Court of Queen's Bench of Alberta

Citation: Kent v Postmedia Network Inc, 2015 ABQB 461

Date:
Docket: 1001 16418
Registry: Calgary

Between:

Arthur Kent

Plaintiff

- and -

Postmedia Network Inc., National Post Inc., Paul Godfrey and Gordon Fisher

Defendants

Reasons for Judgment
of the
Honourable Madam Justice G.A. Campbell

I Introduction

[1] Arthur Kent is a well-known journalist with international prominence. Mr. Kent commenced this action (the "Action") in the Court of Queen's Bench of Alberta against Postmedia Network Inc. ("Postmedia"), National Post Inc. ("National Post"), Paul Godfrey and Gordon Fisher, alleging, *inter alia*, that they defamed him, continued to publish the alleged defamatory article in issue after receiving notices setting out its defamatory nature, intentionally misconducted the litigation to increase costs and delay to Mr. Kent and, as aggravating factors supporting his claim for aggravated and punitive damages, misappropriated his personality and acted with malice. The alleged defamation was contained in a news article written in February 2008 by Don Martin about Mr. Kent and his campaign in the Alberta Provincial General Election

(the "Article"). The Article allegedly was published by the National Post in newspapers and online and subsequently allegedly continuously republished by the National Post and Postmedia.

II Background Facts

[2] Briefly, the relevant background facts are as follows.

[3] The National Post is a major national newspaper that until October 30, 2009 was one of the Canwest group of companies ("Canwest"). From approximately October 30, 2009 until July 13, 2010 the National Post was owned and operated by National Post Inc.

[4] In the March 3, 2008 Alberta provincial general election, Mr

[5] . Kent was a candidate for the Progressive Conservative Party of Alberta.

[6] Mr. Martin was a columnist for the National Post and Calgary Herald newspapers. Mr. Martin wrote the Article, containing numerous allegedly false and defamatory statements concerning Mr. Kent, which was published in the National Post and Calgary Herald newspapers on February 13, 2008. According to Mr. Kent, these statements were intended to have readers infer, *inter alia*, that Mr. Kent's career as an international news correspondent was insubstantial, that he was unworthy of trust and public confidence, that his election campaign was incompetent and that he lacked the support of his campaign team and his political party as a whole.

[7] Mr. Kent did not win the election on March 3, 2008.

[8] At the time of the Article's initial publication in February 2008, Mr. Fisher was the publisher of the National Post. On May 5, 2008, Mr. Kent served Mr. Fisher, as publisher of the National Post, with a Notice of Intention to Bring an Action (the "2008 Notice of Intention").

[9] Mr. Fisher stated in his July 12, 2013 questioning on affidavit that, after receiving the 2008 Notice of Intention, he took the following steps:

> I think if you go back to 2008, when we were first served, I think I've read the article; passed the notice on; satisfied myself at that time, if I recall, that it was journalistically proper and acceptable; and that would be the last time, probably, that I've read that article.

[10] In July 2008, Mr. Kent commenced an action in the Court of Queen's Bench of Alberta against Don Martin, The National Post Company, Canwest Publishing, Inc., National Post Holdings Ltd., and Canwest Mediaworks Inc. (the "Canwest Action"). Mr. Fisher was made aware of the Canwest Action.

[11] On July 13, 2010, Postmedia acquired the assets of Canwest, including the National Post. Postmedia assumed responsibility for the conduct of the Canwest Action.

[12] Mr. Godfrey is the President, Chief Executive Officer and a director of Postmedia.

[13] From July 13, 2010, when Postmedia acquired the assets of Canwest, until January 27, 2013, Mr. Fisher held the position of Executive Vice President of Eastern Canada for Postmedia

and President of the National Post newspaper. He is now the President and publisher of the Pacific Newspaper Group for Postmedia.

[14] On October 12, 2010, Mr. Kent served Mr. Godfrey and Mr. Fisher each with a Notice of Intention to Bring an Action (the "2010 Notices of Intention").

[15] In November 2010, Mr. Kent commenced the Action.

[16] In his Amended Amended Statement of Claim, Mr. Kent alleges that the Article was published with knowledge that the meanings conveyed were false, or with reckless indifference as to whether they were true or false. Mr. Kent's allegations emphasize that none of the Defendants made reasonable efforts to confirm the truth and accuracy of the facts upon which the Article ostensibly was based, nor made any effort to contact Mr. Kent prior to or following publication. Mr. Kent alleges that the Article and its publication violated the basic requirements of responsible journalism as well as National Post's and Postmedia's own directives on journalistic ethics, practice and policy, and that the writing and publishing were motivated by malice. Mr. Kent alleges that the Defendants have continued to permit the Article to be republished. He also alleges that the Defendants have intentionally misconducted the litigation to increase associated costs and delay and have misappropriated his personality and exploited it for financial gain.

[17] In their Statement of Defence, the individual Defendants, Mr. Godfrey and Mr. Fisher, specifically deny that they are proper parties to the Action. They each deny that they published or continue to publish the Article and plead that at no time did either of them have any input, control, responsibility, authority or involvement personally or in their capacity as employees or directors of any of the corporate Defendants with the Article or in the editorial content of the corporate Defendants' websites. Further, Mr. Godfrey and Mr. Fisher plead that if the Article can be searched for and found on any of the corporate Defendants' websites, they each deny that the Article appears on any such website as a result of any knowing act or omission on their part.

