IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sandher Fruit Packers Ltd. v. MacAskill,* 2024 BCSC 1855

Date: 20240919
Docket: S254570
Registry: New Westminster

Between:

Sandher Fruit Packers Ltd., Bir Singh Sandher, Gurtaj Singh Sandher, and Prabtaj Singh Sandher

Plaintiffs

And

Daryl Grant MacAskill

Defendants

Before: The Honourable Justice Branch

Oral Reasons for Judgment

Counsel for Applicants:	M. Parrish D. Byma
Respondent, appearing in person:	D. MacAskill
Place and Date of Hearing:	New Westminster, B.C. September 3, 2024
Place and Date of Judgment:	New Westminster, B.C. September 19, 2024

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I. INTRODUCTION

[1] This is an application for an injunction to stop the publication of allegedly defamatory material, as well as to prevent an alleged campaign of harassment against the plaintiffs.

II. BACKGROUND

[2] The plaintiff, Sandher Fruit Packing Ltd. ("Sandher"), is a family-owned and operated fruit packing business in the Okanagan. The individual plaintiffs, Bir Singh Sandher ("Bir"), Gurtaj Singh Sandher ("Gurtaj"), and Prabtaj Singh Sandher ("Prabtaj"), are members of the family that own and operate Sandher. As the plaintiffs share the same last name, I will refer to each individually by first name meaning no disrespect.

[3] The defendant, Mr. MacAskill, is an individual who maintains and controls a blog entitled "Gangsterism Out" with a URL of https://gangsterismout.wordpress.com (the "Blog").

[4] In or around March 2024, Mr. MacAskill began updating the Blog with allegedly malicious and false statements about the plaintiffs. He also made similar statements (and links to the Blog) in emails to the plaintiffs, their employees, and third parties, including entities that have contractual relationships with the plaintiffs (the "Campaign").

[5] The Campaign included dozens of emails and Blog posts including allegations that the plaintiffs are involved in or with the following activities or groups:

a) the unlawful dumping of "sewage" from their fruit packing facilities into public waterways (the "Environmental Claims");

b) the Sinaloa drug cartel based in Mexico (the "Drug Claims");

c) the Khalistan Tiger Force, designated as a terrorist organization by the Government of India, and Babbar Khalsa International, designated as a

terrorist organization by the Government of Canada (the "Terrorism Claims"); and

d) the Brothers Keepers, an Indo-Canadian organized crime syndicate, and various criminal activities in furtherance of their business, including murder, human tracking, terrorism, drug trafficking, drug smuggling, extortion, money laundering, bribery, and fraud (the "Criminal Activity Claims").

[6] The publications which are of concern to the plaintiffs are set out in a "Schedule of Defamatory Statements" provided to the Court at the time of the hearing (the "Schedule"). The Schedule uses the following headings in grouping the statements alleged to be defamatory or the basis for a claim of harassment (the "Challenged Statements"):

a) Murder;

b) Human Trafficking and Illegal Immigration Activities;

c) Money Laundering;

d) Financing and Sponsoring Terrorist Groups;

e) Member of Terrorist Group – The Khalistan Tiger Force;

f) Terrorist Financier;

g) Member of Terrorist Group – Babbar Khalsa;

h) Drug Trafficking and Drug Smuggling;

i) Members of the Sinaloa Drug Cartel;

j) Members of Brothers Keepers Gang;

k) The Sandher Crime Family;

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l) Sandher Fruit Packers is Operated in an Illegal and Criminal Manner;

m) Sandher Fruit Packers Steals Water from the Crown;

n) Bribery of Public Officials and/or Politicians;

o) Language Commonly Understood to Reflect Homophobic Phrases and Tropes.

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[7] The Challenged Statements include the following:

a) On July 19, 2024, the defendant published a post on the Blog which states in part:

> Why hasn't the Sandher crime family been taken down yet? Their laundry list of serious crimes may include money laundering, murder conspiracy, drug smuggling, drug trafficking, extortion, human trafficking, fraud, and terrorism. The reasons are many. Cops say lack of resources is the top one. A task force is needed to deal with the entire Sikh Punjabi gangster/terrorist problem in Canada.

b) On or about August 3, 2024, the defendant published a post on the Blog which states in part:

> Zindashti has a very long, very close relationship with the Khalistan Tiger Force and Bir Singh Sandher. Orosman Garcia Arevalo and Gurtaj Sandher knew each other well, and Gurtaj Sandher was initially supposed to be the second assassin, but was switched in favor of Harpreet Singh Majhu. Its said this was done because Gurtaj Sandher had not yet proven himself to the Sinaloa Cartel. Considered an asset, he would remedy that and spill blood to cement his status with the cartel a year later.

