

CANADA / JUDGMENT

Manuel v. Astakeesic

2024 BCSC 991

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Supreme Court of British Columbia

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2024 BCSC 991 Manuel v. Astakeesic

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Manuel v. Astakeesic,

2024 BCSC 991

Date: 20240607

Docket: S62200

Registry: Kamloops

Between:

Daniel Manuel, Susan Manuel, Collette Sunday, Diana Boston, Kayla Boston, Fred Holmes, Dennis MacDonald, Brian Holmes, Craig Shintah, Kevin Ned, Eva Marie Tom, Ira Tom and Jeremy Tom

Plaintiffs

And

Zachary Astakeesic and Yvonne Ned

Defendants

Before: The Honourable Justice Hori

Reasons for Judgment

Counsel for the Plaintiffs:

J.J. Kidston

J.T.G. Fenton

Counsel for Defendants:

D.J. McNamee

Place and Date of Hearing:

Kamloops, B.C.

November 16, 2023 and

March 27 & 28, 2024

Place and Date of Judgment:

Kamloops, B.C.

June 7, 2024

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Introduction

- [1] The plaintiffs in this action are the chief, councillors and administrators of the Upper Nicola Band (the "Band"). They bring this action against the defendants for defamation. The plaintiffs claim general, aggravated, punitive and special damages against the defendants as well as a permanent injunction.
- [2] The plaintiffs allege that the defendants posted defamatory comments about them on social media between May and July 2023.
- [3] The defendants are members of the Band. The defendant, Yvonne Ned, assisted by her son, the defendant, Zachary Astakeesic, ran for the position of chief of the Band in an election conducted in March 2023. Ms. Ned was unsuccessful in that election and the members of the band elected the plaintiff, Daniel Manuel, as chief.
- [4] In May 2023, shortly after the election, Mr. Astakeesic and, to a lesser extent, Ms. Ned posted comments on social media calling into question the legitimacy of the election and the integrity and competence of the chief, the councillors and the administrative staff. As a result of those social media posts, the plaintiffs have commenced this action.

Nature of the Applications

- [5] There are two applications before the court.
- [6] The plaintiffs bring an application for an interim injunction against the defendants to enjoin the defendants from publishing defamatory statements about the plaintiffs and to require the defendants to remove and retract defamatory statements from the internet.
- [7] The defendants resist the plaintiffs' application on the following bases:
 - a) that while the plaintiffs commenced this action in their personal names, the action is, in reality, an action by the Band which it cannot maintain because s. 2(b) of the Canadian Charter of Rights and Freedoms [Charter] protects an individual's freedom to be critical of government;
 - b) that the plaintiffs have not met the test for an interlocutory injunction in a defamation action as established by *Yu v. 16 Pet Food & Supplies Inc.*, 2023 BCCA 397; and
 - c) that the plaintiffs' action should be dismissed pursuant to s. 4 of the Protection of Public Participation Act, S.B.C. 2019, c. 3 [PPPA].
- [8] The defendants make a counter-application to dismiss the plaintiffs' action pursuant to s. 4 of the PPPA.

Background

- [9] In 2022, the Band denied Mr. Astakeesic's application for educational funding. After an unsuccessful appeal of the denial to the Band's education committee, Mr. Astakeesic reached out to the then chief of the Band, Harvey McLeod, for confirmation that the Band had followed its policies.
- [10] In 2022, Mr. Astakeesic also ran for the position of youth representative in the British Columbia Assembly of First Nations (the "Assembly"). Mr. Astakeesic claims that the then chief of the Band, Chief McLeod, did not support his nomination. Mr. Astakeesic claims that he was the runner-up in the 2022 election and, as the runner-up, he ought to have assumed the role of youth representative at the Assembly when the winner of the election resigned. Mr. Astakeesic alleges that rather than appoint him to the position of youth representative, Chief McLeod appointed someone else.
- [11] Mr. Astakeesic also alleges that Chief McLeod did not support him when he ran for the same position in 2023. In fact, Mr. Astakeesic claims that Chief McLeod disqualified him on the eve of the election without justification.
- [12] Former Chief McLeod alleges that Mr. Astakeesic was disrespectful to him during this process and commenced spreading rumors about him in the community and posting personal attacks against him on social media. However, I must note that former Chief McLeod is not a plaintiff in this action.
- [13] Ms. Ned ran for chief of the Band in March 2023. Her opponent in the election was the current chief, Daniel Manuel.
- [14] Ms. Ned claims that shortly after the election, the BC Native Women's Association (the "Association") dismissed her from her position as project manager. Ms. Ned suggests that her dismissal was orchestrated by Chief Manuel's spouse who served on the board of directors for the Association.
- [15] Not long after the election, Mr. Astakeesic and Ms. Ned began posting comments on social media about their concerns with Band governance and election issues.
- [16] The postings by Mr. Astakeesic and Ms. Ned in the period between May and July 2023 include postings that the plaintiffs allege are defamatory. I have reproduced the text of the alleged defamatory comments posted on social media in Appendix A to these reasons. However, in general terms, those postings relate to cheating in the election process, corruption, cronyism, cover-ups and lying by the chief and council.

