SUPREME COURT OF YUKON

Citation: *Spurvey v Melew*
2024 YKSC 30

Date: 20240619
S.C. No. 23-A0156
Registry: Whitehorse

BETWEEN:

KAITLYN SPURVEY

PLAINTIFF

AND

YONIS MELEW

DEFENDANT

AND

S.C. No.: 24-A0005
Registry: Whitehorse

BETWEEN:

GEORGINA MCKEE

PLAINTIFF

AND

YONIS MELEW

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for Kaitlyn Spurvey
Counsel for Georgina McKee — Luke S. Faught

No one appearing for the Defendant

REASONS FOR DECISION

Overview

[1] The defendant, Yonis Melew, was prevented by a court order dated March 1, 2024, from publishing or causing to be published any statement referencing the

plaintiffs, Georgina McKee and Kaitlyn Spurvey as Black-hating, racist, or fascist. The defendant had posted on Facebook many comments to this effect about the plaintiffs beginning in the summer of 2023. Those posts remain on his Facebook page. Mr. Melew has also made new posts since the court order was granted, that the plaintiffs say breach the order. The plaintiffs (the "applicants") now apply for a declaration that Mr. Melew (the "respondent") is in contempt of this court order.

[2] Along with a finding of contempt, the applicants also request an order that the respondent be punished by fine and that he pay special costs.[1]

[3] The issues for this Court to decide are: 1) whether the respondent's failure to remove from the Facebook page the posts found to be defamatory for the purpose of the interlocutory injunction is a contempt of the court order; 2) whether the new posts made since the court order constitute contempt; and 3) if the respondent is found guilty of contempt of court, what is the appropriate penalty.

[4] For the following reasons, I find the respondent in contempt of court for failing to remove from Facebook the posts that gave rise to the action in defamation. The new posts do not fall within the scope of the order so are not contemptuous. The appropriate penalty is $1,500 and another $1,500 if the posts are not removed by July 31, 2024.

Background

[5] The applicants are management employees of Connective Support Society ("Connective"), a community-based social services non-profit society that among other things manages and operates the emergency shelter at 405 Alexander Street in Whitehorse. The respondent is a former employee of Connective who worked at

[1] The notice of application and outline request the applicant be punished and pay special costs but I have assumed this was a typographical error.

405 Alexander Street. The applicants brought actions in defamation against him because of the statements he posted on the Facebook page he operates called Canadiansforfairtreatment. This Court found some of the statements were manifestly defamatory and that the respondent has no sustainable defence, and granted an interlocutory injunction preventing the respondent from publishing them.

[6] The court order dated March 1, 2024, provided:

> 1. An interlocutory injunction is granted, enjoining the Defendant, Yonis Melew, his agents, servants or any others acting on his behalf, from publishing or causing to be published by any means, any defamatory statement referring to Katilyn Spurvey by name, pseudonym, address, photograph or by any other means of identifying her including any references to Kaitlyn Spurvey as a person who is black-hating, racist or fascist.

[7] Counsel for the applicants emailed the respondent on March 4, 6, and 8, 2024, to advise he was breaching the order by leaving the defamatory posts on his Facebook page and requesting he remove them immediately. On March 8, 2024, counsel further advised the respondent his clients would bring an application for an order for contempt of court if the posts were not removed by March 11. The respondent did not respond.

[8] The same Facebook posts that were the subject of the interlocutory injunction remain on the Facebook page. The respondent posted on March 5 and 6, 2024, comments referring to Connective as cold-blooded, racist, and Black-hating but did not reference the applicants by name. Since March 6, 2024, on the evidence before the Court, there appear to be no further posts referring to the applicants with the defamatory words set out in the court order.

Preliminary Issue – Absence of the respondent on May 7, 2024

[9] The respondent is self-represented. On March 20, 2024, this Court heard the applicants' application to settle the interlocutory injunction order granted on March 1, 2024, because the respondent refused to respond to their multiple requests to review and approve that order. At the same time, the Court heard the applicants' application for substituted service of the notice of application and supporting materials for this application for a civil contempt order, as well as of future materials required to be served in this litigation. The respondent did not appear in court on March 20, 2024, despite being duly served.

[10] The affidavit evidence provided in support of the application for substituted service included details of the respondent removing his email address in a notice of change of address for delivery, failing to respond to emails at the address provided, advising the Court he had not received application materials despite the Sheriff's photographs of their delivery in hard copy outside his apartment door, and driving his vehicle in a manner that caused Deputy Sheriffs attempting to serve material to fear for their safety.

