

CANADA / JUDGMENT

X Corp. v. Masjoody

2025 BCCA 89

COURT

British Columbia Court of Appeal

DECIDED

25 March 2025

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2025 BCCA 89 X Corp. v. Masjoody

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

X Corp. v. Masjoody,

2025 BCCA 89

Date: 20250325

Dockets: CA49927; CA49928

Docket: CA49927

Between:

X Corp.

Appellant

(Defendant)

And

Masood Masjoody

Respondent

(Plaintiff)

And

Arash Kamancheh, Maryam Lagertha, Sedigheh Minachi,

and Azar Khorramshahi

Respondents

(Defendants)

- and -

Docket: CA49928

Between:

X Corp.

Appellant

(Defendant)

And

Masood Masjoody

Respondent

(Plaintiff)

Before:

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Grauer

The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia,

dated May 21, 2024 (Masjoody v. Momeni, 2024 BCSC 1004,

Vancouver Dockets S240157 and S240583).

Counsel for the Appellant:

M.J. Diskin

L.E. Burgess

The Respondent appearing in person:

M. Masjoody

Place and Date of Hearing:

Vancouver, British Columbia

January 31, 2025

Place and Date of Judgment:

Vancouver, British Columbia

March 25, 2025

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Grauer

The Honourable Justice Edelmann

Summary:

Appeal of an order refusing to stay proceedings on the basis of a forum selection clause. The respondent agreed to the appellant's terms of service when he signed up to use X. Those terms included a requirement to address certain disputes only in California. The judge found the forum selection clause did not apply to the consequences of third parties viewing defamatory content on the platform. Following the appeal hearing, while judgment was under reserve, the respondent applied to vary the decision of one of the justices of appeal, who declined to recuse herself for alleged bias. Held: Appeal dismissed. Rule 62(2) does not authorize review of a recusal decision made during an appeal hearing. As for the appeal, the appellant's publishing of allegedly defamatory content is not a dispute relating to the services because the terms of service differentiate "services" and "content." The dispute is also not related to the terms, as the respondent is not asserting a contractual right to compel the appellant to remove the defamatory content, and the claims and remedies sought go beyond a claim for damages for defamatory content posted by third parties which are subject to the limitation of liability term.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] X Corp. appeals the dismissal of its application to stay the respondent Masood Masjoody's claims against it, contending Dr. Masjoody agreed to a forum selection clause when he first signed up for an X (then Twitter) account--a clause that requires him to sue in California only.
- [2] I wish to emphasize that this appeal is not about whether Dr. Masjoody's claims against X Corp. have merit or whether X Corp. has strong defences to those claims. The appeal concerns only the narrow question of whether he may pursue his claims in British Columbia rather than California.

Background

- [3] Dr. Masjoody resides in British Columbia. He filed two notices of civil claim in the British Columbia Supreme Court. Both proceedings allege X Corp. and various individuals conspired to harm Dr. Masjoody by publishing defamatory statements about him on X. He seeks damages in excess of \$50 million and an injunction against X Corp. compelling it to take down the offending publications.

- [4] X Corp. filed a jurisdictional response to both claims and applied for stays of proceeding based on the forum selection clause contained in its Terms of Service. That clause reads:

The laws of the State of California, excluding its choice of law provisions, will govern these Terms and any dispute that arises between you and us. All disputes related to these Terms or the Services will be brought solely in the federal or state courts located in San Francisco County, California, United States, and you consent to personal jurisdiction and waive any objection as to inconvenient forum. To the extent permitted by law you also waive the right to participate as a plaintiff or class member in any purported class action, collective action or representative action proceeding.

[Emphasis added.]

Dr. Masjoody does not challenge X Corp.'s assertion that he agreed to the Terms of Service in place when he signed up for X (then Twitter) in 2013.