Is This an Action Brought by the Band?

- [17] The first issue is whether this is an action brought by or on behalf of the Band.
- [18] Since the enactment of the Charter, a government body cannot maintain an action for common law defamation: *Dixon v. Powell River (City)*, 2009 BCSC 406 at paras. 46-47, 49.

- [19] The prohibition against government bodies maintaining common law defamation actions extends to an elected body exercising power through the Indian Act, R.S.C. 1985, c. I-5: *Wilson v. Switlo*, 2011 BCSC 1287 at para. 130, *aff'd* on other grounds 2013 BCCA 471.
- [20] The defendants argue that while the notice of civil claim does not name the Band specifically as a plaintiff, this action is, in reality, an action by the Band. Accordingly, the defendants submit that the action is contrary to the Charter and is not maintainable.
- [21] In support of their position, the defendants rely upon a notice issued to the members of the Band by the chief and council on the Band's letterhead. The notice to the membership refers to the chief and councillors of the Band having been involved in dealing with social media posts that complain of certain deficiencies in the recent custom election. While the notice does not name the defendants, it is reasonably clear by the context of the notice that it refers to the social media posts which are the subject matter of this action.
- [22] The defendants also submit that the plaintiffs have not denied that this is an action by the Band and have not presented any evidence to establish that it is not an action by the Band. The defendants urge me to draw an adverse inference from the lack of a denial and the failure to present evidence.
- [23] The evidence presented by the defendants is not sufficient to establish that this action is, in reality, an action by the Band. The notice of civil claim does not name the Band as a plaintiff. The claims made in the notice of civil claim are personal claims. While the comments expressed by the defendants may have consequences for the Band, that should not prevent the personal defendants from protecting their personal reputations by commencing this action.
- [24] The notice issued by the Band to its members is not sufficient to reach the conclusion sought by the defendants. The notice issued by the Band is an attempt to assure its members that it is conducting business in an appropriate way. Since the comments made by the defendants may have consequences for the Band and its members, it must have a method to communicate its position to Band members. That does not lead to the conclusion that the Band is the real plaintiff in this action.
- [25] Further, I am not prepared to draw any adverse inferences against the plaintiffs. It is for the defendants to establish that the Band is the true plaintiff in this action. To draw an adverse inference in these circumstances would be to shift the burden onto the plaintiffs before there is any evidence presented by the defendants requiring explanation.
- [26] Accordingly, I am not prepared to conclude that this action is brought by or on behalf of the Band. However, if this action is allowed to continue, the defendants may raise this issue again by presenting further evidence on this issue.

Injunction Application

- [27] The plaintiffs seek an interim injunction restraining the defendants from publishing defamatory statements about them and retracting the statements already made on the internet.
- [28] In British Columbia, the test for granting an interim injunction in a defamation action is no longer the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117. In the context of a defamation claim, the modified test for an interim injunction is the test established by our Court of Appeal in *Yu*.
- [29] The interlocutory injunction granted by the chambers judge to the plaintiff in *Yu* prohibited the defendant from publishing "any statements or content" concerning the plaintiff.
- [30] At para. 71 of *Yu*, the Court of Appeal formulated the test as follows:
1. The applicant must demonstrate that the impugned words are manifestly defamatory such that a jury finding otherwise would be considered perverse. 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.
- [31] The Court of Appeal went on to expand upon the second element of the test at para. 72. The second element of the test should take account of the full context of the circumstances, including but not limited to, factors such as:
- a) the credibility of the impugned words;
 - b) the existing reputation of the applicant;
 - c) whether the applicant will suffer irreparable harm; and
 - d) whether the respondent is likely to continue to post the impugned words.
- [32] The Court of Appeal, at para. 73, also provided the following cautionary direction:
- [73] If the impugned words are not credible, the applicant already has a deservedly poor reputation, an award of damages will suffice and/or the respondent is unlikely to continue to publish the impugned words, the court should normally decline to make an interlocutory order. Such an order would typically be either of little value or unnecessary.

