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Cour supérieure du Québec

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Please find attached a judgment from Justice Catherine Mandeville in the file mentionned above.

Cordially.

Marie-Josée Williams
Adjointe de l'Honorable
Juge Catherine Mandeville
Cour supérieure
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SUPERIOR COURT
(Civil Division)

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

N°: 500-17-092587-164

DATE: April 17th, 2018

IN THE PRESENCE OF THE HONOURABLE CATHERINE MANDEVILLE, J.S.C.

BARBARA LISBONA
Plaintiff

vs

POSTMEDIA NETWORK INC. AND ALS.
Defendants

and

FACEBOOK INC. AND ALS.
Impleaded Party

JUDGMENT ON MOTION TO DISMISS THE APPLICATION AGAINST POSTMEDIA NETWORK INC.
(Based on 51 ss. C.C.P.)

CONTEXT

[1] The Plaintiff, Barbara Lisbona (Ms Lisbona), has introduced proceedings seeking compensatory and exemplary damages of more than 1.5 M$ as well as a provisional interlocutory and permanent injunction naming as Defendants various individuals and Postmedia Network Inc. (Postmedia).

[2] In a nutshell, Ms Lisbona asserts that these individuals have posted, and continue to post, defamatory comments about her and a nonprofit organization called Animal Rescue Network (ARN), dedicated to the rescue of abandoned or abused animals, particularly cats. Ms Lisbona was the president and is a founder of ARN.

[3] While she is claiming 595 000 $ in damages from the eight individual Defendants and is seeking a permanent injunction enjoining them from publishing any comment of a defamatory nature about herself, the Plaintiff is also claiming 500 000 $ in unspecified damages from Postmedia for defamatory statements that would have been published in the *Montreal Gazette* dated November 10, 2015[1] ("*Gazette* Article") and in a column published in the *National Post* on November 17, 2015[2] ("*Post* Column").

[4] Ms Lisbona is further seeking a permanent injunction against Postmedia, enjoining it to print an apology, pre-approved by her attorneys[3], as well as a complete retraction.

THE PRESENT DISMISSAL APPLICATION

[5] Postmedia seeks the summary dismissal of the Plaintiff's application on the basis of Sections 51, 52 and 53 of the *Code of Civil Procedure* (C.C.P.), because :

a) the judicial application is abusive in that it is frivolous, unfounded, reckless and doomed to fail;

b) the judicial application is abusive, in that it constitutes an attempt to defeat the ends of justice, as it operates to restrict freedom of expression in public debate (i.e. a "slap").

THE LAW

- ABUSE OF PROCEDURE AND SLAPP -

[6] The basis of the dismissal seeked is the abuse of procedure as described in Sections 51, 52 and 53 C.C.P. which read as follows :

> **51.** The courts may, at any time, on an application and even on their own initiative, declare that a judicial application or a pleading is abusive.

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1 Exhibit P-14.
2 Exhibit P-15.
3 Ms Lisbona's application requests this apology to be published on the websites of the *Gazette* and the *National Post*, in their printed editions and also in *La Presse* and the *Journal de Montréal.*

Regardless of intent, the abuse of procedure may consist in a judicial application or pleading that is clearly unfounded, frivolous or intended to delay or in conduct that is vexatious or quarrelsome. It may also consist in a use of procedure that is excessive or unreasonable or that causes prejudice to another person, or attempts to defeat the ends of justice, particularly if it operates to restrict another person's freedom of expression in public debate.

52. If a party summarily establishes that a judicial application or pleading may constitute an abuse of procedure, the onus is on the initiator of the application or pleading to show that it is not excessive or unreasonable and is justified in law.

The application is presented and defended orally, and decided by the court on the face of the pleadings and exhibits in the record and the transcripts of any pre-trial examinations. No other evidence is presented, unless the court considers it necessary.

An application for a court ruling on the abusive nature of a pleading that operates to restrict another person's freedom of expression in public debate must, in first instance, be dealt with as a matter of priority.

53. If there has been an abuse of procedure, the court may dismiss the judicial application or reject a pleading, strike out a conclusion or require that it be amended, terminate or refuse to allow an examination, or cancel a subpoena.