[18] In the alternative, Mr. Godfrey and Mr. Fisher plead that if they are proper parties to the Action, they, together with the corporate Defendants, deny that the words in the Article were defamatory and plead that the Article concerned a matter of public interest – the provincial election – and thus was published under the cloak of qualified privilege. The Defendants deny any malice with respect to the Article and contend that they have acted at all times with integrity, honesty, and professionalism, with a view to being fair, balanced and impartial in their dealings with media coverage of Mr. Kent and his election bid and deny all of the aggravating factors, including misappropriating Mr. Kent's personality.

[19] On June 3, 2011, an application was filed to remove Mr. Godfrey as a Defendant in the Action. In support of that application were filed two affidavits sworn by Lorne Motley, the Editor in Chief of the Calgary Herald.

[20] In Mr. Motley's affidavit sworn May 27, 2011, he stated that "Reporters and editors of Postmedia and National Post exclusively determine the content on the news pages of the Calgary Herald and the National Post newspapers. At no material time was Godfrey a reporter, editor, writer or publisher with National Post or Postmedia." Mr. Motley then deposed that he had reviewed the allegations in Mr. Kent's Statement of Claim and that Mr. Godfrey had no involvement, knowledge, role or personal connection with the Article. In his affidavit sworn on

July 14, 2011, Mr. Motley deposed that he was informed by Mr. Godfrey and believed that Mr. Godfrey had no input, control, responsibility or personal connection to the Article.

[21] On July 22, 2011, Justice Tilleman of this Court, acting as Case Management Justice, dismissed Mr. Godfrey's application, noting that:

(a) only Mr. Godfrey could make a positive assertion that he did not "step outside" his role as Chief Executive Officer and become personally involved with the Article; and

(b) in the Statement of Defence, Mr. Godfrey not only denied involvement with the Article, but also relied on the defenses of qualified privilege, responsible journalism and fair comment, which made it difficult to reconcile these defences with the absence of any involvement on the part of Mr. Godfrey.

[22] In the course of the hearing of that application, counsel for the Defendants expressly reserved the right to reapply with fresh evidence from Mr. Godfrey.

[23] On August 18, 2011, the Defendants filed a second application (the "Second Application") seeking leave to amend their Statement of Defence to remove National Post as a Defendant and for summary judgment dismissing the Action against the individual Defendants, Mr. Godfrey and Mr. Fisher. In support of their summary judgment application, the Defendants relied on the following additional evidence:

(a) Mr. Godfrey's affidavit sworn August 11, 2011 and questioning thereon on October 17, 2011;
(b) Mr. Fisher's affidavit sworn August 17, 2011 and questioning thereon on October 18, 2011;
(c) Mr. Motley's third affidavit sworn August 17, 2011 and questioning on his May 27, 2011, July 14, 2011 and August 17, 2011 affidavits on October 21, 2011; and
(d) the Defendants' Reply to Notice to Admit Facts served on March 22, 2012.

[24] Mr. Godfrey and Mr. Fisher each swore an Affidavit of Records that consisted only of the 2008 and 2010 Notices of Intention and, in the case of Mr. Godfrey, a copy of the then current Statement of Claim.

[25] The summary judgment portion of the Second Application was adjourned at the request of the Court and in light of Mr. Kent's application to amend his Statement of Claim.

[26] On May 29, 2013, Mr. Kent brought an application (the "Third Application") seeking to dismiss the Second Application. In response to the Third Application, each of the individual Defendants filed additional evidence including their Affidavits of Records and an additional affidavit. Each of the individual Defendants was questioned again in July 2013.

[27] On August 7, 2013, the summary judgment portion of those applications was again adjourned for a number of reasons, including new case law as well as Mr. Kent's intention to further amend his Statement of Claim to add additional claims against each of Mr. Godfrey and Mr. Fisher. No such amendments have been pursued by Mr. Kent.

[28] The Action, which has been consolidated with the Canwest Action, has now been set for trial by judge and jury commencing November 16, 2015. A deadline of July 31, 2015 has been set for completion of all applications by the parties.

[29] Counsel of record for all of the Defendants in the Action and the Canwest Action are Scott Watson and his partners at Parlee McLaws LLP.

III Summary Judgment Application

[30] Mr. Godfrey and Mr. Fisher seek an order of summary judgment dismissing all claims against them personally in the Action.

A. Applicable Legal Principles

[31] Rule 7.3 of the *Alberta Rules of Court* governs applications for summary judgment and summary dismissal. Rule 7.3 (1)(b) permits a party to apply to the Court for summary judgment dismissing all or part of a plaintiff's claim on the basis that there is no merit to the claim.

[32] The Supreme Court of Canada recently reconsidered the summary judgment/dismissal test and held that the summary judgment rules are to be interpreted broadly with particular consideration given to the objectives of achieving proportionality and access to affordable, just and timely adjudication of claims: ***Hryniak v Mauldin***, 2014 SCC 7, 1 SCR 87 at para 5.

[33] Subsequently, the proper approach to summary judgment and summary dismissal applications in Alberta was set out by our Court of Appeal in ***776826 Alberta Ltd v Ostrowercha***, 2015 ABCA 49 at paras 9 - 13:

> The governing test for summary judgment in Alberta finds expression in ***Windsor v CPR***, 2014 ABCA 108 at para 13, 572 AR 317; ***Sherwood Steel Ltd v Odyssey Construction Inc.***, 2014 ABCA 320, at paras 7 to 8, 59 CPC (7th) 22; ***Maxwell v Wal-Mart***, 2014 ABCA 383 at para 12; ***W. P.*** and cases mentioned therein, *inter alia*. From the process perspective, summary judgment can be given if a disposition that is fair and just to both parties can be made on the existing record by using that alternative method for adjudication: ***Hryniak v Mauldin***, 2014 SCC 7, [2014] 1 SCR 87.
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> From the substantive perspective, summary judgment can be granted if, in light of what that fair and just process reveals, there is no merit to the claim. No "merit" means that, even assuming the accuracy of the position of the non-moving party as to any material and potentially decisive matters – matters which would usually require ordinary forensic testing through a trial procedure with *viva voce* evidence and which could not be resolved through the fair and just alternative -- the non-moving party's position viewed in the round has no merit in law or in fact.
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> Stated another way, in order for the non-moving party's case to have merit, there must be a genuine issue of a potentially decisive material fact in the case which cannot be summarily found against the non-moving party on the record revealed by the "fair and just process". The mere assertion of a position by the non-moving

