

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Canwest v. Horizon,
2008 BCSC 1609

20081124
Docket: S078309
Registry: Vancouver

Between:

Canwest Mediaworks Publications Inc.

Plaintiff

And

**Horizon Publications Ltd., Garth Leddy, Mordecai Briemberg, Gordon Murray,
Carel Moiseiwitsch, John Doe #2, John Doe #3, Jane Doe #2 and Jane Doe #3**

Defendants

Before: Master Donaldson

Reasons for Judgment

Counsel for Plaintiff

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Date and Place of Hearing:

October 28, 2008
Vancouver, B.C.

[1] This matter arises from the authoring, printing and distribution of “a fake edition of the *Vancouver Sun*” or a “parody” of the *Vancouver Sun* on the 7th of June, 2007. The first motion in time is that brought on behalf of the defendant Gordon Murray seeking production of documents, and the second motion in time is brought on behalf of the plaintiff seeking that certain paragraphs of Mr. Murray’s statement of defence be struck, these being paragraphs 2, 3, 4 and 11. It is contended on the part of the plaintiff that those paragraphs disclose no reasonable defence and are unnecessary, scandalous, frivolous or vexatious or on the bases that they may prejudice or embarrass the proceeding. The defendant has abandoned its application to strike paragraphs 6, 8 and 14.

[2] The defendant Mr. Murray characterizes the publication as being a parody and seeks extensive document production.

[3] The original statement of claim has been amended and the latest iteration is dated the 12th of September 2008. The amended statement of defence of Mr. Murray is dated the 26th of September 2008.

[4] Generally speaking the plaintiffs latest statement of claim makes four claims:

1. passing off;
2. injurious falsehood;
3. breach of copyright; and
4. breach of trademark.

[5] In his defence Mr. Murray claims that:

1. parody as a defence to the counter copyright claim,
2. freedom of expression as a defence to all claims,
- 3 a lack of confusion in relation to the trademark and passing off claims; and
4. truth of the content as a defence to all claims.

[6] The defendant alleges media ownership in British Columbia is concentrated in the plaintiff; the plaintiff has a particular bias in relation to news matters that stem from the Middle East, that the plaintiff maintains a centralized editorial policy and that the action is motivated by an improper purpose.

Striking portions of the Statement of Defence

[7] I propose to deal firstly with the plaintiff's application to strike portions of the amended statement of defence of Gordon Murray. A determination of that issue will reflect on whether all or portions of Mr. Murray's application for production of documents need be dealt with. The paragraphs sought to be struck are:

2. Canwest is Canada's largest newspaper chain reaching 4.8 million readers on a weekly basis. It owns and operates the following newspapers, which together comprise approximately 84% of the daily paid newspaper circulation in British Columbia: the *Vancouver Sun*, the *Vancouver Province*; the *Victoria Times-Colonist*; the *Vancouver Courier*, the *New Westminster Record*; *Surrey New*; *Richmond News*; *North Shore News*; the *Abbotsford/Mission Times*; *Burnaby Now*; *Chilliwack Times*; *Coquitlam Now*; *Delta Optimist*; *Langley Advance*; *Maple Ridge/Pitt Meadows Times*; *Nanaimo Daily News*; *Nanaimo Harbour City Star*; *Port Alberni Times*; *Cowichan Valley and Duncan's Cowichan Valley Times*; *Parksville/Qualicum Beach Oceanside Star*; *Courtney/Comox Comox Valley Echo*; *Campbell River's Courier Islander*; *Tofino/Ucluelet Westerly*; *Port Alberni Pennyworth*; *Alberni Valley Times*; and the *National Post*. Canwest describes itself as the dominant news organization in British Columbia.

3. Canwest newspapers and other Canwest media properties have a strong pro-Israel bias, particularly in their coverage of the Israeli occupation of the West Bank and the Gaza Strip. In Canwest publications, Israelis are usually portrayed as innocent victims and Palestinians as inhuman terrorists. Israeli casualties and deaths are disproportionately reported and sympathetically described while Palestinian deaths are relatively underreported and unsympathetically described. Canwest takes the position that Israel is blameless and described the Palestinian people in one editorial as a single collective suicide bomber.

4. The bias exhibited by individual Canwest papers and media properties is the product of a centralized editorial policy that emanates from Canwest's headquarters and its senior directors and principal shareholders. This centralized policy took hold at the *Vancouver Sun* shortly after Canwest purchased the print media and newspaper holdings of Southam Inc. in November of 2000. One express purpose of the centralized editorial policy is to insulate Israel from criticism for its violations of international law and to influence Canadian public opinion and foreign policy. The editorial policy limits and restricts the freedom of Canwest reporters and editors, including those employed by the *Vancouver Sun*, to publish facts and opinions after their own fashion. Canwest enforces its editorial policy by threatening to terminate the employment of newspaper reporters and editors who are publicly critical of the policy, which is a threat carrying significant weight given the extent of Canwest newspaper ownership.

11. The defendant denies that Canwest suffered any loss of circulation or revenue as a result of the parody. The defendant says that this lawsuit is not intended to compensate Canwest for any losses. This lawsuit is intended to restrict publication and circulation of the Parody, to inflict economic and emotional harm on the defendants for the pro-Palestinian activities listed in paragraphs 10, 11 and 12 of the Statement of Claim, and to generally deter publication of the opinions expressed by the Parody. This purpose and effect of this lawsuit are inimical to the common law and to the Charter of Rights and Freedoms. This lawsuit represents a perversion of civil justice and an abuse of process and is contrary to Rule 19(24) of the Supreme Court Rules.

[8] *Rule 19(24) of the Rules of Court* is the applicable rule dealing with the striking of portions of a claim.

