In the Court of Appeal of Alberta

Citation: Tuharsky v O'Chiese First Nation, 2025 ABCA 267

Date: 20250728
Docket: 2401-0242AC;
2401-0243AC
Registry: Calgary

Docket: 2401-0242AC

Between:

Connie J.M. Tuharsky

Respondent

- and -

Ian Carruthers, Jeffrey D. Pool, Jeffrey D. Poole Professional Corporation, Poole Lawyers and PL LLP

Appellants

Docket: 2401-0243AC

Between:

Connie J.M. Tuharsky

Respondent

- and -

O'Chiese First Nation, Douglas Beaverbones, Beatrice Carpentier, Barry Saulteaux, O'Chiese Energy (GP) Inc, O'Chiese Energy Limited Partnership, O'Chiese Utilities (GP) Limited, O'Chiese Utilities Limited Partnership

Appellants

The Court:

The Honourable Justice Jolaine Antonio
The Honourable Justice William T. de Wit
The Honourable Justice April Grosse

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice L. A. Silver
Dated the 28th day of August, 2024
Filed on the 27th day of September, 2024
(2024 ABKB 511, Docket: 2201 06332)

Memorandum of Judgment

The Court:

I. Introduction

[1] The respondent sued the appellants, alleging statements made in a filed pleading and during account review hearings were defamatory. The appellants applied to have the claim struck for disclosing no viable cause of action. An applications judge struck the claim, holding the impugned statements were made on occasions of absolute privilege. The respondent appealed. The chambers judge allowed the appeal, holding it was not plain and obvious that absolute privilege applied. The appellants appeal that decision.

[2] For the reasons that follow, we allow the appeal and strike the claim.

II. Background

[3] The application to strike was determined under Rule 3.68(2)(b) of the *Alberta Rules of Court*, Alta Reg 124/2010. As such, we set out the relevant background based on the facts alleged in the impugned statement of claim, assuming those facts to be true: *Alberta Rules of Court*, Rule 3.68(3).

[4] Between 2009 and 2019, the appellant O'Chiese First Nation ("O'Chiese") employed the respondent Connie Tuharsky as its general counsel. In the fall of 2010, the respondent recommended that O'Chiese retain DLA Piper (Canada) LLP to act as external counsel on certain oil and gas matters. O'Chiese accepted that recommendation and retained DLA Piper to act for it on a number of matters, including in relation to the preparation of three oil and gas joint venture agreements and subsequently as litigation counsel in a dispute related to those agreements.

[5] In October 2019, after ending its relationship with both the respondent and DLA Piper, O'Chiese retained the appellant law firm Poole Lawyers. On behalf of the O'Chiese First Nation and a number of its affiliated entities (collectively referred to here as "O'Chiese"), Poole Lawyers filed a statement of claim against DLA Piper and a number of its lawyers (collectively referred to here as "DLA Piper"). The statement of claim alleged, among other things, that O'Chiese had a potential "malpractice" claim against DLA Piper with respect to the firm's preparation of the oil and gas agreements, and DLA Piper had been acting in a conflict of interest as litigation counsel in disputes that arose regarding those agreements.

[6] In April 2020, DLA Piper filed a statement of defence, responding to the O'Chiese claim. In her statement of claim, the respondent did not plead particulars of the statement of defence.

[7] In May 2020, Poole Lawyers filed a reply to the statement of defence on behalf of O'Chiese. Although the respondent was not a party to the action, the reply made various allegations about her. It alleged DLA Piper had an influence over her, such that she did not provide O'Chiese objective advice but simply relayed what a DLA Piper lawyer directed her to relay, and she approved of engaging DLA Piper because of her loyalty to them. The reply asserted the respondent breached her obligations to O'Chiese by, among other things, failing to advise of the potential malpractice claim and conflict of interest, maintaining a loyalty to DLA Piper that superseded her loyalty to O'Chiese, failing to provide independent and objective advice, failing to ensure the legal expenses paid to DLA Piper were reasonable, and failing to ensure DLA Piper was fulfilling their obligations. O'Chiese did not add the respondent as a defendant. Instead, it asserted in the event its losses were caused by the fault of both DLA Piper and the respondent, it could recover its losses fully from DLA Piper and DLA Piper was at liberty to seek indemnity or contribution from the respondent.