> party in a pleading or otherwise, or the mere hope of the non-moving party that something will turn up at a trial, does not suffice. The key is whether the circumstances require a *viva voce* evidence in order to properly resolve the case: see ***Canada v Lameman***, 2008 SCC 14 at paras 10 to 11, [2008] 1 SCR 372.
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> The concept of "merit" in this respect is to be distinguished from the test for striking out pleadings under Rule 3.68 which involves deciding "whether there is any reasonable prospect that the claim will succeed, erring on the side of generosity in permitting novel claims to proceed.": compare ***Ernst v Alberta (Energy Resources Conservation Board)***, 2014 ABCA 285 at paras 13 to 15, 85 CELR (3d) 39, under motion [2014] SCCA No 497 (QL).
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> As to the substantive aspect of the test, then, this Court has also put the test for summary dismissal into the following terms in ***W. P.,*** at para. 26:
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> > Summary judgment is therefore no longer to be denied solely on the basis that the evidence discloses a triable issue. The question is whether there is in fact any issue of "merit" that genuinely requires a trial, or conversely whether the claim or defence is so compelling that the likelihood it will succeed is very high such that it should be determined summarily: ***Windsor*** at para 16; ***Beier*** at paras 56, 59-68 and 70.

[34] To summarize, if, on a motion for summary judgment, the Court is able to reach a fair and just determination on the merits, then there is no meritorious issue which requires a trial. Accordingly, an order for summary judgment/dismissal may be granted if the judge can make the necessary findings of fact and apply the law to those facts and if the summary procedure is a proportionate, more expeditious and less expensive means to achieve a just result: ***Windsor v Canadian Pacific Railway Ltd***, 2014 ABCA 108, 572 AR 317 at paras 12-13 and 49.

[35] An applicant seeking summary judgment has the initial onus of presenting the facts which, in combination with the applicable law, show that there is no merit to the respondent's claim or genuine issue requiring a trial.

[36] If the applicant has met this burden, the respondent then has the onus to establish that its claim does have merit in that there is a genuine issue requiring a trial: ***Murphy Oil Co v Predator Corp***, 2006 ABCA 69, 384 AR 251 at para 25; ***Tottrup v Clearwater (Municipal District No. 99)***, 2006 ABCA 380, 401 AR 88 at paras 10-11; ***Beier v Proper Cat Construction***, 2013 ABQB 351, 564 AR 357 at paras 66-69. The respondent has no obligation to present evidence but in not doing so risks summary judgment or dismissal being granted because the evidentiary burden has not been met.

[37] The respondent must present its best evidence to establish that there is a genuine issue of merit requiring a trial and cannot rely on evidence it believes will become available in the future or at trial: ***Ostrowercha*** at para 11; ***Windsor*** at para 21.

[38] In his brief filed May 11, 2012 and his supplementary brief filed April 22, 2015, Mr. Kent articulates a much more stringent test for summary judgment. In his earlier brief, he sets out the issue as "Does the evidence now before the Court make it beyond doubt that claims against

Godfrey and Fisher cannot possibly succeed?" In his supplementary brief, he indicates that the burden of proof is "near 'absolute certainty'".

[39] In light of the case law set out above, this is clearly not the correct standard. The standard required to be met by an applicant bringing a summary judgment application recently was summarized as follows in ***Rai v 1294477 Alberta Ltd (Vinyl Retro Dance Lounge)***, 2015 ABQB 349 at paras 21-22:

> Depriving a civil litigant of full participation in the civil legal process also requires a high standard, though not necessarily as high as the criminal standard. The old cases put the test at: 'plain and obvious', or 'beyond doubt'. This standard is no longer in use for Rule 7.3 applications.
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> Now it is sometimes said that the threshold for showing 'no merit' is that the applicant is required to convince the court that their position is 'unassailable', or so 'compelling that the likelihood of success is very high': ***Access Mortgage Corporation (2014) Limited v Arres Capital Inc.***, 2014 ABCA 280, at para. 45 and, very recently, ***MacKey v Squair***, 2015 ABQB 329, per Topolniski J., at para. 22. Some cases interpret this to mean 80 percent, or four times more likely than not: (***Stout v Track,*** 2015 ABCA 10 at para 48, footnote 65, and ***Can v Calgary (Police Services),*** 2014 ABCA 322 both per Wakeling J.A.). There is no doubt that a high degree of certainty is required to end a case early. However, it seems to be largely a question of balancing the confidence the court has in its ability to call the result on the evidence before it, and the risk of a wrong result. It might be argued that there is little need for a rigid standard of 80 percent, or any other fixed standard above 51 percent, depending on how this venue is used.

B. The Claim

[40] In this case, whether there is any issue of merit that genuinely requires a trial must be considered in the context of the claim made by Mr. Kent against Mr. Godfrey and Mr. Fisher.

