CITATION: *Canadian Union of Postal Workers v. Quebecor Media Inc*, 2015 ONSC 4511
COURT FILE NO.: 14-62129
DATE: 2015/07/15

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Canadian Union of Postal Workers Plaintiff (Responding Party)	Karin M. Pagé, for the Plaintiff
– and –	
Quebecor Media Inc., Sun Media Corporation, TVA Group Inc., Jerry Agar	Tycho Manson, for the Defendants
– and –	
Avi Benlolo Defendants (Moving Parties)	Stephen Cavanagh, for the Defendant
	HEARD: June 24, 2015

REASONS FOR JUDGMENT ON A MOTION PURSUANT TO RULE 21, RULES OF CIVIL PROCEDURE

PELLETIER J.

Introduction

[1] The Defendants to this action bring a motion under Rule 21.01(1)(a) of the *Rules of Civil Procedure* for the determination of 2 questions of law: firstly, whether the Plaintiff complied with the notice requirements under section 5 of the *Libel and Slander Act*, R.S.O.1990 c. L.12 prior to bringing the action, and secondly, whether, as an unincorporated association, a trade union has the legal capacity to sue in defamation. The Defendant Avi Benlolo raises an additional issue relating to whether he is in any way connected to the second of the two purported defamatory statements.

Background

[2] The action arises as a result of two publications, one broadcast and the other printed. On July 24, 2014, Sun News, operated by T.V.A. Group Inc. and its parent company Quebecor Media Inc., broadcast a segment hosted by the Defendant Jerry Agar during which discussions took place with a guest, the Defendant Avi Benlolo, concerning a pro-Palestinian rally on Parliament Hill on July 23, 2014. The Plaintiff alleges that defamatory statements were made, essentially creating a link between CUPW and Hamas supporters, said to have attended the demonstration.

[3] The actual broadcast has been reproduced and entered as an exhibit for the purposes of the present motion. For ease of reference only, a transcript prepared by the Plaintiff, compared by the Court to the actual broadcast, provides a sufficiently accurate record of the interview and the banners attached to the segment by the broadcaster. The transcript of the segment is attached at Appendix A.

[4] On August 19, 2014, the Plaintiff provided the notice to the Defendants, attached at Appendix B.

[5] The apology and retraction referred to in the Notice of Libel reads as follows:

> Draft Retraction and Apology
>
> Re July 24, 2014 Broadcast, "Hamas, CUPW flags fly on Parliament Hill"
>
> In a broadcast published late last month on the Sun News Network's website, www.sunnewsnetwork.com, the Sun News Network questioned CUPW's participation at a demonstration held in Ottawa calling for an end to the violence against Palestinians in Gaza.
>
> We regret and withdraw any suggestion that CUPW, or its members, are terrorists sympathizers or supporters of Hamas, or any other terrorists organization.
>
> Sun News Network sincerely regrets and apologizes for any misunderstanding or harm that this article may have caused to CUPW or its members.

[6] On July 28, 2014, the Toronto Sun, a newspaper operated by Sun Media Corp. and its parent company Quebecor Media Inc. published an article in print and online which forms the second basis of the defamation claim by the Plaintiff. The article is attached at Appendix C.

[7] A notice under the *Libel and Slander Act* concerning the July 28, 2014 article was provided to the Defendants on August 7, 2014. It is attached at Appendix D.

[8] The proposed retraction and apology attached to the notice, reads:

> Draft Retraction and Apology
>
> Re July 28, 2014 Article, "Hamas goes postal? Only in Canada"
>
> In an article published late last month in the Toronto Sun and on-line at www.torontosun.com, the Toronto Sun questioned DUPW's participation at a demonstration held in Ottawa calling for an end the violence against Palestinians in Gaza.
>
> We regret and withdraw any suggestion that CUPW, or its members, are terrorist sympathizers or supporters of Hamas.
>
> The Toronto Sun sincerely regrets and apologizes for any misunderstanding or harm that this article may have caused to CUPW or its members.

The First Issue

[9] The first basis upon which the present motion is brought relates to the sufficiency of the notice provided to the Defendants.

[10] Notice under the *Libel and Slander Act* is governed by s. 5 which provides:

> Notice of action
>
> > 5.(1) No action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff's knowledge, given to the defendant notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant. R.S.O. 1990, c. L.12, s. 5(1).