If there has been or if there appears to have been an abuse of procedure, the court, if it considers it appropriate, may do one or more of the following:

(1) impose conditions on any further steps in the judicial application or on the pleading;

(2) require undertakings from the party concerned with respect to the orderly conduct of the proceeding;

(3) stay the proceeding for the period it determines;

(4) recommend that the chief justice or chief judge order special case management; or

(5) order the party that initiated the judicial application or presented the pleading to pay the other party, under pain of dismissal of the application or rejection of the pleading, a provision for costs, if the circumstances so warrant and if the court notes that, without such assistance, that other party's financial situation would likely prevent it from effectively conducting its case.

(Our emphasis)

[7] Postmedia has the burden to first summarily establish that Ms Lisbona's judicial application may be unfounded, frivolous, or that it attempts to defeat the ends of justice by operating to restrict Postmedia's freedom of expression in public debate.

[8] As per the teachings of the Court of appeal in *Acadia Subaru* vs *Michaud*[4], the use by the legislator of the word "summarily" is suggestive of the degree of dispatch, not of the degree of proof relevant to the reversal of the burden of showing impropriety. Summarily should therefore be considered in its usual meaning, i.e., promptly, prior to full proof and hearing.

[9] As the Court of appeal has often stressed, the judge must be prudent before dismissing an application at such an early stage, when the evidence has not been tested nor heard in full. It is only if the Court finds the judicial application to be clearly unfounded or frivolous that it should grant the dismissal before the case is heard on its merit. Furthermore, as a complete dismissal of the application is the ultimate sanction, the court should not resort to such a drastic remedy should another appropriate sanction for the abuse be available.

[10] In the presence of a SLAPP[5], however, the caution principle referred to above must be modulated; prudence must give way to vigilance.

[11] As Justice Gaudet recently stated in *Sergakis et 9019-8441 Québec inc.* vs *Peter McQueen*[6]:

> [53] Dans l'application de ces principes, il importe de distinguer soigneusement le cas de la poursuite-bâillon, des autres types d'abus de procédures. En effet, lorsque l'abus dont il est question ne met pas en cause la liberté d'expression ou le débat démocratique, la prudence est de mise avant de rejeter une demande en justice sans enquête au fond. En revanche, en matière de poursuite-bâillon, une intervention rapide est nécessaire, voire essentielle, puisqu'il s'agit précisément d'éviter que les tribunaux ne soient utilisés pour indûment limiter la liberté d'expression dans le cadre d'un débat public. Dans l'arrêt *Développements Cartier Avenue inc. c. Dalla Riva,* le juge Vézina, au nom de la Cour d'appel, établit cette distinction [25] :
>
> > Les nouvelles dispositions pour sanctionner les abus de procédure exigent du doigté et de la finesse de la part des juges qui doivent décider sommairement des droits des parties alors que leur rôle est d'abord et avant tout de trancher en pleine connaissance de cause après avoir entendu pleinement les parties et leurs témoins.
> >
> > Confrontés à une poursuite-bâillon, ils doivent intervenir sans délai, mais dans le cas d'actions traditionnelles où il n'y a pas d'urgence, ils doivent se hâter lentement.

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4 2011 QCCA 1037, par.67.

5 A proceeding which attempts to restrict another person's freedom of expression in a public debate.

6 2016 QCCS 5580.

[12] In the present case, the Court has no difficulty to conclude that the *Gazette* Article and *Post* Column intervened in the context of public debate. The issues covered in these publications stemmed from multiple complaints by citizens but also from inspection findings from various entities such as MAPAQ[7] or the S.P.C.A. which all pertained to the inadequacy of care of the abandoned or ill animals, the lack of hygiene and conformity of ARN premises, the 'hording' of the cats rescued and the activities of the non for profit shelter ARN, which is operating, essentially, through public donations and volunteer work.

[13] At the time the litigious Gazette *Article* and Post *Column* were published, these complaints and findings were the object of petitions and numerous publications in the press, on social media and in postings on the Internet.

[14] Thus, in the present case two rights are being opposed: the right of Ms Lisbona to her reputation, and the rights to citizens, including the press, to participate in a public debate.

[15] In including SLAPP procedures within the notion of abusive procedures, the legislator has chosen to assert a policy choice. However, as the Court of Appeal finds in *Acadia Subaru*[8]:

> [69] The mechanism is the reflection of a policy choice by the legislature to assert freedom of expression as a fundamental value and to give it precedence, as a procedural matter, over the right to reputation in this limited way. Amendments brought to article 54.2, paragraph 1 C.C.P. through the legislative process confirm that the provision shifts the burden significantly to the party who seeks to restrict freedom of expression and allows this shift to occur, as it is the case here, at an early stage in the proceedings.*[30]* But freedom of expression in public debate is not a licence to defame and does not trump the right to reputation absolutely. The appellants have the opportunity to discharge the reverse burden and thereby avoid the sanctions set forth at article 54.3 C.C.P. *(our emphasis)*

[16] To decide whether or not Ms Lisbona's judicial application should be dismissed, this Court has to determine whether the "Reamended Introductory Motion" is unfounded, frivolous, or whether it may have some colour of right but should nevertheless be dismissed because it constitutes an attempt to restrict freedom of expression in a public debate.