[41] In his Amended Amended Statement of Claim, Mr. Kent alleges that Mr. Godfrey and Mr. Fisher completely disregarded the personally served Notices of Intention setting out the defamatory nature of the Article. Mr. Kent alleges that Mr. Godfrey and Mr. Fisher's failure to respond to Mr. Kent's request for removal of the Article and the continued republication of the Article on numerous websites owned by Postmedia and over which Mr. Godfrey and Mr. Fisher had authority when they knew the Article was false or with reckless indifference thereto are defamatory in nature. Mr. Kent also alleges that Mr. Godfrey and Mr. Fisher have intentionally misconducted the litigation to cause maximum costs and delay to Mr. Kent. Finally, Mr. Kent alleges that the Defendants, including Mr. Godfrey and Mr. Fisher, acted with malice and misappropriated his personality through the continuous worldwide republication of the Article on Postmedia websites.

[42] Mr. Kent's allegations concerning intentional misconduct of the litigation by the Defendants do not in and of themselves give rise to a cause of action, but ultimately may be relevant in the assessment of costs. Thus, these allegations do not form part of my analysis for purposes of this application.

[43] Mr. Kent's allegations concerning malice and misappropriation of his personality are framed as aggravating factors supporting his claim for aggravated and punitive damages. Thus, these allegations are not part of the cause of action under consideration in this application.

[44] The substantive allegations giving rise to the cause of action against Mr. Godfrey and Mr. Fisher are that they have control over the actions of the corporate Defendants — Mr. Godfrey in his position as President, Chief Executive Officer and a director of Postmedia and Mr. Fisher as an employee of Postmedia and as Chairman of National Post Inc. and the National Post — and have defamed Mr. Kent through their failure to take active steps to remove the Article from Postmedia websites when they knew it was defamatory. Mr. Kent claims they therefore are personally responsible because they aided or assisted in the publication or circulation of the allegedly defamatory Article.

[45] To determine whether Mr. Kent's defamation claim against Mr. Godfrey and Mr. Fisher should be summarily dismissed, what must be addressed is whether the record supports a genuine issue requiring a trial as to the personal liability of the two individuals, separate and distinct from that of Postmedia and the National Post, in the alleged defamation of Mr. Kent.

VI Analysis

A. Defamation Principles

[46] Mr. Kent says there is ample evidence that Mr. Godfrey and Mr. Fisher were either involved in or knowingly blind to or had control over the defamatory Article. He contends that each man, in having been served with the 2010 Notice of Intention and, in the case of Mr. Fisher, the 2008 Notice of Intention, had been made personally aware of the defects of and harm caused by the Article and had each stepped out of their corporate roles by disregarding this information and by personally and deliberately electing to make no inquiry while the Article remained in publication and in use as an advertising platform for Postmedia. Mr. Kent contends that their continuing inaction is an adoptive admission of these two Defendants' continuing approval of, and agreement with, the Article. In the result, Mr. Kent contends that it can be inferred that Mr. Godfrey and Mr. Fisher each knowingly and maliciously caused harm to him by the continued publication of the Article on the Postmedia websites.

[47] Mr. Kent points to an email exchange he had with David Watson, the senior editor at the *Ottawa Citizen*, to contradict Mr. Godfrey's and Mr. Fisher's evidence that they followed standard corporate procedures. Mr. Kent says that the dealings with Mr. Watson show that local editorial personnel in Ottawa were not given the responsibility to investigate and resolve concerns raised by Mr. Kent regarding publication of the Article. Rather, Ottawa editorial staff deferred to the direction of the lawyer acting for the Defendants, including Mr. Godfrey and Mr. Fisher. From this, Mr. Kent suggests it can be inferred that Mr. Godfrey and Mr. Fisher have not always followed standard corporate procedures, but have acted outside the corporate responsibilities imposed on them by Postmedia. Mr. Kent suggests that the appropriate inference is that Mr. Godfrey and Mr. Fisher, despite their disavowals, were the individuals within Postmedia who instructed legal counsel to return the Article to public access on Postmedia's websites.

[48] Mr. Kent relies on three cases in support of his position that the failure by Mr. Godfrey and Mr. Fisher to take active steps to remove the Article from Postmedia's websites constitutes defamation on their part personally.

[49] In particular, he refers to the concurring judgment of Deschamps J. in ***Crookes v Newton***, 2011 SCC 47, 3 SCR 269, in which she alluded at paras. 85 – 89 and 91 to the possibility that failure to act might, in appropriate circumstances, be grounds to attract personal liability for making defamatory information available to a third party. Mr. Kent contends that Deschamps J. provides a direct answer to the corporate law relied on by Mr. Godfrey and Mr. Fisher in those passages as follows:

> There appears to be an emerging consensus among the courts and commentators that only *deliberate* acts can meet the first component of the bilateral conception of publication. According to Prof. Brown, "a person must knowingly be involved in the process of publishing the relevant words" (para. 7.4 (emphasis added)). In *Stanley v. Shaw*, 2006 BCCA 467, 231 B.C.A.C. 186, pleading that the defendants "said and did nothing" (para. 7) was held to be insufficient to support a finding of publication, because no tortious act had been alleged in relation to their silence (see also *Smith v. Matsqui (Dist.)* (1986), 4 B.C.L.R. (2d) 342 (S.C.), at p. 355; *Wilson v. Meyer*, 126 P.3d 276 (Colo. Ct. App. 2005), at p. 281 ("[a] plaintiff cannot establish [publication] by showing that the defendant silently adopted a defamatory statement"); *Pond v. General Electric Co.*, 256 F.2d 824 (9th Cir. 1958), at p. 827 ("[s]ilence is not libel"); Brown, at para. 7.3). In *Scott v. Hull*, 259 N.E.2d 160 (Ohio Ct. App. 1970), at p. 162, a U.S. court held that "liability to respond in damages for the publication of a libel must be predicated on a positive act, on something done by the person sought to be charged". I agree with this view.
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> A deliberate act may occur in a variety of circumstances. In *Byrne v. Deane*, [1937] 1 K.B. 818 (C.A.), the defendants, proprietors of a golf club, were found to have published the words contained on a piece of paper that was posted on premises over which they held complete control. The defendants admitted to having seen the paper, but denied having written it or put it there. Although the words were ultimately found not to be defamatory, Greene L.J., concurring on the issue of publication, concluded that there are circumstances in which, by refraining from removing or obliterating defamatory information, a person might in fact be publishing it (at p. 838):
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> > The test it appears to me is this: having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?
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> (See also *Hellar v. Bianco*, 244 P.2d 757 (Cal. Dist. Ct. App. 1952); *Tacket v. General Motors Corp.*, 836 F.2d 1042 (7th Cir. 1987); *Urbanchich v. Drummoyne Municipal Council* (1991), Aust. Torts Rep. 81-127 (N.S.W.S.C.).)
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> *Byrne* and its progeny are consistent with the requirement that any finding of publication be grounded in a deliberate act. If a defendant was made aware (or had reason to be aware) of defamatory information over which he or she had