[11] This Court granted the order for substitutional service of all documents related to this litigation by email at the most recent email address provided by the respondent on March 20, 2024.

[12] On April 5, 2024, the date originally scheduled to hear the contempt order application as well as another application for an interlocutory injunction to prevent the respondent from publishing defamatory comments about Connective, the respondent did not appear in court. On April 5, 2024, the court registry received a letter from the

respondent dated April 4, 2024, advising he had flown to Ethiopia because his grandfather was dying; he would be back after the funeral; he would report to the Court on his arrival and continue "from where we left off" when he was in court previously. The letter further advised that his friend Brandon would attend court on his behalf and report to the Court about the emergency. On April 5, 2024, Brandon was not present in court. Counsel for the applicants adjourned the contempt motion to May 7, 2024.

[13] The respondent did not communicate further with the court registry after his letter of April 4, 2024.

[14] At the hearing on May 7, 2024, the respondent did not appear, although had been properly served by email and with a hard copy of the materials.

[15] Given this background and the absence of any explanation from the respondent, or request from him for an adjournment, I decided to proceed with this application on May 7, 2024.

Law

[16] The Ontario Superior Court in *Antoine v Antoine*, 2024 ONSC 1397 ("*Antoine*"), provided a comprehensive review of the law of contempt. I have drawn from that case in the following summary.

[17] The remedy of contempt of court comes from the common law (sometimes called judge-made law) and continues to evolve through case law (*Antoine* at para. 9). The Supreme Court of Canada in *United Nurses of Alberta v Alberta (Attorney General)*, [1992] 1 SCR 901 ("*United Nurses*") stated contempt of court is based on the power of the court to uphold its dignity and process: "[t]he rule of law is directly dependent on the

ability of the courts to enforce their process and maintain their dignity and respect" (*United Nurse* at 931).

[18] The *Rules of Court* of the Supreme Court of Yukon (the "*Rules*") govern the court's jurisdiction for contempt motions. Rule 59 includes options for remedy and procedural requirements for bringing an application for contempt.

[19] Examples of contempt of court for conduct outside of the courtroom include wilful breach of a court order, fabrication of evidence, and breach of an undertaking to the court (*Antoine* at para. 11).

[20] There are two categories of contempt: criminal and civil. Examples of criminal contempt include bribing a juror or witness, or attempting to influence a judge – conduct that includes an element of public defiance of the court's process in a way that is calculated to reduce societal respect of the courts (*United Nurses* at 931). Its purpose of prohibiting conduct that undermines a strong and effective justice system is the public element aspect (*United Nurses*; *Fresno Pacific University Foundation v Grabski*, 2015 MBCA 70).

[21] Examples of civil contempt include breaching the rules of court in a civil proceeding or disobeying a court order or judgment. The civil contempt remedy exists to address private wrongs (*United Nurses*), to ensure a party complies with a court judgment or order. It is not intended to be punitive (*Chiang (Re)*, 2009 ONCA 3 at para. 11; *Carey v Laiken*, 2015 SCC 17 ("*Carey*") at para. 31), however, punishment and deterrence are relevant at the stage of remedy, to prevent future breaches of court orders and to repair damage to the administration of justice.

[22] Procedurally in the Yukon, the applicant must comply with the notice provisions in Rule 59 and the terms of the order must be operative at the time of the hearing.

[23] The test for civil contempt has two stages. The first stage requires the applicant to establish three elements (*Carey* at paras. 32-35). First, the order allegedly breached must state clearly and unequivocally what should and should not be done. Second, the party alleged to have breached the order must have had actual knowledge of it — and this can include knowledge that is inferred or if the party is wilfully blind. Third, the party allegedly in breach must have intentionally done the act the order prohibits, or failed to do an act the order compels. In other words, it is not necessary to prove the party intended to breach the order; it is only necessary to prove the party intentionally committed an act or failed to do an act which has the effect of breaching the order.

[24] Because civil contempt proceedings are quasi-criminal in nature, the following interpretive principles and parameters apply:

i) the evidence in support of the application must conform to the rules of admissibility at trial: no hearsay, opinion, or conclusions;

ii) the applicants have the onus to prove the elements of contempt beyond a reasonable doubt; and

iii) if the order in question is ambiguous, the person alleged to have breached it is entitled to its most favourable construction.

(Peel Financial Holdings Ltd v Western Delta Lands Partnership, 2003 BCCA 551 at para. 18,)

[25] The second stage occurs only if the applicant establishes all of the essential elements beyond a reasonable doubt. If they do not, the inquiry is at an end and the court must dismiss the application. At the second stage, the court decides whether to

exercise its discretion to decline to make a contempt finding based on the facts and circumstances of the case at hand; and if it declines to do so, whether it should order a less severe remedy for the moving party (*Carey* at paras. 31-32; *Fiorito v. Wiggins*, 2015 ONCA 729 at para. 17).