[11] The present debate is whether the notices were sufficient in "specifying the matter complained of."

[12] Rule 21.01(1)(a) allows for a determination before trial of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action.

[13] It is not disputed that this first issue, the sufficiency of the notice under the *Libel and Slander Act* is a question of law and properly before the Court on a Rule 21 motion.

The Law on the Issue of Notice Under the *Libel and Slander Act*.

[14] Consideration of the sufficiency of notice under the *Libel and Slander Act* necessarily begins with the principles set out in *Grossman v. CFTO.TV Ltd.* [1982] O.J. No. 3538 (Ont. C.A.).

[15] Concerning the effect and purpose of the notice requirement under the Act, the Court observed at paragraphs 12 to 14 as follows:

> *Effect of the Legislation*
>
> 12 The section stands as a condition precedent to the commencement of an action for libel. It constitutes an absolute bar. The purpose of the notice is to call the attention of the publishers to the alleged libelous matter. When it is received an investigation can be made, and if the publisher deems it appropriate, a correction, retraction or apology can be published. In this way the publisher can avoid or reduce the damages payable for the publication of a libelous statement.
>
> 13 The plaintiff, as well, may benefit from the notice. A timely correction, retraction or apology can often constitute a better remedy than damages. This principle has been recognized in those jurisdictions in the United States which require the service of notice. See, for example, *Webb v. Call Publishing Co.*, 173 Wis. 45, 52, 180 N.W. 263, 265 and *Huck v. Jos. Schlitz Brewing Company*, 302 N.W. 2d 68 (Wis. App.).
>
> 14 The notice provision, therefore, may benefit both parties. It does, however, stand as a bar to the action and forever prevents a determination of the issue on the merits. There is no form of notice set out in the Act.

[16] *Grossman* explains that prior to the 1958 amendments to the Act, no action for libel could be brought unless the Plaintiff gave written notice to the Defendant "specifying the *statement* complained of". The 1958 amendment required notice "specifying the *matter* complained of". The Court in *Grossman* observed that the change in the notice requirement reflected the advent of electronic media and the generally ephemeral nature of broadcast news compared to print media. At paragraphs 18 and 19 the Court notes:

> 18 The newspaper had been an integral part of society for many generations prior to the amendment. The allegedly libelous article in a newspaper could be kept, reviewed, and analyzed over an extended period. The burden thrust upon a

> prospective complainant by the notice requirement was thus neither unduly onerous nor unfair.
>
> 19 On the other hand, television or radio broadcasts can be ephemeral and fleeting. Ephemeral though it may be, the impact of a broadcast may be far greater than that of a newspaper article. The audio-visual effect can be devastating. The words used in the broadcast may be of secondary importance to a number of other features. The intonation, tone of voice, and inflection can make innocent words defamatory. A voice combined with background effects, scenery, music or images can still more readily lead to an insidious result where, although innocent words are used, a person is held up to the most flagrant ridicule and contempt.

[17] Explaining the significance of the 1958 amendments, as they relate to broadcasts, the Court explains at paragraphs 20 to 24:

> 20 How then is a prospective plaintiff to describe the broadcast he complains about in his notice? It may well be that the words themselves form a small portion of the libelous aspect of a broadcast for they may only be libelous in the context of the other sounds and images of the programme. Neither is it possible for the prospective plaintiff to review, study and analyze at his leisure the television programme. He will probably have only a transcript when he prepares the notice.
>
> 21 The word "statement" was plainly not broad enough to cover a broadcast and the draftsmen, in my opinion, deliberately chose a broader word when s.5(1) was amended to apply to broadcasts. I am of the view that the word "matter" in s.5(1) can and should be given a much broader interpretation that the word "statement" in the former section.
>
> 22 Often it will only be possible to refer to the matter complained of in a broadcast in a very wide and general manner. Not only do the realities of the situation suggest a broader interpretation, so too do the dictionary definitions of the words "matter" and "statement". The Shorter Oxford Dictionary includes in its definitions of "statement" as:
>
> 1) The action or an act of stating;
>
> 2) Something that is stated; an allegation, delegation;
>
> 3) A written or oral communication setting forth facts, arguments, demands or the like.
>
> 23 The same dictionary, among its definitions for "matter", includes the following broad concepts:
>
> 1) Material for expression, something to say or write;

> 2) A theme, topic, subject of exposition;
>
> 3) The substance of a book, speech or the like.
>
> 24 The notice complaining of a broadcast must necessarily be broader and less precise than that complaining of written words.

