for intentional infliction of mental distress was still alive and well.

When the plaintiff was asked why she made the redactions in re-examination, she testified that she considered the redacted information to be "very private", that she was "not aware of the legalities around that", because this was her "first court case ever", and she felt like it was "an invasion of my privacy".

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[1] Transcript, pp. 77 and 81.

I agree with the defendants' counsel that, given the above circumstances, this explanation simply rings hollow. I conclude that the plaintiff deliberately omitted potentially relevant information to mislead the defendants and put her case in the best possible light. This egregious manipulation of the evidence is almost singularly fatal to the plaintiff's credibility in this trial. However, there are additional reasons for disbelieving her.

2) The plaintiff lied about attending counselling.

The plaintiff admitted on cross-examination that she went to counselling after the Temporary Assignment was not renewed. However, at her examination for discovery on July 15, 2011, the plaintiff denied several times that she had taken any such counselling. Once again, at the time of her examination for discovery, the plaintiff's claim for intentional infliction of mental distress was still alive. One passage from her discovery is particularly telling:

> "Q: And were you taking counselling during that same time,'05 to present?
> A: I took some counselling right when I separated from my husband, that's it.
> Q: And did you take counselling after you were seconded to Selkirk and took the stress leave and you were seeing your doctor?
> A: No.
> Q: I note that it appears that she recommended some counselling, but you didn't take it?
> A: I didn't take any, correct.
> Q: You haven't taken any, other than after the break-up of your marriage?
> A: Right."

When asked at trial if these answers were truthful, the plaintiff responded "At the time they were." Even though she admitted that she had taken counselling

subsequent to the Temporary Assignment, she testified that she "did not consider it related to this [lawsuit], I didn't see it as related." She further testified that she did not consider those discovery answers to be "a lie". Once again, I agree with the defendants' counsel that this explanation rings hollow.

3) ***The plaintiff's responses were at times argumentative and/or evasive.***

At the trial, the plaintiff entered as exhibits notes she made of two incidents between her and Van Bibber, which she placed on his personnel file. The first was an incident on March 12, 2008 which occurred after work hours and involved Van Bibber's three-year-old son being physically disciplined by the director of the SFN daycare. The second incident occurred on August 5, 2008, and involved a disagreement between the plaintiff and Van Bibber about Van Bibber's entitlement to take possession of a house which had been allocated to him by SFN. Neither incident had anything to do with Van Bibber's performance as an SFN employee. When cross-examined about whether placing those notes on Van Bibber's personnel file constituted "bad management", the plaintiff responded that she did not believe it did. She was then reminded that she was questioned about this subject at her examination for discovery. In particular, she was asked why she placed these notes on the personnel file when they did not address any issues about Van Bibber as an employee. At the discovery, the plaintiff responded "I guess bad management." Then, when asked at trial whether that answer was truthful, the plaintiff replied "I don't personally believe it was. Today, for me, it is not truthful." I find this answer to be argumentative and evasive.

The plaintiff also gave several other answers which struck me as evasive and an attempt to prevaricate. For example, following the examination for discovery, the plaintiff's lawyer sent a letter to the defendants' counsel indicating that the plaintiff "is in the process of obtaining [the requested medical] records." When asked at trial if that was indeed what she was doing at that time, plaintiff answered "I can't answer that for certain." Indeed, notwithstanding that the discovery request for the medical records was filed as an exhibit, when the plaintiff was asked whether she recalled the request, she responded "Not really, no." Then, when asked whether there had been several deletions from the medical records initially disclosed by her counsel on January 19, 2012, pursuant to the false affidavit of documents, the plaintiff responded "I suppose so." Further, when asked whether she made these deletions, the plaintiff responded "I probably did." Then, when asked whether she indeed met with the psychiatrist on July 28, 2009, she responded "According to this [the five-page report she previously redacted], I met with Dr. [H].", suggesting she had no independent recollection of the meeting. The plaintiff then testified that she removed the reference to Dr. H's report <u>after</u> the examination for discovery, and immediately corrected herself by saying she did so <u>prior</u> to the discovery.

Finally, the plaintiff sent an email to SFN on September 24, 2008 entitled "Notice of Intent" and stating that she would be leaving her position at the end of her contract. Yet, when asked whether she gave her notice on that date that she was leaving, she responded "I'm not 100% sure." The plaintiff then sent a subsequent email to Marge Baufeld on October 30, 2008 indicating "Change of plan…. I will not be staying here for another year…" When the defendants' counsel suggested that there had in fact

been no change of plan because she had already given her notice, the plaintiff responded “I had given notice, but I believe I might have been encouraged to stay, so I’m not sure what to tell you.”

4) ***The plaintiff’s salary issues while at SFN.***

The plaintiff was initially retained by SFN under the Temporary Assignment as the Executive Director, which was the highest paid position within SFN. However, in mid-July 2008 she switched from that position to the position of “Capital Director” in charge of SFN public works. The salary for the Capital Director was significantly lower than the salary for Executive Director. However, the plaintiff never communicated this change of position to YG and continued to be paid at the higher salary until the end of the one-year term. Further, after the end of the term, the plaintiff took vacation leave with pay from YG from November 19 to December 2, 2008. However, in what strikes me as an attempt at “double dipping”, she continued to work as Capital Director over that time period and billed SFN $2400 for her services. I find that these facts reflect poorly on the plaintiff’s character and credibility.

[11] On the other hand, I found Van Bibber and Baptiste to be generally credible witnesses.

[12] Admittedly, Van Bibber’s reliability was called into question by his poor memory. Indeed, there were many points about which he simply had no memory. I also acknowledge that he had a history of conflict with the plaintiff and therefore a reason to have some animus towards her. Nevertheless, I found him to be generally candid and straightforward with his testimony. He did not appear to be evasive about issues which

could have reflected poorly on his character. Nor was he significantly challenged in cross-examination.

[13] Baptiste similarly had a poor memory about a number of matters. She was not in the habit of taking notes about business-related conversations. However, to her credit, despite being a party defendant, she appeared to harbour no ill will towards the plaintiff while testifying. Rather, she impressed me as a careful and fair witness, who was not significantly challenged in cross-examination.

[14] The credibility of Wayne Curry ("Curry") was also not significantly challenged by the plaintiff's counsel. As I will come to shortly, his evidence relates primarily to a discrete point, being an incident between him and the plaintiff while they were driving their motor vehicles in Pelly Crossing. While Curry was vague about certain details, he did not appear to have any ill will towards the plaintiff, and generally gave his evidence in a candid and straightforward manner.

[15] The credibility of the two YG witnesses, Baufeld and Harris, tendered on the plaintiff's behalf, was not challenged by the defendants' counsel. However, as I will come to below, the reliability of certain of their evidence is at issue.

FACTS

[16] Based upon my assessment of the credibility and reliability of the parties and the witnesses, I make the following findings of fact.

[17] Pursuant to the Temporary Assignment between YG and the SFN, the plaintiff began working at the SFN in Pelly Crossing as Executive Director on November 19, 2007. The term of the Temporary Assignment was to terminate November 18, 2008, but

after that one year period, the agreement was to be reviewed with an option to renew for a further year, subject to the agreement of the parties.

