# SUPREME COURT OF YUKON

Citation: *Atkinson* v. *McMillan*, 2009 YKSC 81

Date: 20091215
S.C. No. 07-A0044
Registry: Whitehorse

Between:

**CARSON ATKINSON**

Plaintiff

And

**LIARD McMILLAN and LIARD FIRST NATION**

Defendants

Before: Mr. Justice L.F. Gower

Appearances:

Zebedee Brown — Counsel for the Plaintiff
David F. Sutherland — Counsel for the Defendants

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] The plaintiff, Carson Atkinson, has brought this defamation action against the defendants, Liard McMillan and the Liard First Nation, because of a press release published by the defendants to certain Yukon media outlets on October 3, 2006, as well as statements made by Liard McMillan during a CBC Radio interview in Whitehorse on October 4, 2006. Mr. Atkinson was the principal of the Watson Lake Secondary School ("WLSS") at the time and Liard McMillan was chief of the Liard First Nation ("LFN"). The alleged defamatory words were published and spoken following an all candidates meeting in Watson Lake a few days earlier, in anticipation of a territorial election on

October 10, 2006. At that meeting, Premier Dennis Fentie reportedly made a campaign promise that he intended to introduce a “vocational stream” into the curriculum at WLSS. In making that announcement, Premier Fentie apparently mentioned that he had previous discussions with Mr. Atkinson on the topic.

[2] Mr. Atkinson applied to have this matter tried by way of a summary trial under Rule 19 of the *Rules of Court*. Counsel for the defendants, Mr. Sutherland, indicated at the outset of the hearing that he was not instructed to resist proceeding in that fashion, and accordingly, I allowed the summary trial. The evidence consisted of affidavits from Mr. Atkinson, Chief McMillan, David Dickson, a former councillor in the LFN government and Rick Harder, a retired chair of the Watson Lake Secondary School Council, as well as a number of “read-ins” from the examinations for discovery of Chief McMillan and Mr. Dickson. The arguments of the parties were put forward by outlines filed by each counsel, as well as oral submissions made over the course of a two day hearing.

**ISSUES**

[3] There are a number of issues arising in this action:

1. Were the words published by the LFN and spoken by Chief McMillan defamatory?
2. If any of the words were defamatory, does the defence of qualified privilege apply?
3. If qualified privilege applies, has the defence been defeated by either:
    a) malice; or
    b) by exceeding the limits of the duty or interest giving rise to the privilege?

4. Whether or not the defence of qualified privilege applies, to what extent can the defendants rely upon the *Canadian Charter of Rights and Freedoms* in their defence to this action?
5. If there is no defence to the alleged defamation, what is the appropriate measure of damages?

**CHRONOLOGY OF EVENTS**

[4] Mr. Atkinson has been a secondary school principal and teacher for approximately 37 years, including four years as a principal in Inuvik, Northwest Territories, and four years as principal of WLSS, commencing at the start of the 2003 school year. From the time of his arrival at WLSS, he had an idea about expanding the school's vocational curriculum through the construction of a mechanical arts building, which would enable the school to offer students courses in areas such as small engine repair, auto mechanics, welding, and electrical work. His stated objective was to get all students into some kind of post-secondary training, whether it was in trades, community college or university. He felt strongly that students at WLSS did not have enough opportunity to explore the trades as a possible career option, and that expanding the vocational program might encourage students to pursue post-secondary vocational training, rather than going directly into the job force after graduation.

[5] Mr. Atkinson deposed that he did not have any direct input into the budget or the decision to build such a facility, so all he could do was champion the idea by taking every opportunity to promote it at School Council meetings, to interested members of the community, and whenever he gave tours of the school. The visitors who received such tours included Premier Fentie, who is also the Member of the Legislative Assembly for

Watson Lake, as well as Chief McMillan and David Dickson, who was the education portfolio holder for the LFN government at the time.

[6] On June 14, 2005, David Dickson, Chief McMillan, as well as other representatives of the LFN met with Mr. Atkinson and the principal of the Watson Lake Elementary School, as well as other officials from the Yukon Department of Education, on a variety of topics relating to the two schools in Watson Lake. At that meeting, Mr. Dickson apparently made certain comments on the subject of crystal meth being introduced into the Watson Lake area, which Mr. Atkinson interpreted as some form of attack on his leadership at WLSS.