[18] *Grossman* establishes that the notice requirement is mandatory. Failure to provide sufficient notice is an absolute bar to proceeding. This necessarily requires a notice which sufficiently identifies the matter complained of. Proper notice is beneficial to both the plaintiff and the publisher, in that properly identified, the statements alleged to be defamatory in nature can be examined, considered, corrected or retracted as the case calls for. The benefit to the plaintiff is the prompt restoration of their reputation, considered in *Grossman*, as possibly more valuable than an eventual award in damages. The Act does not require or prescribe a particular form of notice. To the extent that *Grossman*, decided in 1982, stands for the proposition that "it will always be more difficult to frame a notice complaining of a matter contained in a television broadcast than a statement contained in a newspaper, magazine article, or book.", this principle must be examined in the context of current broadcast practices and technology. Indeed, the Statement of Claim asserts that both the broadcast of July 24, 2014 and the article of July 28, 2014 were published online and were still accessible to the public at large as of the date of the issuance of the of the amended Statement of Claim, September 29, 2014.

[19] In *Grossman*, complete transcripts of three broadcasts suggesting corruption in the issuance of taxi licences in Toronto were provided together with a notice that the "statements complained of are attached hereto".

[20] The Court concluded that the notice was sufficient stating, at paragraph 38:

> 38 Here, in light of the brevity of the broadcasts, the limited number of allegations made with regard to Mr. Grossman, the defendants could not possibly have been prejudiced or confused by the notice which they received in this case. They were made aware of the nature of the plaintiff's complaint for their attention was drawn to the three short segments of the news programmes broadcast on three successive days. There was no necessity in this case to specify in any greater detail the matters complained of. The notice in my opinion sufficiently specified the matter complained of as required by s.5(1) and was adequate to permit the defendants to make a "full and fair retraction". The plaintiff is accordingly entitled to have the action tried on its merits.

[21] The issue of sufficient notice under the Act was further considered in *Siddiqui v. Canadian* Broadcast Corp. [2000] O.J. No. 3638 (Ont. C.A.). A CBC broadcast concerning an alleged mismanagement of CARE Canada charitable funds formed the basis of an action brought by the owner of a travel agency, to whom it was suggested priority was given in booking flights for CARE Canada representatives while doing so at inflated prices. The notice stipulated:

> We act as solicitors on behalf of Salma Siddiqui. We have had an opportunity to review the Canadian Broadcasting Corporation broadcast of May 30, 1995 regarding CARE Canada.
>
> The broadcast was slanderous. The reputation of our client, Slama Siddiqui, has been severely damaged which appeared to be the clear intent of the broadcast. This letter shall serve as notice to both of you personally and to the Canadian Broadcasting Corporation of Ms. Siddiqui's intention to commence legal proceedings against you.
>
> Please have your legal counsel contact the undersigned.

[22] In *Siddiqui*, the notice was found to be inadequate. Certain *Grossman* principles were reaffirmed. The Court stated at paragraphs 16 to 18:

> [16] There is no jurisprudential doubt that an action for libel cannot be brought unless the defendants have first been properly served with written notice specifying the words and matter complained. The reason such notice must precede the commencement of the action is to give a defendant an opportunity to correct, retract, justify, apologize for, or otherwise consider what mitigating steps are appropriate.
>
> [17] In *Grossman v. CFTO-TV Ltd.* (1982), 39 O.R. (2d) 498 at p. 505, 139 D.L.R. (3d) 618 (C.A.), Cory J.A. held that the s. 5(1) written notice must make a defendant "clearly aware" of the matter about which the plaintiff complains. There must, in other words, be more than technical compliance with the notice requirement.
>
> [18] It is true that s. 5(1) does not stipulate what form a written notice must take, but it is also true that the section provides that the written notice must "specify" the matter complained of. This means that a defendant is entitled to know with clarity the essence of the case it has to meet and have an opportunity to meet it before an action for libel is commenced. The denial of sufficient particularity constitutes a denial of that opportunity. The issue in every case, therefore, is whether the written notice provides enough clear information for an appropriate response to be considered and taken.