[8] In addition to filing a claim against DLA Piper, O'Chiese also sought review of DLA Piper's accounts. Account review hearings were held before a review officer in February and November 2021. On February 17, during one of the hearings, a lawyer with Poole Lawyers on behalf of O'Chiese referenced the reply pleading and noted that it alleged the respondent "had not been acting with full loyalty to" O'Chiese. On November 3, during another review hearing, another Poole Lawyer explained that the reply pleading impugned the relationship between the respondent and DLA Piper. Counsel alleged the respondent and DLA Piper "kept things from Chief and Council". Counsel further explained that his firm may be retained "to make a claim against DLA Piper for their illicit relationship with [the respondent] and for overbilling".

[9] The respondent commenced a court action against the appellants O'Chiese, Poole Lawyers, two specific Poole lawyers, and others, alleging the statements made in the reply pleading and during the February and November 2021 account review hearings were defamatory. The appellants defended, asserting the reply pleading and oral submissions were protected by absolute privilege.

[10] The appellants applied under Rule 3.68 to have the respondent's claim struck for disclosing no viable cause of action.

III. Decisions below

[11] An applications judge issued a chambers endorsement granting the applications to strike. She noted allegations in pleadings are generally subject to absolute privilege. While in some cases questions can arise as to remoteness, she held that in this case the allegations contained within the reply were not remote from the court proceeding or gratuitous. The applications judge held the statements in the account review hearings were also made on occasions of absolute privilege. The review hearing was a quasi-judicial proceeding, and the statements made by O'Chiese's lawyers

were made during, incidental to, and in the processing and furtherance of the review. The respondent appealed to the chambers judge.

[12] By reasons dated August 28, 2024, the chambers judge granted the appeal and set aside the order striking the respondent's claim: *Tuharsky v O'Chiese First Nation*, 2024 ABKB 511 [*Chambers Decision*].

[13] The chambers judge stated absolute privilege attaches to communications made "during, incidental to, and in the processing and furtherance of, judicial or quasi-judicial proceedings", and that the statements at issue were made in judicial and quasi-judicial proceedings. However, she held it was not "clear and obvious" the statements were made "during, incidental to, and in the processing and furtherance of those proceedings", and therefore she concluded she could not strike the claim. She held it was necessary to examine the circumstances of making the statement "holistically and contextually to determine if there is an underlying connection between the making of the statement and the judicial or quasi-judicial proceedings", and that an assessment of "the purpose of making [the] statements" was "key": *Chambers Decision* at paras 12-15, 33, 67.

[14] The chambers judge held it was arguable some of the statements in the reply pleading were made "for a purpose unconnected to the action", suggesting they may have been made because of an upcoming labour complaint hearing. She noted the respondent was never properly brought into O'Chiese's action against DLP Piper and had no ability to defend herself against the allegations. The chambers judge also said it was unclear how the statements made about the respondent during the account review hearings were in furtherance of that proceeding. Again, she held it was arguable "the purpose of making the statements" was unconnected with the review of the DLA Piper accounts. She held "the purpose, use and circumstances of making these statements in connection with the purpose of the review hearing require further exploration": *Chambers Decision* at paras 47-65.

IV. Grounds of appeal

[15] The appellants appeal, arguing the chambers judge erred in law by: holding it was necessary to analyze the content as well as the context of the allegedly defamatory statements to determine whether absolute privilege applies; considering each statement made to be a distinct occasion; and applying case authorities that relate to extending absolute privilege beyond the well-established categories that apply in the present case.

V. Standard of review

[16] Rules 3.68(1)(a) and 3.68(2)(b) of the *Alberta Rules of Court* allow the court to strike all or any part of a claim where the statement of claim "discloses no reasonable claim". As the chambers judge correctly noted (*Chambers Decision* at paras 19-21), a pleading will only be struck under Rule 3.68(2)(b) if it is "plain and obvious that it does not disclose a valid claim". No

evidence may be submitted. The facts as pleaded are assumed to be true and the claim is assessed for its legal sufficiency: *SR v Edmonton (Police Service)*, 2024 ABCA 340 at para 13; *Gay v Alberta (Workers' Compensation Board)*, 2023 ABCA 351 at para 11; *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 20; *Alberta Rules of Court*, Rule 3.68(3).

[17] The ultimate determination whether to strike a claim is discretionary and is reviewed deferentially. However, whether a pleading discloses a cause of action is a question of law to which the correctness standard of review applies: *Okeke v Oakes*, 2025 ABCA 52 at para 10; *Co-Solve Solutions Inc v Purdy*, 2023 ABCA 324 at para 7, *Lameman v Alberta*, 2013 ABCA 148 at para 11. In this case, the central question is whether the doctrine of absolute privilege applies in the circumstances alleged in the statement of claim. That is a question of law, reviewable for correctness: *Liboiron v Majola*, 2007 ABCA 18 at para 7 [*Liboiron*]; *Wilson v Williams*, 2013 BCCA 471 at paras 53, 57-60 [*Wilson*].

