

CANADA / JUDGMENT

Wiebe v. Bouchard et al

2005 BCSC 47

COURT

Supreme Court of British Columbia

DECIDED

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2005 BCSC 47 Wiebe v. Bouchard et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wiebe v. Bouchard et al,

2005 BCSC 47

Date: 20050114

Docket: 04 1156

Registry: Victoria

Between:

Ken Wiebe

Plaintiff

And:

Pierrette Bouchard, Isabelle Boily, Marie-Claude Proulx,

Her Majesty the Queen in the Right of Canada, and

The Minister Responsible for the Status of Women Canada

Defendants

Before: The Honourable Mr. Justice Melvin

Reasons for Judgment

Counsel for the Plaintiff:

D. H. Christie

Counsel for the Defendants Pierre Bouchard, Isabelle Boily and Marie-Claude Proulx:

D. A. Gooderham

Counsel for the Defendants Her Majesty the Queen in Right

of Canada and The Minister Responsible for the Status of Women Canada:

S. Gaudet

Dates and Place of Trial/Hearing:

January 6 - 7, 2005

Victoria, B.C.

- [1] Within defamation proceedings commenced by the plaintiff, the defendants Bouchard, Boily and Proulx seek an order that this court does not have jurisdiction to hear the plaintiff's defamation action or alternatively, the court ought to decline jurisdiction as a result of the Supreme Court of British Columbia not being the forum conveniens.
- [2] The plaintiff's defamation action is based on information which was placed on a website by the Government of Canada and the Minister Responsible for the Status of Women Canada (the "corporate defendants"), which in turn, was a translation of a report prepared by the defendant Bouchard with the assistance of the defendants Boily and Proulx (the "personal defendants").
- [3] By way of background, the defendant Bouchard, a professor at Laval University, became aware in 1999 that the Status of Women Canada issued a nationwide call for proposals on the following subject: "Where Have All the Women Gone? Shifts in Policy Discourses". The proposal, according to the Bouchard affidavit, defined research needs as follows:
24. This call for proposals defined the research need as follows:

"Across Western democracies, significant shifts in policy discourses can be observed, often fostering a propensity to neglect a line of argument or analysis based on gender equality issues in favour of other foci whether they be child-centred, family-centred, human- or cultural-rights-centred, or even centred on differences and diversity. Although all these issues are vitally important, this shift restricts more and more the advocacy of women's rights and increasingly portrays it as special interest pleading.... The emergence of child-centred policy discourses is apparent in a number of recent developments.... This policy discourse masks the problem of women's poverty as well as the central role and primary responsibility taken by women with respect to children. The emergence of a "rights-oriented" lobbying seems designed to give a voice to those who have been portrayed as newly disadvantaged groups in the wake of feminism (for instance, men's rights, fathers' rights, parents' rights, children's rights and the rights of the fetus). (translation)"

- [4] This proposal provided Bouchard with an opportunity to research the subject on a systematic approach. As a result, Bouchard set forth her research proposal in French, stating that the purpose of her research was first to describe the process by which new forms of discourse are evolving to show how a reactionary ideology is currently being developed for the purpose of weakening women's gains, and second, to contrast this discourse with actual data from research related to comparative school successes. In her affidavit, the defendant Bouchard deposed that the research dealt with an educational phenomenon occurring in the Province of Quebec, but stated:
29. However, since the question raised was not only of national interest but also relevant from an international perspective, broader consultation and research were contemplated.
- [5] In pursuance of her research goals, the defendant Bouchard became aware of an entire network of "Internet sites dealing with men's and fathers' causes". She deposed that this discovery revealed a social phenomenon "very much unknown to both the Quebec mainstream and the province's scientific community".
- [6] As a result of this research, she located the B.C. Fathers Website, and the heading "Why don't we all call it femi-Naziism?" which purported, according to the defendant Bouchard, to list thirty alleged similarities between feminism and early Naziism. In addition, the website displayed a swastika with extra bars to each of the four branches of the swastika which might be construed as the initials "F". The defendant Bouchard then prepared her report entitled:

School Success by Gender:

A Catalyst for Masculinist Discourse

- [7] This report was submitted to the Status of Women Canada in French, and was subsequently translated to English in March of 2003. The second page of the document stated that the research and publication of the study was funded by the Status of Women in Canada's "Policy Research Fund of Status of Women Canada". The covering document makes it abundantly clear that the document is issued with the first page marked with the "Status of Women Canada" and in the bottom right hand corner, the language used is "Canada". It would appear that although the names of the defendant Boily and Proulx appear on the document, they were the research assistants used by the defendant Bouchard in her report.
- [8] This report, in its English translation, was placed by the Government of Canada and/or Status of Women Canada on a national website, and as a result, was made available to all persons in Canada who had access to a computer. The report was not restricted to the Province of Quebec.