[23] In *Siddiqui*, the original notice was provided to the two original defendants. An action was then instituted. Further notices, with specific references to the broadcast were then provided

to six additional defendants. The motions judge dismissed the action as against the six additional defendants as no notice had been provided to them prior to the commencement of the action. The Court of Appeal upheld the motion judge's ruling on this issue. The Court of appeal observed that the subsequent notice was far more detailed and in full compliance with the notice requirement of s. 5(1) of the Act, however did not precede, as required, the commencement of the action.

[24] In relation to the original notice, the Court observed at paragraph 21:

> [21] There were several hundred words in the documentary about the plaintiff. The defendants were entitled to know which of them were alleged to be libellous. In the absence of specificity, their ability to consider what response or responses were appropriate, was fundamentally impaired. The generalities in the June 9, 1995 letter cannot, therefore, be said to satisfy the notice requirements contemplated by s. 5(1).

[25] In *Supreme Auto Group Inc. v. Toronto* (Police Services Board) 2010 ONSC 3803 (S.C.J.), the notice requirement was considered in an action resulting from statements made during a press conference following a series of arrests in relation to gang activities involving firearms. The Court observed that the notice provisions do not require the Plaintiff to describe the defamatory meaning attributed to the impugned publication. The Court further held that the notice was sufficient in that the words alleged to be defamatory were identified in the notice.

[26] Finally, in *Shtaif v. Toronto Life Publishing Co. Ltd.* [2013] ONCA 405, a notice referring, in detail, to the portions of an article claimed to be defamatory was deemed to be sufficient in the circumstances, in order to allow the defendant to consider any remedial action by way of correction, apology, or retraction.

Analysis

[27] It is against this factual and jurisprudential backdrop that the issue of the sufficiency of the notices, in the current matter, must be determined.

[28] The July 24, 2014 broadcast was of a duration of approximately six minutes. The transcript prepared, for ease of reference, while not *verbatim*, contains some 900 words. The July 28, 2014 article similarly contains over 500 words.

[29] The notices do not quote specific words from the publications, with one exception. The notice in relation to the July 24, 2014 broadcast states:

> This broadcast entitled "Hamas CUPW flags fly on Parliament Hill" which was hosted by Jerry Agar and which featured Avi Benlolo as a guest, contains many untrue, disparaging and defamatory statements about CUPW and its workers. These defamatory statements were made by both Mr. Agar and by Mr. Benlolo, and they wrongfully infer that CUPW and its members are supportive of and partner with terrorist organizations and hate groups and that they support Hamas and the genocide of Jewish people.

[30] The notice given by the Plaintiff concerning the July 28 publication reads:

> This article, "Hamas goes postal? Only in Canada" written by Jerry Agar, contains many untrue, disparaging and defamatory statements about CUPW and its members, and wrongfully infers that postal workers are "Terrorist Sympathizers" and that they support Hamas and the genocide of the Jewish people.

[31] It is clear that the general complaint of the Plaintiff has to do with the tenor of the publication which, in the Plaintiff's view, depicts the CUPW as supportive of a terrorist organization. In that limited sense, the "matter complained of" has been identified. The notice required under s. 5(1) however has as its purpose the identification of impugned comments to the degree that the defendant can consider the comments and the complaint and decide whether an apology, retraction or correction is necessary. Clearly, the Plaintiff's complaints in the present case did not relate to the entire broadcast or article.

[32] It is, in my view, significant that the statement of claim sets out in specific detail the words deemed to be defamatory in both publications.

[33] The Statement of Claim identifies the following excerpts from the July 24, 2014 broadcast:

> - "Canadian Union of Postal Workers, who has often lent their support to terrorists organizations"
>
> - "To support a designated terrorist organization is shocking and bewildering to us, particularly for a public organization like CUPW"
>
> - I don't find it surprising given that CUPW has a history of partnering up with hate groups"

- "CUPW in support of Gaza…supporting terrorists?"

- "This is really shocking that an organization that should really function in the interests of Canadian workers should be so political and siding and partnering with a hate group like Hamas"

[34] The Statement of Claim further identifies as defamatory the following passages of the July 28, 2014 article:

- "Would you want a terrorist sympathizer coming to your door every day? Apparently, that may already be happening."

- "A pro-Palestinian rally in Ottawa last week demonstrated more than just support for the average Palestinian mother and child…."