c) On or about August 8, 2024, the defendant published a post on the Blog which states in part:

> This blogger cannot imagine what kind of elected retard supports an open Khalistani terrorist, Sinaloa Cartel drug importer, and money launderer. Tom Dryas is so hopelessly obtuse it is unbelievable. He has zero clue. None. Bir Singh Sandher has polluted into a Kelowna ditch for 7 years. He has undercut all other growers, including those in B.C. Tree Fruits, for 20 years. He likely has $2 billion tied up in Kelowna alone yet cannot dig a $25k lined sewage lagoon to comply

> with the law. What manner of toad people run Kelowna City Hall whilst throwing taxpayer money at criminals?

[8] On July 4, 2024, counsel for the plaintiffs sent a cease and desist letter to the defendant, including to the email address drstoxxman@gmail.com. The defendant responded negatively. Since then, the defendant has made further posts, including posts about plaintiffs' counsel and sent numerous emails to various lawyers and employees of the plaintiffs' counsel's firm.

[9] The plaintiffs deny that the Challenged Statements are true. However, in relation to the Environmental Claims, Gurtaj admits to the following:

> As acknowledged in two press releases posted to our website on March 22 and April 17, 2024, Sandher has, in recent years, had challenges with our wastewater management system…
>
> Sandher has received two administrative penalties from the Minister of Environment - $32,000 in 2018 and $78,368 in April 2024 – for unauthorized discharge of effluent from our facilities.

[10] The plaintiffs claim that the Campaign has caused them irreparable harm, including:

a) Fear for their personal safety when visiting India. This fear caused the family to cancel a customary trip to India to visit family and prepare for a family wedding.

b) Damage to the individual plaintiffs' standing and reputation in the small and close-knit Okanagan community. Bir and his wife provide evidence that they no longer attend their temple and do not practice their religion in their chosen way because of the treatment they receive in public.

c) Gurtaj says he deals with anxiety when interacting with anyone he doesn't know out of fear for whether they have read the defendant's publications.

d) Fear of racist and aggressive behaviour towards themselves and members of their wider family.

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e) Sandher will continue to suffer significant damage to its reputation and relationship with customers, consumers, and the government, and impairment to its ability to be competitive with other suppliers.

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[11] The defendant has brought an application to dismiss the plaintiffs' action pursuant to s. 4 of the *Protection of Public Participation Act*, S.B.C. 2019, c. 30 [*PPPA*].

[12] The defendant has been found liable for damages of at least $190,000 in other matters, and received indigent status in two other actions that allege that he published defamatory comments.

III. <u>ANALYSIS</u>

A. The Legal Principles

[13] The overarching test for a preliminary mandatory injunction is well known. An injunction may be granted by an interlocutory order of this Court in cases in which it appears to be just or convenient that the order be made: *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 39(1); *Supreme Court Civil Rules*, Rule 10-4.

[14] That said, the plaintiffs accept that the tests for granting an injunction to prevent harassment and defamation are somewhat different. Specifically, the threshold for obtaining an injunction to prevent alleged defamation is now higher.

[15] Assuming for the moment that there is a tort of harassment recognizable in British Columbia, the applicable test for an injunction to prevent such harassment would be the standard three-part test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR*]. The applicant must establish that:

a) there is a serious question to be tried;

b) the applicant will suffer irreparable harm if the injunction is not granted; and

c) the balance of convenience favours the granting of the injunction.

[16] On the other hand, the applicable test for an injunction to prevent defamation is the test set out recently by the BC Court of Appeal in *Yu v. 16 Pet Food & Supplies Inc.*, 2023 BCCA 397, where the Court stated:

> [71] I would formulate the test as follows:
>
> 1. The applicant must demonstrate that the impugned words are manifestly defamatory such that a jury finding otherwise would be considered perverse. To do so, the applicant must establish that:
>
> a. the impugned words refer to them, have been published, and would tend to lower their reputation in the eyes of a reasonable observer; and
>
> b. it is beyond doubt that any defence raised by the respondent is not sustainable.
>
> 2. If the first element has been made out, the court should ask itself whether there is any reason to decline to exercise its discretion in favour of restraining the respondent's speech pending trial.
>
> [72] The second aspect of the test should take account of the full context before the court. Without intending to provide an exhaustive list of considerations, at the second stage, the court can consider factors such as the credibility of the impugned words, the existing reputation of the applicant, whether the applicant will suffer irreparable harm and whether the respondent is likely to continue to publish the impugned words.
>
> [73] If the impugned words are not credible, the applicant already has a deservedly poor reputation, an award of damages will suffice and/or the respondent is unlikely to continue to publish the impugned words, the court should normally decline to make an interlocutory order. Such an order would typically be either of little value or unnecessary.

