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Female mining executive's defamation claim against government employee allowed to proceed

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Ontario and British Columbia are the only two common law provinces that have anti-SLAPP legislation. This legislation permits the early dismissal of claims that involve expressions on a matter of public interest. Although the legislation is designed to protect freedom of expression, the right is not absolute and a defendant must be cautious of what they say and where their words are spoken. In particular, it is unlikely that a claim for damages based on words that appear to include demeaning personal attacks which undermine professional competence, integrity and reputation will be dismissed under an anti-SLAPP motion.

In *Lee-Sheriff v. Christman*, 2022 BCSC 1914, a government employee's motion brought under section 4 of the BC *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (the "Act") to dismiss the plaintiff's action for defamation was dismissed in circumstances where the alleged defamatory words involved a personal attack toward a female mining executive in the course of her employment.

This action arose out of statements made by the defendant during a mining industry conference held on January 19, 2020. At the conference, the plaintiff, who was a shareholder in a mining company and its Chief Executive Officer, provided a public update on the company's projects in the Yukon, including a mine at Brewery Creek. The plaintiff referred to licences, and stated that the mine was "fully licenced". Reference was made to a Quartz Mining Licence and Water Licence which were required to carry on mining operations at the mine.

During her presentation, someone shouted that plaintiff was a "liar". After her presentation, the plaintiff and defendant met and proceeded to the mining company's exhibit booth. There, the defendant raised his voice and repeatedly accused the plaintiff of being a "liar" and that the plaintiff did not have a licence to operate the mine. The plaintiff felt physically intimidated during the altercation and eventually

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left the booth, where her husband, an employee and potential investors were standing. However, the defendant continued to speak loudly and to make statements about the mining company and its licences, and about the plaintiff. The defendant said: (1) "your people lie"; (2) "you lie"; (3) "you misrepresent"; (4) "you don't have the licence that you claim to have"; (5) "you are doing things you have no right to do"; (6) "you don't have a water licence at all, what makes you think you do?"; and (7) "get your fucking wife under control".

The defendant was the Chief Mine Engineer for the Government of Yukon, Department of Energy, Mines and Resources and was involved in reviewing the mining company's application to reactivate the mine. On January 7, 2020, the mining company entered into Terms of Reference with the Yukon Government that among other things confirmed the validity of the licences held to operate the mine and that their expiry date was December 31, 2021.

The defendant sought to have the plaintiff's action dismissed. He contended that he never threatened, berated or disparaged the plaintiff and that he believed that the mining company was misleading the public by stating that the Government had confirmed that the Water Licence was valid in order to re-activate the mine. He also contended that he never spoke the words allegedly attributed to him during the plaintiff's presentation. On his motion to dismiss the action, the defendant relied on the defences of truth/justification, qualified privilege and fair comment.

Section 4 of the Act establishes a four-part test that contains shifting burdens of proof. The first part requires a defendant to show on a balance of probabilities that the proceeding arises from an expression made by the defendant related to a matter of public interest. The defendant was able to meet this test because the mine was being promoted as the largest lode mine ever constructed in Yukon, the mine was located on First Nations territory and the mine was subject to a joint public press release between the company and the Yukon government. The Court was satisfied that the press release suggested that there was public interest into the company's activities and the status of their licences. However, not all of the defendant's comments fell within the first part of test because the defendant denied having made the alleged impugned statement that was attributed to him during the plaintiff's presentation. As determined in *Walsh v. Badin*, 2019 ONSC 689, at paragraph 27: "A defendant cannot both demonstrate that [a] proceeding arises from an expression made by them and deny making the expression." A similar conclusion was reached in *Waterton Global Resource Management, Inc. v. Bockhold*, 2022 BCSC 499. Accordingly, the defendant was unable to have the plaintiff's claim in regard to the alleged defamatory statement made during her presentation dismissed.