- It is easy to believe there are many in Gaza who don't support Hamas and their vicious, evil campaign to wipe the Jews from the face of the earth…It is also easy to believe there are many in Canada who mean well when they support Palestine and want Israel to abandon its deadly offensive; one started in response to a daily barrage of rocket fire from Gaza. So in that spirit I was certain when and if CUPW responded to questions about why they were marching next to terrorist sympathizers, (and one would hope not actual terrorists) they would distance themselves by claiming they meant only to support peace and Palestinian civilians, including mothers and children, and were unaware that Hamas flags would be present. Apparently not."

- "Good people like Watson lost the vote, leaving CUPW roundly condemning Israel, while willingly flying their flag next to that of the terrorist organization, Hamas. The enemy of Hamas' enemy is their friend."

[35] A Statement of Claim must set out in specific terms the basis upon which the claim is made. Section 5(1) of the *Libel and Slander Act* may not create as onerous a requirement, however the ability to specify the precise nature of a defamation claim in a Statement of Claim should enable a plaintiff to be as specific in providing notice.

[36] In *Siddiqui*, the second notice, deemed insufficient due to the prior commencement of the action, contained details which would have lead the Court to conclude that the notice was sufficient, in contrast to the initial notice which only contained a general description of the matter complained of.

[37] The requirement that the notice specify the "matter complained of" while not requiring direct quotations *per se*, must nonetheless be specific enough to provide the defendant the opportunity to correct or at the very least, limit the harm. This, as observed in *Grossman*, ensures to the plaintiff's benefit.

[38] I would conclude therefore that while the notices i*dentified* the matter complained of, they did not sufficiently *specify* the matter complained of, as was clearly possible, particularly given the specificity of the statement of claim. The notices provided were more in the nature of the plaintiff's interpretation of the words spoken and published than they were direct references to them.

[39] I have determined therefore that the notices provided in the present matter did not meet the requirements of s. 5(1) of the *Act*. The Defendants' motion on this issue is accordingly granted, and the action is therefore dismissed.

The Second Issue

[40] Having dispensed with the matter in granting the motion on the notice issue, it is not, strictly speaking, necessary to deal with the issue of an unincorporated association's status to bring an action in defamation; the second issue.

[41] In the event that the present judgment is reviewed however, it may be useful at this time for the second issue to be examined and determined.

[42] Briefly stated, I have concluded that the very perplexing issue of a trade union's capacity to sue in defamation, a personal action, is not a matter of settled law and therefore not properly before the Court on a Rule 21 determination.

The Law on the Legal Capacity of Trade Unions

[43] The authorities on this issue are diverse and this area of civil litigation is in a stage of development.

[44] Originally, a trade union's legal status, in England, was confined to areas recognized by statute: see *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* [1901] A.C. 426 (H.L.):

> Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature.

[45] Absent such statutorily conferred standing, Canadian courts, historically, have held that a trade union lacks the capacity to sue in tort, see *Orchard v. Tunney* [1957] S.C.R. 436. Their standing was however recognized in the area of contracts on the basis that:

> page 445…each member commits himself to a group on a foundation of specific terms governing individual and collective action, a commitment today almost obligatory, and made on both sides with the intent that the rules shall bind them in their relations to each. That means that each is bound to all the others jointly. The terms allow for the change of those within that relation by withdrawal from or new entrance into membership. Underlying this is the assumption that the members are creating a body of which they are members and that it is as members only that they have accepted obligations: that the body as such is that to which the responsibilities for action taken as of the group are to be related.

[46] The creation in Canada of statutory rights, in addition to rights in property and the recognition of contractual obligations, has resulted in trade unions having status to sue in their own name, see *International Brotherhood of Teamsters. v. Therien* [1960] S.C.R. 265.

[47] More recent legislation has recognized the trade union as an entity capable of being prosecuted in its own name, see *Canada Labour Code* R.S.C. 1985 C.L-2, s. 103, and Ontario *Labour Relations Act* 1995, S.O. 1995, c. 1, ss. 107 and 108

[48] These developments in the area of trade union's legal capacity were recognized in Berry v. Pulley [2002] 2 SCR 40. At paragraph 46, the Court stated:

> *The Union Contract and Union Status in the Modern Context*
>
> As the above case and statutory provisions suggest, the world of labour relations in Canada has evolved considerably since the decision of this Court in *Orchard*, *supra*. We now have a sophisticated statutory regime under which trade unions are recognized as entities with significant rights and obligations. As part of this gradual evolution the view has emerged that, by conferring these rights and

> obligations on trade unions, legislatures have intended, absent express legislative provisions to the contrary, to bestow on these entities the legal status to sue and be sued in their own name. As such, unions are legal entities at least for the purpose of discharging their function and performing their role in the field of labour relations. It follows from this that, in such a proceeding, a union may be held liable to the extent of its own assets.