[17] As such, the challenges facing the plaintiffs differ as between the two torts advanced in the Notice of Civil Claim:

a) For the alleged harassment tort, the real question is whether there is a serious question to be tried, which in this case involves a consideration of whether the tort:

i. exists, and

ii. is adequately pled.

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b) For the alleged defamation tort, the real question is whether the higher standard for obtaining an injunction set out in *Yu* has been cleared.

B. Harassment

[18] The merits threshold for most applications seeking a preliminary injunction is a low one. The applicant only needs to establish that the application is not frivolous or vexatious. An 'arguable' case is sufficient: *Harm Reduction Nurses Association v British Columbia (Attorney General)*, 2023 BCSC 2290 at para. 48. Whether an action raises a serious question to be tried is to be determined by a motions judge based on common sense and an extremely limited review of the merits. A novel claim may constitute a serious issue to be tried: *2788610 Ontario Inc. v. Bhagwani*, 2022 ONSC 905 at para. 15.

[19] No court in British Columbia has yet decided on the merits whether the tort of harassment is recognized at law. Courts in British Columbia have referred to, but explicitly declined to decide, whether the tort of harassment exists. The Court has, however, considered the test that may apply if a tort of harassment exists, finding in *obiter* that the plaintiff would be required to establish:

a) outrageous conduct by the defendant;

b) the defendant's intention of causing or reckless disregard of causing emotional distress;

c) the plaintiff's suffering severe or extreme emotional distress; and

d) actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

See *Mainland Sawmills Ltd. v. IWA - Canada*, 2006 BCSC 1195 at para. 17; *Gokey v. Usher*, 2023 BCSC 1312 at para. 211.

[20] The Alberta Court of King's Bench and the Ontario Superior Court of Justice have recognized the torts of harassment and internet harassment, respectively. The

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Alberta Court of King's Bench has recognized a tort of harassment and developed a test requiring the plaintiff to establish that the defendant:

a) engaged in repeated communications, threats, insults, stalking, or other harassing behaviour in person or through or other means;

b) that he knew or ought to have known was unwelcome;

c) which impugn the dignity of the plaintiff, would cause a reasonable person to fear for her safety or the safety of her loved ones, or could foreseeably cause emotional distress; and

d) caused harm.

See *Alberta Health Services v. Johnston*, 2023 ABKB 209 at para. 107.

[21] Similarly, the Ontario Superior Court of Justice has recognized a tort of internet harassment to prevent online attacks and bullying. In *Caplan v. Atas*, 2021 ONSC 670 at para. 171, Justice Corbett defined the test as follows:

> [W]here the defendant maliciously or recklessly engages in communications conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance, with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff, and the plaintiff suffers such harm.

[22] The Ontario Court of Appeal has declined to determine whether the tort of internet harassment is a recognized cause of action, instead simply recognizing that such a tort had not yet been recognized at the appellate level: *40 Days for Life v. Dietrich*, 2024 ONCA 599 at para. 60. The Court stated that the question of whether the tort of internet harassment should be recognized at the appellate level should be addressed in a more suitable case.

[23] The plaintiffs thus face two challenges:

a) establishing that there is an arguable case that the tort of harassment will be recognized in BC; and

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b) establishing that they have adequately established that the tort is available to these plaintiffs on the facts pled.

[24] Although the harassment tort has not yet been formally recognized in BC, I am prepared to accept that the state of the law is such that there is a good arguable case that it would be recognized:

a) In *Mainland*, the court recognized this possibility and went so far as to discuss the test that should be used if the tort was adopted; and

b) There is pan-Canadian trial-level support for the establishment of such a new common law tort.

[25] As such, it is not so much the viability of the tort generally that is the difficulty for the plaintiff here, but the tort's specific viability in this case. In terms of the proper approach to cases alleging harassment in BC, I find that it would be improper to:

a) invoke *Mainland*'s *obiter* discussion to help establish the tort's viability in BC,

b) but simultaneously ignore *Mainland*'s *obiter* recitation of the test for the new tort, in favour of more easily satisfied tests recently adopted by trial courts in other jurisdictions.

[26] The proposed *Mainland* test requires that the plaintiffs suffer "severe or extreme emotional distress." The plaintiffs' difficulty in the present case is that I do not see that they have pleaded such effects, nor does the affidavit evidence support a finding that such a high level of distress was reached. There is no evidence that any of the plaintiffs have sought medical assistance for the challenges they have faced because of the alleged harassment. They discuss the serious damage to their family's reputation, but provide far less evidence about the impact on each of them personally.