> sufficient control but decided to do nothing about it, this nonfeasance might amount to a deliberate act of approval, adoption, promotion, or ratification of the defamatory information (see, e.g., *Frawley v. State of New South Wales*, [2007] NSWSC 1379 (AustLII)). The inference is not automatic, but will depend on an assessment of the totality of the circumstances. In *Underhill v. Corser*, [2010] EWHC 1195 (BAILII) (Q.B.), the defendant, who was treasurer and a board member of a charity, had been aware that an editorial levelling accusations against the plaintiff would be published, but took no action and gave no further thought to the matter. Although Tugendhat J. found that the defendant could have prevented the publication of the editorial, which the plaintiff alleged to be defamatory, he distinguished *Byrne*, concluding that the defendant's role as a board member was different from that of the proprietors in *Byrne* (para. 110).
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> This requirement of a deliberate act has already been applied in the context of the Internet. In *Godfrey*, the defendant Internet service provider ("ISP") had received a "posting", which it stored on its news server. The plaintiff had notified the ISP that the posting was defamatory and requested that it be removed, but the defendant had allowed it to remain on its servers until it automatically expired 10 days later. The court held that the ISP's failure to act, once it had become aware of the defamatory information over which it had control, constituted an act of publication once an Internet subscriber had accessed the posting. In the circumstances of the case, the ISP's failure to act amounted to a deliberate act of approval, adoption, promotion or ratification of the defamatory information.
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> In *Bunt v. Tilley*, [2006] EWHC 407, [2006] 3 All E.R. 336 (Q.B.), the defendant ISPs were found not to be publishers because, even though they provided services, their role in the publication process was a passive one. This aspect of the decision in *Bunt* is a welcome development and should be incorporated into the Canadian common law. Those whose services are used to facilitate the communication of defamatory information may be shielded from responsibility for publication if they played a "passive instrumental role" in that process (para. 23).
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> ...
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> It should be plain that not *every* act that makes the defamatory information available to a third party in a comprehensible form might ultimately constitute publication. The plaintiff must show that the act is deliberate. This requires showing that the defendant played more than a passive instrumental role in making the information available.

[50] Mr. Kent also refers to the recent case of ***Weaver v Corcoran***, 2015 BCSC 165, a defamation action involving, *inter alia*, the National Post and Mr. Fisher. In that case, the Court did not accept Mr. Fisher's argument that there was no evidence that he had played a role in the publication of the impugned article and refused to dismiss the case against him. Mr. Kent argues that the circumstances in ***Weaver*** are virtually identical to those before me and points out that Mr. Fisher was publisher of the National Post at the time of the Article's initial publication.

[51] Finally, Mr. Kent notes that Mr. Fisher's own evidence is that, after being served with the 2008 Notice of Intention, he read and assessed the Article and approved it. Mr. Kent contends

that Mr. Fisher's approval of the Article is sufficient to make him jointly and severally liable for the damages caused by the defamation. In support of his position, Mr. Kent relies on ***Hill v Church of Scientology of Toronto*** [1995] 2 SCR 1130 in which the Supreme Court of Canada at para 176 discussed the principle of joint and several liability for damages as follows:

> It is a well-established principle that all persons who are involved in the commission of a joint tort are jointly and severally liable for the damages caused by that tort. If one person writes a libel, another repeats it, and a third approves what is written, they all have made the defamatory libel. Both the person who originally utters the defamatory statement, and the individual who expresses agreement with it, are liable for the injury.

[52] Mr. Kent argues that Mr. Godfrey and Mr. Fisher continue to maintain their agreement with, and approval of, the Article as evidenced by their most recent Statement of Defence. Mr. Kent suggests that these statements in the Statement of Defence speak to their personal involvement in the defamation.

[53] One of the elements required to prove defamation is publication of the defamatory words. The Supreme Court of Canada in ***Crookes*** at para 16 held that to prove publication, "a plaintiff must establish that the defendant has, by any *act*, conveyed defamatory meaning to a single third party who has received it". The Court also noted that the form of the defendant's act and manner in which it assists in transferring the defamatory information to a third party is irrelevant.

[54] Mr. Godfrey and Mr. Fisher assert that the majority of the Supreme Court of Canada in ***Crookes*** ruled that defamation requires a deliberate act of publication before personal liability can be found and note that Deschamps J, notwithstanding her other comments, agreed with this finding at para. 85. Subsequent decisions confirm that liability arises from a defendant's active engagement, control and authority over the location of the defamatory information. A failure to remove defamatory information will result in liability only in circumstances in which it was a deliberate act: ***Baglow v Smith***, 2015 ONSC 1175 at paras 192-196. Following these legal principles, Mr. Godfrey and Mr. Fisher contend that they cannot be found personally liable for failing to see to the removal of the Article from Postmedia's websites.