[49] Clearly, to this point, the trade union as a separate legal entity in matters of litigation and prosecution was conferred standing "*at least for the purpose of discharging their function and performing their role in the field of labour relations*."

[50] On a strict reading of *Berry v. Pulley*, a personal action such as an action in defamation relating to union activities outside the "field of labour relations" would not appear to lie.

[51] The need for statutorily conferred rights, as a pre-condition to legal standing in litigation, was dispelled in *Public Service Alliance of Canada v. Canada (Attorney General)* [2002] O.J. No 4831 (Ont C.A.). Examining the principles set out in *Berry v. Pulley*, the Court held, at paras 24 – 27:

> [24] I would take three propositions from the Supreme Court's discussion in this case.
>
> [25] First, absent clear contrary legislation, the legal status of trade unions to assert their rights in court, including common law rights, is now beyond question, at least in matters relating to their labour relations function and operations.
>
> [26] Second, while that legal status is founded in each case on the relevant provincial or federal labour legislation governing the union, it does not depend on any provision specific to that legislation. While variations exist among jurisdictions, the legal status accorded to trade unions derives not from specific provisions in any particular piece of legislation, but from the reality that, throughout Canada, the world of labour relations is governed by sophisticated statutory machinery which requires that unions have sufficient legal personality to play their role in that world. Thus legislatures must be taken to have impliedly conferred on unions the legal status necessary for them to do so.
>
> [27] Third, this recognition of the broadening legal status accorded to trade unions is a reflection of the extraordinary evolution over the last half century of both their role and the complex labour relations regimes which now govern them and their activities. In order that unions be able to properly fulfill the functions now expected of them, courts must treat them as juridical entities.

[52] The issue in *PSAC v. Canada* was the distributions of surpluses in pension plans relating to members of the Plaintiff union, clearly an issue with the "field of labour relations". It is

however significant that legal standing was no longer dependent upon statutory rights but rather derived from the labour union's composition, role and responsibilities in the evolving world of labour relations in Canada.

[53] The Court in *PSAC v. Canada* also expressly rejected the view that a union governed by federal labour legislation is prohibited from suing in its own name in Ontario by operation of s. 3(2) of the *Rights of Labour Act*, R.S.O. 1990 c. R. 33 which provides:

> A trade union shall not be made a party to any action in any court unless it may be so made a party irrespective of the *Act* or of the *Labour Relations Act*.

[54] The Court also offered the following observation concerning s. 3(2) of the *R.L.A.* at para. 45:

> Before moving to the second issue in this appeal, one further comment may be useful. Although it is not necessary to decide in this case, the answer I have given to the application of s. 3(2) of the RLA might well be different for unions governed by the OLRA, something which could force them to attempt to access the courts using the antiquated and uncertain vehicle of the representative action described by Osler J. in Seafarers, supra. Such a result would seem inconsistent with the broad, principled approach to the legal status of unions found in Berry. That approach reflects the reality that, across the country, unions share a common history and, speaking generically, perform common functions, and are governed by common legislative provisions. Viewed against commonality, if s. 3(2) creates an anomalous result for some unions in a single province, it may be time, after more than 50 years, that it be revisited for possible revision.

[55] On the expanding role of trade unions and their legal capacity, the Court observed, at para. 49:

> The respondent acknowledges that the appellants are all trade unions whose objects include, in each case, regulating relations between its members and their employer. As with all unions, the appellants' raison d'être is to represent the interests of their members in matters that affect their employment circumstances. The courts have long recognized that this may take them well beyond the strict limits of contract negotiation and administration. See, for example *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545, at p. 288 S.C.R. per Wilson J.; *Canada (Deputy Attorney General) v. Delisle* [1999] 2 S.C.R. 989, 176 D.L.R. (4th) 513, at p. 1021 S.C.R. This recognition reflects the reality that the modern workplace is the product of many forces and, if a union is to do its job, it must try to influence those forces on behalf of its members.