[7] On June 15, 2005, Mr. Dickson paid a visit to Mr. Atkinson's office to follow up on what he thought was generally a successful meeting the day before. Mr. Atkinson complained loudly that Mr. Dickson had taken him by surprise the previous day by raising the subject of crystal meth. Mr. Dickson recalled that Mr. Atkinson said that he (Dickson) had accused Atkinson of bringing crystal meth into the school. Mr. Atkinson was reportedly raising his voice and standing over Mr. Dickson at the time. The heated conversation lasted two or three minutes, after which Mr. Dickson left Mr. Atkinson's office. As Mr. Dickson was leaving, a person in the outer office who had apparently overheard the conversation asked Mr. Dickson if he was alright. Mr. Dickson said that he reacted emotionally and felt a constriction in his throat, similar to feelings that arise when he recalls memories of his residential school experiences.

[8] Mr. Dickson informed Chief McMillan about the June 15th meeting with Mr. Atkinson. Both were concerned that if Mr. Atkinson could speak that way to an LFN government representative, then he might also treat LFN students in a similar manner.

Accordingly, on June 17, 2005, Chief McMillan wrote to the Assistant Deputy Minister of Education, Colin Kelly, complaining about Mr. Atkinson's perceived verbal abuse of Mr. Dickson, which was said to be culturally and professionally inappropriate. The letter raised two issues. The first was to demand that there be "culturally appropriate atonement", presumably from Mr. Atkinson personally. The second was to request an investigation by the Department of Education, as Mr. Atkinson's employer, to ensure that he had the cross-cultural qualifications to enable him to build a respectful relationship with the LFN members. A courtesy copy of the letter was provided to Mr. Atkinson.

[9] On June 23, 2005, Mr. Atkinson wrote to Chief McMillan acknowledging the letter of complaint and purporting to apologize to Mr. Dickson and to Chief McMillan for having raised the issue in the manner in which he did at the June 15th meeting with Mr. Dickson. Mr. Atkinson deposed that, subsequent to that letter, he and Mr. Dickson shook hands and carried on without any further animosity. In his affidavit, Mr. Dickson deposed that he did not consider the letter to be an apology and that there was no "atonement", as demanded by Chief McMillan. However, that evidence is in contrast with Mr. Dickson's evidence at his examination for discovery, where he was asked the following questions, and gave the following answers:

> "Q Was there ever another time that Principal Atkinson treated you the same way?
> A No.
> Q Did he ever do that again?
> A No, every time I tried to talk to him, you know, like in the Vancouver Airport, we come and meet each other like we're old friends. You know, but it does make me wonder. If he can talk to me like that, how can he talk to my students? Based on my background of residential school, I have to think that way to protect my children. I'm not saying he's a bad person, but behind closed doors, you don't know what happens…" (my emphasis)

[10] For his part, Chief McMillan also deposed that he was not aware of any atonement by Mr. Atkinson. Further, it is apparent from Chief McMillan's later correspondence on October 20, 2006, which I will discuss below, that he also had not accepted Mr. Atkinson's apology.

[11] According to the evidence, nothing of any consequence relevant to this litigation occurred for the balance of 2005.

[12] In or about January 2006, an internal report was prepared for the LFN by Martina Donnessey, who was then Community Education Liaison Coordinator for the LFN. Part of that report included the following comments:

> "… I am very upset with the WLSS principle [as written] who is Carson Atkinson. He and I do not see eye to eye and I find him to be hard headed and very uptight. He mistreats our students with disrespect and suspends them for walking in the halls…"

It is apparently not disputed that this document was never provided to anyone outside the LFN until this litigation was commenced.

[13] On January 19, 2006, the LFN wrote to Mr. Atkinson inviting him or any of his staff to attend a workshop on genealogy and cross-cultural awareness to be held February 13-17, 2006. Mr. Atkinson responded with a letter on February 2, 2006, thanking the LFN for the invitation, but indicating that he had a scheduling conflict for two of the five days proposed for the workshop. He also expressed a concern that no staff member from the school could be excused from student assignments for a full five consecutive days and therefore requested more details on the agenda.

[14] A meeting was arranged between representatives from the Department of Education, the LFN and the WLSS Council to take place on or about April 3 and 4, 2006. According to Chief McMillan, the purpose of the meeting was to discuss "cross-cultural

sensitivity and consultation", which he perceived as being lacking in early 2006. According to an email from the then Director of Learning, Chris Gonnet, dated April 3, 2006, the subject of the meeting was the "Staffing Process in Watson Lake". Mr. Atkinson was one of several recipients of that email. In any event, the meeting was postponed for some un-stated reason.

[15] A territorial election was set for October 10, 2006. In early October, an all candidates meeting was held in Watson Lake, which was followed by the LFN press release on October 3rd and the CBC interview on October 4th. I will come to the details of both shortly. The complete press release is attached to these reasons as Appendix A. Incidentally, on October 5, 2006, there was also a radio broadcast by CHON FM on some of the details arising from the press release, however, the plaintiff's counsel has not pled that broadcast to be defamatory.