[55] Mr. Godfrey and Mr. Fisher suggest that the formulation of liability advocated by Mr. Kent would unreasonably expand the law of defamation applicable to corporate officers and directors by creating a strict liability regime for those in executive positions with a media corporation, with no need to examine whether the individual's actual duties and responsibilities involved any role in publication or control over content of published material. Mr. Godfrey and Mr. Fisher contend that this is an untenable position.

[56] Both Mr. Godfrey and Mr. Fisher point out that Mr. Kent has adduced no evidence that they have involvement in or authority over the Postmedia websites. They referred to their evidence as to their functions, duties, roles and responsibilities within the corporate Defendants. They assert that the uncontroverted evidence remains that as set out in their affidavits and questioning thereon, which establishes that neither man:

(a) had any role in respect to the content that appears on the websites of the National Post or Postmedia;
(b) had any control over the websites of the National Post or Postmedia;

(c) had any contact with anyone regarding the preparation or publication of the Article, other than in the context of this Action;
(d) had any role in responding to requests for removal of articles or any proposed rebuttals;
(e) acted in any way outside their functions or duties as officers (or directors) of Postmedia or other than on behalf of or in the interests of Postmedia.

[57] Both Mr. Godfrey and Mr. Fisher contend that Mr. Kent has failed to establish any facts that would support a finding that, while in their leadership roles, they exerted any personal control over the content of the websites in issue or stepped outside their respective corporate roles. Both Mr. Godfrey and Mr. Fisher point to their evidence in affidavits and questioning thereon that neither man:

(a) had any contact with anyone regarding the contents of the Article prior to its publication;
(b) had any involvement in determining the contents of the Article;
(c) had any knowledge of the contents of the Article until served with the Notice of Intention;
(d) had any knowledge or involvement with contact or communications that Mr. Kent had with David Watson or anyone at the Ottawa Citizen regarding the request for removal of the Article, any proposed rebuttal by Mr. Kent, or the reappearance of the Article;
(e) had any knowledge or involvement with the Article being removed from any Postmedia website in November 2012;
(f) derives any personal benefit from where the Article does or does not appear.

[58] Rather, Mr. Godfrey and Mr. Fisher say that the evidence clearly establishes that Postmedia employs other individuals with specific responsibility for print and website content and for managing requests for removal and rebuttal articles and for conduct of legal activities, including the carriage of lawsuits.

[59] Both Mr. Godfrey and Mr. Fisher point to their uncontroverted evidence that, upon receipt of their respective 2008 and 2010 Notices of Intention, they followed their standard corporate procedure and own usual practice to address the allegedly defamatory Article by referring the matter to Postmedia's Senior Vice President and General Counsel for further handling.

B. Principles Respecting Personal Liability of Directors and Officers

[60] Personal liability of corporate directors and officers has been addressed by the courts a number of times in the past several years.

[61] Our Court of Appeal considered the issue in ***Blacklaws et al v 470433 Alberta Ltd***, 2000 ABCA 175, 261 AR 28, stating as follows at paras 41 and 48:

> We begin our analysis by acknowledging that there will be circumstances in which the actions of a shareholder, officer, director or employee of a corporation may give rise to personal liability in tort despite the fact that the impugned acts were ones performed in the course of their duties to the corporation. Where those actions are themselves tortious or exhibit a separate identity or interest from that

> of the corporation so as to make the act or conduct complained of their own, they may well attract personal liability.
>
> ...
>
> Certainly, the mere existence of such relationships as officer, director and manager do not create personal liability, whether in tort or otherwise. [Emphasis in original.]

[62] The Court of Appeal enlarged upon the issue in ***Hogarth v Rocky Mountain Slate Inc***, 2013 ABCA 57, 542 AR 289, in which the majority adopted the above reasoning in ***Blacklaws*** and noted at para 11 that Slatter JA's concurring reasons "admirably canvassed the law with respect to the circumstances in which personal liability may be imposed upon corporate directors and officers for conduct made in the course of carrying on the business of the corporation."

[63] Slatter JA, in his concurring reasons, made these comments at paras 68, 73, 95, 96, 111 and 126:

> The point is that separate corporate existence, and the resulting limited liability, is not a loophole, a technicality, or a mischievous stratagem; it is an essential tool of social and economic policy.
>
> ...
>
> The law respecting the liability of directors and officers for torts committed while conducting corporate business is not entirely consistent. ...
>
> ***ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.*** (1995), 26 O.R. (3d) 481, 129 D.L.R. (4th) 711 (CA), leave refused [1996] S.C.C.A. No. 40, [1996] 3 S.C.R. viii ... confirms that the directors of a limited liability company are not identified with the company for purposes of legal liability.
>
> While ***ScotiaMcLeod*** does not directly deal with the test for the liability of individual directors and officers, the appellant Simonson relies on the following comments:
>
> > 25 The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare.
> >
> > ...
> >
> > Considering that a corporation is an inanimate piece of legal machinery incapable of thought or action, the court can only determine its legal liability by assessing the conduct of those who caused the company to act in the way that it did. This does not mean, however, that if the actions of the directing minds are found wanting, that personal liability will flow through the corporation to those who caused it to act as it did. To hold the directors of Peoples personally liable, there must be some activity on their part

> that takes them out of the role of directing minds of the corporation.

Cooper v. Hobart identified an overriding objective of determining whether it is "just and fair" having regard to the relationship to impose a duty of care in law upon the defendant. ...