[18] At some point after the commencement of the Temporary Assignment, Baufeld had a conversation with the plaintiff at a General Assembly for the Council of Yukon First Nations. While Baufeld did not remember the details of much of that conversation, one aspect of it stood out in her mind. At one point, the two were on the topic of men and the plaintiff referred to a gentleman who was “quite nice-looking” and “nummy”. When Baufeld ask who the plaintiff was referring to, she responded “Chief Darin Isaac”. Baufeld was quite surprised by that answer, because she knew that the plaintiff would be reporting to Chief Isaac under the Temporary Assignment and she considered the remark to be “not appropriate” in the human resources context.

[19] In 2008, the plaintiff began making notes in a daytimer-style calendar about the comings and goings of various employees and directors of SFN. However, she did not make notes for every work day. At one time she was using two different daytimers to record this information. The one entered as an exhibit at the trial has large gaps of several days between the entries, and there were several instances where the plaintiff could not recall the meaning of certain of her notes.

[20] On February 29, 2008, the plaintiff sent an email to Baptiste raising some issues about her work performance. Baptiste was somewhat offended by this email and responded within an hour, attempting to address the concerns raised by the plaintiff. The plaintiff subsequently apologized to Baptiste for offending her. Baptiste accepted the apology as sincere and the two subsequently continued to have a good working relationship, although Baptiste noticed that the plaintiff was not quite as friendly with her

afterwards. That was the only occasion of friction between the plaintiff and Baptiste referred to in the evidence.

[21] Also in February, the plaintiff began to take on the role of acting director of the Capital Works department. In mid-July 2008, she formally stopped working as the Executive Director and began working exclusively as the Capital Works Director.

Relationship with Adam Van Bibber

[22] On March 12, 2008 Van Bibber went to the SFN daycare to pick up his three-year-old son. He was late and when he arrived, the daycare director already had the child in her car ready to drive him to Van Bibber's home. When the child got into Van Bibber's vehicle, he complained that he had been "hit" by the daycare director. Van Bibber became upset and went to the SFN band office after work hours, where he interrupted a meeting between the plaintiff and another SFN employee to relay to them what happened. The plaintiff documented this incident and verified that Van Bibber was very upset and "slammed doors" when he left. The plaintiff concluded that Van Bibber had conducted himself unprofessionally and she told him that their conversation would be documented in his personnel file.

[23] It was a term of the Temporary Assignment that the plaintiff was to abide by all SFN policies and procedures. One of those policies was a "Human Resource Manual", which contained a section regarding the discipline of SFN employees. That section provided that a verbal reprimand would normally precede a written reprimand, and that an employee must know what is documented on their personnel file. In the event of a written reprimand, the employee was to be given the opportunity to make explanations,

either verbally or in writing. Further, all written reprimands were to be “signed by both the employee and supervisor”.

[24] The plaintiff failed to comply with this procedure in relation to the incident of March 12, 2008. Indeed, Van Bibber was not made aware that the plaintiff’s note of that date was placed on his personnel file until his examination for discovery on July 29, 2011.

[25] In May 2008, the plaintiff, who was a Canadian Ranger, went on a river expedition with Van Bibber and other Canadian Rangers. One of the group mistakenly shot a pregnant female moose, thinking it was a bull which had lost its antlers. Van Bibber had encouraged his companion to take the shot. The plaintiff was very upset by the incident and thought that Van Bibber had a cavalier attitude about it.

[26] On June 23, 2008, Jessica Alfred, the godmother of Van Bibber’s son, lodged a written complaint of harassment against Van Bibber over a personal issue where she claimed that he raised his voice and swore at her in the lobby of the SFN band office. The plaintiff filed a copy of this complaint in Van Bibber’s personnel file, but without his knowledge and contrary to the SFN Human Resource policy on discipline in that regard.

[27] On another undated occasion, but prior to August 5, 2008, the plaintiff accused Van Bibber of going home to shower during work hours. Van Bibber claimed that he did so because he got some fecal matter on him while operating the sewage truck. The plaintiff disbelieved this explanation. According to my notes, Van Bibber was not specifically asked about this incident. However, he did generally explain that because he worked with both sewage and potable water, if he got sewage on his clothing, he was required to clean himself up before attending to any water issues.

[28] On August 5, 2008, the plaintiff confronted Van Bibber about moving in to a house which had been allocated to him by SFN. According to a new SFN housing policy, residents were not to take possession of their houses until they had paid a damage deposit. Van Bibber had not yet paid his damage deposit. The two got into an argument. Van Bibber suggested they take the matter up with the Chief and Council, however no one was available to meet with them. Later that afternoon, Van Bibber indicated to the plaintiff that he had paid the damage deposit. Again, the plaintiff made a note of this incident and placed it on Van Bibber's personnel file, but without his knowledge and contrary to the SFN discipline policy.

[29] On August 21, 2008, Van Bibber confronted the plaintiff during a work day about the fact that the plaintiff and Van Bibber's immediate supervisor, Richard Baker, had not yet "signed off' on his time sheets. The result was that Van Bibber's pay cheque was late. Van Bibber decided to take the rest of the day off. The plaintiff made a note of this incident, but there is no evidence whether it was placed on Van Bibber's personnel file. Van Bibber had no memory of the incident at all.

[30] On another unspecified occasion, the Capital Works department required a "heat trace" and Van Bibber volunteered to drive to the neighbouring community of Carmacks to pick it up. However, the plaintiff went instead. Van Bibber later confronted the plaintiff about this, suggesting that she had an ulterior purpose for making the trip. Again, according to my notes, Van Bibber was not asked about this incident.

[31] Van Bibber admitted that he did not always arrive on time for his employment. The plaintiff suggested through her evidence in relation to her daytimer that this was a chronic problem. However, when she was specifically asked about it, she testified that

she only raised the issue of Van Bibber's attendance with him on three occasions and only once went driving around Pelly Crossing to look for him.

Incident with Wayne Curry

[32] The plaintiff and Wayne Curry met in Dawson City in the late 70's. The two had occasional one night stands over a period of four or five years, but Curry stopped that prior to 1985 because of his marriage.

[33] Curry is an SFN member and an independent excavation contractor living and working in Pelly Crossing. He is also Van Bibber's cousin. After the plaintiff became the director of the Capital Works department, she began to have more job-related contact with Curry.

[34] Eventually, the plaintiff brought up the past with Curry and demanded an explanation from him for what had happened between them. Curry tried to explain that he never considered that the two of them ever had a true relationship, but the plaintiff had difficulty accepting that response. She became quite emotional during those discussions, at times becoming angry and tearful. The plaintiff repeatedly raised the topic with Curry, but he tried to explain to her that there was "no chance" of them getting back together. At one point, Curry went to the RCMP detachment in Pelly Crossing to inform them of what was happening. He said that he did so "in case something <u>did</u> happen" (his emphasis), because the plaintiff was "totally emotional" and "unpredictable".

[35] On one occasion in particular, the date of which was not specified, the plaintiff had booked a meeting with Curry for 11 o'clock in the morning. Curry did not show up for the meeting. The plaintiff went to Curry's residence and he explained that he had to go to Whitehorse because of an emergency. About four hours later, the plaintiff saw that Curry

was still in Pelly Crossing, driving his one-ton truck. The plaintiff was driving a marked SFN vehicle. The two were on the Klondike Highway, in front of the RCMP houses, travelling towards each other at about the speed limit of 50 km/h. The plaintiff swerved across the centerline towards Curry and gave him "the finger". Curry could see that she was obviously upset because her face was red and her mouth was moving, as though she was yelling at him. Curry had a passenger with him at the time. The plaintiff then served back into her own lane. Curry thought that this behaviour by the plaintiff was "a little suicidal" because he had a much larger vehicle than she did, in the event of a collision. Within five minutes of that incident, the plaintiff left three consecutive voicemail messages for Curry. In one of the messages she called him a "spineless bastard".