[16] Also on October 5, 2006, a teacher at WLSS, Tracy Krauss, wrote a response to the LFN press release indicating, in no uncertain terms, how she viewed the press release as a vicious and unjustified attack on Mr. Atkinson.

[17] According to Chief McMillan's affidavit, a copy of the press release was posted in a securely enclosed staff bulletin board in the staff room of WLSS for a number of weeks after its issuance, and the response by Ms. Krauss was distributed in loose form in the staff room.

[18] On October 18, 2006, Rosemary Burns, recently appointed as the new Department of Education Director of Learning for the Watson Lake region, wrote to Chief McMillan about an upcoming community meeting the following week and acknowledged LFN's dissatisfaction with the level of consultation that had previously occurred with

respect to WLSS. In response, Chief McMillan wrote to Ms. Burns on October 20th regarding programming at WLSS. In that letter, he repeated his dissatisfaction with the lack of consultation prior to the announcement of the vocational stream initiative by Premier Fentie. He also complained about Mr. Atkinson's cultural insensitivities and referred to his earlier request in June 2005 for an investigation of Mr. Atkinson in that regard. It is not disputed that, prior to this litigation, Mr. Atkinson was unaware of that correspondence.

[19] On October 23 and 25, 2006, meetings were held in Watson Lake between Ms. Burns and the LFN's Director of Education, Dorothy Dickson, regarding educational issues. During those meetings, and in a follow up letter from Ms. Dickson to Ms. Burns, dated October 31, 2006, LFN complained about the lack of leadership by Mr. Atkinson and his perceived need for cross-cultural training. Again, it is not disputed that Mr. Atkinson did not receive a copy of that letter until this litigation commenced.

[20] Also on October 31, 2006, Ms. Krauss wrote to Chief McMillan apologizing for her earlier letter of October 5th.

[21] On November 29, 2006, Rosemary Burns wrote to Chief McMillan and Mr. Atkinson inviting them to join her in an initial strategic planning meeting to be held in January 2007, regarding the school planning process. On January 3, 2007, Dorothy Dickson responded with a willingness to participate in the planning process. She also reminded Ms. Burns of the response she was awaiting to the matters raised in her memo from the previous fall. She said that some of those matters "should be addressed on a government to government basis". I take that to be a reference to Ms. Dickson's letter to Ms. Burns dated October 31, 2006, which I just referred to.

[22] On February 12, 2007, a meeting was held between Department of Education officials, Chief McMillan and other LFN officials regarding various topics related to the development of a Kaska[1] education curriculum. Interestingly, one of those topics was on vocational trades/technology and the minutes of the meeting state, “We all agree that this is an important initiative and we have a shared commitment to make this work…”

[23] On February 13, 2007, a further meeting was held with many of the same participants as the day before, but this time including Mr. Atkinson. Once again, it is interesting to note that the minutes reflect a reference to the proposed mechanical arts facility and imply, without any hint of criticism, that Mr. Atkinson had been regularly raising that initiative at meetings of the Watson Lake Chamber of Commerce.

[24] On February 14, 2007, Chief McMillan wrote separately to the Deputy Minister of Education, Gordon McDevitt, and to the Yukon Public Service Commission, regarding LFN’s request for an investigation of Mr. Atkinson going back to June 2005.

[25] On March 2, 2007, Deputy Minister McDevitt responded to Chief McMillan with a commitment to conduct a “review” of the matters he raised regarding WLSS, and the Deputy Minister stated his intention to establish a “review team” for that purpose. On June 5, 2007, Chief McMillan wrote back with suggestions as to who should be involved in the process. Once again, Mr. Atkinson was unaware of any of this correspondence until this litigation was commenced.

[26] On June 18, 2007, Deputy Minister McDevitt sent an email to Chief McMillan informing him that Mr. Atkinson had left work for medical reasons and would be away for the following school year. In particular, the Deputy Minister noted that it was “imperative”

[1] According to Chief McMillan the LFN is one of four Indian bands within the larger cultural group known as the Kaska Nation.

that Mr. Atkinson be advised specifically of the allegations against him and that he be provided an opportunity to have his say in the matter. Accordingly, the email indicated that the review would be delayed until such time as Mr. Atkinson was able to participate.

[27] On June 20, 2007, Mr. Atkinson commenced this lawsuit. He is now 62 years old and it appears unlikely that he will be able to return to work due to unrelated medical issues.