The Hearing Below

- [5] The chambers judge dismissed X's applications. He began by identifying the two-part test to be applied in determining whether a court should enforce a forum selection clause in a consumer contract, as set out in *Douez v. Facebook, Inc.*, 2017 SCC 33 at paras. 28 and 29:
1. Is the clause valid, clear and enforceable, and does it apply to the causes of action in issue?
 2. If so, can the party challenging the clause establish strong cause for not giving effect to the clause?
- [6] The judge held that X Corp. failed the first part of the test because the forum selection clause does not apply to the causes of action in defamation brought by Dr. Masjoody. He reasoned that those claims were based on harm caused by third parties viewing defamatory statements about Dr. Masjoody that were available on X, whereas the forum selection clause covers disputes over Dr. Masjoody's access to and use of X Corp.'s services himself. In the judge's view, the forum selection clause does not extend to the consequences of third parties viewing content on X: at para. 28.

On Appeal

- (a) Application Filed While Judgment was on Reserve
- [7] Before turning to the substantive appeal, I must digress to address an application filed by Dr. Masjoody in this appeal while judgment was under reserve. That application seeks to challenge the denial of an earlier application, made by Dr. Masjoody at the outset of the hearing of the appeal, to have two of the three members of the division recuse themselves. Dr. Masjoody's recusal applications were supported by an extensive written submission outlining numerous bases for his belief that Justice Edelman and I would be unable to decide this appeal objectively and impartially.

[8] An application for recusal must be decided by the judge whose impartiality has been called into question; it is not a decision to be made by the division collectively: *Arsenault-Cameron v. Prince Edward Island*, [1999] 3 S.C.R. 851; *R v. Anderson*, 2017 BCCA 154 at para. 2. In keeping with that requirement, Justice Edelmann and I independently considered the relevant application to recuse and each delivered oral reasons declining the request. The hearing then proceeded and judgment was reserved. A week later, Dr. Masjoody purported to file an application to vary or cancel the order of a single justice under Rule 62(2) of the Court of Appeal Rules, B.C. Reg. 120/2022, which provides:

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(2) A person who wishes to apply to have the court, under section 29 of the Act, vary or cancel an order [of a single justice] must do the following not more than 7 days after the order is made:

- (a) obtain a hearing date for the application;
- (b) file and serve a notice of application to vary or cancel an order of a justice in Form 8.

In particular, Dr. Masjoody sought to have a division of the Court review my decision to decline to recuse myself from the hearing of the appeal--apparently having accepted Justice Edelmann's decision to continue.

[9] I conclude that Rule 62(2) does not permit review of a ruling made during the hearing of an appeal. Dr. Masjoody's application to vary the recusal decision is misguided. Since it cannot be set down for consideration by another division, I will address it here.

[10] First, although a judge asked to recuse on the basis of bias makes that decision based on their independent assessment of the merits of the application, a challenge to the impartiality of a judge sitting as a member of a division of the Court is in reality a challenge to the impartiality of the division as constituted by the Chief Justice. It is, then, a decision delivered by one judge that affects the constitution of the court hearing the appeal. If the application were to succeed, the appeal hearing would have to be adjourned and a new division constituted.

[11] A recusal decision in these circumstances is analogous to a mid-trial ruling, which can only be raised as a ground of appeal once the trial concludes and judgment is delivered. Similar decisions are regularly made during appeal hearings: refusal of an application to adjourn, a decision to allow or refuse a new issue to be raised on appeal, or to allow or refuse fresh evidence. A party having received a ruling in relation to such applications cannot, either during the appeal or while judgment is on reserve, apply to have those decisions reviewed by another division. That approach would result in a chaotic fracturing of the integrity of the appeal and a senseless waste of resources.