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[27] As such, I find that, based on the present pleadings and legal framework in British Columbia, there is no serious question to be tried in relation to the potential tort of harassment. As such, no injunction may be issued based on this plea.

[28] Had I found that the harassment tort had the necessary viability on the facts of this case, I would have concluded that the plaintiffs had satisfied the irreparable harm and balance of convenience aspects of the test. The plaintiffs have provided adequate evidence of harm of the type which cannot be quantified in monetary terms. Further, even if the plaintiffs' loss was compensable by damages, the evidence is that the defendant is impecunious.

[29] In terms of the balance of convenience, this stage of the test requires a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits, considering factors such as the following:

a) the adequacy of damages as a remedy for the applicant if the injunction is not granted and for the respondent if an injunction is granted. Here there is a real risk that some of the harm cannot be compensated by money;

b) the likelihood that if damages are finally awarded, they will be paid. Here there is a real risk that any damages awarded will not be paid;

c) other factors affecting whether harm from granting or refusing the injunction would be irreparable;

d) which of the parties has acted to alter the balance of their relationship and so affect the status quo;

e) the strength of the applicant's case;

f) any factors affecting the public interest; and

g) any other factors affecting the balance of justice and convenience.

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See *526901 B.C. Ltd. v Dairy Queen Canada Inc.*, 2018 BCSC 1092 at para. 29.

[30] I find that the plaintiffs will suffer greater harm from the refusal of this application than the defendant will should this Court grant it. The harm that the plaintiffs will suffer is outlined above, and there is no apparent damage to the defendant should the injunction be granted. If there were, any damages should be minimal and compensable by the plaintiffs, who are individuals and a corporation involved in a relatively large business operation.

[31] There is no real countervailing factor requiring the ongoing publication of any harassing material.

C. Defamation

[32] I reach the same conclusion as to irreparable harm and balance of convenience in relation to the alternative defamation tort, based largely on the same analysis. While there is a public interest in genuine reporting on true facts; false, damaging, maliciously, or recklessly published information serves no positive public purpose.

[33] The more difficult issue in relation to the imposition of an injunction based on the defamation tort is the heightened merits standard set out in *Yu*. Again, the *Yu* test requires the plaintiffs to establish that:

a) the impugned words refer to the plaintiffs, have been published, and would tend to lower the plaintiffs' reputation in the eyes of a reasonable observer;

b) it is beyond doubt that any defence that could be raised by Mr. MacAskill is not sustainable; and

c) there is no reason to decline to exercise the court's discretion in favour of restraining the respondent's speech pending trial.

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[34] The first and third elements are clearly established on the facts of this case. In terms of the first element, the defendant did not advance any real argument to the contrary. He did not deny publishing the Challenged Statements or that the Challenged Statements were referring to the plaintiffs. I accept the plaintiff's submission that, in their natural and ordinary meaning or, in the alternative, by way of innuendo, the Challenged Statements meant and were understood to mean that the plaintiffs:

a) are involved in illegal activity;

b) are involved in criminal activity;

c) are involved in immoral activity;

d) are involved in unethical activity;

e) are involved in activity related to terrorism;

f) are corrupt;

g) are dishonest;

h) lack integrity;

i) cannot be trusted; and/or

j) associate or conduct business with persons who engage in criminal, illegal, or immoral activities.

[35] What remains at issue is whether it is "beyond doubt" that any defence that the defendant could raise is not sustainable. There is limited authority to date on the application of this new test. However, this is the same type of language used in determining whether pleadings should be struck. In *Steveston Seafood Auction Inc. v. Bahi*, 2013 BCSC 1072, Mr. Justice Abrioux, then of this court, stated.

> [19] These [principles] can be summarized as follows:

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> (a) The test on this application is the same as under Rule 9 – 5. The proposed third party must establish beyond doubt that the pleadings disclose no cause of action. The court is permitted to reject proposed claims only if the action is “bound to lose” or there is no *bona fide* triable issue.

[36] In the most recent decision considering the new *Yu* test, *Amber Mortgage Investment Corp. v Guo*, 2024 BCSC 1553, the Court stated as follows, in *obiter*:

> [91] However, the allegations regarding Amber’s financial health are not completely refuted by the financial documents relied on by Amber. I say this for the following reasons…
>
> [92] Thus, despite the financial evidence provided to the Court thus far, it is possible that the Defendant could still show that Amber is in severe financial difficulty.
>
> [93] The possibility that Amber is in significant financial trouble is also given some credence by the Notice of Application itself which suggests that Amber has been put into a dire financial situation and its entire existence may be under threat. …
>
> ...
>
> [97] In my view, the Applicant has failed to establish that it is impossible for the defence of justification to succeed. I say this despite the evidence provided by the Plaintiff. In my view, that evidence does not entirely remove the possibility that the statements attributed to Mr. Guo regarding the company’s financial health, are true.
>
> [Emphasis added.]

