

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Yu v. 16 Pet Food & Supplies Inc.*,
2023 BCCA 397

Date: 20231030
Docket: CA48918

Between:

Yelin Yu

Appellant
(Defendant)

And

16 Pet Food & Supplies Inc. also known as WoوووF

Respondent
(Plaintiff)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Butler
The Honourable Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated
March 1, 2023 (*16 Pet Food & Supplies Inc. v. Yu*, Vancouver Docket S231241).

Counsel for the Appellant: R. Lo

Counsel for the Respondent: D.D. Way

Place and Date of Hearing: Vancouver, British Columbia
September 27, 2023

Place and Date of Judgment: Vancouver, British Columbia
October 30, 2023

Written Reasons by:

The Honourable Justice Marchand

Concurred in by:

The Honourable Madam Justice Newbury
The Honourable Mr. Justice Butler

Summary:

The appellant seeks to set aside an interlocutory injunction prohibiting her from posting “any statements or content” online about the respondent pet food store. She contends that the chambers judge erred in granting the order by: (1) applying the incorrect legal test; (2) finding the respondent suffered irreparable harm; (3) wrongly assessing the balance of convenience; (4) granting an overly broad order; and (5) refusing to hear her submissions on costs. Held: Appeal allowed. The judge erred by applying the RJR-MacDonald test for granting an interim injunction in the defamation context. To issue an interlocutory injunction, the court must be satisfied that the impugned statements are manifestly defamatory such that a jury finding otherwise would be considered perverse. If the first element has been made out, the court should ask itself whether there is any reason to decline to exercise its discretion to issue the injunction. In this case, it cannot be said that the appellant’s defences of “truth, justification, and fair comment” would necessarily fail, and further, the order was overbroad. The interlocutory injunction is set aside, and the respondent’s application is dismissed.

Reasons for Judgment of the Honourable Justice Marchand:**Introduction**

[1] In February 2023, the appellant, Yelin Yu, made a number of disparaging online posts concerning her former employer, the respondent, 16 Pet Food & Supplies Inc., also known as WooooF (“WooooF”). After Ms. Yu ignored a “cease and desist” letter from WooooF’s counsel, WooooF commenced an action against her seeking an injunction to prohibit her from defaming it and damages.

[2] On March 1, 2023, the chambers judge granted an interlocutory injunction compelling Ms. Yu to “delete or remove all statements and content” she had published in any online forum which contained references to WooooF and associated parties, and prohibiting Ms. Yu from publishing “any statements or content” in any online forum concerning WooooF and associated parties. The judge also ordered that Ms. Yu “provide particulars of where all defamatory statements were made” within 48 hours and that she pay WooooF costs of \$3,000 within ten days.

[3] On March 23, 2023, Ms. Yu was granted leave to appeal the interlocutory injunction. She raises five grounds of appeal. She submits the judge erred:

1. in law by applying the *RJR-MacDonald* test in a defamation case;
2. in law by finding that WooooF would suffer irreparable harm if the interlocutory injunction were not granted;
3. in law in his assessment of the balance of convenience;
4. in law by granting an impermissibly overbroad interlocutory injunction; and
5. by refusing to hear submissions on the issues of costs, thus breaching Ms. Yu's right to procedural fairness.

[4] WooooF maintains that the judge made no reversible errors. It submits that the judge correctly applied a modified *RJR-MacDonald* test, weighed the factors appropriately and made an order in the same form as made in *Slater Vecchio LLP v. Arvanitis*, 2019 BCSC 1156 at para. 29 [*Arvanitis BCSC No. 1*]. It also submits there is no basis to interfere with the judge's discretionary award of costs.

[5] In my respectful view, the judge did not apply the correct test for an interim injunction in the specific context of a defamation claim. I would therefore set aside the interim injunction. Rather than remit WooooF's application for reconsideration, for the reasons that follow, I would dismiss it. As a result, I would also set aside the order for costs made against Ms. Yu.

Background

[6] The following background is based on the affidavit evidence that was before the chambers judge. It does not include affidavit evidence that Ms. Yu subsequently filed in this Court in support of her application for leave to appeal.

[7] WooooF sells food and supplies for dogs and cats. Ms. Yu worked for WooooF for one month in October 2022. She then voluntarily left her position, apparently on good terms. A few months later, she made a number of disparaging social media posts about WooooF and its owners. That information related primarily to a power outage at WooooF's store that allegedly caused issues with its freezers.

[8] On February 5, 2023, Ms. Yu made a number of posts, including the following (as translated):

Vancouver bby Pet Store Is Really Disgusting

Why do I know that they are disgusting? If you were there, you will know.

Right, I just quit. Again the rumour has started. Heehee. This couple are indeed better at scheming than others. [emoji omitted]

Be careful that you might be called dirt poor or shabby, couldn't afford stuff when you shop there.

Be careful that there might be a rumour saying that you come from a broken family and have a crush on her stinky-feet husband.