[36] In his report of July 28, 2009, the plaintiff's psychiatrist reported that the plaintiff:

> "has felt obsessed by thoughts of another man over the last 30 years, particularly since having seen him again in the past year… [but that] There is no indication that she has acted on the obsession inappropriately."

This is a reference to Wayne Curry. Obviously, the plaintiff failed to disclose this swerving incident to her psychiatrist.

[37] In April 2013, the plaintiff learned that Wayne Curry had expressed some concerns that certain conduct by her bordered on harassment. Because the plaintiff is planning to return to live and establish a business in Pelly Crossing, she explained that she sent a text message to Mr. Curry to ensure him that he had no reason to worry about her. The content of the text message was;

> "Omg im so sorry.ill nvr approach u again.i promise.I just felt so much love for u for so long. So very sorry u felt harassed. It wont happen again. [J]"

End of employment with SFN and discussions between SFN and YG

[38] On September 24, 2008, the plaintiff sent an email to the Chief and Council informing them that she would be leaving her position at the end of her contract. On the same date, the plaintiff emailed Melanie Harris at YG to inform her that she had just given her "notice" to SFN.

[39] On October 27, 2008, the plaintiff attended a meeting with the Chief and Council. To the plaintiff's surprise, one of the councillors reported that Van Bibber had been complaining of sexual harassment by her. The plaintiff had previously arranged to have a meeting that day with Van Bibber and another councillor, Jeremy Harper ("Harper"), who was in charge of the Capital Works portfolio for SFN. The original purpose of the meeting was to discuss Van Bibber's job performance. However, after learning of the sexual harassment complaint, the plaintiff indicated to Harper that they would also have to ask Van Bibber about that at the meeting.

[40] When the plaintiff eventually met with Harper and Van Bibber later that day, the initial conversation was about Van Bibber's job performance and his working relationship with the plaintiff. Van Bibber was complaining because he thought the plaintiff was picking on him and was too arrogant. The plaintiff was complaining about Van Bibber's poor productivity and about the amount of time he spent following Wayne Curry around during the workday. Both were very angry and Harper tried to calm them down. Eventually, the plaintiff said "What is this about sexual harassment?" Van Bibber responded "That's right. I have a right to a workplace free from harassment." The plaintiff then asked him "Why? What happened?" Van Bibber then described the following two incidents.

[41] The first incident, although not necessarily the first in time, occurred when the plaintiff was still working as Executive Director. She had been in Pelly Crossing for about four or five months by then, so it would have been in approximately March or April, 2008. Van Bibber was complaining to the plaintiff about the fact that, because the pipes were frozen, he did not have a functional bathroom at his residence where he could bathe his three-year-old son. According to Van Bibber, the plaintiff replied "You can come over anytime you want to use my washroom" (his emphasis), in a suggestive tone of voice, which made him feel uncomfortable. According to the plaintiff, she said "You can come over and use my bathroom anytime". Although she did not specifically say so then, the plaintiff claims she meant that he could do so for the purpose of bathing his son, and that she was just trying to be nice. I find there is no significant difference between the words attributed to the plaintiff in either version.

[42] The second incident occurred when Van Bibber went to the plaintiff's house to fix something. Van Bibber picked the plaintiff up at the upstairs office of the band administration building, and the two drove to the plaintiff's residence in Van Bibber's one-ton SFN truck. The plaintiff was wearing a white miniskirt and had some difficulty getting into the cab of the truck. When they arrived, the plaintiff used the side entrance to the house, rather than the front door. The washer and dryer were located near the side entrance and the two had to pass by a pile of laundry on the floor to get into the interior of the house. According to Van Bibber, as they passed by the pile of laundry, the plaintiff kicked it, raised her hands and said in a high suggestive voice "Oh, don't look at my panties!" Again, he said that made him uncomfortable and he found the incident

embarrassing. According to the plaintiff, the pile of laundry was covered with a towel, and when she kicked it, she simply said “Oh, don’t look at my dirty laundry.”

[43] The plaintiff typed three pages of notes following the meeting of October 27, 2008 and placed them on Van Bibber’s personnel file, again without his knowledge and contrary to the SFN discipline policy.

[44] Van Bibber made his sexual harassment complaint to both his supervisor, Richard Baker, and his Personnel Officer, Baptiste. Although he did not recall whom he complained to first, I conclude that it must have been Baker. That is because Baker was his immediate supervisor and also because Baker took no action in response to the complaint. Thus, logically, Van Bibber would have next complained to Baptiste, who did take action, which he seemed to be content with. In other words, there would have been no need for Van Bibber to go to Baker after Baptiste.

[45] Baptiste described Van Bibber as being “really upset” when he made the complaint to her in her office behind closed doors.

[46] Baptiste had never dealt with a sexual harassment complaint. Her only experience was limited to a couple of conferences and workshops where the topic was raised. She initially thought it might be a federal matter and sought advice from Labour Canada. They told her to contact the Yukon Human Rights Commission for suggestions on how to handle the complaint. Baptiste did so and was advised to document the claim and to not allow Van Bibber and the plaintiff to have contact with each other. On October 30, 2008, Baptiste sent the following email to the plaintiff and Councillor Harper:

> “Hi [J],
> I discussed this issue going on between you and Adam with Jeremy and recommended that, until this issue is resolved

> that you and Adam should not have contact with each other what so ever, this is a very serious situation that we are dealing with. Richard [Baker] is his direct supervisor therefore until this issue is resolved I think that Richard should be dealing with Adam.
> Jeremy; In the meantime we need to get a plan of action in place of how we can resolve this without having to take it to the Human Rights Commission.
> Thank you."

The tenor of Baptiste's evidence was that she began dealing with the sexual harassment complaint soon after it was made to her by Van Bibber. Therefore, it is reasonable to conclude that Van Bibber reported the matter to her within a few days of October 30 2008.

[47] Also on October 30, 2008, the plaintiff sent an email to Marge Baufeld, at YG, curiously stating "Change of plan… I will not be staying here for another year…." I addressed this point earlier when discussing the plaintiff's credibility. If in fact this was a "change of plan" for the plaintiff, then she must have made a decision to stay with SFN sometime between her earlier notice of September 24 and that date of October 30. However, there was no clear evidence from the plaintiff that she had ever made such decision.

[48] In yet another reversal of her position, on November 6, 2008, the plaintiff met with Chief and Council and agreed to stay on with SFN for another year. She received a direction to draft a letter to be signed by the Chief in that regard. She did so on the same date, however the letter was not received by YG until November 12, 2008.

[49] Also on November 6, 2008, the plaintiff had a strange and curious exchange of emails with Melanie Harris at YG. In the first of these emails, Harris asked the plaintiff to confirm the date she will be returning to YG. Rather than informing Harris of her decision

to stay at SFN, the plaintiff's replies suggested that she was interested in taking vacation leave time upon her return to YG. Once again, this suggests that the plaintiff could not seem to make up her mind about what she was going to do.

[50] In any event, the plaintiff ultimately decided to stay on with SFN after the end of the one-year term of the Temporary Assignment on November 18, 2008. However, her Deputy Minister was out of the country at that time and a new Temporary Assignment could not be signed until after his return on November 24th.