- [33] Ultimately, the Court in Yu held that the applicant had established that the impugned words referred to them, that the words were published and that they would tend to lower the reputation of the applicant in the eyes of a reasonable observer.
- [34] On the next stage of the test, the Court considered the defences of truth, justification and fair comment and held that the applicant had failed to establish "beyond doubt" that those defences were not sustainable.
- [35] The Court went on to further find that in any event, on the final stage of the test, there was a reason to deny the injunction. At this stage, the Court held that an interlocutory injunction was not necessary because the application respondent had deleted the alleged defamatory comments and there was no evidence of a real risk that further defamatory statements would be posted.
- [36] In addition, the Court would have set aside the interlocutory injunction on the basis that the injunction was overbroad. In reaching that conclusion, the Court held that:
- a) Injunctions that prohibit the defendant from making any statements at all about the plaintiff may be overbroad because they restrain speech that is not defamatory; and
 - b) Injunctions that prohibit the defendant from making any defamatory statements about the plaintiff are vague because defamation is a technical area of the law and defendants may have difficulty knowing whether a statement is caught by the prohibition and may restrain lawful speech.
- [37] Based on this analysis, the Court held that the injunction in Yu, which prohibited the defendant from publishing "any statements or content" concerning the plaintiff, was overbroad because it restrained speech that may not be defamatory.
- [38] By applying the test in Yu, I must dismiss the plaintiffs' application for an interim injunction for the following reasons:
- a) For the reasons set out in my analysis of the PPPA issues, the plaintiffs have failed to establish beyond doubt that all of the defences to the defamation claim raised by the defendants are not sustainable;
 - b) An interim injunction is not necessary because the defendants have deleted the comments that the plaintiffs allege to be defamatory and there is no evidence of a real risk that further defamatory statements will be posted; and
 - c) The interim injunction sought by the plaintiffs is to enjoin the defendants from the "publication of defamatory statements directed at the plaintiffs". As held in Yu, injunctions that prohibit the defendants from making any defamatory statements about the plaintiffs are too vague because the parties will have difficulty knowing whether a statement is caught by the prohibition and may restrain lawful expressions.
- [39] Accordingly, the plaintiffs' application for an interim injunction is dismissed.

Defendants' Dismissal Application Under the PPPA

- [40] The defendants apply to dismiss the plaintiffs' action pursuant to s. 4 of the PPPA.
- [41] The defendants' application illustrates the friction between a person's right to freedom of expression and another person's right to protect their reputation: *Hansman v. Neufeld*, 2023 SCC 14 at para. 1.
- [42] The PPPA is legislation enacted to counter the use of strategic law suits against public participation ("SLAPPs") to silence individuals or organizations from speaking out on issues of public interest. As such, the PPPA will, in some instances, deny plaintiffs a remedy in otherwise meritorious claims: *Hansman* at para. 51.
- [43] Section 4 of the PPPA provides:

Application to court

4 (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that

- (a) the proceeding arises from an expression made by the applicant, and
 - (b) the expression relates to a matter of public interest.
- (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that
- (a) there are grounds to believe that
 - (i) the proceeding has substantial merit, and
 - (ii) the applicant has no valid defence in the proceeding, and
 - (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.
- [44] The term "expression" is defined in s. 1 of the PPPA as meaning "any communication, whether it is made verbally or non-verbally, publicly or privately, and whether it is directed or not directed at a person or entity".
- [45] On an application for the dismissal of an action pursuant to s. 4 of the PPPA, the burden is initially on the defendant to show, on a balance of probabilities, that:
- a) the proceeding arises from an expression made by the defendant; and
 - b) the expression relates to a matter of public interest.

This is a threshold burden that must be satisfied before moving to the next stage of the analysis: 1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22 [Pointes] at paras. 21-23; Hansman at para. 53.

[46] Once the defendant has satisfied the threshold burden, the onus shifts to the plaintiff to establish both criteria set out in s. 4(2)(a) of the PPPA. Under s. 4(2)(a), the plaintiff must establish there are grounds to believe that:

- a) the proceeding has substantial merit; and
- b) the applicant has no valid defence in the proceeding.

[47] Once the plaintiff satisfies the criteria in s. 4(2)(a), the plaintiff must go on to satisfy the requirements of s. 4(2)(b). The onus under s. 4(2)(b) is on the plaintiff to satisfy the court that the harm likely to have been or to be suffered by the plaintiff as a result of the expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

Expressions Made by the Defendants

[48] The burden is on the defendants to prove, on a balance of probabilities, that this action arises from an expression or expressions made by them.

[49] Since this is an action brought by the plaintiffs in defamation, the pleadings themselves establish that this proceeding arises from expressions made by the defendants. The plaintiffs' action is based upon statements published on the internet by the defendants.

[50] Accordingly, the defendants have satisfied their burden to establish that these proceedings arise from expressions made by them.

Matters of Public Interest

[51] The burden is upon the defendants to establish that the expressions, which are the subject matter of this action, relate to a matter of public interest. However, this burden is not onerous: Pointes at para. 28.

[52] The Supreme Court of Canada in Pointes, at para. 26, held that the phrase, "relates to a matter of public interest", should be given a broad and liberal interpretation. The Court applied the principles established in Grant v. Torstar Corp., 2009 SCC 61 and held, at para. 27:

The expression should be assessed "as a whole", and it must be asked whether "some segment of the community would have a genuine interest in receiving information on the subject".

- [53] The expressions, which are the subject matter of this proceeding, relate to the Band election process and the conduct of the chief, councillors and administrative staff of the Band. In particular, the expressions call into question the integrity of the chief and council, and the competence of the chief, councillors and administrative staff in carrying out their responsibilities for the Band. The expressions would be of interest to members of the Band qualified to vote at a Band election.
- [54] In my view, the expressions in question fall within the broad and liberal interpretation of a matter of public interest.
- [55] Accordingly, the defendants have met their burden under s. 4(1) of the PPPA.

