

Defamation suit surrounding BC's foreign buyer tax is dismissed

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The law of defamation is fascinating because the fact scenarios of each case are unique. Where matters of public interest are involved, people are prone to express opinions about the activities and comments of others and to say things which either expressly accuse someone of illegal conduct or accuse someone by way of innuendo of such conduct.

In *Zhao v. Corus Entertainment Inc.*, 2020 BCSC 1533, after a three-day summary trial, Justice Milman was required to determine whether to dismiss a defamation action that involved comments made by multiple media outlets, radio hosts, and a BC Liberal candidate about the plaintiff and a plan the plaintiff had developed to help foreign investors buy real estate in British Columbia without having to pay the “foreign buyer tax.”

The “foreign buyer tax” was enacted by the BC government following a sharp increase in housing prices in the summer of 2016. A widely held belief was that the sharp increase in prices was causing local residents to be forced out of the housing market by foreign speculators, and thus the government introduced an extra 15% in property purchase tax on foreign buyers.

The plaintiff was a real estate agent. In his view, there was a gap in the legislation which permitted foreign buyers to avoid paying the new tax by entering into a partnership with a Canadian and buying property in the name of the partnership. The plaintiff advertised his plan online in a Chinese-language forum and distributed some flyers at a Burnaby shopping mall. Upon learning of the plaintiff's promotion, an organization called “Housing Action for Local Taxpayers” (“HALT”) contacted the media because it wanted to expose the apparent “loophole” in the legislation and to get it closed. A radio station invited representatives of HALT to be interviewed, thereby bringing the legislation and the plaintiff's activities to the public's attention.

During the interview, a BC Liberal candidate (and former cabinet minister) called into the radio show to comment on the legislation and to essentially quash the idea that there was a loophole in the legislation. This led to questions about potential fraud and comments that complaints about the plaintiff's promotion should be made to the “Ministry of Finance” or the “RCMP”.

More media coverage followed, including in Chinese-language media. The plaintiff learned about these articles and subsequently contacted the radio station to speak about his proposal. He was unhappy with the way his proposal had been presented. The radio station agreed. However, the plaintiff complained that the radio station altered his interview and as set out at paragraph 40 of the decision portrayed him “to the audience as having low personal ethical standards and being guilty of making home ownership unaffordable for the local people in Metro Vancouver.”

Eventually, the publicity resulted in the plaintiff receiving angry and threatening phone calls, emails and text messages. He was investigated by the Real Estate Council of British Columbia. While no disciplinary action was taken against him, the plaintiff contended that the entire situation prevented him from being able to pursue a career in real estate. The plaintiff also contended that the events had an adverse impact on his state of mind.

Among other things, the plaintiff pleaded in his claim that the comments of the various parties accused him of developing a plan that was a fraud, that he was a liar, that he should be investigated by police, that he would be prosecuted of a criminal offence, that he was involved in tax evasion, and that he was running an illegal partnership.

The plaintiff also contended that the case was inappropriate for summary trial. Although the court undertook a comprehensive analysis of this issue, ruling against the plaintiff, this issue is beyond the scope of this blog.

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The defendants relied on the defences of justification, fair comment, responsible communication and qualified privilege. They also contended, among other things, that the comments did not convey the defamatory meanings attributed to them by the plaintiff and that the comments did not identify the plaintiff.

While the court was satisfied that the plaintiff was identifiable in the comments, relying upon the test set out in the BC case of *P.G. Restaurant Ltd. v. Northern Interior Regional Health Board*, 2004 BCSC 294, the defendants were able to succeed on the various defences raised.

With respect to the radio station, Judge Milman found that the initial interview could be divided into three separate segments and that in the first segment statements of fact were simply being provided to the audience. Those statements either did not carry a defamatory sting or they were substantially true.

Substantial truth in a statement is protected under the defence of justification.

Justification is an absolute defence and applies to statements of fact. The defence will succeed if the defendant can prove on a balance of probabilities the truth of the comment that is said to be defamatory. As stated in *Cassels v. Canadian Broadcasting Corp.*, 2015 BCSC 2150 at para. 550, a defendant, however, is not required to prove the truth of each and every word. The defendant must only prove that the gist of the alleged defamatory comment was true or was substantially true. Thus, substantial truth is the test.

With respect to those comments that were made as observations about the plaintiff's proposal in other segments, Judge Milman found that they were properly classified as "comment" as defined in the case law because they were matters of "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof". These comments qualified as "fair comment" because the foreign buyer tax was a matter of public interest, the comments were based on facts, the remarks were identifiable as comment, and the comments expressed by the defendants could honestly be expressed by others based on the same facts.

In addition, there was no evidence that the radio station and its hosts acted with malice. In general, malice may exist where it shown that a published comment is: (a) knowingly false; (b) made with reckless indifference to truth or falsity; (c) made for the dominant purpose of injuring the plaintiff; or (d) made for an improper dominant purpose. The comments at issue did not fall into these categories.

The court also concluded that the comments of the BC Liberal candidate did not convey the defamatory meaning attributed to his words by the plaintiff, that even if they did they were also protected by the defences of justification and fair comment, and that those comments additionally were protected by the qualified privilege defence.

Qualified privilege protects comments that may be untrue about another provided that those comments are made on a protected occasion and are not made with malice. Based on *Lane v. Nanaimo-Ladysmith School District No. 68*, 2006 BCSC 129, citing the House of Lords in *Adam v. Ward*, [1917] A.C. 309 at p. 334, "...a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. The reciprocity is essential."

In this case, the BC Liberal candidate had a duty to keep the public informed about the law, especially where he believed the public was being misinformed about it on the radio.

As well, there was no evidence of malice. While the plaintiff contended that the candidate demonstrated malice on the grounds that "he didn't care about the truth", Judge Milman concluded at para. 126 that even if that was sufficient to vitiate the defence, there was no basis in the evidence to support that conclusion. The candidate's evidence was that his sole purpose in making his comments was to correct the misinformation that was being reported on the radio and that he genuinely believed the views he was expressing were well-founded.

The court found that the comments made in all of the articles, which were similar to those made on the radio station or published by the radio station, including the comments of the BC Liberal candidate, were protected by the defences of justification and fair comment.

This case once again shows that where matters of public interest generate public debate, a plaintiff will have difficulty succeeding in a defamation action and that courts will be compelled to summarily have them dismissed. While one can sympathize with the plaintiff for the publicity that his ideas about the "foreign buyer tax" generated and the eventual adverse effect that the news coverage had on him, this is simply not enough to succeed in a defamation, particularly where matters of public policy and legislation are involved. In these kinds of cases, a plaintiff should expect that when they enter the arena of public policy by taking a stand on an issue, that there will likely always be opposition to a plaintiff's views, including unexpected and unkind opinions which may ultimately carry the day. A PDF version is available to download [here](#).

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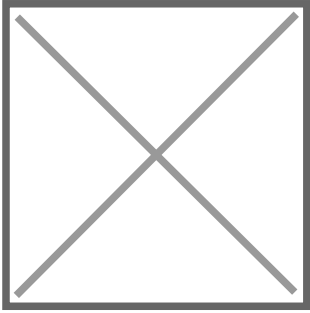
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