[51] Sometime between November 17 and 21, 2008, Marge Baufeld spoke with Baptiste about the plaintiff's performance under the Temporary Assignment. Neither Baufeld nor Baptiste made any notes of the conversation. Baptiste was reluctant to discuss any of the particulars about whether the Temporary Assignment would be extended and asked Baufeld to treat as confidential any information that she provided to her. Baufeld advised Baptiste that, because the plaintiff was YG's employee, Baufeld had to know of any concerns, and Baptiste raised a number points:

1) The plaintiff's move from Executive Director to Capital Works Director;
2) The plaintiff's claim for overtime; and
3) That the Temporary Assignment may not be renewed because of the sexual harassment allegation and the swerving incident with Wayne Curry.

Baufeld told Baptiste to let Melanie Harris know about these concerns as well. Baptiste did not want to repeat the conversation and asked Baufeld if she could speak with Harris, but Baufeld insisted that Baptiste had to do so.

[52] On November 21, 2008, Baufeld telephoned Harris to inform her that some issues had arisen out of the Temporary Assignment. Harris made notes of that conversation, which read as follows:

> "Marge
> - Betty following up on S.Har. charge (25 yr. old male direct report -"cougar meat" - teased by others)
> - told Chief may want to advise [the plaintiff] reconsidering extension
> - tried to run old boyfriend who was walking off the road w Selkirk F.N. vehicle
> - wagging finger in subordinate's faces
> - did report at General Assembly - cutting down F.N. people - called on it in meeting - left room crying"

[53] On November 24, 2008, Harris telephoned Baptiste to discuss several issues relating to the Temporary Assignment. Only Harris made notes of that conversation, however she has little or no present recollection of the content of it. As in the conversation with Baufeld, Baptiste mentioned the plaintiff's move from Executive Director to Capital Works Director and the issue of unapproved overtime. They also discussed the sexual harassment allegation and the swerving incident with Wayne Curry. Harris' notes about those matters read as follows:

> Re. the sexual harassment complaint:
>
> "- direct Sup.,O&M (Richard Baker) Water System
> - 3 guys refusing to go to work because [the plaintiff] still here
> - let Chief know (generally not close - accuser 1 of them)
> - meeting w portfolio holder
> - direct report
> - human rights - not able to discuss (federal)
> - …
> - Exec. Dir. Role - couple of incidents
> - Not dir. sup.

- Capital
- Richard Baker - direct Sup. - not dealing w things
- documenting stuff on him
- Federal Human Rights complaint - not sure - if leaving drop it - told him staying - I'm going to do it
- walks by my office - cold shoulder
- asked for copy of letter
- chatted - a really nice person"

Re. the Wayne Curry incident:

"- Selkirk F.N. vehicle - driving truck - swerved it at him 3 times
- left messages on his answering - needs closure from 25 yrs. ago
- screaming yelling
- went R.C.M.P.
- crazy - fearful"

[54] By consent, Harris gave her direct evidence by way of an affidavit. Her interpretation of these aspects of the conversation with Baptiste on November 24, 2008 are set out at paras. 11 through 14:

> "11. My notes indicate that Betty Gill [now Baptiste] told me that she was not able to discuss an alleged sexual harassment complaint brought against [the plaintiff] by a man who reported directly to [the plaintiff]. Betty Gill told me that she could not discuss it because it was a federal Human Rights issue.
>
> 12. My notes indicate that when I asked Betty Gill if a formal Human Rights complaint had been filed, she said that she was not sure. She told me that the man had said that he would drop the complaint if [the plaintiff] did not remain in Pelly, but that if [the plaintiff] remained in Pelly he would file a formal Human Rights complaint.
>
> 13. My notes indicate that Betty Gill also told me that [the plaintiff] had swerved a Selkirk First Nation vehicle at a man in Pelly. Betty Gill also told me that the man was an ex-boyfriend of [the plaintiff's] and that he thought [the plaintiff]

> was crazy and that he was fearful of her. Betty Gill told me that the man had gone to the RCMP about the incident.
>
> 14. I recall that Betty Gill also told me that she felt sorry for [the plaintiff] because it was difficult being an outsider in Pelly. She indicated that the complaint may have been a result of [the plaintiff] doing performance management with staff which had not been done before."

[55] As I noted earlier, the plaintiff continued to work as the Capital Works Director for SFN from November 19 to December 2, 2008, even though she was technically on paid vacation leave with YG at that time. In any event, sometime between those two dates, SFN changed its mind and decided it did not want the plaintiff to stay on for an additional year. On December 2, 2008, Baptiste met with the plaintiff thinking that she had already been told by councillor Jeremy Harper of this decision. Accordingly, Baptiste sat down with the plaintiff and mentioned that she wanted to discuss "an exit plan". When the plaintiff became very upset upon the use of that phrase, Baptiste realized that the plaintiff was hearing about the decision for the first time, and felt sorry for her.

[56] Later on December 2, 2008, the plaintiff cleaned out her office and left Pelly Crossing.

ANALYSIS

1. Did Van Bibber make a defamatory statement?

[57] There is a line of authority which holds that a plaintiff alleging defamation must plead the exact words that are alleged to be defamatory: *Lougheed v. Canadian Broadcasting Corp.* (1978), 11 A.R. 55 (S.C.T.D.) , aff'd on this point (1979), 15 A.R. 201 (S.C.A.D.); *Universal Weld Overlays Inc. v. Shaben*, 2001 ABQB 1009; *Neuschaefer v.*

Leskiw , 2008 ABQB 18, at para.46. Indeed, in *Brown on Defamation* (2nd ed) (Toronto: Carswell, 1999) (looseleaf) Professor R.E. Brown states, at pp. 19-28 through 19-30:

> "The general rule is that the defamatory words about which the plaintiff complains must be set out fully and precisely in the statement of claim. The particular words that are claimed to be defamatory must be included in the claim. The impugned words must be pleaded. They should be set forth verbatim, or at least with sufficient particularity to enable the defendant to plead to the allegation. The statement of claim should include the words that were published…"

[58] Alternatively, in *Magnotta Winery Ltd. v. Ziraldo* (1995), 25 O.R. (3d) 575 (Gen.Div.), the court relied upon another line of authorities which indicate that it is open to a court, in a limited set of circumstances, to permit a plaintiff to proceed with a defamation action, in spite of an inability to state with certainty at the pleading stage the precise words published by the defendant. One such circumstance would be if the exact words are not within the plaintiff's knowledge at the time of the pleading.

[59] Prof. R.E. Brown continues with this theme in suggesting that it is not always necessary for the plaintiff to plead or allege verbatim the exact words, providing there is sufficient certainty as to what is being charged. In *Brown on Defamation,* he states, at pp. 19-39 and 19-40:

> "The more modern rule is to permit a plaintiff to plead and prove words that are substantially but not precisely the same as those which were spoken. It is not necessary for the plaintiff to plead or allege verbatim the exact words; it is sufficient if they are set out with reasonable certainty. Not every word must be proved if the variance or omission does not substantially alter the sense of the meaning of the words set out in the pleading. The test is whether the claim is pleaded with sufficient particularity to enable the defendant to understand whether the words have the meaning as alleged or some other meaning, and to enter whatever defences are appropriate in light of that meaning. It is impossible to require

> absolute precision in the pleading of oral communications; it is sufficient if there is certainty as to what was charged. If the words proved are substantially to the same effect as those used in the pleading, the pleading should stand."