Merits of the Plaintiffs' Action

- [56] Once the defendants have satisfied the threshold burden, the onus shifts to the plaintiffs to satisfy the court that there are grounds to believe that their proceeding has substantial merit. The plaintiffs need not establish that the action is "likely to succeed". All that is required are grounds to believe that the action has a "real prospect of success": Pointes at para. 49.
- [57] The Supreme Court of Canada in Pointes described the plaintiffs' burden as being to "satisfy the motion judge that there are grounds to believe that its underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success": Pointes at para. 54.
- [58] The Court provided further insight into the meaning of "substantial merit" when it stated, at para. 49:
- [49] Therefore, I conclude from the foregoing exercise of statutory interpretation that for an underlying proceeding to have "substantial merit", it must have a real prospect of success - in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff.
- [59] The plaintiffs' action is for defamation. The elements required to establish defamation are set out in Bent v. Platnick, 2020 SCC 23 at para. 92:
- a) The impugned words were published, meaning that they were communicated to at least one person other than the plaintiffs;
 - b) The impugned words referred to the plaintiffs; and
 - c) The impugned words were defamatory, in the sense that they would tend to lower the plaintiffs' reputations in the eyes of a reasonable person.

- [60] The plaintiffs have presented evidence that the words they allege to be defamatory were published on the internet. Those words clearly referred to the plaintiffs as a group or to some of them individually and, in my view, the words would tend to lower the plaintiffs' reputations in the eyes of a reasonable person.
- [61] The defendants essentially admit that the words were published and that they referred to the plaintiffs. The publications suggest that the plaintiffs are liars and cheaters. The words allege that the plaintiffs lack the integrity and the competence to run the Band. It is not difficult to conclude that those words would tend to lower the plaintiffs' reputations in the eyes of a reasonable person reading those publications.
- [62] Accordingly, I find that there are grounds to believe that this proceeding has substantial merit. However, that does not end the inquiry in that the plaintiffs must also show that there are grounds to believe that the defendants have no valid defences to the allegations of defamation.

Defendants' Defences

- [63] The onus is on the plaintiffs to satisfy the court that there are grounds to believe that the defendants have no valid defences to the proceeding. While the burden has shifted to the plaintiffs, the plaintiffs are not required to anticipate every defence that the defendants may raise. The legislation operates to require the defendants to first put in play the defences they intend to rely upon. The plaintiffs must then show that there are grounds to believe that those defences are not valid: *Pointes* at para. 56.
- [64] In this case, the defendants rely upon the defences of justification, fair comment and qualified privilege.
- [65] The standard of proof imposed on the plaintiffs to show that there are grounds to believe that the defences are not valid mirrors the standard established for proving that their case has "substantial merit". The burden on the plaintiffs with respect to the defendants' defences is to satisfy the court that there are grounds to believe that none of the defences have a real prospect of success: *Pointes* at para. 60.

Defence of Justification

- [66] The defence of justification is based on the concept that words or expressions cannot be defamatory if they are true or substantially true: *Pereira v. Klonarakis*, 2023 BCSC 1760 at paras. 54-55, *aff'd* 2024 BCCA 75.
- [67] On the defence of justification, the plaintiffs submit that there are grounds to believe that this defence is not valid because it is supported only by hearsay evidence and the opinion evidence of the defendants. Therefore, the plaintiffs argue that there are grounds to believe that the defence of justification has no prospect of success.

- [68] In this case, the defendants make assertions about the plaintiffs in their online posts and Chief Manuel denies those assertions. There is no independent evidence against which to test either the assertions or the denials. Accordingly, I cannot determine whether the expressions alleged to be defamatory are true or not.
- [69] Since the onus is on the plaintiffs, I must conclude that they have not met the onus on them to establish the grounds to believe that the defence of justification has no prospect of success. In other words, I am unable to conclude that the evidence before me weighs more in favour of the plaintiffs on the defence of justification.
- [70] Even though my conclusion on the defence of justification results in the dismissal of the plaintiffs' action pursuant to s. 4 of the PPPA, I will go on to consider the other defences relied upon by the defendants.