Be careful that you get might get meat refrozen after being thawed during a power outage. ...

...

I recommended a pet store woooof before. I have more than one thousand WeChat contacts, to say the least. I myself worked there for a month and finally quit. Now I am telling everyone not to go there [emoji omitted] because this couple are inhumane, getting rid of people as soon as they cease to be useful, very bad in character, having a mouth full of lies, calling whoever bought stuff from them dirt poor, spreading rumours about those with whom they are displeased. Make money from others yet want to lord over them...

[9] On February 10, 2023, WooooF's counsel served a "cease and desist" letter on Ms. Yu. WooooF also posted information about a power outage at its store that occurred on November 5, 2022 and its efforts to ensure that its frozen meat did not thaw.

[10] In response to the "cease and desist" letter, Ms. Yu did not take down her posts. Instead, she posted further about the power outage. She also posted about the "lawyer's letter" saying that she had been "lambasted" and that she "[l]aughed [her] head off."

[11] On February 22, 2023, WooooF filed its notice of civil claim. It alleged that Ms. Yu's posts intended to convey the following:

- a. The Plaintiff is a disgusting business;
- b. The Plaintiff sells rotten meat that has been thawed and frozen again after a power outage; and
- c. Such other defamatory meanings as may be proven at the trial of this action.

[12] On the same date, WoوووF filed a without notice of application seeking the following orders:

1. Until further order of the Court:
 - a. Yelin Yu shall immediately delete or remove all statements and content, which she has published or caused to be published in any online forum including any social media platform, which contain direct or indirect references to:
 - i. 16 Pet Food & Supplies Inc. also known as WoوووF; or
 - ii. The current or former:
 1. directors;
 2. shareholders;
 3. employees; or
 4. clients
- of 16 Pet Food & Supplies Inc. also known as WoوووF.
(Collectively, the “Protected Parties”)
2. Yelin Yu is hereby prohibited on an interlocutory basis from:
 - a. publishing or causing to be published any statements or content, in any online forum including social media, which contain direct or indirect references to the Protected Parties; or
 - b. directing, encouraging, or assisting any other person from engaging in conduct which the defendant is prohibited from engaging by way of this order.
3. An order that Yelin Yu, within 48 hours of delivery of a copy of this order to Yelin Yu, shall provide particulars of where all defamatory statements were made by Yelin Yu; and
4. Costs of this application fixed at \$5,000 payable forthwith...

[13] A director of WoوووF, Xinran Cheng, filed an affidavit in support of WoوووF’s application. The affidavit provided information regarding Ms. Yu’s employment at WoوووF, WoوووF’s efforts to ensure its frozen meat did not thaw during the power outage and the allegedly defamatory posts.

[14] Justice Kent dismissed WoوووF’s application “without prejudice to the merits of the claim for an injunction”. Justice Kent made orders for WoوووF’s application to be heard on an urgent basis on March 1, 2023, with notice to Ms. Yu.

[15] In accordance with the order of Kent J., WooodF served its application materials on Ms. Yu. In turn, Ms. Yu filed an application response and an affidavit from a paralegal at her lawyer's office. That affidavit attached copies of screenshots of a number of "Google Reviews" of WooodF over the previous five months. These reviews were apparently intended to demonstrate that WooodF's reputation had not declined as a result of Ms. Yu's posts. Ms. Yu did not swear an affidavit herself and she provided no evidence regarding the power outage or its impact on WooodF's operations.

Reasons for Judgment of the Chambers Judge

[16] On March 1, 2023, the judge gave relatively brief oral reasons for judgment.

[17] The judge set his mind to the legal test to be applied for an applicant to obtain an interlocutory injunction in a defamation action. He accepted Ms. Yu's submission that the test was a "high one." He then cited the well-known three-part test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 (SCC) namely that: (1) there is a serious issue to be tried; (2) the applicant will suffer irreparable harm if the application is refused; and (3) the balance of convenience favours the applicant: at 334.

[18] The judge referred to *Arvanitis BCSC No. 1* where, in the context of an online campaign against a law firm that included "manifestly defamatory" comments, Justice Duncan noted:

[21] The internet is a powerful tool for the spread of defamatory statements. The speed at which information spreads via the internet is now taken for granted but that same speed provides an instant and boundless audience for defamatory posts and commentary.

[19] The judge declined to follow *Compass Group Canada et al v. Hospital Employees' Union et al*, 2004 BCSC 51 which had been cited by Ms. Yu. As the judge noted, in that case, Justice Garson (as she then was) held:

[62] ... [I]njunctive relief to restrain alleged defamation is an exceptional remedy which should be granted in only the rarest and clearest of cases. The Court should only issue such relief when the words complained of are so

manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal...

[63] In addition, there must be evidence of an intention, or grounds to infer, that the alleged defamation will be repeated or published...

[Citations omitted by the chambers judge.]

[20] In the judge's view, *Compass Group* was "dated" and did "not reflect the reality of defamation in the age of the internet and in the age of online posts."