[60] *Magnotta Winery* and the passage from Brown immediately above were both referred to with approval by the Ontario Court of Appeal in *Lysko v. Braley* (2006), 79 O.R. (3d) 721.

[61] The words pled by the plaintiff in this action are that Van Bibber stated at the meeting with Jeremy Harper on October 27, 2008 that the plaintiff had "sexually harassed" him. Jeremy Harper was not called as a witness. Van Bibber did not remember very much of that conversation and gave no evidence of using those words. The plaintiff's evidence was that it was she who brought up the topic of "sexual harassment" and not Van Bibber. Further, she testified that when she did so, Van Bibber's response was "That's right. I have a right to a workplace free from harassment.", before going on to describe the two incidents giving rise to his complaint.

[62] Strictly speaking, the plaintiff has not proven that Van Bibber spoke the alleged defamatory words. However, in the context of the entire conversation, one might conclude that Van Bibber was effectively accusing the plaintiff at that meeting that she had "sexually harassed" him. Such a statement could be potentially defamatory, as it was capable of lowering the plaintiff's reputation in that community in the estimation of other reasonable persons: *Atkinson v. McMillan,* 2009 YKSC 81, at para. 31.

2. Assuming Van Bibber made the defamatory statement that the plaintiff "sexually harassed" him at the October 27th meeting, does the defence of justification apply?

[63] It is a complete defence to a defamation action that the defamatory imputation is true on a balance of probabilities: *Gatley on Libel and Slander*, 8th ed. (1981), at p. 150. As stated in *MacDonald v. Tamitik Status of Women Assn.,* cited above, a true statement cannot, by definition, be defamatory. Here, the defendants' counsel argued that the defence of justification applied because the two incidents underlying the sexual harassment complaint (i.e. the bathroom and laundry comments) have been substantially proven to have occurred.

[64] I conclude that the defence of justification is not available in these circumstances. The issue justification is concerned with is not whether the words alleged by the plaintiff were actually spoken, but rather whether they were the truth. Thus, it seems to me that in order for the defence of justification to apply, the defendants would have to prove on a balance of probabilities that the plaintiff truly sexually harassed Van Bibber. However, that question is beyond the scope of this action.

3. Assuming Van Bibber made the defamatory statement that the plaintiff "sexually harassed" him at the October 27th meeting, does the defence of qualified privilege apply?

[65] There are occasions on which a person may make (publish) untrue statements about another and avoid liability even though the statement is defamatory. One such occasion gives rise to the defence of qualified privilege. An occasion is privileged if a statement is fairly made by a person discharging a public or private duty, providing it is made to a person who has a corresponding interest in receiving the information: *Brown on Defamation*, cited above, Vol. 4 at 13-5. In other words, the communication must be made in good faith in furtherance of a common or mutual interest. The test is whether persons of ordinary intelligence and moral principle, or the great majority of right-minded

persons, would have considered the maker of the statement to have had a duty to communicate information to those persons to whom it was published. Qualified privilege attaches to the occasion on which the communication is made, and not to the communication itself: see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 143.

[66] In *London Association for Protection of Trade v. Greenlands Ltd.*, [1916] 2 A.C. 15, at 35-6, Lord Atkinson said:

> "… if one person makes an inquiry of another touching the position or character of a third, and the person inquired of makes a reply which he bona fide believes to be true, and also bona fide believes that the inquirer desires the information, not merely to gratify idle curiosity, but for some purpose in which he, the inquirer, has a legitimate interest of his own, the occasion upon which the answer is communicated to him is a privileged occasion…"

[67] At the October 27th meeting, the only person, besides the plaintiff and the defendant, who was present was Jeremy Harper. He was the councillor in charge of the Capital Works portfolio for SFN, and had a legitimate interest in attending the meeting. Both the plaintiff, who was then the Capital Works Director, and Van Bibber, who was an Operations and Maintenance worker within that department, were ultimately accountable to Harper for work-related matters. The alleged sexual harassment was clearly a work-related matter. Indeed, the topic was initially raised by the plaintiff herself at the meeting. Further, I am satisfied on a balance of probabilities that Van Bibber honestly believed that the two incidents giving rise to the complaint were capable of constituting reasonable grounds for sexual harassment. Thus, I have no difficulty in concluding that anything said by Van Bibber during the occasion of that meeting about being "sexually harassed" by the plaintiff would be protected by the defence of qualified privilege.

4. If qualified privilege applies, is it defeated by either: (a) malice; or (b) by exceeding the limits of the duty or interest giving rise to the privilege?

[68] As I stated in *Atkinson*, at paras. 46 through 52, qualified privilege is not absolute. It can be defeated if the plaintiff can prove, on a balance of probabilities, either:

a) that the dominant motive for making the statement was actual or express malice, or

b) that the limits of the duty or interest giving rise to the privilege in the first place have been exceeded, in the sense that the statement went beyond what was germane and reasonably appropriate in the circumstances.

[69] The plaintiff's counsel argued that Van Bibber made the complaint of sexual harassment for the ulterior purpose of preventing the plaintiff's contract from being renewed. Further, counsel submitted that Van Bibber did not want to continue working under the plaintiff because: (a) she was a demanding superior; and (b) she was bothering his cousin, Wayne Curry. Finally, counsel argued that there was a significant delay between the incidents giving rise to the sexual harassment complaint and the actual reporting of the complaint to Baptiste, and that this supports the inference that Van Bibber made the complaint for the strategic purpose of getting rid of the plaintiff. If the sexual harassment complaint was made for an ulterior purpose, malice is established and any defence of qualified privilege is defeated.

[70] I reject this argument for several reasons. I also note that this entire theory was never put to Van Bibber in cross-examination. Thus, he was never challenged with the suggestion nor given any opportunity to comment upon it.

[71] First, there is no evidence that Van Bibber had any knowledge of when the plaintiff's contract was coming up for potential renewal, and thus no evidence to support the inference that he was strategically planning to get rid of the plaintiff.

[72] Second, there is little evidence that Van Bibber found the plaintiff to be a demanding superior, and even less evidence that Van Bibber did not want her to continue working for SFN for that reason. While there was evidence of friction between the plaintiff and Van Bibber at various times, this must be kept in perspective. On the plaintiff's own evidence, there were only three occasions on which she recalled Van Bibber being late for work, and only one occasion on which she went driving around the community to look for him. Further, although the plaintiff gave evidence about incidents which she noted on Van Bibber's personnel file, i.e. March 12, June 23 and August 5, 2008, none of these were formally put to Van Bibber as discipline issues according to the SFN discipline policy. Indeed, he had no knowledge of these notes on his file until his examination for discovery. The other incidents of conflict which the plaintiff testified about were either not put to Van Bibber during his testimony, or he had no recollection of them. Finally on this point, even if it could be inferred that Van Bibber disliked the plaintiff, that does not defeat qualified privilege if Van Bibber was otherwise acting for a proper purpose: *Neuschaefer v. Leskiw*, cited above, at para. 70.

[73] Third, there is no evidence that Van Bibber did not want the plaintiff to continue to work for SFN because she was bothering his cousin, Wayne Curry. While the "swerving incident" is evidence of some friction between the plaintiff and Curry, Van Bibber was never asked how he felt about that.