- [12] A party aggrieved by decisions of the kind I have described, including recusal decisions, must wait to address those complaints as part of an appeal from the judgment of the Court to the Supreme Court of Canada, generally on leave. The efficiency of this approach is evident: if the aggrieved party is ultimately successful in this Court despite having lost an application made during the hearing, a further appeal will be unnecessary. If the aggrieved party is unsuccessful, the complaint can be advanced together with any other grounds of appeal that might support the setting aside of the court's judgment.
- [13] The second reason Dr. Masjoody's application cannot be heard is that it is moot. I did not recuse myself and the appeal has been heard. It is, in short, too late to try to convince another division that the appeal should proceed before a differently constituted division. Again, the recourse in such circumstances is to raise bias as a ground of appeal if the party is dissatisfied with the substantive judgment.
- [14] Having determined that Dr. Masjoody's application for variation of the recusal decision must be quashed, I turn again to the matters in issue on this appeal.
- (b) Standard of Review
- [15] X Corp. asserts that the judge erred in interpreting the scope of the forum selection clause. Interpretation of a contract is generally reviewed as a question of mixed fact and law (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 52). However, the Terms of Service in issue here are a standard form contract applicable to a vast number of customers. I agree with X Corp. that in these circumstances the interpretation should be reviewed as a question of law on a standard of correctness: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at paras. 24 and 39; *Cellular Baby Cell Phones Accessories Specialist Ltd. v. Fido Solutions Inc.*, 2017 BCCA 50 at para. 48.
- (c) The Forum Selection Clause
- [16] The central issue on appeal is whether the forum selection clause applies to Dr. Masjoody's claims against X. Corp. If it does, it will then be necessary to determine whether Dr. Masjoody has shown strong cause not to enforce the clause.
- [17] X Corp. has the burden of proving that the claims fall within the scope of the forum selection clause. It begins that task by describing the defamation claim against X as a dispute between Dr. Masjoody and X Corp. over content displayed on the X platform and removal of that content. X then makes three arguments in support of its position that the forum selection clause encompasses the claims. I will address each argument in turn.
- [18] First, X Corp. says the complaint that it is publishing defamatory content is a dispute "relating to the Services" as per the forum selection clause, which I set out again here for ease of reference:

The laws of the State of California, excluding its choice of law provisions, will govern these Terms and any dispute that arises between you and us. All disputes related to these Terms or the Services will be brought solely in the federal or state courts located in San Francisco County, California, United States, and you consent to personal jurisdiction and waive any objection as to inconvenient forum. To the extent permitted by law you also waive the right to participate as a plaintiff or class member in any purported class action, collective action or representative action proceeding.

[Emphasis added.]

[19] X argues that, although the forum selection clause does not expressly refer to "content," Services are meaningless without content, therefore Services must encompass content.

[20] I would not accede to this argument because the Terms of Service define both "Services" and "Content" as distinct concepts:

These Terms of Service ("Terms") govern your access to and use of our services, including our various websites, SMS, APIs, email notifications, applications, buttons, widgets, ads, commerce services, and our other covers services (<https://help.x.com/rules-and-policies/x-services-and-corporate-affiliates>) that link to these Terms (collectively, the "Services"), and any information, text, links, graphics, photos, audio, videos, or other materials or arrangements of materials uploaded, downloaded or appearing on the Services (collectively referred to as "Content"). By using the Services you agree to be bound by these Terms.

[Emphasis added.]

[21] The Terms of Service draw a distinction between Services and Content throughout the agreement. For example, Part Five, "Disclaimer and Limitations of Liability," provides "[y]our access to and use of the Services or any Content are at your own risk" [emphasis added]. If "Services" subsumes "Content," the reference to Content would be unnecessary. It does not follow, then, that a dispute over the Services includes a dispute over Content.

[22] Second, X Corp. says that even if content is not caught by "Services," the dispute Dr. Masjoody wishes to pursue is a dispute related to the Terms, noting that the forum selection clause encompasses disputes "related to these Terms or the Services." X Corp. relies on two of the terms in the Terms of Service. The first pertains to content regulation. It stipulates that X Corp. does not control content posted on the X platform and does not take responsibility for it:

Any use or reliance on any Content or materials posted via the Services or obtained by you through the Services is at your own risk. We do not endorse, support, represent or guarantee the completeness, truthfulness, accuracy, or reliability of any Content or communications posted via the Services or endorse any opinions expressed via the Services. You understand that by using the Services, you may be exposed to Content that might be offensive, harmful, inaccurate or otherwise inappropriate, or in some cases, postings that have been mislabeled or are otherwise deceptive. All Content is the sole responsibility of the person who originated such Content. We

may not monitor or control the Content posted via the Services and, we cannot take responsibility for such Content.