[56] The expansion of legal standing of trade unions is further recognized in *Kiewning v. Communications, Energy and Paper Workers Union of Canada* 2011 OMNSC 712. In K*iewning*, the action involved an allegation of harassment and bullying on the part of a Union president as against the plaintiff, the president of a certain local of the union. In recognizing the plaintiff's right to sue the union itself, the Court observed, at paras. 34 and 35:

> The defendants submit that if the defendant unions are legal entitles (sic) which can be sued, their legal status is limited by the words in *Berry v. Pulley*, namely that they are legal entities "for the purpose of discharging their functions and performing their role in the field of labour relations." The defendants submit that his action does not deal with their role in the field of labour relations.
>
> I agree with the observation of Kelliher J. in *British Columbia Nurses Union v. British Columbia (Attorniey General)*, [2008] B.C.J. No. 470, at para 17, that it is noteworthy that in Berry v. Pulley the Court said that unions are legal entitles (sic) "at least" for the purpose of discharging their functions and performing their roles in the field of labour relations. The Supreme Court of Canada did not define the limits of a trade union's legal status.

[57] Relying on the reasoning in *National Union of General and Municipal Workers v. Gilian and Others* [1946] 1. K. B. 81 (C.A.), the Court in *Ironworkers local 97 v. Gordon Campbell et al* 1997 Can LII 1379 (B.C.S.C.) found that the plaintiff union could sue the provincial opposition party in defamation as a result of a published suggestion that the plaintiff was complicit in "Another N.D.P. kickback scheme". The very brief judgment is however of little assistance in applying the principles and developments of trade union status in the civil courts.

[58] In *Pulp and Paper workers of Canada v. International Brotherhood of Pulp, sulphite and Paper Mill Workers et al.* [1973] 4 W.W.R. 160 (B.C.S.C.), the plaintiff union sued the defendant union in relation to their respective efforts in establishing themselves as the bargaining unit at an aluminum plant in Kitimat B.C. The action in defamation revolved around the defendant union's depiction, on placards, of the plaintiff union as a "Communist Front Organization". Following a very detailed review of the law of defamation as it relates to trade unions, the Court concluded as follows at paras. 74 and 75.

> [74] It is clear, therefore, that the plaintiff trade union can maintain in its own name an action for libel in respect of words which tend to affect it injuriously in its financial position or in relation to its business. A lessening of subscriptions or membership is such an injury. And where the words are calculated to injure the plaintiff's reputation in relation to its trade or business the plaintiff is entitled to

> recover without proof of special damage: se *D. & L. Caterers Ltd v. D'Ajou (D'Anjou),* [1945] 1 ALL E.R. 563; see also the *South Hetton Coal* case, supra at p. 139
>
> [75] It appears that the plaintiff did not in the ultimate receive the necessary certification to enable it to supplant Local 5115 as bargaining agent for the employees in the Alcan plant. The plaintiff sought to attribute this to the libel but it has not established that. There is some evidence to indicate that there was no appreciable change in the number of new members signed up by the plaintiff on the days immediately preceding the libel and on the days following it. I am satisfied on the evidence before me that the libel complained of did, nevertheless, have an effect on the plaintiff PPWC in the community of Kitimat in the way of its business as a union and that its subscriptions for membership and membership were affected by the publication to the public at large. No special damage having been alleged or proven, damages are at large. So that, as stated in the *South Hetton Coal* case, supra, such damages are to be given as a jury, or a judge acting in the place of a jury, thinks fit, having regard to the conduct of the parties and all the circumstances.

[59] *Pulp and Paper Workers of Canada* can reasonably be restricted to the principle of legal standing granted to trade unions in the area of defamation where the impugned comments are intended to injuriously affect its financial position or its trade union activities.