- [9] The plaintiff, who resides in British Columbia, learned of the report on the national website and is of the view that certain passages are offensive and justify an action brought by him against the authors, Canada, and the Status of Women Canada, for defamation. In addition to the article being on the website, hard copies (paper copies) are available in Victoria in the main public library.
- [10] In her report, the defendant Bouchard refers to the B.C. Fathers Website and the reference to the swastika symbol.
- [11] There is no doubt in the report that she is identifying the website which is in turn authored by the plaintiff and perhaps others. Her criticism of the website, and the language she uses in the course of that criticism, is the basis upon which the plaintiff alleges that he has been defamed and his reputation in the Province of British Columbia has been damaged.
- [12] On this motion, counsel for Canada and the Status of Women Canada takes no position. Those corporate defendants take the position that in the event the court concludes that because of the national publication of the Bouchard article that the Supreme Court of British Columbia can take jurisdiction over the corporate defendants, but the court concludes that the trial of the personal defendants should take place in Quebec and not British Columbia, the whole action should go to Quebec. In other words, the corporate defendants take the position that the action should not be divided into two parts involving two trials as any defence of the corporate defendants, especially as it may involve fair comment, should be available in both locations. Hence, there should be one trial, and not two in two separate locations.
- [13] On the question of determining which is the appropriate forum, it is also necessary to note that *Prud'homme v. Prud'homme* (2002), 221 D.L.R. (4th) 115 (S.C.C.) points out that there is a distinction between the law of Quebec and the common law provinces with reference to defamation. In particular, the court stated at paragraph 32:
- [32] Quebec civil law does not provide for a specific form of action for interference with reputation. The basis for an action in defamation in Quebec is found in art. 1457 C.C.Q., which lays down the general rules that apply to questions of civil liability. Thus, in an action in defamation, the plaintiff must establish, on a balance of probabilities, the existence of injury, of a wrongful act, and of a causal connection, as in the case of any other action in civil, delictual or quasi-delictual liability. (See *N. Vallieres, La presse et la diffamation* (1985), at p. 43; *Houde v. Benoit*, [1943] B.R. 713, at p. 720; *Société Radio-Canada v. Radio Sept-Îles Inc.*, [1994] R.J.Q. 1811 (C.A.), at p. 1818.)
- [14] And further, at paragraph 37:
- [37] Accordingly, in Quebec civil law, communicating false information is not necessarily a wrongful act. On the other hand, conveying true information may sometimes be a wrongful act. This is an important difference between the civil law and the common law, in which the falsity of the things said is an element of the tort of defamation. However, even in the civil

law, the truth of what is said may be a way of proving that no wrongful act was committed, in circumstances in which the public interest is in issue (see the comments by Vallieres, *supra*, at p. 10, cited with approval by the Quebec Court of Appeal in *Radio Sept-Îles*, *supra*, at p. 1819).

- [15] Although the personal defendants' report was written in French, and purported to discuss issues in the Province of Quebec, it is important to note that in the words of the defendant Bouchard herself, the topics discussed were of national, and perhaps international, importance. It is also important, in my view, in determining whether or not the British Columbia court has or should exercise jurisdiction, to note that this report that was prepared by the defendant Bouchard was not a report prepared for the purposes of the Province of Quebec. It was a report prepared for the Status of Women Canada and the Government of Canada. The socio-economic and legal issues canvassed by the report are of national importance.
- [16] Under those circumstances, it is understandable why the Government of Canada decided to initially translate and secondly place the translation on its website for the benefit of all Canadians. This is factually contrary to the finding in the American authority *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002) where the court concluded that a Virginia court could not constitutionally exercise jurisdiction over a Connecticut-based newspaper because that defendant did not manifest an intention to aim their website at, or post its articles for, a Virginia audience.
- [17] Pertinent Canadian authorities on the subject of jurisdiction start with *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897. *Amchem*, *supra*, was not a website defamation action. Nevertheless, the matter of jurisdiction was addressed and the court concluded that the action should be tried in the jurisdiction that has the closest connection with the action and the parties, and not merely where one litigant will secure a juridical advantage. The two remedies to control the choice of forum are, according to *Amchem*, a stay of proceedings or an injunction. The issue to be considered at this stage is whether or not the province has jurisdiction in the first instance. In that regard, one aspect of the test to be applied is whether the defendant has clearly shown some other forum to be appropriate. If so, the plaintiff then must show that justice requires the trial take place in the plaintiff's proposed forum. The Supreme Court of Canada stated that juridical advantage should be weighed with other factors in identifying the appropriate forum in relation to the first condition.
- [18] This approach is to be contrasted where it can be argued that there are two forums that have jurisdiction. Then the question arises as to which of the two is the appropriate forum. In this respect, the Supreme Court of Canada in *Amchem* stated as follows:
- [53] The first step in applying the SNI analysis is to determine whether the domestic forum is the natural forum, that is the forum that on the basis of relevant factors has the closest connection with the action and the parties. I would modify this slightly to conform with the