[74] It does appear that there was some delay between the two incidents giving rise to the sexual harassment complaint and the actual reporting of the complaint by Van Bibber to Baptiste. There is evidence from the plaintiff that the “bathroom” incident occurred in March or April 2008. The evidence of when the “laundry” incident occurred is less clear. If it was while the plaintiff was still employed as Executive Director, then it could have happened as late as July 2008. Van Bibber’s unchallenged statement that the plaintiff was wearing a miniskirt that day supports the inference that the incident occurred when the weather was warmer. In any event, the argument of the plaintiff’s counsel ignores the fact that Van Bibber initially reported the sexual harassment to his immediate supervisor, Richard Baker. Baker was not called as a witness and there is no evidence of when that report was made. What Van Bibber did say about reporting to Baker is that Baker did nothing in response. What we do not know is how long Van Bibber waited for Baker to take action before deciding to go to Baptiste.

[75] Even assuming that Van Bibber did delay in making his complaint to Baptiste, that fact standing alone is incapable of reasonably supporting the inference that he made the complaint for the ulterior purpose of preventing the renewal of her contract. It seems to me that there would have to be some additional evidence, e.g. that Van Bibber had knowledge of the terms and circumstances of the Temporary Assignment, in order to support the inference. Finally, to make the inference without such evidence and in the context that Van Bibber was never specifically challenged about the alleged ulterior purpose, would simply be unfair.

[76] The plaintiff's counsel made no argument about whether anything Van Bibber said at the October 27th meeting about being "sexually harassed" by the plaintiff exceeded the limits of any duty or interest giving rise to the occasion of qualified privilege.

[77] Accordingly, I find that the defence of qualified privilege has not been defeated vis-à-vis Van Bibber.

5. Did Baptiste make defamatory statements?

[78] In paras. 51 through 53 of the second amended statement of claim the allegation is made that:

> "… between November 21, 2008 December 4, 2008… Baptiste repeated the defamations of…Van Bibber to employees of Yukon Government in telephone conversations with [those] employees…"

And further, that "these words" are defamatory because they "imply that [the plaintiff] sexually harassed Adam Van Bibber." Once again, strictly speaking, the plaintiff has failed to specifically plead the exact words which she says Baptiste used in repeating "the defamations of…Van Bibber" and which imply that she had "sexually harassed" him. However, in the context of each of the two conversations which Baptiste had with Baufeld and Harris, it is reasonable to infer that there was some mention by Baptiste of the sexual harassment allegations by Van Bibber. On its face, such a statement could be construed as defamatory.

[79] At paras. 54 through 57 of the second amended statement of claim, the plaintiff alleges that:

> "… on or about November 21, 2008,.. Baptiste published to… Melanie Harris that a 25-year-old male had reported that he was being teased by others as "cougar meat"."

And further, that these words are defamatory because they "imply that [the plaintiff] had sexually harassed Adam Van Bibber."

[80] I accept for the sake of argument that, if the plaintiff could prove on a balance of probabilities that Baufeld correctly attributed the statement to Baptiste and accurately relayed it to Harris, then it is arguably defamatory. Having said that, for the reasons which follow, I conclude that the reliability and therefore the probative value of this evidence is tenuous at best.

[81] First, it must be remembered that the statement was recorded by Melanie Harris during her conversation with Marge Baufeld on November 21, 2008. In that conversation, Baufeld was relaying to Harris certain details of Baufeld's previous conversation with Baptiste. There is no evidence when the conversation between Baufeld and Baptiste occurred. It is reasonable to infer that it happened shortly before Baufeld spoke with Harris about it on November 21st, but whether it was one or two or more days is unknown. That is a potentially important missing piece of the puzzle, because it goes to the reliability of: (a) what Baufeld actually recalled of what Baptiste told her, keeping in mind that Baufeld made no notes of the conversation; (b) the accuracy of what Baufeld relayed to Harris on November 21st; and (c) Harris' interpretation of what Baufeld was telling her.

[82] Second, Baufeld was never asked during her testimony whether Baptiste made this statement to her. Therefore, she has not confirmed its authenticity.

[83] Third, there is an obvious inaccuracy in Baufeld's affidavit about her conversation with Baptiste. There, Baufeld deposed that Baptiste told her of "some male employees" being allegedly sexually harassed by the plaintiff. Clearly, the evidence is that there was

only one such complainant, and that was Van Bibber. That error raises a general concern about the accuracy of Baufeld's recollection of the conversation.

[84] Fourth, there is also an obvious inaccuracy in one of Harris's notes regarding the "swerving incident" with Wayne Curry. The note states: "tried to run old boyfriend **who was walking** off the road w Selkirk F.N. vehicle" (my emphasis). It is clear that Curry was driving his own truck when the plaintiff swerved towards him. The fact that this information was inaccurate raises concerns about whether other information relayed by Baufeld and recorded by Harris was also inaccurate, including the alleged defamatory statement about "cougar meat".

[85] Fifth, while Baptiste did recall telling Baufeld in general terms about the sexual harassment complaint, she said that she did not remember the conversation in particular. Further, the alleged defamatory statement was never specifically put to Baptiste during her testimony. Accordingly, she was never given the opportunity to confirm whether she made such a statement to Baufeld, or had any other comments about it.

[86] Sixth, in his cross-examination, Van Bibber himself specifically denied that anybody "teased" him about the alleged sexual harassment. That in turn raises a concern about the accuracy and truth of the note made by Harris regarding "cougar meat".

[87] In the result, I remain skeptical whether Baptiste made the alleged defamatory statement to Baufeld at all. More importantly however, the plaintiff has clearly failed to prove on a balance of probabilities that Baptiste made the alleged statement to Harris, as was pled in the second amended statement of claim. Therefore, this aspect of the plaintiff's claim must also fail.

[88] At paras. 58 through 61 of the second amended statement of claim, the plaintiff alleges that:

> "On or about November 21, 2008, Betty Baptiste published to an employee of Yukon Government believed to be Melanie Harris that the Plaintiff was "cutting down First Nations people" and that she had been "called on it in meeting".

And further, that these words are defamatory in that they imply that the plaintiff "is racist and that she treated First Nations people in a disrespectful manner because of their race."

[89] I treat this allegation the same as the previous one. Again, the attribution to Baptiste is two steps removed and unreliable for the reasons I just gave. As well, we do not know how much time passed between the original undocumented conversation between Baufeld and Baptiste and the subsequent conversation between Baufeld and Harris on November 21, 2008. Further, Baufeld was never specifically asked whether Baptiste made the statements to her. Further still, there was a significant inaccuracy in Harris' note of her conversation with Baufeld.

[90] Moreover, Baptiste was not specifically asked whether she made such a statement to Baufeld. Rather, what Baptiste was asked about in direct examination was how she had an awkward discussion with the plaintiff about how to "conduct herself" in the workplace. Baptiste was worried about the plaintiff being "too direct" with SFN members, and that she might "get called" on that at a General Assembly. Baptiste explained that something similar happened to her when she attended one of her first General Assemblies with a former Executive Director. She said that "people called us on things and I left crying". There was no reference in that evidence to Baptiste acknowledging

that the plaintiff was “cutting down First Nations people”. In cross-examination, Baptiste was asked whether she remembered seeing Harris’ notes from earlier in her testimony about the conversations she had with Baufeld and Baptiste. In particular, Baptiste was asked whether she recalled seeing the statement that the plaintiff had been “called” for “cutting down First Nations people”. Baptiste’s answer was “I recall seeing something like that, yeah.” However, Baptiste did not specifically acknowledge that she had made such a statement to Baufeld, because she was never asked that question.