Holding an individual liable for a tort committed directly in pursuit of the company's business amounts to requiring that individual to grant a personal guarantee for the tort liabilities of the company.

[64] Similar comments were made by McIntyre J of this Court in ***Petrobank Energy and Resources Ltd v Safety Boss Ltd***, 2012 ABQB 161, 534 AR 265 at 236, 238 and 242:

> My review of the case law suggests that a cause of action against a director, officer or employee cannot be founded on acts identical with those alleged against the corporation itself.
>
> ...
>
> In my view ... the case law shows that some action separate from that of the corporation is required.
>
> ...
>
> In this province, this view seems to have been accepted by Martin J. of this Court in ***Stewart v. Enterprise Universal Inc.***, 2010 ABQB 259, 489 AR 153. Martin J. referred to several cases, including both ***ScotiaMcLeod*** and ***Blacklaws***, and made these comments at paras. 58 – 60 and 63 – 64:
>
> > The Defendants argue that officers, directors or employees of companies are generally protected from personal liability unless a plaintiff can establish that the actions of the officer or employee are independently tortious or exhibit a separate identity from the company so as to separate the actions from the company.
> >
> > The most fundamental principle of corporate law is that of limited liability; see ***Salomon v. Salomon***, [1897] A.C. 22. It is clear that a corporation like Enterprise can only operate through its human agents, or what has become known as its "directing mind". However, the converse is not true; meaning that the liability of Enterprise does not necessarily flow through to its human agents, like the Directors. At law there is a very strong presumption that a director in his/her personal capacity is not responsible for harms done by his/her corporation. The point is well made by the Ontario Court of Appeal in [***ScotiaMcLeod***]...
> >
> > However, in extreme cases the corporate veil can be lifted to impose personal liability on a director; see ***Kosmopoulos v. Constitution Ins. Co. of Canada***, [1987] 1 S.C.R. 2, 34 D.L.R. (4th) 208. In ***Nielsen Estate v. Epton***, 2006 ABCA 382, the Alberta Court of Appeal acknowledged at para. 20 that, "[i]t is settled law

> that a corporate director may have a personal duty of care and may be liable for acts that are in themselves tortious."
>
> ...
>
> Therefore, the legal test is clear. The Directors in this case must either have done something that is tortious in itself or have done something that is independently tortious, such that they exhibited a separate interest from Enterprise and in doing so made the tort their own.

[65] Personal liability of corporate officers for defamation is discussed in Raymond E. Brown, *The Law of Defamation in Canada*, loose-leaf, (Toronto: Thomson Reuters Canada Limited, 1994), ch 18 at 138:

> A stockholder or corporate officer, merely by virtue of their office, cannot be held personally liable for a corporate wrong. There must be some showing that they were personally connected with the publication because they aided or assisted in the publication or circulation of the defamatory material. Where the defendant corporation is a newspaper, a publisher and editor will be liable only if he or she aided, assisted and advised in the publication or circulation of the defamation, or their duties charged them with the performance of functions concerning the publication and circulation of the newspaper.

C. Findings

[66] The inquiry on this application is somewhat limited and there is no need for me to address all of the issues raised.

[67] I make no finding as to whether the Article is or is not defamatory. Neither do I express any view as to the conduct of the litigation in this Action or the current state of the law respecting misappropriation of personality or its potential application to the Article. Rather, having regard to the applicable legal principles set out above and the evidentiary record, I must consider whether there is a genuine issue requiring trial respecting the personal liability of Mr. Godfrey and Mr. Fisher arising out of Postmedia's and National Post's publication and republication of the Article.

[68] While the cases make clear that directors and officers may be personally liable for acts performed in the course of their duties to their corporation, I find that the imposition of personal liability is not appropriate in these circumstances. The case law emphasizes the importance of limited liability as a feature of corporate identity and establishes that directors and officers will not be personally liable unless their actions are somehow separate from those of the corporation in such a way as to make the corporation's tort their own.

[69] To succeed in this defamation claim against the Defendants, Mr. Kent must prove the publication element of defamation by establishing that the Defendants, including Mr. Godfrey and Mr. Fisher, have by any *act*, communicated defamatory words to a third party recipient: **Crookes** at para. 16.

[70] On the facts before me, I see no evidence of any action on the part of Mr. Godfrey or Mr. Fisher that would make publication or republication of the Article their own deed, rather than an

act of Postmedia or the National Post. I find that neither Mr. Godfrey's nor Mr. Fisher's role within Postmedia or the National Post was such as to charge them with control over editorial content or control over the content published on Postmedia websites. As such, their failure to take independent active steps to remove the Article from Postmedia's websites is not a sufficiently separate act to make publication of the Article their own defamatory act. To the contrary, I find that their individual referral of Mr. Kent's 2008 and 2010 Notices of Intention to Postmedia's editorial staff and legal counsel for further handling is what would be expected from persons in their executive roles. It is not an unusual corporate practice to charge specified individuals in a corporation with the responsibility to investigate and take carriage of corporate lawsuits. Such delegation of responsibility is neither an abdication of responsibility nor grounds for liability.

[71] I do not agree with Mr. Kent's contention that simply serving a Notice of Intention to Bring an Action is sufficient to impose upon the recipient corporate officer or director individual responsibility personally to investigate and resolve alleged defamatory material. I do not think it reasonable to conclude that the mere conduct of a Plaintiff in serving a Notice of Intention to Bring an Action on a corporate officer or director operates to create personal liability for that officer or director, with no consideration to be given to that individual's actual role and control over the content or publication of the defamatory information.