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7 Ministère Agriculture, Pêcheries et Alimentation, Sous-Ministériat à la santé animale.

8 Note 4, par. 69.

- DEFAMATION -

[17] The defamatory character of the impugned declarations or comments must be analysed in the overall factual context in which they were made. The defamatory nature must be analysed in accordance to an objective norm. The question is not to determine whether Ms. Lisbona herself has been hurt by these declarations, but rather whether an ordinary citizen would find that these declarations have brought discredit to the reputation of Ms. Lisbona, and could "*cause someone to lose in estimation or consideration, or prompt unfavourable or unpleasant feelings toward her.*"[9]

[18] Further, it is not sufficient for Ms Lisbona to prove that the litigious declarations are defamatory, she must further establish that Postmedia committed a fault in making these declarations in the *Gazette* Article and/or the *Post* Column and that she sustained damages because such declarations were made.

[19] As Pelletier J. of the Court of appeal, observed[10]:

> [65] On le sait, toutefois, cette seule qualification ne permet pas d'inférer le comportement fautif. En matière de diffamation, la méthode d'analyse propre au droit civil diffère de celle préconisée par la common law. Voici ce qu'enseigne la Cour suprême dans *Prud'homme* c. *Prud'homme*[11] :
>
> 57. As may be seen, an action in defamation in civil law in a way proceeds in the opposite direction from an action for defamation in common law. In the civil law, the defendant's good faith is presumed (art. 2805 C.C.Q.) and it is up to the plaintiff to establish that the defendant committed a fault (...)

[20] According to the Supreme Court in *Prud'homme*, such a fault may occur in three situations:

> [36] *Based on the description of these two types of conduct [malicious conduct or negligence], we can identify three situations in which a person who made defamatory remarks could be civilly liable. The fist occurs when a person makes unpleasant remarks about a third party, knowing them to be false. Such remarks could only have been made maliciously, with the intention to harm another person. The second situation occurs when a person spreads unpleasant things about someone else, when he or she should have known them false. A reasonable person will generally refrain from giving out unfavourable information about other people if he or she has reason to doubt the truth of the information. The third case, which is often forgotten, is the case of a scandalmonger who makes unfavourable but true statements about another person without any valid reason for doing so.*

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9 *Prud'homme* c. *Prud'homme*, 2002 CSC 85, par. 34.
10 *Séguin c. Pelletier**, 2017 QCCA 844, par 65.
11 Prec., note 8, par 57.

[21] As for the Column, as its heading indicates[12], it is of the nature of a comment on the "cat hoarders" phenomenon and relays some excerpts of scientific literature (a study by a social worker and a veterinary) on that subject. Its author introduces the subject of her opinion on "rescuers/hoarders" by first referring to a cat hoarder Halloween costume and then to Lisbona, whom she states made headlines and was the object of several stories featuring the "sickening abuse of the cat rescue operations of ARN".

[22] Seeing the *Post Column* is the expression of an opinion rather than an objective report of facts, the notion of fault asserted against its author has to be appreciated in accordance with the Supreme Court decision of WIC Radio[13], which made a distinction between the liability of the author of a comment and that of a report. As Justice LeBel stated: "la nature suggestive du commentaire atténue généralement l'atteinte à la réputation d'autrui par rapport à un énoncé de faits objectif, ce dernier étant plus susceptible d'influencer le public qu'un commentaire."[14]

[23] While this decision of WCI radio was rendered in Common Law and cannot directly apply in civil law where there is no defence of loyal comment, the Court of appeal in Proulx vs Martineau[15] maintained the distinction in the appreciation of fault committed by the author of a report versus that of a comment. It stated :