[60] By contrast, the High Court of Justice of Ontario found, in 1985, that an unincorporated association cannot sue in defamation as it is the member individually and not the association collectively whose reputation is said to be maligned. See *Stark et al. v. Toronto Sun Publishing Corp et al.* (1993) 42 O.R. (2d) 791:

> What must be kept firmly in mind, however, is that the unincorporated body "Operation Dismantle" cannot be defamed. Only its members can. The distinction is important because the danger is forever lurking in the background of actions being prosecuted superficially on behalf of members of a class when in reality they are suing for an on behalf of the unincorporated association or entity. It will be a difficult judgment call to make in each case. When defamatory words are spoken of the members of a small association comprising 10 members for instance, a representative action would lie, as long as the pleadings were satisfactory, even absent specific names in the offensive article. Indieed a representative action would be encouraged in the interest of avoiding multiplicity of proceedings. But an opposite pole exists.
>
> From the other extreme in my view may be taken a case like the present one. The line of demarcation may on occasion be fuzzy. In my opinion it is not so here. The members of a specific union as an instance may be defamed. Speaking generally, the members of the "union movement" in the country cannot be. The nature and size of the class must be studied, its composition scrutinized and its

> object defined. When it casts too wide and too philosophical or ideological a net on most or all accounts, then Rule 75 ought not to be resorted to.

[61] Stark has subsequently been considered and applied in the Ontario Arbitration case of *Fortino's Supermarket Ltd. v. U.F.C.W., Local 175* 2003 CarswellOnt 4468, [2003] O.L.A.A. No. 203, 117 L.A.C. (4th) 154, 73 C.L.A.S. 63 (Ont. Arbitration), which concluded that a union cannot claim that its reputation has been defamed, stating "the words complained of must refer to the plaintiff, an actual person."

[62] *Fortino* dealt primarily with derivative actions available to individual members of an unincorporated association, and the circumstances and pleadings particular to that form of action.

[63] Finally, academic opinion is divided on the issue of legal standing of unincorporated associations to sue in defamation. See: the Law of Defamation, Second Edition Raymond E. Brown, Carswell Thomson Professional Publishing, and Trade Union Law in Canada, MacNeil, Link and Engelman release no. 27, November 2014.

Analysis

[64] In all of the circumstances, I have determined that the issue of legal standing in an unincorporated association to sue in defamation is case specific and remains an unsettled and burgeoning area of the law. It can accordingly not be concluded that it is plain and obvious that the pleadings disclose no actionable cause. See: *Gauthier v. Toronto Star Daily Newspapers Ltd* [2003] 228 D.L.R. (4th) 748(Ont.C.A.), *Northfield Capital Corp. v. Aurelian Resources Inc*. [2007] 84 D.R. (3rd) 748 (S.C.J.), *Portuguese Canadian Credit Union Ltd. V. Cumis General Insurance Co.* [2010] 104 O.R. (3rd) 16 (S.C.J.).

[65] The motion is therefore dismissed on the second ground, the legal status of CUPW to sue in defamation in the circumstances of the present case.

[66] Finally, on the specific issue of the Defendant Benlolo's motion to dismiss the action relating to the second publication, the July 28, 2014 article, I would observe that the pleadings indeed do not connect him to the subsequent article specifically, under the heading of republication. Liability in defamation based on republication must be specifically pleaded. It cannot be inferred. In response to the Plaintiff's submissions on this issue, Rule 5.02(2) of the *Rules of Civil Procedure* R.R.O. 1990, Reg 194 creates rules for joinder of defendants based on

common issues, unresolved degree of liability and convenience. It is not intended to create heads of liability. Similarly, the *Negligence Act* R.S.O. 1990 c. N.1 (ss.1 and 4) do not assist the plaintiff given the very technical nature of defamation and its pleadings.

[67] In my view, the Defendant Benlolo's motion to strike the claim as against him concerning the second publication would not however succeed. Leave to amend the pleadings is raised by the responding party Plaintiff in a subsidiary argument.

[68] Under Rule 26, the pleadings would in all likelihood be amended at this juncture of the proceedings.

Conclusion

[69] In the result, the motion is granted on the primary issue of notice under the Libel and Slander Act. The action is accordingly dismissed.

Costs

[70] Unless the parties are able to agree otherwise, cost submissions, not to exceed three pages together with accompanying documents may be exchanged and filed within 45 days of the release of the judgment herein.

PELLETIER, J.

Released: July 15, 2015

CITATION: Canadian Union of Postal Workers v. Quebecor Media Inc, 2015 ONSC 4511
COURT FILE NO.: 14-62129
DATE: 2015/07/15

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Canadian Union of Postal Workers

Plaintiff
(Responding Party)

– and –

Quebecor Media Inc., Sun Media Corporation, TVA Group Inc., Jerry Agar and Avi Benlolo

Defendants
(Moving Parties)

REASONS FOR DECISON

PELLETIER, J.

Released: July 15, 2015