Defence of Fair Comment

- [71] The justification for the defence of fair comment is that "citizens must be able to openly declare their real opinions on matters of public interest without fear of reprisal in the form of actions for defamation": *Rooney v. Galloway*, 2024 BCCA 8 at para. 105, citing *Hansman* at para. 95.
- [72] The Court of Appeal in *Rooney*, at para. 106, held that a defendant can rely on the defence of fair comment if they can establish the following:
- a) The comment is on a matter of public interest;
 - b) The comment is based on fact;
 - c) The comment, though it can include inferences of fact, is recognizable as comment;
 - d) The comment satisfies the following objective test: "Could any person honestly express that opinion on the proved facts?"; and
 - e) Even if the comment meets those elements, the defence can still be defeated if the plaintiff proves that the defendant was actuated by expressed malice.
- [73] I have already determined that the impugned comments are a matter of public interest.
- [74] Most, if not all, of the comments with which the plaintiffs take issue are based on the following allegations of fact:
- a) Voting on the March 18, 2023, election was conducted contrary to the Band's Custom Election Regulations. The factual allegation is that the Custom Election Regulations allow voting from 8:00 a.m. until 8:00 p.m. on the second Saturday in March and on election day, which is to be held on the third Saturday of March. The defendants allege that, contrary to the Custom Election Regulations, Daniel Manuel promoted and encouraged members of the Band to vote from March 11 to 18, 2023 (the "Election Voting Irregularity");

- b) Daniel Manuel was ineligible to run for Chief of the Band by the Custom Election Regulations because he had previously vacated his position on a previous Band Council. The factual allegation is that the Custom Election Regulations provide that any vacancy or resignation by a chief or councillor render them ineligible to run for office for three fiscal years after which the candidate has the opportunity to have an eligibility hearing. The allegation is that Daniel Manuel either resigned or vacated his position as Chief of the Band during his first term and had not had an eligibility hearing. Therefore, he was ineligible to run for a Band position in the March 18, 2023 election;
 - c) The defendants reported allegations of sexual abuse to the Band implicating a person who had connections to Daniel Manuel, but no investigations of those allegations were conducted;
 - d) The plaintiff, Susan Manuel, rejected Mr. Astakeesic's land allocation application on behalf of the Band; and
 - e) After the March 18, 2023, election, the Association dismissed Ms. Ned from her position with that organization. The allegation is that the wife of Chief Manuel was a member of the Association's board and orchestrated the dismissal.
- [75] The plaintiffs may establish that the defence of fair comment has no prospect of success if the facts on which the comments are based are false. However, I am not satisfied that the evidence tendered by the plaintiffs to refute these factual allegations is sufficient to establish the grounds to believe that the allegations are false. While Chief Manuel seeks to refute the factual allegations, his evidence is either a general denial with very little detail or misses the point of the allegations.
- [76] In any event, I cannot determine whether the factual allegations are true or false. Similar to my conclusion on the defence of justification, since the onus is on the plaintiffs, I must conclude that they have not met the onus on them to establish the grounds to believe that the factual allegations are false.
- [77] There is no requirement that the facts support the comment, in the sense of confirming the truth of the comment. The comment must relate to the facts on which it is based, but the comment need not be a reasonable or proportionate response. The purpose is not to measure the fairness of the comment but to ensure the readers are aware of the basis for the comment to enable them to make up their own minds as to its merits: *Hansman* at para. 100.
- [78] It appears to me that all of the expressions that the plaintiffs allege are defamatory are tethered to the facts outlined above. The comments made based on those facts need not be reasonable or proportionate responses. The facts on which the comments are based are either expressly stated in the internet postings or they are a matter of public record for the members of the Band. In that sense, the readers of the postings have the information on which to make up their own minds.

- [79] There is a basis to accept that the expressions alleged to be defamatory are recognizable as comments based on facts and that they are opinions that could honestly be held. As stated earlier, the comments need not be reasonable or proportionate as long as they are related to the facts.
- [80] The final question on the defence of fair comment is whether the expressions are motivated by malice. I will deal with the question of malice later as a separate topic because it is an issue that relates to both fair comment and qualified privilege. However, my conclusion on the issue of malice is that there are grounds to believe that the defence of fair comment has no prospect of success.
- [81] My conclusion on the issue of malice is the factor that tips the scales more in favour of the plaintiffs' position that the defence of fair comment has no prospect of success.

Defence of Qualified Privilege

- [82] Qualified privilege attaches to the occasion in which the comments are made and not to the comment itself. The defence of qualified privilege arises on an occasion where the person making a comment has a legal, social, moral or personal interest or duty to publish the information in issue to the person to whom it is published and the recipient has a corresponding interest or duty to receive it: Rooney at para. 112, citing Bent at para. 121.
- [83] Where the occasion is shown to be privileged, the defendants are free to publish remarks that are defamatory and untrue about the plaintiffs with impunity. Therefore, the precise characterization of the occasion is essential. In this case, the defendants characterize the occasion as the need to expose election irregularities and the ineligibility of Chief Manuel to hold office.
- [84] The defence of qualified privilege may be defeated where the dominant motive behind the comments is malice or where the scope of the occasion of privilege is exceeded: Rooney at para. 113. As I indicated earlier, I will deal with the issue of malice later.
- [85] On the issue of the scope of the privilege, I accept the defendants' characterization of the privilege as the need to expose election irregularities and the ineligibility of Chief Manuel. If that is the scope of the privilege, then I must find that there are grounds to believe that the defendants have exceeded the privilege.
- [86] The expressions that are related to the election and the candidacy of Chief Manuel are within the privilege.
- [87] However, other expressions related to sexual assault allegations, competence of the defendants, the transfer of lands, misappropriation of funds, the involvement of Chief Manuel's wife on the board of the Association and cronyism are outside the scope of the privilege. Therefore, there are grounds to believe that the defence of qualified privilege has no prospect of success with respect to these expressions.