[91] In the result, I find the evidence surrounding the statement to be unreliable and I give it no weight. In any event, as with the foregoing allegation, it is abundantly clear that Baptiste never made that statement to Melanie Harris on November 21, 2008, as was pled.

[92] At paras. 62 through 64 of the second amended statement of claim, the plaintiff has pled:

> “On or about November 24, 2008, Betty Baptiste published to an employee of Yukon Government believed to be Melanie Harris that the Plaintiff swerved a Selkirk First Nation vehicle at an individual three times, that she left messages on the individual’s answering machine, that she needed closure from 25 years ago, that she was screaming and yelling, that the individual had reported the incident to the Royal Canadian Mounted Police, and that the plaintiff further says that Betty Baptiste used the words crazy and fearful in reference to the Plaintiff in relation to these incidents.”

And further, that these words are defamatory in that they imply that the plaintiff was unfit for her employment.

[93] This allegation proceeds on a different footing than the previous two. Here, Baptiste admitted in direct examination that she was told about this incident by Van

Bibber, and that she relayed the following details to Harris during their conversation on November 24, 2008:

- that the plaintiff was driving a SFN vehicle;
- that the other individual was driving a truck;
- that the plaintiff swerved at the individual driving the truck; and
- that the plaintiff had left messages on the individual's answering machine, that she was screaming and yelling and needed closure from 25 years ago.

However, Baptiste denied telling Harris that this had happened three times. In particular, Baptiste said "I only remember once when she swerved at Wayne Curry". Further, Baptiste initially said that she did not recall using the words "crazy" or "fearful" in relation to the plaintiff, and then when asked "Are those your words?", she replied "No". I accept that as a denial that she used those words in relation to the plaintiff.

[94] However, notwithstanding that Baptiste has substantially admitted the allegation, the plaintiff herself has also largely admitted the truth of this allegation. She testified that:

- She was frustrated with Wayne Curry that day because she felt that he had lied to her about missing an appointment in the morning.
- She was driving a SFN vehicle with SFN logos on the sides.
- Curry was in his vehicle coming towards her on the Klondike Highway in front of the RCMP houses.
- She estimated that she was doing about 20 to 30 km/h.
- She said she moved over into Curry's lane about 1 ½ feet and "squeezed him a bit".

- She said that Curry never turned his vehicle.
- When she swerved, she noticed that Curry had a passenger in his vehicle.
- She gave him the finger and then got back into her own lane.
- Within about five minutes of swerving at him, she left Curry three voicemail messages back to back. Although she did not recall the content of those messages exactly, she said she would have "called him" (i.e. called him to account) for missing the earlier meeting and that she also called him a "spineless bastard".

Although the plaintiff also testified that she did not consider the matter to be "life-threatening" or "inappropriate", I prefer the evidence of Wayne Curry in that regard.

[95] Curry testified that when the plaintiff swerved at him and gave him the finger, he could see that her face was red, her mouth was moving as though she was yelling at him, and she was "obviously upset". He also said that he thought she was "a little suicidal on her part", because he had a much larger vehicle in the event of a collision. Curry testified that he probably told Van Bibber about the incident, and I conclude that he did so because it was a matter of significant concern for Curry.

[96] While there are some minor differences between what Baptiste told Harris about this incident, those are not surprising given that Baptiste was relaying what she had heard second-hand from Van Bibber.

[97] In *Moores v. Salter*, [1982] N.J. No.167 (D.C.), the court held that a simple error in the correctness of a statement was not sufficient to constitute malice. There, the plaintiff claimed that the publication of a letter from Salter, his superior, was defamatory. The letter stated that the plaintiff, while involved in an argument with two other employees at

work, displayed “violent displays of temper and the use of language not conducive to civilized human beings”. The court found that the statement was published and that it was defamatory, but that the defence of qualified privilege applied. In deciding whether the defence of qualified privilege was defeated by express malice or excessive language, the court noted that the contents of Salter’s letter were “not exactly correct” in fact and could be viewed as “an overstatement” of the plaintiff’s actions. Nevertheless, the court was satisfied that this did not defeat the privilege. At para. 33, the court addressed this issue as follows:

> “33 There is no doubt that the contents of the letter of August 4th are not exactly correct in respect of the plaintiff Moores in that there is no evidence that he had struck the desk or that he had used offensive language. There is therefore some evidence of excess in the letter of August 4th. To hold that such correspondence when being used to report an employee for improper conduct was excessive so as to constitute actual or express malice and thereby constituting libel, would in my opinion limit the protection which the law places on privileged communications. It would make it too difficult and too exacting for the normal conduct of employee - employer relations and would defeat the whole reason why such communications should be privileged. It is not right that a management employee must be exactly correct in all that he states in reporting an employee if he reasonably and honestly believed that the employee was a party to the incident which was the cause of the reprimand or report. To hold otherwise would make it almost impossible for any manager to make a report concerning an employee without exposing himself to an action in libel. Malicious intent must be shown from the facts. A simple error in correctness of the act complained of and written about is not enough, nor is an over statement of the act always evidence of actual or express malice.”

[98] In my view, this reasoning is equally applicable to an assessment of whether the defence of justification applies. Accordingly, I find that what Baptiste relayed to Harris on

November 24, 2008 was essentially true in substance and in fact. Furthermore, as I noted earlier, a true statement cannot, by definition, be defamatory. Therefore, this aspect of the plaintiffs claim must also fail.

6. If Baptiste told Baufeld and Harris of the sexual harassment allegations, does the defence of qualified privilege apply?

[99] I conclude that the defence of qualified privilege does apply in these circumstances. I accept Baufeld's evidence in this regard. When she initially spoke with Baptiste, Baufeld informed Baptiste that because the plaintiff was YG's employee, she "had to know" of any concerns about the plaintiff. Baufeld explained that she was concerned because she did not want her employee to be in trouble with any First Nation. She further explained that she was concerned about the relationship between the Yukon and Selkirk First Nation governments, as well as the relationship between the plaintiff, as a YG employee, and those governments.

[100] Further, I accept Baptiste's evidence that she was directed by Baufeld to relay all of the concerns she had mentioned to Baufeld to Melanie Harris. Although Baptiste was reluctant to do so, she said that Baufeld told her "because [the plaintiff] was their employee, I <u>had</u> to tell her" (her emphasis).

[101] Indeed, the plaintiff's counsel conceded in her written submissions that Harris had an interest in being advised whether a sexual harassment complaint had been raised by a SFN employee against plaintiff. I conclude that Baufeld also had such an interest.

[102] In *MacDonald v. Tamitik,* cited above, the court noted that qualified privilege can exist between separate, and even competing organizations, so long as a mutual or shared common interest is present (paras. 106 and 108).

7. If qualified privilege applies to Baptiste's statement about the sexual harassment allegations, is the defence defeated by either: (a) malice; or (b) by exceeding the limits of the duty or interest giving rise to the privilege?

(a) Malice?

[103] The plaintiff's counsel argued that Baptiste had a duty to investigate the sexual harassment allegations, but failed to do so. Thus, when she relayed the allegations to Baufeld and Harris, she did so with reckless indifference to their truth, i.e. with malice.