[21] The judge characterized Ms. Yu's posts as "an internet derogatory campaign". He expressed astonishment that Ms. Yu took it upon herself "for whatever reason, to try to destroy the business and the reputation" of her former employer when she seemed to have departed on relatively good terms.

[22] In his application of the *RJR-MacDonald* test, the judge found:

1. There was a serious issue to be tried in that "[d]efamation is a significant matter";
2. WoouoF would suffer irreparable harm if its application were refused because Ms. Yu did not modify her behaviour after receiving the "cease and desist" letter. Instead, her behaviour continued. She had "mock[ed]" the letter and made further defamatory claims; and
3. The balance of convenience favoured WoouoF and its owners. They faced "a risk of continuous harm to their business and their livelihood", while the judge was "not sure what inconvenience" Ms. Yu could possibly suffer "if she [was] simply told that she [was] not allowed to continue to defame the plaintiff."

[23] The judge granted WoouoF the orders it was seeking, except he fixed costs at \$3,000 (rather than the claimed \$5,000) and made them payable within ten days.

Standard of Review

[24] The decision whether to grant or deny an interlocutory injunction is discretionary and entitled to deference. It will be reversible where the lower court

misdirected itself, came to a decision that is so clearly wrong that it amounts to an injustice or gave no or insufficient weight to relevant considerations: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27, citing *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 at 1375, 1989 CanLII 10 (SCC); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76–77, 1992 CanLII 110 (SCC).

[25] Here, however, Ms. Yu alleges that the judge committed errors of law. The standard of review on questions of law is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8.

Analysis

What is the test for granting an interlocutory injunction in the context of a defamation claim?

[26] During the hearing, the judge was referred to a number of authorities regarding the test for granting an interlocutory injunction in the context of a defamation case, including *RJR-MacDonald*, *Compass Group* and *Arvanitis BCSC No. 1*.

[27] In *RJR-MacDonald*, the Supreme Court of Canada reaffirmed the applicability of the three-part test from *American Cyanamid Co. v. Ethicon Ltd.*, [1975] UKHL 1, [1975] A.C. 396 for an applicant to obtain an interlocutory injunction. On the other hand, in *Compass Group* and *Arvanitis BCSC No. 1*, judges of the Supreme Court of British Columbia set out more stringent tests that must be satisfied in the special circumstance of an applicant seeking to restrain the opposing party's freedom of speech before trial.

[28] As noted above, in *Compass Group*, Garson J. held:

[62] ... [I]njunctive relief to restrain alleged defamation is an exceptional remedy which should be granted in only the rarest and clearest of cases. The Court should only issue such relief when the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal: *Lasik Vision Canada Inc. v. TLC Vancouver Optometric Group Inc.*, [1999] B.C. J. No. 2834, ¶ 20 (S.C.).

[63] In addition, there must be evidence of an intention, or grounds to infer, that the alleged defamation will be repeated or published: *R.T. Investment Counsel Inc. v. Werry*, [1999] BCJ No. 756 (S.C.) paragraph 15.

[29] Justice Garson then cited *Lasik Vision Canada Inc. v. TLC Vancouver Optometric Group Inc.*, 1999 CanLII 3248 (BC SC), [1999] B.C.J. No. 2834 at para. 21 for the proposition that “the traditional balance of convenience comprising part of the [interlocutory injunction] test is inapplicable in the circumstances”: at para. 66.

[30] Although troubled by the absence of evidence from the defendant union on the point, Garson J. was not satisfied that the message intended to be conveyed by its picket signs was “necessarily defamatory” to the required standard of proof. She was also not satisfied that “such general statements would necessarily cause Compass irreparable harm”: at para. 68. In the result, she set aside a without notice interlocutory injunction that had been issued restraining the union from picketing the plaintiff’s job fairs in Vancouver and Victoria.

[31] In *Arvanitis BCSC No. 1*, Duncan J. applied a modified *RJR-MacDonald* test. She stated that “not only must the plaintiff show there is a serious issue to be tried but also that the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse”: at para. 19, citing *Canadian National Railway Company v. Google Inc.*, 2010 ONSC 3121; *Nazerali v. Mitchell*, 2011 BCSC 1581.

[32] In the context of an ongoing and rather egregious defamatory Internet campaign against Ms. Arvanitis’ former law firm, Duncan J. concluded that Ms. Arvanitis’ statements were “defamatory on their face”: at para. 24. In fact, in Ms. Arvanitis’ action against her former firm in negligence, they had been proven to be untrue: *Arvanitis v. Slater Vecchio*, 2016 BCSC 1612 [*Arvanitis BCSC No. 2*]. Justice Duncan also concluded that Ms. Arvanitis’ statements were likely to cause irreparable harm and were motivated by malice. Justice Duncan was further satisfied that the firm would suffer greater prejudice if the injunction were refused than

Ms. Arvanitis would suffer if the injunction were granted. In other words, the balance of convenience favoured the firm.