[Emphasis added.]

[23] In my view, the Terms must be read in the context of the contract as a whole. As the chambers judge observed, the Terms address Dr. Masjoody's use of and access to the Services and the Content displayed on the Services, whether posted by Dr. Masjoody or others. The opening words of the Terms of Service state:

These Terms of Service ("Terms") govern your access to and use of our services and [your access to and use of] any information, text, links, graphics, photos, audio, videos, or other materials or arrangements of materials uploaded, downloaded or appearing on the Services (collectively referred to as "Content").

[Emphasis added.]

[24] Under the heading "Content on the Services," a user agrees to be responsible for any Content they provide to X, that any reliance on any Content posted on X is at their own risk, and that they "may be exposed to Content that might be offensive, harmful, inaccurate or otherwise inappropriate." The contract states that X cannot take responsibility for such Content and makes no warranties or representations as to accuracy or reliability of any Content. It also states that X takes no responsibility for harm to "your computer system, loss of data, or other harm that results from your access to or use of the Services or any Content." The same lack of liability applies to service interruptions.

[25] I conclude that Dr. Masjoody's claims cannot be described as a dispute over the content terms he agreed to with X Corp. Those Terms address X's right to remove or refuse to distribute content, to use and publish content posted by the user, and to modify, adapt or use the content. As I read these terms, they relate to X's entitlement under the agreement to make use of, modify, display, or remove content on its own initiative, without complaint from the user. In the present case, Dr. Masjoody is not asserting a right under the Terms of Service to compel X to remove the defamatory content. Rather, he seeks as a remedy, a court-imposed removal order directing X to take down certain content.

[26] In summary, I agree with the judge that Dr. Masjoody's claim is not a complaint about what content he has been exposed to on X. It is, rather, a complaint about what the general public can read about him on X, and the impact of that content on his reputation and security. That does not arise from his use of or access to X's services as a member so as to fall within the contract.

[27] The second term X Corp. relies on is the "Disclaimer and Limitations of Liability" Term, which more directly addresses defamatory content posted by others:

TO THE MAXIMUM EXTENT PERMITTED BY APPLICABLE LAW, THE X ENTITIES SHALL NOT BE LIABLE FOR ANY INDIRECT, INCIDENTAL, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES, OR ANY LOSS OF PROFITS OR REVENUES, WHETHER INCURRED DIRECTLY OR INDIRECTLY, OR ANY LOSS OF DATA, USE, GOODWILL, OR OTHER INTANGIBLE LOSSES, RESULTING FROM (i) YOUR ACCESS TO OR USE OF OR INABILITY TO ACCESS OR USE THE SERVICES; (ii) ANY CONDUCT OR CONTENT OF ANY THIRD PARTY ON THE SERVICES, INCLUDING WITHOUT LIMITATION, ANY DEFAMATORY, OFFENSIVE OR ILLEGAL CONDUCT OF OTHER USERS OR THIRD PARTIES; (iii) ANY CONTENT OBTAINED FROM THE SERVICES; OR (iv) UNAUTHORIZED ACCESS, USE OR ALTERATION OF YOUR TRANSMISSIONS OR CONTENT. IN NO EVENT SHALL THE AGGREGATE LIABILITY OF THE X ENTITIES EXCEED THE GREATER OF ONE HUNDRED U.S. DOLLARS (U.S. \$100.00) OR THE AMOUNT YOU PAID US, IF ANY, IN THE PAST SIX MONTHS FOR THE SERVICES GIVING RISE TO THE CLAIM. THE LIMITATIONS OF THIS SUBSECTION SHALL APPLY TO ANY THEORY OF LIABILITY, WHETHER BASED ON WARRANTY, CONTRACT, STATUTE, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, AND WHETHER OR NOT THE X ENTITIES HAVE BEEN INFORMED OF THE POSSIBILITY OF ANY SUCH DAMAGE, AND EVEN IF A REMEDY SET FORTH HEREIN IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE.