[104] I accept that Baptiste had a duty to investigate the allegations. However, I reject the suggestion that she failed to do so. As I noted above, after receiving the complaint from Van Bibber, Baptiste sought advice from Labour Canada. They told her to contact the Yukon Human Rights Commission for suggestions on how to handle the complaint. Baptiste did so and was advised to document the claim and to not allow Van Bibber and the plaintiff to have contact with each other. On October 30, 2008, Baptiste sent the email to the plaintiff and Councillor Harper recommending that the plaintiff and Van Bibber should not have contact with each other until the issue was resolved. Baptiste further testified that she asked Van Bibber to put his complaint in writing, but that he declined to do so because he heard the plaintiff was leaving SFN, and if she did he would forget about the matter. That evidence is consistent with the other evidence that the plaintiff was indeed considering returning to YG about that time. Thus, without a written statement from Van Bibber, there was little Baptiste could do to further investigate the complaint. Finally, the plaintiff was gone from SFN little more than a month later.

[105] One of the reasons proffered by the plaintiff's counsel in support of her submission that Baptiste acted with reckless indifference to the truth is that Baptiste herself did not believe that the allegations of sexual harassment were true. Accordingly, as I understood

the argument, it was even more important for Baptiste to verify the allegations before relaying them to Baufeld and Harris. The problem with this argument is that there is no evidence Baptiste did not believe the allegations. When referred to her evidence at her examination for discovery where she was asked whether she believed that Van Bibber was making a genuine complaint, Baptiste merely stated that she did "not… make a judgment on it". In her testimony, Baptiste confirmed that she did not form an opinion on whether the sexual harassment complaint was genuine or not.

[106] In any event, I do not accept that Baptiste was acting with reckless indifference to the truth of the allegations. Rather, I conclude that she felt she was under a duty to pass on the information to the YG officers, without necessarily endorsing the truth of the statement. Her dominant motive was to comply with the direction given to her by Baufeld to pass the information along to Harris, and that motive was not improper. On the contrary, it gives rise to an exception to the ordinary requirement that the alleged defamer hold an honest belief in the truth of the statement. This principle was applied in *Horrocks v. Lowe* [1975] AC 135, at pp. 149 and 150:

> "So, the motive with which the defendant on a privileged occasion made a statement defamatory of the plaintiff becomes crucial. The protection might, however, be illusory if the onus lay on him to prove that he was actuated solely by a sense of the relevant duty or a desire to protect the relevant interest. So he is entitled to be protected by the privilege unless some other dominant and improper motive on his part is proved. 'Express malice' is the term of art descriptive of such a motive. Broadly speaking, it means malice in the popular sense of a desire to injure the person who is defamed and this is generally the motive which the plaintiff sets out to prove. But to destroy the privilege the desire to injure must be the dominant motive for the defamatory publication; knowledge that it will have that effect is not enough if the defendant is nevertheless acting in

> accordance with a sense of duty or in bona fide protection of his own legitimate interests.
>
> The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interest can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.
>
> Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'…" (my emphasis)

(b) Did Baptiste exceed the limits of the duty or interest giving rise to the privilege?

[107] The plaintiff's counsel did not argue this point and I conclude that it does not apply.

[108] In summary, the defence of qualified privilege in relation to Baptiste telling Baufeld and Harris of the sexual harassment allegations is not defeated.

7. If I am wrong about whether the defence of justification applies to Baptiste's statement about the swerving incident, does the defence of qualified privilege apply?

[109] For the reasons I just gave above, I conclude that the defence of qualified privilege does apply to the conversations when Baptiste mentioned the swerving incident to Baufeld and Harris.

8. If qualified privilege applies to Baptiste's statement about the swerving incident, is the defence defeated by either: (a) malice; or (b) by exceeding the limits of the duty or interest giving rise to the privilege?

(a) Malice?

[110] Here, the plaintiff's counsel again argued that Baptiste made the statement to Harris with malice because she acted with reckless indifference to its truth. This submission is based upon Baptiste's evidence that she did not form any opinion about whether Wayne Curry's allegations were true, and she did not speak with the RCMP, Curry or the plaintiff about them. Thus, goes the argument, Baptiste could not have held an honest belief that the statement was true.

[111] For my reasons set out above, I also reject this argument because of my conclusion that Baptiste felt she was under a duty to pass this information along to the YG officers, without necessarily endorsing the truth of the statement. Thus, the exception in *Horrocks v. Lowe* applies.

[112] At para. 65 of the second amended statement of claim, the plaintiff also pled that Baptiste's statement about the swerving incident was made for the "ulterior motive… of having the Plaintiff removed from her assignment with Selkirk First Nation." However, there was no evidence of any such motive and Baptiste was never asked any questions about such a theory. Therefore, this argument must also fail.

[113] In the result, the defence of qualified privilege in relation to the swerving incident is not defeated by malice.

(b) Did Baptiste exceed the limits of the duty or interest giving rise to the privilege?

[114] Here, the plaintiff's counsel argued that all of Baptiste's statements concerning Wayne Curry went beyond what was reasonable and germane to the circumstances, because they were "wholly unrelated" to the plaintiff's work performance. I reject this argument. The plaintiff was driving an SFN vehicle marked with SFN logos at the time of

the incident. That clearly makes it a work-related matter. Further, given that Curry was sufficiently concerned about the incident to describe the plaintiff's actions as "suicidal" and to report the matter to Van Bibber, and given that Curry had a passenger in his vehicle at the time, I am satisfied that there was a legitimate public safety concern arising from the plaintiff's actions.

[115] Therefore, the plaintiff has not defeated the defence of qualified privilege vis-à-vis Baptiste.

CONCLUSION

[116] I find that Van Bibber did not, at the meeting on October 27, 2008 with the plaintiff and Jeremy Harper, make the alleged defamatory statement that the plaintiff had "sexually harassed" him. In the alternative, if he did, then such a statement is protected by the defence of qualified privilege.

[117] The plaintiff's claim at paras. 51 through 53 of the second amended statement of claim must fail, because she has failed to plead the exact defamatory words allegedly used by Baptiste. In the alternative, if Baptiste did mention the sexual harassment allegations to Baufeld and Harris, then the statement is protected by the defence of qualified privilege.

[118] The plaintiff's claim at paras. 54 through 57 of the second amended statement of claim must also fail, because she has failed to prove on a balance of probabilities that Baptiste made the statement to either Harris or Baufeld on November 21, 2008 that "a 25-year-old male had reported that he was being teased by others as "cougar meat"."

[119] The plaintiff's claim at paras. 58 through 61 of the second amended statement of claim must also fail, because she has failed to prove on a balance of probabilities that

Baptiste made the statement to either Harris or Baufeld on November 21, 2008 that the plaintiff was “cutting down First Nations people” and that she had been “called on it in meeting”.

[120] The plaintiff’s claim at paras. 62 through 64, that Baptiste’s statement to Harris on November 24, 2008 about the Wayne Curry swerving incident was defamatory, fails because the statement was true in substance and in fact. In the alternative, if the statement was defamatory, it is protected by the defence of qualified privilege.

[121] Finally, because the plaintiff has failed to prove any of her claims of defamation against Van Bibber or Baptiste, the issues of vicarious liability and damages do not arise.

[122] I did not hear from the parties on the issue of taxable court costs. Ordinarily, those costs would follow the event and would be awarded in favour of the defendants. However, if the parties are unable to agree on costs, I will remain seized of this matter for the purpose of resolving the issue.

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Gower J.