[33] Justice Duncan granted a very broadly worded interlocutory injunction restraining Ms. Arvanitis from, among other things, posting any comments whatsoever about the plaintiff on any online forum. If Duncan J. was referred to either *Compass Group* or *Lasik*, she did not cite them in her reasons.

[34] The stringent approach to granting interlocutory injunctions to restrain allegedly defamatory speech dates back to what has been referred to as the “leading case” of *Bonnard v. Perryman*, [1891] 2 Ch. 269. In that case, Lord Chief Justice Coleridge, on behalf of a majority of the Chancery Division of the High Court of Justice, held that the Court had the jurisdiction to restrain the publication of an alleged libel before trial but should exercise its jurisdiction with caution. In recognition of the public interest in free speech, he held:

Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free-speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. We entirely approve of, and desired to adopt as our own, the language of Lord Esher, M.R., in *Coulson v. Coulson* (1)—“To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether it was a libel or not. Therefore the jurisdiction was of the delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable.”

[At 284. Emphasis added.]

[35] In the result, the Court set aside an interim injunction made by Justice North. While the libellous nature of the publication at issue was “beyond dispute,” Lord Coleridge C.J. could not be sure that a jury would find the defence of justification to be “wholly unfounded”. Further, Lord Coleridge C.J. was unsure whether the plaintiffs would recover anything more than nominal damages: at 284.

[36] Although the language has evolved and *Bonnard* is not always cited, over the decades, courts in Canada and England have almost universally applied the test from *Bonnard* when considering whether to grant an interlocutory injunction to

restrain allegedly defamatory speech. In addition to *Compass Group* and *Arvanitis BCSC No. 1*, some further examples follow.

[37] In *Canada Metal Co. Ltd. et al. v. Canadian Broadcasting Corp. et al.* (1975), 7 O.R. (2d) 261, 1975 CanLII 661 (ON SC) the Court dismissed an appeal from an order that set aside a without notice interlocutory injunction that restrained the defendant from broadcasting a program titled “Dying of Lead”. The Court endorsed the reasons of Justice Holland reported at (1974), 3 O.R. (2d) 1, 1974 CanLII 529 (ON SC) and added the following:

The granting of injunctions to restrain publication of alleged libels is an exceptional remedy granted only in the rarest and clearest of cases. That reluctance to restrict in advance publication of words spoken or written is founded, of course, on the necessity under our democratic system to protect free speech and unimpeded expression of opinion. The exceptions to this rule are extremely rare.

For at least one hundred years and certainly since the leading cases of *William Coulson & Sons v. James Coulson & Co.* (1887), 3 T.L.R. 846, and *Collard v. Marshall*, [1802] 1 Ch. 571, and perhaps above all, in the leading case of *Bonnard v. Perryman*, [1891] 2 Ch. 269, it has been universally and consistently held by British and Canadian Courts that such an interim injunction will never be granted where the defendant expresses his intention to justify unless the words in question are so clearly defamatory and so obviously impossible to justify that the verdict of a jury accepting a plea of justification as a defence would of necessity have to be set aside as a perverse finding on appeal. That is not this case. Some of the words in the broadcast here are admittedly capable of defamatory meanings, but they are not all so clearly defamatory that a jury could not decline to accept all or some of the many allegations made by the plaintiff; and certainly the issue of justification in this case is a triable and disputable issue, not one which can be decided at this stage and clearly one which must go to the jury.

[At 261–262. Emphasis added.]

[38] In *Rapp et al. v. McClelland & Stewart Ltd. et al.* (1981), 34 O.R. (2d) 452, 1981 CanLII 1696 (ON SC), Justice Griffiths declined to make an interlocutory injunction restraining the defendants from publishing or distributing a book that was alleged to contain defamatory statements about the plaintiff. Justice Griffiths cited the above passage from *Canada Metal* and held:

In the light of this sovereign jurisdiction of the jury to determine the issue of defamation a fairly stringent rule was developed early in the history of the law concerning the granting of interim injunctions restraining the publication of alleged defamatory material until the trial of the action...

...

The guiding principle then is, that the injunction should only issue where the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal. To put it another way where it is impossible to say that a reasonable jury must inevitably find the words defamatory the injunction should not issue.

[At 455. Emphasis added.]

[39] The “manifestly defamatory” language used in *Rapp* was subsequently picked up by the Supreme Court of Canada in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 1998 CanLII 818 (SCC). In *Liberty Net*, the Federal Court, Trial Division prohibited Liberty Net from offering callers offensive telephone messages, including racist messages, pending a final determination by a Human Rights Tribunal as to whether the messages constituted discriminatory conduct. The interim injunction was set aside by the Federal Court of Appeal but restored by a majority of the Supreme Court of Canada.