[72] Further, I find that there is no evidence of any deliberate act on the part of either Mr. Godfrey or Mr. Fisher that could constitute defamation as contemplated by the Supreme Court of Canada in ***Crookes***. Indeed, Mr. Kent appears to agree that there was no such deliberate act as shown by his focus on Mr. Godfrey's and Mr. Fisher's failure after receipt of their respective 2008 and 2010 Notices of Intention to do anything personally to address his concerns that their corporation was publishing damaging and false information about him.

[73] All the Defendants in the Action are represented by the same legal counsel. Mr. Kent has suggested that it can be inferred that it was either Mr. Godfrey or Mr. Fisher or both who instructed their and Postmedia's legal counsel to direct return of the Article to public access on Postmedia websites after being removed from such publication by the Ottawa Citizen's senior editor. Mr. Kent suggests that this allows an inference that Mr. Godfrey and Mr. Fisher have stepped outside their corporate roles. In my view, this is mere speculation or conjecture on Mr. Kent's part. The evidence of Mr. Godfrey and Mr. Fisher is that they had no knowledge of any communications Mr. Kent may have had with the Ottawa Citizen's senior editor or the reappearance of the Article. Postmedia has a general counsel responsible for Postmedia legal actions and instructing external counsel. There are no other facts to support the inference Mr. Kent seeks. As noted earlier, summary judgment applications are to be decided on the evidence presented and not on the assumption that there may be more evidence at trial.

[74] Finally, I do not find that Mr. Godfrey's and Mr. Fisher's alternative pleadings in their Statement of Defence denying any defamation and raising defences of qualified privilege, responsible journalism, fair comment and so on, constitutes any deliberate action on their part to agree with, or approve, the Article. Denials and defences set out in pleadings are neither proven facts nor evidence and thus are accorded no weight on this application.

[75] With respect, I find the ***Weaver*** decision to be of little authoritative assistance in determining whether Mr. Fisher, in the roles he had with National Post and Postmedia, could be held personally liable for publication of the Article and as such a proper party to the Action. The

Court in ***Weaver*** provided little insight into its reasons for finding on the facts before it that Mr. Fisher had an actionable role in the defamation in that case. As such, I cannot conclude that the circumstances in that case are akin to those in issue here. However, I agree with the Defendants that ***Weaver*** is in accord with ***Crookes*** in that it reiterates the requirement for a deliberate act to constitute publication of defamatory information.

[76] Regarding Mr. Godfrey specifically, there is no evidence that he by any act conveyed the Article to any third party. Mr. Kent has failed to show any deliberate act of publication of the Article by Mr. Godfrey.

[77] With respect to Mr. Fisher specifically, his evidence is that when he read the Article after being served with the 2008 Notice of Intention, he "satisfied" himself that the Article "was journalistically proper and acceptable". I find that, without more, this constitutes neither approval of the Article nor a deliberate act that could make Mr. Fisher personally liable for what had been written. There is no evidence that Mr. Fisher's opinion that the Article "was journalistically proper and acceptable" was ever communicated to anyone in the National Post organization or that he had ever conveyed any approval of what had been written in the Article to a third party. Indeed, Mr. Fisher's evidence is to the contrary. Mr. Kent has failed to show any deliberate act of publication of the Article by Mr. Fisher.

[78] The question of whether the Article is defamatory so as to give rise to liability on the part of Postmedia and National Post is a matter for trial. Similarly, the questions of whether Postmedia is liable for aggravated and punitive damages due to malice or misappropriation of Mr. Kent's personality or for increased costs due to litigation misconduct are matters for trial. Postmedia has made no application for summary dismissal of Mr. Kent's claims against it and the Action will go forward as against Postmedia. In the same vein, National Post has not pursued its application to be removed as a Defendant and the Action will go forward against it as well.

[79] However, Mr. Godfrey and Mr. Fisher have shown that there is no genuine issue requiring a trial in respect of their liability for any alleged publication of the Article on Postmedia and National Post websites and their personal liability in these circumstances. Mr. Kent has failed to demonstrate on the evidence that there remains a genuine issue in this regard. In arriving at this determination, I have been guided by Slatter JA's statement in ***Hogarth*** that personal liability of these individuals would amount to granting personal guarantees for Postmedia's and National Post's tort liabilities. That, in my view, is not appropriate in the circumstances here.

[80] I am satisfied that summary dismissal is appropriate in this case. Applying the modern tests articulated in ***Hryniak***, ***Windsor*** and ***Ostrowercha***, I find that I am able to arrive at a fair and just determination on the issue of whether Mr. Godfrey and Mr. Fisher are personally liable for any defamation in the Article of Mr. Kent on the evidentiary record before me and that there is here no genuine issue of material fact requiring trial.

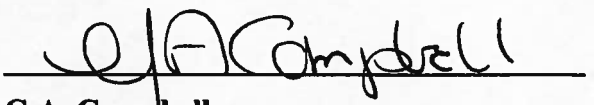
VII Decision

[81] For these reasons, the application for summary judgment is granted and the Action against the Defendants Mr. Godfrey and Mr. Fisher is dismissed.

[82] As the unsuccessful party on this application, Mr. Kent normally would be responsible for costs. I am cognizant that Mr. Kent alleges that the Defendants have intentionally

misconducted this litigation with the objective of delaying the trial of the Action and increasing Mr. Kent's costs. In light of those allegations and of the fact that all of the Defendants have the same legal counsel, I think it most appropriate that costs for this application be determined in the cause.

Heard on the 25th day of May, 2015.
Dated at the City of Calgary, Alberta this 17th day of July, 2015.



G.A. Campbell
J.C.Q.B.A.

Appearances:

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for the Plaintiff

G. Scott Watson – Parlee McLaws LLP
for the Defendants