[26] The court in *Antoine* summarized the purpose of civil contempt orders well at para. 14:

> The remedy of civil contempt of a court order is a mechanism designed to emphasize that orders cannot be ignored or disobeyed. It is founded on the fundamental principle that a court order stands binding and conclusive unless it is set aside at first instance or on appeal or is lawfully quashed. … The remedy reinforces the point that any wilful disobedience of court orders is a very serious matter that strikes at the very heart of the justice system. … (citations omitted)

Analysis

Procedural Issues

[27] Notice as required by Rule 59 was provided to the respondent, as outlined in the section above about the preliminary issue of the respondent's absence. The notice of application heard on March 20, 2024, clearly set out the background facts, the order, and the reason for the contempt application.

[28] The original Court order of March 1, 2024, was operative at the time of the hearing and continues to be so.

Order was clear and unambiguous

[29] The order prohibits the respondent from publishing or causing to be published any defamatory statement about the applicants that refers to Black-hating, racism or fascism.

[30] The Facebook posts containing the defamatory statements date to the summer of 2023. They continue to exist on the Facebook page. Failure to remove them constitutes a publishing of the material, contrary to the order.

[31] In *R v The Canadian Broadcasting Corporation*, 2017 ABQB 329, the court was asked to decide whether CBC was guilty of criminal contempt for publishing a report on its website about the death of a young person, identified by her name, photo and other personal information, before a publication ban prevented the publishing of any information that could identify her. CBC was aware of the publication ban and although complied with it in further reports, did not remove or edit the earlier reports. Although not a defamation case, the court referenced defamation to distinguish it from the publication ban and criminal contempt circumstances. The court wrote that in the defamation context, publication, normally defined as “to make public, to make generally known, and to disseminate to the public: Merriam-Webster online dictionary” also occurs every time an article is accessed (at para. 23). I agree with this definition.

[32] In this case, the lawyer for the applicants emailed the respondent on March 4, 6, and 8, 2024, for approval of the order granting the interlocutory injunction and confirmed in each of those emails that failure to take down the existing posts containing the defamatory material noted in the order would be a breach of the order.

[33] The meaning of the order is clear on its face and its interpretation does not depend upon evidence outside of the order (*Antoine* at para. 26).

Actual Knowledge or Wilful Blindness of the Terms of the Order

[34] The order granted was delivered orally in court, with reasons. The reasons set out the wording of the order that appeared in the order itself. The respondent was

present in the courtroom at the time the reasons were delivered and the order granted. He had actual knowledge of the order.

Intentionally failed to do an act that resulted in a breach of the order

[35] The question here is not whether the respondent wilfully and deliberately disobeyed the order, but whether he engaged in an intentional act or omission that breached the order. Proof of an intentional breach of the order or of an intention to bring the administration of justice into disrepute is not required.

[36] Here the evidence that the impugned Facebook posts remain on the Canadiansforfairtreatment Facebook page comes from the affidavit of the paralegal from the applicants' law firm, who provided all of the other uncontradicted affidavit evidence in support of the interlocutory injunction.

[37] The paralegal further provided by affidavit for this hearing printed copies of posts dated after the date of the order, March 1, 2024, containing the defamatory words of Black-hating, racism and fascism to describe the applicants. There are no further posts of this kind after March 1, 2024.

[38] The respondent's failure to remove the Facebook posts containing statements ruled to be defamatory for the purpose of the interlocutory injunction constitutes an ongoing breach of the order, as they continue to be published defamatory statements.

Discretion to decline to make a contempt finding

[39] All of the required elements for a civil contempt order have been proven beyond a reasonable doubt. As a result the second stage is to determine whether discretion should be exercised to decline to make a contempt finding.

[40] The Supreme Court of Canada in *Carey* stated that as a matter of judicial discretion, a contempt order should not be used routinely as a compliance mechanism, or as a way to enforce orders. Instead, it should be invoked cautiously, with great restraint and as an enforcement power of last resort to address matters that are "not trifling" (*Antoine* at para. 33).

[41] In this case, the respondent's disregard of the court order is consistent with the pattern of behaviour he has demonstrated throughout this proceeding. The difficulties the applicants have had in serving him with materials in this matter, resulting in the need for a substitutional service order, and his failure to appear in court on recent occasions without explanation are other examples of his unwillingness to comply with court processes.