[40] Justice Bastarache for the majority held that the *RJR-MacDonald* test for granting an interim injunction was inappropriate to the circumstances. That case, and its predecessors (*American Cyanamid* and *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, 1987 CanLII 79 (SCC)), were commercial cases where the “irreparable harm” and “balance of convenience” criteria had “some measurable meaning”: at para. 47. Those cases did not involve society’s countervailing interest in free speech. Justice Bastarache explained why the second and third criteria from the *RJR-MacDonald* test were therefore “virtually impossible to use” in the context of “non-commercial speakers”:

47 In my view, the *Cyanamid* test ... is inappropriate to the circumstances presented here. The main reason for this is that *Cyanamid*, as well as [*Metropolitan Stores* and *RJR-MacDonald*], involved the commercial context in which the criteria of “balance of convenience” and “irreparable harm” had some measurable meaning and which varied from case to case. Moreover, where expression is unmixed with some other commercial purpose or activity, it is virtually impossible to use the second and third criteria without grievously undermining the right to freedom of expression contained in s. 2(b) of the *Charter*. The reason for this is that the speaker usually has no tangible or measurable interest other than the expression itself, whereas the party seeking the injunction will almost always have such an interest. This test developed in the commercial context stacks the cards against the non-

commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself.

[Emphasis in original.]

[41] Justice Bastarache supported his conclusion by analogy to the jurisprudence relating to the granting of interlocutory injunctions restraining allegedly defamatory speech. Although recognizing some obvious differences between hate speech and defamatory speech, Bastarache J. highlighted that “from the point of view of the rights of the speaker, bigotry and defamation cases both represent potentially low-or no-value speech”: at para. 48.

[42] Justice Bastarache cited with approval the following excerpt from Robert J. Sharpe, *Injunctions and Specific Performance*, 2nd ed. (Toronto: Canada Law Book, 1992):

There is a significant public interest in the free and uncensored circulation of information and the important principle of freedom of the press to be safeguarded...

... The well-established rule is that an interlocutory injunction will not be granted where the defendant indicates an intention to justify [i.e. prove the truth of] the statements complained of, unless the plaintiff is able to satisfy the court at the interlocutory stage that the words are both clearly defamatory and impossible to justify.

... it seems clear that the rule is unaffected by the *American Cyanamid* case and that the balance of convenience is not a factor.

[*Liberty Net* at para. 49, citing Sharpe at paras. 5.40–5.70. Emphasis added.]

[43] After citing *Herbage v. Pressdram Ltd.*, [1984] 2 All E.R. 769, [1984] 1 W.L.R. 1160 (C.A.), *Rapp and Champagne c. Collège d'enseignement général et professionnel de Jonquière*, [1997] R.J.Q. 2395, 1996 CanLII 4413 (QC CS), Bastarache J. concluded:

These cases indicate quite clearly that the *Cyanamid* test is not applicable in cases of pure speech and, therefore, the appellants are misguided in presuming that this test does apply. As Griffiths L.J. points out in *Herbage v. Pressdram, supra*, such a test would seldom, if ever, protect controversial speech...

[*Liberty Net* at para. 49.]

[44] Subsequent cases that have directly or indirectly applied the stringent *Bonnard* standard include: *Starlight v. Onespot*, 1998 ABCA 361; *Lasik*; *Compass Group*; *Beidas v. Pichler (Legassé)*, 294 D.L.R. (4th) 310, 2008 CanLII 26255 (ON SCDC); *Gant v. Berube*, 2013 BCSC 1721; *Bagwalla v. Ronin et al*, 2017 ONSC 6693; *Peyrow v. Kaklin*, 2022 ABKB 823; *Pereira v. Dexterra Group Inc.*, 2022 BCSC 1481; and *Surrey Animal Hospital Ltd. v. Veira*, 2023 BCSC 1298.

[45] Many of these cases involved businesses like WooooF that sought to restrain allegedly defamatory speech that the businesses considered harmful to their commercial interests. Others had no commercial context. Several involved statements disseminated over the Internet. Some suggest that an applicant must also establish irreparable harm and/or provide evidence that the defamation will be repeated. Almost all recognize that the prohibition against issuing an interlocutory injunction applies where any viable defence is raised.

[46] While the overwhelming weight of authority supports the application of the stringent *Bonnard* test, WooooF relies heavily on a recent exception. In *M.S. v. T.V.*, 2022 MBKB 211, Associate Chief Justice Perlmutter declined to apply *Liberty Net* and instead applied *RJR-MacDonald* in issuing an interlocutory injunction to restrain the defendant from publishing statements “that the plaintiff was sexually, emotionally and physically abusive of her, repeatedly sexually assaulted her, and did similarly to other women, or any other disparaging statements about the plaintiff”: at para. 89.

[47] Associate Chief Justice Perlmutter correctly noted that the Supreme Court’s discussion of defamation in *Liberty Net* was *obiter*. The case involved hate speech not defamation: at para. 63. Further, by the time the case reached the Supreme Court, a final order made by the Human Rights Tribunal had supplanted the interlocutory injunction: at para. 61.