The defendant was also unable to succeed with respect to the other alleged defamatory statements that he purportedly spoke because the plaintiff satisfied the burden that her claim had substantial merit and there were no valid defences, and that the public interest in her claim being allowed to proceed outweighed the public interest in protecting the defendant's expression.

With respect to the substantial merit of the plaintiff's claim, the allegations that the defendant repeatedly called her a liar clearly called into question the plaintiff's honesty and integrity, which tended to lower her reputation in the eyes of the reasonable person. The Court viewed the alleged statement, "get your fucking wife under control", as defamatory because the plaintiff worked in an industry dominated by

men and the words tended to undermine her authority. The alleged statement essentially accused the plaintiff of being hysterical and in need of spousal authority to control her.

The words were also spoken in a manner that others at the conference could easily hear them. Thus, the three elements to prove a defamation case were met on a balance of probabilities. The impugned words would tend to lower the plaintiff's reputation in the eyes of a reasonable person; the words referred to the plaintiff; and the words were communicated to at least one person other than the plaintiff.

With respect to the defences, there were grounds to believe that the defence of truth/justification was not legally tenable. As stated in *Grant v. Torstar*, 2009 SCC 61 (CanLII) at paragraph 33, to establish the defence of justification a defendant must adduce evidence that an impugned statement is substantially true. There was a dearth of evidence to support the substantial truth of the impugned statements.

The defence of qualified privilege was not legally tenable because the basic elements of the qualified privilege defence did not exist in the circumstances. The defence of qualified privilege applies where a person who makes a communication has an interest or duty to impart information to the person to whom it is made, and the recipient has a corresponding interest or duty to receive the information. The Court found that the defendant had no interest in allegedly speaking the impugned words to the people who were present at the company's booth, and those people did not have interest or duty in receiving the statements.

The defence of fair comment was also not legally tenable because the Court did not accept the alleged statements to be "comments". To qualify as a fair comment, it has been held that the words must be presented as an expression of a subjective opinion, not as an objective fact: see *Peterson v. Deck*, 2021 BCSC 1670 at paragraph 91. At all times, the defendant was cloaked in a professional capacity. He was easily identifiable as a government employee and he used his professional credentials to support the alleged statements. In the circumstances, the defendant's impugned statements would be recognized as assertions of fact.

Lastly, the plaintiff demonstrated that the continuation of her claim outweighed its dismissal because the evidence established that her damages went beyond nominal or notional harm, whereas the nature of the alleged statements generated doubts about the defendant's motivation. The evidence showed that following the industry conference the share value of the company dropped, the company was privatized and the plaintiff resigned as the company's Chief Executive Officer. The plaintiff further stated that she felt humiliated, embarrassed and shocked by the impugned statements.

In contrast, the defendant, as a government official, raised his voice and angrily confronted the female plaintiff in the course of her employment at a public event. Nothing suggested that the plaintiff was trying to silence the defendant with her action, and indeed, the Court found that the plaintiff had no other recourse but to commence her action. The Court concluded with the following statement of Justice Côté from *Bent v. Platnick*, 2020 SCC 23 (CanLII) at paragraph 172:

> [This] is not the type of case that comes within the legislature's contemplation of one deserving to be summarily dismissed at an early stage, nor does it come within the

language of the statute requiring such a dismissal.

This case serves to remind defendants that blatant personal attacks that lower the reputation of a plaintiff in the eyes of a reasonable person will not be protected by anti-SLAPP legislation, particularly where the nature of the comments include sensitive societal values. Here, the defendant's alleged defamatory words were made against a female corporate executive in a male-dominated industry and were humiliating and demeaning. The alleged words were spoken during the course of her employment and the encounter ultimately caused her to give up her position. In essence, the alleged defamatory words struck at the inequality of women in executive positions and the mining industry, and thus deserved to continue.

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If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** in our dispute resolution group at 416.865.6651 or via email at sthiele@grllp.com.

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