[37] The language “completely refuted”, “impossible”, “given some credence”, and “entirely remove” shows how difficult it will be for a plaintiff to meet the new *Yu* standard.

[38] With this guidance in mind, I am not satisfied that the heightened standard is met in relation to the Environmental Claims. The defendant indicated an intention to rely on the defence of justification in relation to such claims. As the Court stated in *Amber Mortgage*:

> [89] The defence of justification will succeed if the defendant proves the truth of the statement. This does not mean that each and every word must be proven to be true. Nor is the defendant required to prove the literal truth of every word. At issue is whether the substance of the allegation or “the sting of the charge” is true. Where the gist or the sting of the charge is proven to be true, any minor inaccuracies will not defeat the defence. Conversely, if the

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> overall impression of the publication is false, the defence fails even if some or even all of the literal words are proven to be true....

[39] In light of the evidence of environmental problems outlined above, I cannot say that it is “beyond doubt” that such a defence will not succeed in relation to such claims. This conclusion covers the Challenged Statements outlined in Schedule A under the heading “13. Sandher Fruit Packers is Operated in an Illegal and Criminal Manner”. It does not include the Challenged Statements found in Schedule A under the heading “14. Sandher Fruit Packers Steals Water from the Crown”, as I see no evidence supporting the truth of these latter comments.

[40] I note parenthetically that had I been in a position to apply the traditional interlocutory injunction merits test rather than the heightened *Yu* standard, I would have found that it was satisfied with respect to the Environmental Claims.

[41] Beyond this one reservation for the Environmental Claims, I find that the heightened standard has been met in relation to the Drug, Terrorism, and Crime-Related Claims set out in the balance of Schedule A. The Challenged Statements are defamatory. Once again, the only defence the defendant suggested he planned to advance in relation to these claims was justification. However, unlike the situation concerning the Environmental Claims, there is no useful evidence before me supporting such hurtful and extreme statements beyond the defendant’s own personal belief in their truth. In *Connective Support Society v. Melew*, 2024 YKSC 15, the Court noted that the onus of proof in relation to a defamation defence is on the defendant: para. 26. It is notable that in that case, the Court also found that the test was met for some allegations, but not others. In relation to those statements where the Court found that the test was met, the Court stated that “no facts have been provided in the posts to support these assertions”: para. 33.

[42] It is possible that further evidence will come out at trial in support of the defendant’s position in relation to the remaining claims, but that is not the basis upon which I must make my assessment of the reasonableness of issuing a preliminary injunction at this time.

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[43] I reiterate that in relation to the statements that I have found meet the *Yu* test, I do not find that there are any residual factors that would cause me to exercise my discretion to refuse to grant the injunction. The words are not credible. There is no indication that the plaintiffs otherwise have a poor reputation. There is evidence of irreparable harm being caused to the plaintiffs. Absent an injunction, the respondent is likely to continue to publish the Challenged Statements: *Connective Support Society* at paras. 44-50.

IV. CONCLUSION

[44] I find that an injunction should issue preventing the continued publication, and requiring the removal, of the Challenged Statements identified above. The form of order will need to be amended from that proposed in the plaintiff's application in order to:

a) remove any reference to the tort of harassment, and the remedies based on the tort of harassment;

b) particularize the specific Challenged Statements I found met the *Yu* standard; and

c) remove any reference to the Challenged Statements I found did not meet the *Yu* standard.

[45] In light of the upcoming *PPPA* application that could undercut the underlying foundation for the injunction, the order should also provide that it is an interlocutory and interim injunction pending: (1) any amendments necessarily required by any order issued as a result of the *PPPA* application, (2) any amendments required by the court hearing the *PPPA* application, or (3) trial.

[46] I would dispense with the self-represented defendant's signature on the order.

[47] In terms of costs, if the parties are unable to agree within 15 days, then:

a) the plaintiffs may submit a written brief of no longer than five pages;

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b) the defendant shall have the right to respond with a brief of no longer than five pages within ten days of receiving the plaintiffs' costs brief; and

c) The plaintiffs shall then have five days to file a reply brief of no longer than three pages.

"The Honourable Mr. Justice Branch"

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