[48] In Perlmutter A.C.J.’s view, the applicable test for interlocutory injunctive relief had to reflect and balance both the defendant’s right to freedom of expression and the plaintiff’s competing *Charter* protected right to privacy and dignity. The *Liberty*

Net test did not do so. In fact, because of the difficulty of establishing that the impugned words of a defendant are false at the interlocutory stage, the *Liberty Net* test would make it “virtually impossible for a plaintiff to obtain interlocutory injunctive relief even in the face of serious harm caused by the defendant’s speech”: at paras. 65–67.

[49] Associate Chief Justice Perlmutter identified an unintentional adverse consequence that would flow from “slavishly applying the test in *Liberty Net*” in the circumstances before him. He feared that other areas of the law designed to protect the reputation and dignity of sexual assault complainants would be compromised. In his view, applying *Liberty Net* could result in plaintiffs trying to establish that the defendant/complainant’s words were manifestly defamatory by engaging in “inappropriately aggressive attacks on the credibility and integrity of the defendant/complainant”, including by relying on reasoning prohibited by the criminal law. The defendant/complainant would be at risk of being re-victimized twice, once at the interlocutory stage and once at the eventual criminal trial: at paras. 69–71.

[50] Associate Chief Justice Perlmutter ultimately concluded that in the particular circumstances before him, the *RJR-MacDonald* test “most sensibly, justly and fairly balances [the] competing values.” On applying that test, he found: (1) on the conflicting evidence of the parties, the plaintiff had established that there was a serious question to be tried; (2) based on the defendant’s repeated malicious statements, the plaintiff was suffering irreparable harm and “irrevocable damage to [his] business reputation”; and (3) the balance of convenience favoured the plaintiff because the defendant would only be restrained from making potentially defamatory remarks about the plaintiff until trial while the plaintiff would suffer irreparable harm from a continuation of the defendant’s statements: at paras. 75–86.

[51] Neither party has cited binding authority from this Court regarding the test to be applied on an application to restrain allegedly defamatory speech before trial. However, both have identified authorities in which they say the Court has recognized the applicability of one test or another.

[52] WoouoF submits that this Court has affirmed *Arvanitis BCSC No. 1* (in which Duncan J. employed a modified *RJR-MacDonald* test). I do not agree. In *Slater Vecchio LLP v. Arvanitis*, 2019 BCCA 481 (in Chambers) [*Arvanitis BCCA*], Justice Dickson declined to extend the time for Ms. Arvanitis to appeal the order made by Duncan J. because Ms. Arvanitis' proposed appeal was moot. The interlocutory injunction at issue had been supplanted by a permanent injunction: *Slater Vecchio LLP v. Arvanitis*, 2019 BCSC 2369 [*Arvanitis BCSC No. 3*]. Justice Dickson was not called upon to consider, and did not endorse, the modified *RJR-MacDonald* test employed by Duncan J.

[53] Ms. Yu points to *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 as an example of this Court recognizing the *Liberty Net* approach. The appeal involved an interlocutory injunction in the context of the Vancouver Aquarium's copyright and breach of contract claims against the defendant/appellant. It did not involve either hate speech or defamation. Justice Bennett for herself and Justice Donald cited *Liberty Net* but only by way of setting out an argument advanced by the defendant: at para. 41. The Court did not find it necessary to resolve the appeal by way of analogy to injunctions in defamation cases (at para. 42) and did not endorse the *Liberty Net* approach. Rather, the Court found that the chambers judge had erred in his application of the *RJR-MacDonald* test. The Court allowed the appeal and set aside the injunction.

[54] From my review of the authorities, it appears that this Court has not meaningfully weighed in on the question of the test to be applied when one party seeks to restrain the speech of another party before trial.

[55] To be sure, formulating a test for the granting of an interlocutory injunction in the defamation context is challenging. That is because determining whether to restrain allegedly defamatory statements before trial often involves an irreconcilable clash of interests that are deserving of protection.

[56] On the one hand, Canadian law has long recognized the inherent good associated with free speech to advance: (1) democratic discourse; (2) the search for

the truth; and (3) the self-realization of speakers and listeners: see e.g., *Grant v. Torstar Corp.*, 2009 SCC 61 at paras. 42–50. Although the common law of defamation is not subject to *Charter* scrutiny, it should generally conform with *Charter* values, particularly the *Charter*'s guarantee of freedom of expression under s. 2(b): *Grant* at paras. 44–46; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 97, 1995 CanLII 59 (SCC).

[57] On the other hand, Canadian law has also long recognized the importance of a person's reputation to their dignity, self-image, sense of self-worth, ability to interact with others and, in some cases, ability to earn a livelihood: *Grant* at paras. 117–120. While not guaranteed by the *Charter*, reputation is intimately tied to the right to privacy which has been accorded constitutional protection: *Hill* at para. 121. One person's right to free expression has never conferred a licence to defame another person: *Grant* at para. 58.