VI. Analysis

A. Overview

[18] The statement of claim alleges the appellants made defamatory statements on three occasions: in the reply pleading filed on behalf of O'Chiese; at the account review hearing held on February 17, 2021; and at the account review hearing held on November 3, 2021. The reply pleading was filed in a Court of King's Bench action. The account review hearings were proceedings conducted pursuant to the *Alberta Rules of Court*.

[19] As acknowledged by the chambers judge, there is no dispute that these statements were made in "judicial or quasi-judicial proceedings". The "main question" was "whether the statements were made 'during, incidental to, and in the processing and furtherance' of those proceedings". To answer this question, the chambers judge considered whether absolute privilege extends to "malicious statements" and "irrelevant or gratuitous statements made about a person who is not a party or participant in the proceedings": *Chambers Decision* at paras 13-15.

[20] A misinterpretation of case authorities led the chambers judge into misdirection. To find absolute privilege applied, it was sufficient that the allegedly defamatory statements were made in filed court pleadings and during oral submissions before a court-designated review officer. The other two questions asked by the chambers judge were irrelevant in the circumstances. On the facts as pleaded, it is plain and obvious that the communications were made on occasions of absolute privilege and fell within the core of what is protected. That is the end of the inquiry. There is no factual nuance that would need to be determined on evidence at a trial.

B. Absolute means absolute

[21] Absolute privilege attaches to the occasion on which a statement is made, not the words used to make it. Communications made within a protected occasion, regardless of the words used, are protected and may not be the basis of an action in defamation: *Oei v Hui*, 2020 BCCA 214 at para 45 [*Oei*]; *Elliott v Insurance Crime Prevention Bureau*, 2005 NSCA 115 at para 114 [*Elliott*]; *Prefontaine v Veale*, 2003 ABCA 367 at para 10 [*Prefontaine*]; *Dechant v Stevens*, 2001 ABCA 39 at para 101 [*Dechant*] per McFadyen JA; Erika Chamberlain, Karen Eltis & Raymond Brown, *The Law of Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed (Toronto: Thomson Reuters, 2025) (loose-leaf updated April 2025, release 2) at §12:17 [*The Law of Defamation*].

[22] Providing immunity for statements made in court, regardless of their content, ensures that defamation actions do not deter parties and counsel from participating. It allows those involved in the administration of justice, including litigants, witnesses, advocates and judges, to speak freely without fear of being sued. It protects the vigorous and undistracted advocacy that is essential to our adversarial system: *Liboiron* at para 10; *Amato v Welsh*, 2013 ONCA 258 at para 37 [*Amato*]; *Jordan v De Wet*, 2016 ABCA 366 at para 21; *1704604 Ontario Ltd v Pointes Protection Association*, 2020 SCC 22 at para 123; *Curtis v McCague Borlack LLP*, 2024 ONCA 729 at para 11. "Freedom from vexatious litigation for honest participants is so important that the law will not take the risk of subjecting them to such danger in order that a malicious participant may be mulcted in damages": *Dechant* at para 33, citing V Veeder, "Absolute Immunity in Judicial Proceedings" (1909) 9 Col L Rev 463 at 469-70.

[23] A number of courts, including this one, have cited earlier editions of *The Law of Defamation* for the proposition that "[a]n absolute privilege or immunity attaches to those communications which take place during, incidental to, and in the processing and furtherance of, judicial or quasi-judicial proceedings": see, e.g., *Prefontaine* at para 10; *Elliott* at para 112; *Liboiron* at paras 10, 13; *Lefebvre v Durakovic*, 2018 BCCA 201 at para 22. This passage describes a variety of occasions on which absolute privilege will arise: *e.g.*, where statements are made "during", and also where they are made "incidental to", judicial or quasi-judicial proceedings. The current version of the text provides a separate footnote to different case authorities from various common law jurisdictions for each of "during", "incidental to", and "in the processing and furtherance of", and also states, "There is an absolute privilege for all those communications made in the course of, or incidental to, the processing and furtherance of judicial and quasijudicial proceedings" [emphasis added]: *The Law of Defamation* at §12:1, §12:17.