> [27] Dans un contexte journalistique, l'appréciation de la faute se rapproche généralement de celle des professionnels et comporte l'évaluation du respect des normes journalistiques. Toutefois, lorsqu'il s'agit d'une chronique, qui s'avère plutôt un mélange d'éditorial et de commentaire qui permet l'expression d'opinions, de critiques et de prises de position, et peut même parfois faire place à l'humour et la satire, le comportement du journaliste ne relève pas des normes journalistiques. Le juge Dalphond signalait d'ailleurs cette distinction dans l'affaire Genex communications inc. c. Association québécoise de l'industrie du disque, du spectacle et de la vidéo :
>
>> [29] Dans WIC Radio, précité, la Cour suprême a eu l'occasion de se prononcer sur la nature de l'équilibre à établir entre la liberté d'expression d'un animateur de radio et le droit à la dignité de la personne qui fait l'objet de commentaires (paragr. 14). Elle y mentionne l'importance de distinguer en matière de diffamation entre le reportage journalistique qui présente des faits et le commentaire d'événements (paragr. 26), lequel peut prendre plusieurs formes : éditorial, émission-débat radiophonique, tribune radiophonique, caricature, émission satirique. Elle souligne aussi que les règles régissant la défense de commentaire loyal accordent une grande latitude aux commentateurs (paragr. 25). Elle retient ensuite qu'il est permis à l'égard de questions d'intérêt public d'exprimer un commentaire diffamatoire, si une personne, si entêtée soit-elle

[12] It is published under the heading : FULL COMMENT

[13] *WIC Radio Ltd. c. Simpson*, 2008 CSC 40, [2008] 2 R.C.S. 420, [2008] R.R.A. 515.

[14] *Genex communications inc.* c. *Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201.

[15] 2015 QCCA 472.

> dans ses opinions et ses préjugés, pouvait honnêtement exprimer ce commentaire vu les faits prouvés, ajoutant qu'il s'agit d'un critère objectif qui n'est pas très exigeant (paragr. 49-50). Cependant, l'auteur du commentaire diffamatoire perdra cette protection si la victime prouve qu'il a agi avec malveillance (paragr. 52-53). Elle conclut que si les commentaires de l'animateur de la station WIC étaient diffamatoires et peuvent être considérés d'une virulence malsaine (paragr. 56), ils sont néanmoins permis dans une société libre et démocratique.
>
> *(Our emphasis)*

ANALYSIS

[24] Applying the principles described above, the Court finds that Postmedia has summarily established that Ms. Lisbona's procedure is abusive in that it is unfounded in law and that it also appears to operate to restrict freedom of speech in a public debate.

[25] In this particular instance, the Court has already found that the declarations that would have been published by Postmedia occurred in the context of public debate: the wellbeing of animals and the activities of non for profit shelters soliciting donation for their operations such as ARN being preoccupation for citizens.

[26] It further stresses that the *Gazette* Article is essentially directed towards ARN operations, and ARN is not the plaintiff in this instance. It is not even a party to these proceedings. The reference to Lisbona in the Gazette Article is related to her being a founding member of this organization and an actor in its operations as well as being its representative. Indeed, the writer of the Article communicated with Lisbona to obtain her comments and he obtained two interviews with her. He has published Lisbona's statements and she recognizes that the reported statements are accurate.

[27] This Court cannot find any element of fault in the work of the journalist and the very limited declarations that relate to Lisbona herself or indirectly to her work do not appear defamatory.

[28] Upon perusing the Article, one understands that the author has reported various facts about ARN's operations, starting with the very decrepit status of the premises it had vacated and the poor conditions under which a very large number of cats were housed there.

[29] The journalist has met with the owner of these premises and has visited them himself. He reports on his own observations and on his exchanges with this owner. He has further visited another shelter operated by ARN.

[30] He reported on the result of inquiries made by MAPAQ or SPCA further to complaints they had received against ARN and on the results of proceedings filed by the owner of the premises rented by ARN.

[31] This journalist further refers to the public information he has obtained, such as that which relates to the founding of ARN and the composition of its board of Directors, the register of ARN with Canada Revenue Agency and court judgments.

[32] He reports on his interview with and cites the author of a petition against ARN.

[33] He has also met and interviewed several persons who volunteer or volunteered for ARN.

[34] Contrarily to cases where the journalist presented a one-sided view of a situation and failed to provide any opportunity to the person or organization criticized to make a statement, the journalist did not only interview ex-volunteers or people who are critic of ARN.