[58] No formulation of a test can be expected to always get it "right" before a case has been decided on its merits. But, the stringent approach of *Bonnard* and *Liberty Net* has stood the test of time in a wide variety of contexts, including in the age of the Internet, and should continue to govern for the reasons expressed in those cases and for the reasons provided below.

[59] Defamation arises in a wide variety of contexts from those that are purely commercial to those that involve "pure speech" with no commercial element. In many cases, there is an element of both. Given that it can be difficult to isolate where on the spectrum a particular allegedly defamatory statement lies, in my view, it would be unhelpful and unnecessarily complicated to use one test for purely commercial cases, another for cases involving "pure speech" and perhaps a third for cases that lie somewhere in between.

[60] To my mind, as between the low bar associated with the first element of the *RJR-MacDonald* test (serious question to be tried) and the stringent *Bonnard/Liberty Net* test (manifestly defamatory and no sustainable defence), the greater risk to the administration of justice lies in having a low bar rather than a high one. With the

greatest respect for Perlmutter A.C.J.'s principled views otherwise, *M.S.* provides a good example of why that is so.

[61] In the “he said/she said” context of cases such as *M.S.*, there will almost always be a serious question to be tried and a realistic prospect of irreparable harm. Furthermore, given that the speech at issue may be seen to have no or low value and that an interim injunction will necessarily only be temporary, the balance of convenience will typically tip in favour of the plaintiff. Setting a low bar would therefore typically favour the plaintiff over the defendant/complainant.

[62] Why would tipping the scale in favour of a plaintiff like *M.S.* be problematic? Without minimizing the obvious importance of protecting the reputation of a wrongfully accused person, there are a number of reasons.

[63] First, setting a low bar will encourage litigation and applications for interlocutory injunctions. Defendant/complainants with legitimate underlying complaints will therefore face a greater, not lesser, risk of being revictimized during the application process.

[64] Second, the threat of litigation is already a significant deterrent to false and harmful speech. Increasing the frequency, intensity, length and cost of legal proceedings by encouraging more interlocutory injunction applications is unlikely to have much impact on further deterring such speech but could be expected to have an unwarranted chilling effect on legitimate complainants coming forward.

[65] Third, setting a low bar would be at odds with other efforts, such as the *Protection of Public Participation Act*, S.B.C. 2019, c. 3, that are aimed at preventing the wealthy and powerful from silencing the voices of the disadvantaged and vulnerable.

[66] Fourth, while difficult, it is certainly not impossible to meet the stringent *Bonnard/Liberty Net* test. Although in a different context, *Arvanitis BCSC No. 1* provides a helpful example. In that case, Ms. Arvanitis persisted in continuing her egregious defamatory campaign after her claims of solicitor negligence had been

heard and dismissed. Although I have concerns about the breadth of the orders that were made in that case, there can be no question that it was an appropriate case for an interim injunction.

[67] Finally, in many cases, the primary harm is done once a false statement has been made. In such cases, an interim injunction will be of significant cost but marginal value. Though the damage may never be fully undone, real vindication can only come following a trial on the merits. In the meantime, wrongly besmirched plaintiffs may find it more productive to publicly deny untrue allegations and/or take steps to obtain the earliest possible trial date.

[68] I have focused my comments on *M.S.* because it is the only case identified by WoouoF that applied the *RJR-MacDonald* framework without modification to the granting of an interim injunction in the defamation context. With appropriate contextual adjustments, the reasoning set out above applies with similar force to the many other scenarios addressed in the authorities I have cited.

[69] All of this brings me to formulating the test.

[70] I largely agree with the formulation of the test set out by Justice Grauer (as he then was) in *Gant*: at paras. 16–18. I would, however, add a second element to the test set out in that decision.

[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.

Did the judge err in law by applying the *RJR-MacDonald* test?

[74] Ms. Yu submits that the judge erred by applying the *RJR-MacDonald* test to the question of whether to issue an interlocutory injunction to restrain her speech before trial. Respectfully, I agree.

[75] While the judge correctly stated that the test for granting an interlocutory injunction to restrain allegedly defamatory speech before trial was a "high one", a functional and contextual review of his reasons reveals that he nevertheless only set his mind to whether there was a serious issue to be tried. In other words, he applied the incorrect test. For the reasons provided above, the first element of the standard *RJR-MacDonald* test was ill-suited for and inapplicable to WooooF's application for an interlocutory injunction.

[76] In view of this finding, it is not necessary for me to address WooooF's further grounds of appeal. However, as mentioned above, I have concerns about the breadth of the orders made in *Arvanitis BCSC No. 1* which were advanced by

WooooF and accepted by the judge as appropriate in this case. I consider it wise to offer a few comments about the appropriate breadth of orders in cases seeking to restrain speech in advance of trial, and will return to this issue after dealing with the question of the appropriate remedy.

What is the appropriate remedy?