[24] The chambers judge reframed the inquiry in a subtle but important way when she queried "whether the statements were made 'during, incidental to, and in the processing and furtherance'" of the proceedings: *Chambers Decision* at paras 13. Rather than describing distinct ways in which a privileged occasion may arise, she treated "during", "incidental to" and "in the processing and

furtherance" as three necessary criteria for an occasion to exist. This approach led her to question whether statements she acknowledged were made "in the… Reply" pleading and "during the review hearings" were each individually "in the processing and furtherance" of the proceedings with a particular focus on the "purpose" behind each of the statements: *Chambers Decision* at paras 15, 47, 49, 52, 57, 62, 63, 64, 67. That approach was incorrect.

[25] A statement need not be "during" *and* "incidental to" *and* "in the processing and furtherance of" a proceeding for absolute privilege to apply. If nothing else, a statement made "during" a judicial proceeding will rarely also be "incidental to" that proceeding.

[26] Absolute privilege applies if a communication was made within a "step" of the judicial or quasi-judicial proceeding that has been recognized as affording absolute privilege: *Dechant* at para 49; *Liboiron* at para 13. Communications made in court or during a formal step in litigation lie at the core of what is protected by absolute privilege: *Elliott* at para 145; *Lincoln v Daniels*, [1961] 3 All ER 740 (CA) at 751-753 [*Lincoln*]. Statements made in pleadings or by counsel during oral submissions fall within that core and are protected: *Piikani Nation v Kostic*, 2018 ABCA 234 at para 35; *Abt Estate v Cold Lake Industrial Park GP Ltd*, 2019 ABCA 16 at para 39; *Oei* at para 48; *Rahman v Elia Associates*, 2025 ONCA 16 at para 6; *The Law of Defamation* at §12:26, §12:29.

[27] Here, the chambers judge's findings that the statements were made in a reply pleading and during the course of oral submissions should have been the end of the analysis. The statements were "made within a step recognized as affording the privilege": *Dechant* at para 49; *Liboiron* at para 13. Absolute privilege applies.

C. Content and purpose are not relevant within an occasion of absolute privilege

[28] If a statement is made on a privileged occasion, then absolute privilege applies regardless of the content of that statement or the motive behind it. It does not matter whether the statement communicated was false or made with malice: *Prefontaine* at para 10; *McDaniel v McDaniel*, 2009 BCCA 53 at para 28; *Rubin v Ross*, 2013 SKCA 21 at para 38; *Tewari v Sekhorn*, 2024 ONCA 123 at para 3; *The Law of Defamation* at §12:17.

[29] The cases relied on by the respondent and referred to by the chambers judge in support of a detailed factual analysis address the boundaries of absolute privilege – circumstances where it was not obvious whether a communication was made within a "step" recognized as affording absolute privilege. In such cases, a contextual analysis may be required to assess whether the communication was made incidental to or in furtherance of the underlying proceeding.

[30] *Dechant*, for example, considered whether communications made in the context of a Law Society complaint attracted privilege. The majority emphasized that "no consensus" had yet "emerged on what constitute[d] a privileged occasion in a *quasi*-judicial setting" and that there was "no evidence as to the Law Society's procedures and protocol for processing a claim".

Therefore, the chambers judge reasonably concluded he was unable to determine if the occasion attracted privilege. The majority noted, "in judicial proceedings, the steps are more obvious than may be the case in many *quasi*-judicial settings": *Dechant* at paras 50, 52-58.

[31] In *Liboiron*, as another example, a defendant submitted a letter to court along with his speeding ticket payment. In the letter, the defendant pled guilty to the traffic violation and made various allegations about how he had been treated by police. The letter was not a recognized legal document. It was not necessary for the judicial process, because under the applicable legislation, payment of the ticket was the guilty plea. It was important in those circumstances for the court to review the context and content of the letter to determine whether the communication "fit within the process prescribed" and "further[ed] the proceedings": *Liboiron* at para 16.

[32] In boundary cases, determining whether an occasion is one that attracts absolute privilege can be highly contextual: *Wilson* at paras 72, 82. In such cases, close inquiry into how the occasion fits within the judicial or quasi-judicial process and its purpose will often be appropriate.

[33] The chambers judge erred in moving aspects of this analysis from the boundary, where it is unclear whether an occasion is privileged, to the core, where it is clear. She erred in holding that a "further and deeper contextual analysis" considering "the purpose of making the statements" and whether the statements "advance[d] or further[ed] the proceedings" was required: *Chambers Decision* at paras 37, 47-64, 67-68. As noted, the communications at issue in this case – a pleading filed in court and oral submissions before a court-designated review officer – were made in circumstances that fall within the core of recognized protected occasions. Absolute privilege applied, regardless of the content or purpose behind the statements.