At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence as the case may be,
- (b) It is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[9] The leading case on motions to strike pleadings is **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959. In **Hunt** at page 980, Wilson, J. for the court set out the test:

...assuming that the facts as stated in the statement of claim can be proved, is it “plain and obvious” that the plaintiff’s statement of claim discloses no reasonable cause of action?...

[10] Romilly, J. also discussed the “plain and obvious” rule in the context of subrules 19 (24) (c) and (d) in **Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress** (1999), 36 C.P.C. (4th) 266 @ para 47. The theme throughout the definitions of scandalous, vexatious, unnecessary and frivolous allegations is relevance. That is, if the allegation is or may be relevant to a claim or defence, it must stay in; if not, it should be struck.

[11] The issue in this matter is whether the defendant’s allegations are relevant to any of the defences. The media ownership, centralized editorial policy and

motivation allegations clearly do not go to any of the defences which the defendant has raised. Therefore, they should be struck.

[12] The defendant Mr. Murray contends that the defence of freedom of expression is appropriate and applicable to him in this matter. In ***Compagnie Générale des Établissements Michelin – Michelin & Cie v. National Automobile, Aerospace, Transportation and Générale Workers Union of Canada (CAW – Canada)*** (1996), 124 F.T.R. 192, (*sub nom. Cie Generale des Établissements Michelin-Michelin & Cie v. C.A.W.-Canada et al*) 71 C.P.R. (3d) 348 [***Michelin***], raised freedom of expression as a defence to both copyright and trade-mark infringement. Teitelbaum J. (as he then was) analyzed freedom of expression in relation to the ***Copyright Act***, R.S. 1985, c. C-42, and held at Para. 76 that “the principles and outcome” also applied to the ***Trade-marks Act***, R.S. 1985, c. T-13.

[13] Teitelbaum J. clearly found that freedom of expression is not a defence to copyright or trademark infringement. At Para. 79 he stated that:

... the defendants’ right to freedom of expression was not restricted. The **Charter** does not confer the right to use private property – the plaintiff’s copyright – in the service of freedom of expression...

He further held at Para. 109 that, if he had found an infringement, he would have held that the relevant provisions of the ***Copyright Act*** were justified under s. 1 of the ***Charter***.

[14] In the statement of defence, the defendant seems to assert that the fake *Sun* is a parody, and therefore it does not infringe the **Copyright Act** due to the “fair use” exception for criticism in s. 29.1. However, Teitelbaum J held clearly in *Michelin* at Para. 63 that parody is not an exception to copyright infringement under the **Copyright Act**, and therefore does not constitute a defence.

[15] As parody is not a defence to a copyright claim, the defendant’s allegations cannot be necessary to prove it.

[16] The defendant further alleges that there was no confusion in this case in part because of the differing editorial content and bias of the fake *Sun* and the actual *Vancouver Sun*. However, when determining whether there is likely confusion, the content of the fake *Sun* is not relevant.

[17] Thus I am satisfied that paragraphs 2 and 3 of the amended statement of defence filed the 21st of October 2008 should be struck.

[18] With regard to the injurious falsehood claim it may well be that the editorial content and the biases of the *Vancouver Sun* and the parody may be relevant. To prove injurious falsehood the plaintiff must prove that there is a falsehood. In this case the plaintiff and defendant seem not to agree on what the “falsehood” is. In its submissions the plaintiff identifies the “falsehood” as the “misrepresentation that the fake newspaper was the *Vancouver Sun*”. The defendant contends that it is the content of the parody which is the alleged falsehood.

[19] If the nature or characterization of the “falsehood” cannot be prescribed it would appear that the nature of the “falsehood” will be a matter for the trial judge to determine. If the trial judge finds that the “falsehood” relates to the contents of the parody, then the allegation in the statement of defence of bias may well be necessary to show that the contents of the parody are true.

[20] Unless the plaintiff clearly restricts the claim for injurious falsehood to the use in the parody of the “*Vancouver Sun*” logo and name then I am satisfied that the plaintiff must produce documents as sought in paragraph 1 (e) of the defendant’s notice of motion. The plaintiff will have 21 days from this date to confirm such restriction. If that is done, para 4 of the statement of defence will be struck.

[21] In the event such confirmation is not given the application to strike para 4 of the statement of defence is dismissed and the plaintiff will be required to produce documents as sought in para 1(e) of Mr. Murray’s notice of motion.

[22] Paragraph 11 of the statement of defence should be struck as it is in reference to paragraphs 10, 11 and 12 of an earlier version of the statement of claim which has since been amended to delete those paragraphs.

Production of Documents

[23] The plaintiff will be required to produce documents, to the extent it has not been done as sought in para 1(c) and (d):

- (c) Documents dealing with historical trademark usage and ownership;

(d) Documents dealing with the subsistence of copyright in the plaintiff (ie. Evidence tracing authorship of the layout and design of the Vancouver Sun logo and the general format of the Vancouver Sun and supporting ownership by the plaintiff), as claimed in paragraph 8A of the Further Amended Statement of Claim dated September 12, 2008;

[24] The plaintiff has argued documents do not exist in relation to Para 1 (a) and (b) and agrees if such existed they would be relevant. Should documents become available they are to be produced as required by the **Rules**.

[25] Documents sought in paragraphs 1 (e), (f) and (g) need not be produced.

[26] Following my conclusions, paragraphs 2, 3, 4 and 11 of the amended statement of defence should be struck.

[27] The plaintiff is entitled to costs of its application as against the defendant Gordon Murray. The plaintiff and defendant Gordon Murray will bear their own costs in relation to the defendant's motion for production of documents.

“Master A. Donaldson”