Malice

[88] The defences of fair comment and qualified privilege may be defeated if the dominant purpose for publishing the impugned words was malice: Rooney at para. 114; Bent at para. 121.

[89] The plaintiffs submit that the defendants were motivated by malice when making the impugned expressions because there is evidence of friction and difficult relationships between Mr. Astakeesic and some of the plaintiffs. In addition, Ms. Ned's loss of the election to Chief Manuel is another factor in the assessment of malice.

[90] The Court in Rooney, at para. 115, identified four potential categories of express malice:

A defendant is actuated by express malice if [they publish a] defamatory expression:

- i) knowing it was false; or
- ii) with reckless indifference whether it is true or false; or
- iii) for the dominant purpose of injuring the plaintiff because of spite or animosity; or
- iv) for some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

[91] In my view, the record before me discloses grounds to believe that the defendants were motivated by malice when they published the impugned words. The existence of friction and animosity between Mr. Astakeesic and the plaintiffs, Ms. Ned's loss of the election to Chief Manuel and the expressions that fall outside the scope of qualified privilege tend to tilt the scale more in favour of the plaintiffs on the malice issue.

[92] Accordingly, there is a basis in the record and in the law for concluding that there are grounds to believe that the defences of fair comment and qualified privilege have no prospect of success because the impugned words were motivated by malice.

Weighing of Interest

[93] Even though I have found that the plaintiffs have failed to satisfy me that there are grounds to believe that the defendants have no valid defences in this proceeding, I will assess the final requirement of s. 4 of the PPPA. Under s. 4(2)(b) of the PPPA, the plaintiffs must satisfy the court that the harm likely to be suffered by them as a result of the defendants' expressions is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

[94] Citing both Hansman and Pointes, the Court of Appeal, in Rooney, described the weighing of the public interest under s. 4(2)(b) of the PPPA as the "'fundamental crux' or core of the s. 4 analysis": at para. 83. In Hansman, the Supreme Court of Canada held:

- [58] Even when a plaintiff shows the proceeding substantial merit and the defendant has no valid defence, "it remains vulnerable to summary dismissal as a result of the public interest weighing exercise , which provides courts with a robust backstop to protect freedom of expression" (Pointes, at para. 53). Pointes described this weighing exercise as the core of the analysis, as it allows the court to strike an appropriate balance between the protection of individual reputation and freedom of expression, the competing values at the heart of anti-SLAPP legislation.
- [95] The onus is on the plaintiffs to prove on a balance of probabilities that due to the harm likely to have been or to be suffered by them as a result of the defendants' expressions, the public interest in allowing the proceeding to continue outweighs its deleterious effects on expression and public participation: Hansman at para. 59, citing Pointes at para. 82.
- [96] The weighing of the public interest requires an assessment of the harm likely to have been or to be suffered by the plaintiffs as a result of the defendants' expressions. In defamation actions, general damages are presumed. This presumption may be sufficient to establish harm to the plaintiffs, but that is not sufficient in the weighing exercise because it is the seriousness of the harm that is important: Rooney at para. 85.
- [97] Accordingly, the Court in Rooney held that presumed general damages or bare assertions of harm are not a sufficient basis upon which the court can draw an inference of the likelihood of harm that is of such a magnitude that it outweighs the public interest in protecting the freedom of expression: Rooney at para. 85; Hansman at para. 67. The Court in Rooney recognized that while plaintiffs cannot be expected to present a fully developed damages brief on a PPPA application, they must provide sufficient evidence that allows a causal connection between the expression and damages that are more than nominal: Rooney at para. 86; Hansman at para. 67.
- [98] The harm sustained by a plaintiff in a defamation action may be harm that results in financial loss, in damage to reputation or both: Pointes at para. 169.
- [99] In this case, there is no evidence that any of the plaintiffs sustained any financial loss as a result of the defendants' expressions. For instance, there is no evidence that as a result of the defendants' expressions, the plaintiffs, who are administrative staff of the Band, lost their jobs or were passed over for other positions. There is also no evidence that any of the chief or councillors were financially affected by the expressions.
- [100] There is also no evidence of reputational harm to the plaintiffs as a result of the defendants' expressions over and above the presumed harm associated with a defamation action. General damages are presumed in a defamation action because one of the elements of the cause of action is that the defamatory words tend to lower the plaintiffs' reputations in the eyes of a reasonable person. Chief Manuel makes bare assertions of harm to reputation. However, there is nothing in his evidence that raises the seriousness of that harm above the level of the presumed general damages in a defamation action.