[35] He has met with acting volunteers and has met, interviewed and exchanged e-mails with Lisbona who defended her work with ARN. He cites several of her responses to critics of ARN. Furthermore, he has obtained and referred to several extracts of the public statement issued by ARN in response to a petition. In fact, the *Gazette Article* ends on a quote from this public statement which refers to Ms. Lisbona which reads:

> *"If there were more people like Barbara who dedicated their life, their own money, their health, and 70 hours a week day and night to save and nurse animals, the world would be a better place."*

[36] Lisbona confirmed that the journalist accurately quoted her statements in the *Gazette Article*.

[37] While Lisbona admits the *Gazette Article* is not directly about her, she claims it is defamatory because it negatively reflects on her work and on what she created (ARN).

[38] Even if , and there is no need to conclude to same, the litigious statements were to be found defamatory, Lisbona's judicial application does not reveal any element or indication of a fault which would be responsible for her damages. At most, one understands from her examination on discovery and her judicial application that Lisbona is of the view that the Gazette Article should be more "balanced" in that it should equally criticize the operations of ARN and stress all the good work it achieves towards assisting in the care and protection of sometimes very ill and neglected animals.

[39] It must be restated that Lisbona is the claimant here and not ARN which is absent from the proceedings. Further, journalists do not have an obligation to write an article that contains just as much praise as critics of an organization. Also, while it is not per se sufficient to conclude that the proceeding is abusive and made with a view to restrict freedom of speech in a public debate, the amount of $500 000 in damages claimed in view of the difficulty of Lisbona to identify specific damages, appears grossly exorbitant of awards found in cases of a similar nature.

[40] As per the Post Column, a reasonable person would understand after reading the comment that it is an opinion on hoarders/rescuers that is not directed at Lisbona specifically and that the author finds similarities in what has been reported about Lisbona and the "rescuer-hoarder syndrome" which was studied by American researchers.

[41] As Postmedia argued, the Column uses the Gazette article and other publications as background but it is an opinion piece on "rescuers-hoarders" in general and it constitutes fair comment on matters of public interest.

[42] Considering the types of injunctive remedies seeked, the amount claimed in damages, the failure by Lisbona to describe specific damages which she herself would have sustained and in the absence of fault asserted, the Court also found that Postmedia had summarily established that the judicial application was made with a view to restrict freedom of expression in a public debate.

[43] As the Court found that Postmedia had summarily established that the judicial application was both ill-founded and an attempt to restrict freedom of expression in public debate, it proceeded to the second stage of the hearing of the dismissal application. Lisbona was asked to show that her judicial application was not excessive or unreasonable and is justified in law.

[44] Lisbona's response came as a single argument: This Court should follow the teachings of higher courts and not dismiss proceedings at such an early stage, as Lisbona should be given the opportunity to provide further evidence at trial to both support her claim and the amount of damages seeked.

[45] As for damages, despite further questioning, the Court was not provided with any explanations as to how the amount claimed had been established and what were the damages sustained. Counsel could not say if the actual case law in similar matters supported any such amounts being awarded.

[46] The Court also notes that Lisbona is suing 8 other Defendants for a further $595 000 and has attempted to obtain against them injunctive proceedings to enjoin them from publishing "any comments of a defamatory nature on Plaintiff" and, as mentioned, is seeking from Postmedia, on top of the large sums claimed in damages, that it effect a complete retraction of the litigious publications but also that it prints a "pre-approved apology".

[47] Considering Lisbona appears not to be able to advance any evidence of a fault by Postmedia nor to explain or provide support for her significant claim in damages, the Court concludes that her judicial application is unfounded and should be dismissed.

[48] Considering further the injunctive reliefs sought by Lisbona against Postmedia in the context of the whole of her proceeding, the Court also concludes that the judicial application operates to stifle public comment on matters of public interest.

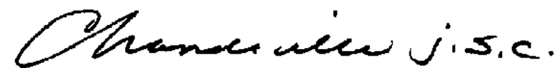
FOR THESE REASONS, THE COURT:

[49] **GRANTS** the Motion to dismiss the Application against Postmedia;

[50] **DISMISSES** the Application of Ms. Lisbona in all that relates to Postmedia Network inc.;

[51] **RESERVES** to Postmedia Network inc. its rights to apply, within 60 days of the present judgment, for damages resulting from the abusive application of Plaintiff;

[52] **Judicial costs against Plaintiff.**



CATHERINE MANDEVILLE, J.S.C.

Me Jamie Benizri and Mr Patriarco
for the Plaintiff

Mes Mylène Lemieux and Mark Bantey
for Postmedia Network inc.

Date of hearing : July 27, 2017.