test relating to forum non conveniens. Under this test the court must determine whether there is another forum that is clearly more appropriate. The result of this change in stay applications is that where there is no one forum that is the most appropriate, the domestic forum wins out by default and refuses a stay, provided it is an appropriate forum. In this step of the analysis, the domestic court as a matter of comity must take cognizance of the fact that the foreign court has assumed jurisdiction. If, applying the principles relating to forum non conveniens outlined above, the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, the domestic court should respect that decision and the application should be dismissed. When there is a genuine disagreement between the courts of our country and another, the courts of this country should not arrogate to themselves the decision for both jurisdictions. In most cases it will appear from the decision of the foreign court whether it acted on principles similar to those that obtain here, but, if not, then the domestic court must consider whether the result is consistent with those principles.

- [54] In a case in which the domestic court concludes that the foreign court assumed jurisdiction on a basis that is inconsistent with principles relating to forum non conveniens and that the foreign court's conclusion could not reasonably have been reached had it applied those principles, it must go then to the second step of the SNI test. I prefer the initial formulation of that step without reference to the terms "oppressive or vexatious". At p. 522, Lord Goff states:

This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action, and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. [Emphasis added.]

That case was decided on the basis of the injustice to SNI by reason of the loss of juridical advantages in Brunei but not available to it in Texas. The characterization of this loss as oppressive added nothing to the analysis. This is especially so since neither "oppressive" nor "vexatious" was satisfactorily defined in SNI nor, from my reading of the cases, anywhere else. If flexibility is the desired objective, it is achieved by the use of the term "injustice" which, in addition, is more in keeping with the language of the statutes which provide for injunctive relief. For example, the British Columbia Law and Equity Act, R.S.B.C. 1979, c. 224, s. 36, authorizes an injunction when "it appears to the court to be just or convenient."

- [19] Use of the Internet to transmit or publish defamatory information was the subject of the jurisdictional issue in *Braintech, Inc. v. Kostiuk*, [1999] B.C.J. No. 622. *Braintech*, supra, had corporate offices in British Columbia and alleged that the defendant Kostiuk used the Internet to transmit and publish defamatory information about Braintech in Texas. It then commenced an action and obtained a default judgment against Kostiuk in Texas. *Braintech*

then commenced action on the judgment in British Columbia. Apparently, Kostiuk was a non-resident of Texas and had no business in Texas. In addition, there was no evidence that anyone in Texas had read the alleged libel.

[20] In Braintech, the court recognized that if every jurisdiction in the world which has access to the Internet took jurisdiction, it would have a crippling effect on the freedom of expression. In concluding that Texas was not the appropriate forum for the exercise of jurisdiction, the court considered the American decision in Zippo Manufacturing Company v. Zippo DotCom, Inc., 952 F.Supp. 1119 (W.D.Pa. 1997), and the application of a three-prong test:

(1) the defendant must have sufficient "minimum contacts" with the forum state, (2) the claim asserted against the defendant must arise out of those contacts, and (3) the exercise of jurisdiction must be reasonable.

[21] With reference to libel, the court stated that the libel is only committed when the defamatory material is published to at least one person other than the complainant. In the case at bar, the alleged offending words were published nationwide.

[22] In the context of forums conveniens, the court in Braintech adopted De Savoye v. Morguard Investments Limited, [1990] 3 S.C.R. 1077 at page 1079 and stated:

The approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. [my underlining]

[23] There are, as previously stated, two issues: whether or not the court in British Columbia has jurisdiction in the first instance and secondly, if it does have jurisdiction, is there another jurisdiction which falls within the descriptive words forum conveniens. As Downard, in his text on Libel (Markham: Butterworths LexisNexis, 2003), states at page 160:

It is well known that as a matter of general principle, a Canadian court only has jurisdiction over a civil action if there is a "real and substantial" connection between the tort and the jurisdiction in which the action is brought. If the court has jurisdiction, it may still decline to exercise that jurisdiction if it is satisfied that it is an inconvenient forum (a 'forum non conveniens'), and another forum is more appropriately suited to take jurisdiction over the case.