[42] For these reasons, along with the fact that the very purpose of actions in defamation is to stop the publication of the prohibited material, a contempt finding is appropriate.

Penalty

[43] As noted above, compliance, not punishment, is the primary objective of the remedy for civil contempt orders. The importance of ensuring respect for court processes is also paramount.

[44] Factors to be considered in deciding on a sentence or a penalty for contempt of court were thoroughly set out in the case of *Health Care Corp of St John's v Newfoundland and Labrador Assn of Public and Private Employees*, [2001] NJ No 17 (Nfld TD) cited in *Langford (City) v dos Reis*, 2016 BCCA 460 ("*City of Langford*") at para. 16. The factors relevant to this case are as follows:

1. the inherent jurisdiction of the court, as a superior court, allows for the imposition of a wide range of penalties for civil and criminal contempt;
2. deterrence, both general and specific — but especially general deterrence — as well as denunciation are the most important factors to be considered in the imposition of penalties for civil, as well as criminal, contempt;
3. it is the defiance of the court order and not the illegality of any actions which led to the granting of the court order in the first place, which must be the focus of the contempt penalty;
4. imprisonment is normally not an appropriate penalty for civil contempt where there is no evidence of active public defiance (such as public declarations of contempt; obstructive picketing; and violence) and no repeated unrepentant acts of contempt; and
5. where a fine is to be imposed, the level of the fine may appropriately be graduated to reflect the degree of seriousness of the failure to comply with the court order.

[45] The applicants request the imposition of a fine of $500 for each day that the posts remain on the Facebook page, retroactive to March 2, 2024.

[46] In *Gwich'in Development Corporation v Alliance Sonic Drilling Inc et al*, 2009 YKSC 19 ("*Gwich'in*"), a private commercial dispute where the party in contempt disobeyed a court order, the Court imposed a fine of $1,000.

[47] In *Whitehorse (City of) v Annie Lake Trucking Ltd*, 2022 YKSC 54, this Court ordered a fine of $2,500 against each one of the three partners of the Annie Lake

Trucking company for breaching a consent order entered into with the City of Whitehorse that terminated Annie Lake Trucking's lease of land owned by the City, confirmed they had no ongoing rights to the lands, and required the business to cease commercial operations and vacate the land by a certain date. Annie Lake Trucking did not vacate the land by the agreed upon date and continued their commercial and other activities.

[48] In our neighbouring jurisdiction of British Columbia, the court in *City of Langford* set out a range of fines imposed in other cases for contempt orders, between $1,500 and $7,500.

[49] In this case, the respondent has ignored the order by not removing the posts that have been found to be defamatory in the decision on the interlocutory injunction application. Their continued presence on his Facebook page is publication and they can continue to be accessed. His postings since March 1, 2024, have not breached the order, suggesting he is aware of what the order prevents him from doing.

[50] The fine amount sought by the plaintiffs far exceeds the range of fines imposed by the Court in this jurisdiction and in British Columbia for civil contempt orders. In my view, the goal of deterrence will be met with a fine of $1,500.

[51] If the posts are not removed by July 31, 2024, a further $1,500 fine will be imposed. If the posts remain on the Facebook page after that date, this matter may return to court by way of case management in order to address the issues.

[52] As noted by the courts in the *Gwich'in* and the *City of Langford* cases, contempt is an offence against the authority of the court and the administration of justice and is a

matter between the entity or the person in contempt and the court, not between litigants. The fines shall be paid to the Territorial Treasurer.

Costs

[53] The plaintiffs have requested special costs to which they are entitled under Rule 59(4) and at common law. In *City of Langford*, the court stated at para. 28, quoting from *North Vancouver (District) v Sorrenti*, 2004 BCCA 316:

> [28] It is axiomatic that contempt of a court order is reprehensible conduct, the signal feature of a special costs award. Such an award also serves to indemnify a party who is required to bring contempt proceedings to have an order obeyed. Therefore, such an award should be concomitant to a finding of contempt. I refer to this Court's disposition in *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316:
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> > [20] In her able submissions, however, Ms. Marzari referred us to the comments of Southin J.A. for the Court in ***Everywoman's Health Centre Society (1988) v. Bridges*** (1991), 54 B.C.L.R. (2d) 294, where she observed that it is a long-standing practice to award solicitor-client costs to the successful applicant in a civil contempt proceeding. She added that "[t]he practice is sound. A person who obtains an order from the court is entitled to have it obeyed without further expense to himself." …

[54] The applicants shall be awarded special costs for these contempt proceedings.

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DUNCAN C.J.