- [101] I also note that there is no evidence from the plaintiffs, other than Chief Manuel, that speaks to reputational harm.
- [102] Chief Manuel asserts that the defendants' expressions have affected his mental and emotional well-being. However, Chief Manuel provides no details of how they have affected him and has not provided any medical support for this assertion.
- [103] Chief Manuel also submits that the expressions made by the defendants included allegations of sexual misconduct that raise the level of harm he is likely to have suffered. He submits that where there are allegations of criminal misconduct, the harm arises from the nature of the allegations and there is no need to prove actual loss: Rooney at para. 87. However, the allegations of criminal sexual misconduct relate to misconduct on the part of others, not Chief Manuel. Accordingly, the allegations do not amount to criminal conduct on the part of Chief Manuel and do not elevate the level of harm to him.
- [104] Based on the foregoing and adopting the terminology used by Justice Côté in Bent, I conclude that the harm that has been or is likely to be suffered by the plaintiffs as a result of the defendants' expressions lies at the low end of the protection-deserving spectrum. As a result, the public interest in allowing this defamation action to continue also lies at the low end of the spectrum.
- [105] On the opposite side of the scale is the public interest in protecting the defendants' expressions. As held in Hansman, at para. 79, in Pointes, at para. 77, and in Bent, at para. 163, the public interest in protecting an expression is found in s. 2(b) of the Charter. The public interest was summarized in Bent at para. 163 as follows:
- [163] In Pointes Protection, this Court finds that the public interest in protecting an expression can be determined by reference to the core values that underlie s. 2(b) of the Canadian Charter of Rights and Freedoms, such as the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing; para. 77.
- [106] However, the Court in Bent continued at para. 163 by saying that there will be less of a public interest in protecting statements that contain "gratuitous personal attacks" and that the "motivation behind" the expression is a relevant inquiry.
- [107] In my assessment of the defences to the claim of defamation, I concluded that there are grounds to believe that the defendants were motivated by malice when they published the impugned words. However, that initial analysis applied the "grounds to believe" standard. The standard applicable in the weighing of the relative interests in this analysis is proof on a balance of probabilities.
- [108] Applying the balance of probabilities standard to the question of motive in the weighing exercise, I find that the plaintiffs have not satisfied their burden of proof. Accordingly, I cannot conclude, on a balance of probabilities, from the evidence before me that the impugned expressions were the result of improper motives.

[109] The impugned expressions are directed at election irregularities, the qualification of Chief Manuel as a candidate and the actions or inaction of the Band Council. In that sense, the expressions are directed at the political process and are seeking transparency in the work of the Band Council. These expressions are worthy of protection for that reason. On that basis, I conclude that the public interest in protecting the defendants' expressions lies somewhere in the middle of the spectrum.

[110] In the foregoing analysis, the harm likely to have been or to be suffered by the plaintiffs is at the low end of the spectrum and, accordingly, so too is the public interest in allowing the action to continue. In contrast, the public interest in protecting the defendants' expressions is in the mid-range of the spectrum. Therefore, the public interest in protecting the defendants' expressions outweighs the public interest in allowing this action to continue.

Conclusion

[111] Based on the foregoing analysis, the plaintiffs' action against the defendants is dismissed pursuant to s. 4 of the PPPA.

Costs

[112] The parties have leave to file written submissions on costs if they cannot agree. The defendants will file their submissions on costs within 14 days. The plaintiffs will file their response within 14 days of receiving the defendants' submissions and the defendants will file any reply submissions within seven days thereafter.

"D.K. Hori J."

HORI J.

Appendix "A"

Date:

Comments Made:

On or about May 23, 2023, published on Facebook

"Daniel cheated the nomination to be chief."

On or about May 23, 2023, published on Facebook

"These lies and liars and predators amongst these families need to stop and be stopped from their corruption."

On or about May 23, 2023, published on Facebook

"Not to mention member issues of allegations regarding sexual assault from people in Daniel Manuel's family."

On or about May 23, 2023, published on Facebook

"Now in our case our #chief Yvonne Ned didn't need a CHIEF ELIGIBILITY HEARING, because she never resigned a job/duty in her life. Thus making her the only qualified nominee according to Upper Nicola Band Policy. Why do chiefs resign like Daniel Manuel, "

On or about May 23, 2023, published on Facebook

"According to Upper Nicola Band Custom Regulation Our true Chief Yvonne Ned is requested to take our sacred oath as Chief by UNB Custom "

On or about May 23, 2023, published on Facebook

"let's look at the Manuel allotments being on tribal land, Collette's land, why is the Manuel land on Tom territory. And why do the Manuel's get all the procurement. Their an adopted family of upper Nicola injecting lies of Manuel Leadership and history like a hereditary chief that never was hereditary here until they turned Tom land into Manuel Land."

On or around June 1, 2023, published to Facebook

"Our leaderships gene a culture of cheaters with little regard for morality. Loretta Holmes along side Danny again spoke volumes confusing their history and Danny's history as chief in his 2011 term."