[24] In the case at bar, I am satisfied that a real and substantial connection exists between the tort (defamation) alleged and British Columbia (Braintech, supra).

[25] In the context of determining what might be the forum conveniens, one factor is where the plaintiff resides and where the defamatory remarks were published. In Downard's text, he refers to Jenner v. Sun Oil Co. Ltd., [1952] O.R. 240 at 538 (C.A.):

In an action for defamation it is a matter of great importance whether the plaintiff is a resident of the locality in which the writ is issued ...

- [26] The rationale for that statement is of course that the plaintiff may be well known, well regarded, have social or business connections, or have a reputation well known within the community, and as a result, publication in that community of the defamatory words would cause the plaintiff the greatest harm in that locale.
- [27] In the case at bar, the plaintiff does reside in British Columbia, as described in his affidavit. There is no direct evidence as to his reputation in the community; nevertheless it is in the community that he resides that he has decided to commence proceedings to clear his name by an action in defamation.
- [28] Other factors which the court may take into consideration in forum conveniens are the difference in the law in the two locations and whether or not there is a juridical advantage to a plaintiff in the case at bar suing in British Columbia versus having to commence proceedings in Quebec. The language of the Supreme Court of Canada in *Prud'homme*, supra, tends to support the conclusion that the laws of defamation may be different; consequently, it may be a juridical advantage if the plaintiff commences proceedings in British Columbia.
- [29] The corollary of that, of course, is it may be to the disadvantage of the personal defendants if they are required to defend in accordance with British Columbia law dealing with the common law of defamation, rather than the Quebec Civil Code.
- [30] The answer to that, in my view, is found in the defendant Bouchard's affidavit, wherein she deposed that the subject-matter of her report was of national and international importance. It is also important to recall that it was a national body that called for proposals as a result of which the defendant Bouchard submitted her report. This national body then made the value judgment to translate into English and convey the content coast to coast.
- [31] This was not a report created by the personal defendants for use solely in the Province of Quebec. It obviously had national importance.
- [32] Counsel for the personal defendants submits that it is of importance that the trial be conducted in Quebec as there are witnesses available in Quebec (other than the personal defendants) who may be in a position to give evidence as to the significance of the report, and the significance of the comments that the authors made concerning the plaintiff in the context of that society. In conjunction with that submission, counsel for the personal defendants submits that the defendants' inability to testify in English if the trial was held in British Columbia operates as a disadvantage to them.
- [33] In my view, neither of these factors should be given significant weight. The personal defendants, as well as any other witnesses they wish to call, are able to come to British Columbia on their own behalf, or at the behest of the corporate defendants, to testify as to the socio-economic conditions in the Province of Quebec, and what impact, if any, the article would have in that community in terms of fair comment. Nevertheless, in my view, the defence of fair comment must relate to the actions of the personal defendants at the

location where the alleged defamatory material was published and where it created the harm. In other words, in British Columbia. The court should be addressing the issue as to whether or not the content of the report, insofar as it contains alleged defamatory language, is such that the defence of fair comment would be applicable to the offending language in the Province of British Columbia.

- [34] In my view, that approach is justified particularly where the report is of national publication.
- [35] Consequently, in my opinion, those authorities which emphasize the focal point or the location of the website in terms of publication of defamatory statements are of limited application.
- [36] As to the inabilities of the personal defendants to communicate effectively in English, it is important to note that the report was prepared in French, one of the two official languages, and translated into English, the other official language. It is also important to note that the plaintiff sues on the basis of the English translation which was published by the corporate defendants on their national website.
- [37] If the personal defendants are required to testify in British Columbia, it may well be that a translator will be required. If the plaintiff and any of his witnesses are required to attend and testify in Quebec, if the trial is conducted in French, then the plaintiff and his witnesses will require the use of a translator. It should be noted parenthetically that in the Province of British Columbia there are sufficient members of the Supreme Court of British Columbia who can conduct a trial in French if it is thought under the circumstances this trial should be conducted in that official language.
- [38] Insofar as examinations for discovery are concerned, the same applies. The plaintiff will require French translation; the defendants will require English translation in the event the discoveries take place in either British Columbia or Quebec. As a result, in my view, the French/English translation issue is of no consequence in determining what jurisdiction is the forum conveniens.
- [39] I am satisfied, considering all the factors, that a trial of the plaintiff's cause of action in the Province of British Columbia is an appropriate exercise of jurisdiction by the British Columbia courts, and as a result, the personal defendants' application is dismissed.

"F.A. Melvin, J."

The Honourable Mr. Justice F.A. Melvin

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