[77] Ms. Yu asks this Court to allow the appeal, set aside the judge’s order and dismiss WooooF’s application. In the alternative, Ms. Yu asks the Court to remit WooooF’s application to the Supreme Court for reconsideration in accordance with this Court’s reasons.

[78] Given the nature of the error identified and the adequacy of the record, I consider it to be in the interests of justice to save the parties further time and expense by addressing the merits of WooooF’s application.

[79] As noted above, WooooF’s notice of civil claim alleges that Ms. Yu’s posts falsely suggested that it is “a disgusting business” that “sells rotten meat that has been thawed and frozen again after a power outage.” Ms. Yu does not contest that her posts refer to WooooF, have been published, and would tend to lower WooooF’s reputation in the eyes of a reasonable observer.

[80] At the next stage of the analysis, Ms. Yu’s application response raises the defences of “truth, justification, and fair comment”. While WooooF has adduced evidence that no meat thawed during the power outage that occurred in November 2022 and Ms. Yu has not adduced any evidence to establish otherwise, in my view, WooooF has not proven to the required standard that Ms. Yu does not have a sustainable defence. In other words, at this stage of the proceedings, I cannot say that it is “beyond doubt” that no meat thawed during the power outage and was then refrozen.

[81] In any event, at the final stage of the analysis, I would exercise my discretion against making an interlocutory injunction. It is not contested that Ms. Yu has now taken down her allegedly defamatory posts. In the absence of evidence of a real risk

that she will make further such posts, an interlocutory injunction is simply not necessary.

Did the judge err in law by granting an impermissibly overbroad interlocutory injunction?

[82] In her article “The Scope of Canadian Defamation Injunctions” (2021) 44:1 Dal LJ 285, Professor Hilary Young is critical of the breadth of interlocutory and permanent injunctions made by Canadian courts to restrain defamatory or allegedly defamatory speech. As she notes:

Overbroad orders risk proscribing lawful speech and potentially punishing speakers with penalties including imprisonment. While it may be difficult to decide exactly how broad a particular order should be, the principle that orders should be minimally impairing of speech is, I think, uncontroversial. According to the Ontario and British Columbia Courts of Appeal, “injunctive relief must be broad enough to be effective but no broader than reasonably necessary to effect compliance.”

[At 288–289, citing *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396 at para. 39, cited in *Labourers’ International Union of North America, Local 183 v. Castellano*, 2020 ONCA 71 at para. 18.]

[83] Professor Young identifies four types of defamation injunctions, namely those that prohibit the defendant from making:

- any statements at all about the plaintiff;
- any defamatory statements about the plaintiff;
- statements about the plaintiff with a particular imputation, where the imputation has not been found to be defamatory; and
- statements about the plaintiff whose imputations have been found to be defamatory: at 290–291.

[84] As Professor Young notes, the first three types of injunctions are particularly difficult to justify. I note what I consider to be the primary concerns below.

[85] Injunctions that prohibit the defendant from making any statements at all about a plaintiff restrain speech that is not defamatory. For example, the defendant would be restrained from saying something favourable about the plaintiff or making a fair comment about the plaintiff on a topic of public importance.

[86] Injunctions that prohibit the defendant from making any defamatory statements about the plaintiff may be vague. Defamation is a highly technical area of the law. In some cases, defendants may have difficulty knowing whether a specific statement is caught by the prohibition. In particular, they may have difficulty knowing whether they are prohibited from making a statement that merely disparages the plaintiff or one that satisfies all of the elements of the tort and none of the defences.

[87] Injunctions that prohibit the defendant from making imputed statements that have not been proven to be defamatory may, like those that prohibit all statements about the plaintiff, restrain lawful speech.

[88] In this case, WoouoF sought and was granted a very broad order. The order was in the same form as granted in *Arvanitis BCSC No. 1*. WoouoF says the order had the advantage of creating a bright line for Ms. Yu.

[89] I understand WoouoF's desire to create an easily enforceable order. I also understand the judge's concern about both the power of the Internet to spread falsehoods and Ms. Yu's response to the "cease and desist" letter. Nevertheless, in my respectful view, the order was overbroad.

[90] On a plain reading, the order required Ms. Yu to remove all posts about WoouoF and associated parties and restrained her from making any posts at all about them. For example, Ms. Yu could not retain any posts that had positive things to say about WoouoF and could not make future posts to inform others that she had been sued by WoouoF, was subject to an injunction not to make any statements about WoouoF or perhaps offer an apology to WoouoF.

[91] Given the egregious facts of *Arvanitis BCSC No. 1*, I express concern but offer no opinion about the breadth of the order in that case. In this case, however,

even if the judge had applied the correct legal test and had a basis for finding that the test was satisfied, I would have set aside the order for being overbroad.

Disposition

[92] With thanks to counsel for their submissions, I would allow the appeal, set aside the judge’s order and dismiss WooooF’s application.

“The Honourable Justice Marchand”

I AGREE:

“The Honourable Madam Justice Newbury”

I AGREE:

“The Honourable Mr. Justice Butler”