On or around June 7, 2023, published to Facebook

I'm very concerned that for the first time out of political "retaliation" their will be a civil legal battle at Upper Nicola Band brought by the Chief and wife. From a fake chief who allegedly never had a hearing to be an eligible nominee or candidate for chief of upper nicola band in the 2023 election according to policy "

On or around June 1, 2023, published to Facebook

"Daniel Manuel has eroded his authority and stretched his position with scandal and abuse of the trust by an alleged affair."

On or around June 1, 2023, published to Facebook

"These people in leadership are unstable and are out of touch with reality. BC Assembly of First Nations shutting down the band is getting quicker signatures."

On or around June 1, 2023, published to Facebook

"Danny's the liar like Trish Manuel they're bullies imposter a chief like that creep Dan senior who allegedly was also a predator according to our real hereditary chiefs."

On or around June 9, 2023

"They didn't protect members and grandstanded the issue. They were not voted in and should be removed."

On or around July 12, 2023, published to Facebook

"Danny Manuel allows voting outside of the online voting dates outlined as a disqualification in the upper Nicola band custom election regulations."

On May 16, 2023, published to Facebook

"Enough with the misappropriation of funds and the lack of transparency!"

On May 16, 2023, published to Facebook

"Yes this was a stolen election."

On or around May 4, 2023, published to Facebook

"I've had it with Upper Nicola Band boy is their tea to spill about chief and his family and how they've sucked the opportunities from other families and tore our community up after Daniel Manuel's affair which is why he resigned in 2013 he handed it off to Harvey handed it right back to a cheater in chief Daniel Manuel whose wife does nothing but take honorariums while claiming to volunteer for the BCNWA [Board]. Bernie Charlie's goal at upper Nicola is to attack other native women and she fired strong upper Nicola women due to political retaliation as she fronts our boards A BCRs in order and for chief and councillors literally not working or violating their oaths and regulations should be removed. I'm sick of the admin and business as usual cronyism. I mean Sue Manuel gave Danny land last year he surely knew when land allocations were getting dropped The Manuel Family believes policy doesn't apply to them "

On or around May 4, 2023, published to Facebook

"the election appeal shows Danny never received the votes correctly in fact he received votes on dates voting was supposed to be shut down and then there are sexual abuse claims going around involving certain people right now is astonishing. Leadership is poisoned "

On or around May 4, 2023, published to Facebook

"Are you tired of the corruption and cronyism within the Upper Nicola Band community? It's time to take action. Chief and his family have taken opportunities away from other families and torn our community apart. After Daniel Manuel's affair in 2013, Harvey took over And now we have a cheater as the current Chief, with his wife claiming to volunteer for the BCNWA board while requesting thousands in honorariums."

On or around May 4, 2023, published to Facebook

"We can no longer tolerate the admin and business-as-usual cronyism."

On or around May 4, 2023, published to Facebook

"Sue Manuel gave Danny land last year, and accepted incomplete applications as complete ones during this allotment of 102 1R3. The Manuel family believes that policies don't apply to them."

On or around May 4, 2023, published to Facebook

"The Election appeal shows that Danny never received votes correctly on the specified dates in the election policy. And now, there are sexual abuse claims involving certain people that are truly disturbing at nkwala school who is chief while this was going on."

On or around May 19, 2023, published to Facebook

"I ask that council do their duties shrined in our policy that "only eligible candidates ultimately win" not the cheaters. That we never allow a cheater in chief #acronymism #corruption THE ONLY ONES NOT FOLLOWING THE RULES HERE AT THE COUP conspirators one feather, diana Boston, and Danny all advised votes outside of voting dates outline in our policy. conspirators WHO allowed an INELIGIBLE CANDIDATE BE IN THE contest will be investigated as per federal guidelines. We need to define the real winner when corruption like this happens."

On or around May 30, 2023, published to Facebook

"Our administration appears to be corrupted, despite claiming to stand against the colonizer path. Additionally, the council, which was not elected by the people, has the audacity to preach about values and principles while blatantly ignoring their own policies. This hypocrisy is evident and cannot be dismissed."

On or around May 30, 2023, published to Facebook

"We must not allow cronyism to prevail in our community."

On or around May 30, 2023, published to Facebook

Mr. Astakeesic uses the hashtags #corruptbenefactors and #corrupt superimposed over a video containing the letter released to UNB members regarding Mr. Astakeesic's allegations.

On or around May 30, 2023, published to Facebook

"Disgraceful, Martha Chillihibitia muscling her way into power via dan Manuel, both of which are known cheaters."

On or around May 30, 2023, published to Facebook

"I demand an investigation into admin and the sexual assaults we have on our band including victims that are upper Nicola members."

On or around May 30, 2023, published to Facebook

"We also are revealing the sleazy nature of our fake chiefs legacy of cheating and resignation and stealing a nomination."

On or around June 1, 2023, published to Facebook

"What a bunch of cheaters and non mandated weak officials."

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