[Bold in original; underline emphasis added.]

However, this clause too is rooted in Dr. Masjoody's "access to and use of services or any content." The limitation of liability clause expressly limits X's liability for damages or loss of profits or loss of data, etc., caused by "your access to or use of the Services." But it also disclaims liability for damages resulting from "any conduct or content of any third party on the Services, including any defamatory, offensive or illegal conduct of other users or third parties." X Corp. says the meaning is clear: it is not liable for damages for defamatory content posted by third parties on the Services. By suing X for damages for republishing such content, Dr. Masjoody's claim is said to be a "dispute related to" the limitation of liability term and is therefore caught by the forum selection clause.

[28] This submission has some merit. The phrase "related to" is very broad (see *Slattery (Trustee of) v. Slattery*, [1993] 3 S.C.R. 430 at 445; *Jaguar Financial Corporation v. Alternative Earth Resources Inc.*, 2016 BCCA 193 at para. 82). Further, one part of Dr. Masjoody's claims seeks damages against X Corp. for defamation. However, despite the lack of clarity in Dr. Masjoody's pleadings, it is apparent that his claims against X Corp. go well beyond a claim for damages for republication of defamatory content posted by third parties. Those claims include the following:

7. In addition, X Corporation is liable to the plaintiff for publishing and continuing to publish the impugned words against the plaintiff, failing to remove the defamatory publications from X, and failing to stop the campaigns of defamation, targeted harassment, hatred, and incitement to violence against the plaintiff. Through its persistent failures, X Corporation further facilitated and encouraged the continuation and escalation of the conspiracy of the Monarchist Defendants against the plaintiff.
25. Actions of X Corporation X Corporation against the plaintiff involved, and continue to involve, defamation, incitement to defamation, inciting hatred, willfully promoting hatred, uttering threats to cause death or bodily harm and causing the plaintiff to receive such threats some examples of unlawful actions besides defamation include death threats, and incitement to violence.
- [29] It appears that Dr. Masjoody claims X Corp. has defamed him directly, and incited others to do so. That claim cannot be described as a dispute over the conduct of, and content posted by, third parties on the Services. In addition, X Corp. appears to be included in claims grounded in conspiracy, or at a minimum facilitation of conspiracy to incite hatred, which also goes beyond X's liability for the conduct or content of third parties.
- [30] Further, insofar as Dr. Masjoody seeks a finding of defamation against X Corp. in order to obtain an injunction to compel X to take down defamatory publications, it is not a dispute relating to recovery of damages. The Term we are now considering is a limitation on liability for damages only.
- [31] Third, X Corp. says that even if the forum selection clause and the Terms are limited to Dr. Masjoody's access to and use of the Services, the defamation claim relates to that use. That is so, they say, because many of the allegedly defamatory posts are comments made in response to Dr. Masjoody's use of X as a platform to share his opinions.
- [32] I would not accede to this argument. It is not evident at this stage of the proceedings that all or even most of the comments (the majority of which are untranslated posts in Persian) are directly responsive to what Dr. Masjoody has said on X. In any event, the posts in issue are more accurately described as related to the use by others of their accounts on X.
- [33] I conclude that X Corp. has not met its burden of establishing that the proceedings against it are clearly within the scope of the forum selection clause. It is accordingly unnecessary to consider whether there is just cause not to enforce the clause.

Disposition

- [34] I would dismiss the appeals with costs to Dr. Masjoody.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Justice Edelman"

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