D. Is there an exception for statements made about non-parties?

[34] In reaching the conclusion that a "further and deeper contextual analysis" was required, the chambers judge relied in part on the fact that the impugned statements were made about the respondent, who was not a party to either the O'Chiese action or the account review proceeding. She cited the Saskatchewan Court of Appeal cases of *M(MJ) v M(DJ)*, 2000 SKCA 53 [*M(MJ)*] and *Duke v Puts*, 2004 SKCA 12 [*Duke*] in holding that "making a statement about a non-party may suggest that the statement is unconnected to an occasion of absolute privilege and thus the protection of absolute privilege should not apply": *Chambers Decision* at para 46.

[35] In *M(MJ)*, the Saskatchewan Court of Appeal considered a letter written by a woman to the Law Society, complaining about her husband's lawyer. In addition to complaining about the lawyer, the woman also made allegations about her husband. The court held it was not "clear and obvious" that absolute privilege attached to the statements made about the husband, because "[t]he impugned statements were not made with reference to the person who [was] being complained against, but [were]… *irrelevant statements* against a third party" [emphasis original]. In the court's view, it was an open question whether the policy reasons for absolute privilege supported

application of the doctrine in such circumstances: *M(MJ)* at paras 8, 9, 18. In *Dechant* at paras 46-47, this Court acknowledged *M(MJ)* but did not rely on it.

[36] Subsequently, in *Duke*, the Saskatchewan Court of Appeal considered allegedly defamatory statements contained within a complaint letter submitted to the College of Physicians and Surgeons. Again, the statements were about someone other than the person who was the subject of the complaint. The court cited *M(MJ)* and concluded that statements made about a non-party in the course of a complaint needed to "have some nexus or be connected to the proceedings". It concluded the subject statements had no nexus or connection to the complaint and, as such, were not protected by absolute privilege: *Duke* at paras 53-62.

[37] The authors of *The Law of Defamation* summarize these Saskatchewan authorities by saying: "In the province of Saskatchewan the Court of Appeal now requires that statements made about third persons, who are not a party to the judicial proceedings, must have some nexus or be connected in some way with those proceedings in order to enjoy an absolute privilege": *The Law of Defamation* at §12:52. In our view, neither *M(MJ)* nor *Duke* purport to address statements made in judicial proceedings. They deal specifically with statements made in the course of complaints submitted to professional regulatory bodies. The court in *Duke* identified the question it was "confronted with" as being specific to the *quasi*-judicial complaints process: whether "statements not made with reference to the person being complained of, but gratuitous irrelevant statements against a third party" [emphasis added] should attract absolute privilege: *Duke* at para 53.

[38] We need not decide whether an exception to absolute privilege should be recognized in the circumstances addressed in *M(MJ)* and *Duke.*

[39] It is sufficient for the present purposes for us to confirm that no such exception exists with respect to statements made in filed court pleadings or during oral submissions. Recognizing an exception as applying to communications made in court or during a formal step in litigation would be contrary to the policy rationale underpinning absolute privilege. Any statement made about a non-party in a pleading or during oral argument – and such statements are not uncommon – could then become the basis for a claim in defamation, whether irrelevant or not, and whether truly defamatory or not. This case illustrates that mischief. As correctly noted by the Saskatchewan Court of Appeal in *M(MJ)* at para 6, absolute privilege exists to "protect those involved in the justice system from the necessity of having to weigh their words for fear of an action in defamation".

VII. Conclusion

[40] The statements at issue were made in a pleading filed in court and during oral submissions before a court-designated review officer. It is plain and obvious that absolute privilege attaches. The contextual analysis that might apply in borderline cases, where it is unclear whether an

occasion is privileged, does not apply here. The chambers judge erred in dismissing the applications to strike.

[41] The appeal is allowed, and the statement of claim is struck. The appellants are awarded costs assessed using Column 1 of the Schedule C tariff.

[42] Rule 9.4(2)(c) is invoked, and the Court will prepare the resulting judgment.

Appeal heard on May 12, 2025

Memorandum filed at Calgary, Alberta
this 28th day of July, 2025

Antonio J.A.

Authorized to sign for: de Wit J.A.

Grosse J.A.

Appearances:

Respondent C. Tuharsky

S.J. Weatherill
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