**ANAYLSIS**

***1. Were the words published by the LFN and spoken by Liard McMillan defamatory?***

[28] The plaintiff's counsel has pled that the entirety of the press release is defamatory. However, for present purposes, I will only make reference to the following excerpts:

> "Dennis Fentie Making Up Yukon Party Platform On The Fly"
>
> At the all candidate's debate in Watson Lake, MLA Dennis Fentie suddenly announced his decision to establish a "vocational stream" for the Watson Lake High School. As a result of his private discussions with high school principal Carson Atkinson, Mr. Fentie and the principal have decided that this addition to school programming will be the answer to the high school drop out rates of students.
>
> …
>
> Chief Liard McMillan states, "Mr. Fentie has never discussed the educational needs of our children with us. He doesn't know what our children's needs are because he doesn't understand Kaska people. The current principal has no idea what our needs are either. Mr. Atkinson has demonstrated a remarkable inability to foster a positive working relationship with our citizens and our administration. The Department of Education is fully aware of the principal's shortcomings.
>
> "This demonstrates a patronizing, condescending attitude towards First Nation people." adds Chief McMillan. "We have our MLA, who has a disintegrating relationship with Kaska people, meeting privately with a principal who has little understanding of our interests, deciding for us what is best for our children."

> "This is the same kind of patronizing attitude that laid the foundation for the residential schools. Two non-Kaska policy makers, without input from Kaska citizens or government, deciding to create a Kaska labour force for their idea of our role in their economy…"

[29] With respect to the CBC interview on October 4, 2006, Mr. Atkinson alleges that the following words spoken by Chief McMillan are defamatory:

> "… Essentially Nancy the concern that the Liard FN has surrounding the Premier's promise to establish a vocational stream or trades school in the Watson Lake High School is the plain and simple fact that neither the Yukon Government Department of Education nor the local principal in the local high school have made any effort whatsoever to consult with the Liard FN and work with Liard FN on the development of this program…
>
> Well, overall the relationship between the high school principal and the Liard FN hasn't been very positive. We've expressed a number of concerns to the Department of Education regarding this in the past and they're well aware of the issues that we have with the local high school principal…
>
> Well, I think it's highly important that both the principal as well as other Department of Education officials take notice and take account of what these issues are and there needs to be a bit of a change of attitude in recognizing and dealing with these issues. We're quite willing to work with both the Department of Education and the local high school to try and address our concerns and to try and come up with some constructive solutions and ways that we can address the high drop out rate, that we can address the need for having more culturally appropriate programming in the school…"

[30] It is important to note that sixty percent of the students at WLSS at the time were First Nation, and that the highest drop out rate was among that group of students.

[31] A helpful overview of the law of defamation was provided by Dorgan J., in *Newman* v. *Halstead*, 2006 BCSC 65, at paras. 25-29. She noted that in a defamation action, the plaintiff has the burden of establishing that the imputed words were published, that they referred to the plaintiff, and that they are defamatory. Publication is, at a minimum, the communication of a defamatory statement to a third party and

dissemination to a wider audience is not required. A statement is defamatory if it tends to lower one's reputation in his or her community in the estimation of other reasonable persons. In *Botiuk* v. *Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, Cory J. stated, at para. 62:

> "… it is sufficient to observe that a publication which tends to lower a person in the estimation of right-thinking members of society, or to expose a person to hatred, contempt or ridicule, is defamatory and will attract liability. See *Cherneskey* v. *Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, at p. 1079. What is defamatory may be determined from the ordinary meaning of the published words themselves or from the surrounding circumstances. In *The Law of Defamation in Canada* (2nd ed. 1994), R. E. Brown stated the following at p. 1-15:
>
> > [A publication] may be defamatory in its plain and ordinary meaning or by virtue of extrinsic facts or circumstances, known to the listener or reader, which give it a defamatory meaning by way of innuendo different from that in which it ordinarily would be understood. In determining its meaning, the court may take into consideration all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented."

[32] In the case at bar, the defendants admit the words were published and referred to the plaintiff. As for their plain and ordinary meaning, I have no difficulty in concluding that they are defamatory. In short, they suggest that Mr. Atkinson is not competent for his position and is regarded as such by the Department of Education: see *Angle* v. *LaPierre*, 2008 ABCA 120; *Ottawa-Carleton District School Board* v. *Scharf*, [2007] O.J. No. 3030 (S.C.J.); *Lane* v. *School District 68 (Nanaimo-Ladysmith)*, 2006 BCSC 129; *Mitchell* v. *Nanaimo District Teachers Association*, [1993] B.C.J. No. 386 (S.C.).

[33] Further, the words also have a defamatory meaning by way of innuendo, which arises from the express comparison of Mr. Atkinson to the founders of the residential schools. The tragedy of the residential school experience by members of Yukon First

Nations is widely known and is generally thought to be the result of a fundamentally racist ideology, involving a significant number of educators who inflicted various forms of mental, physical and sexual abuse. The words effectively constitute an accusation of racism and associate Mr. Atkinson with other serious wrongdoers: see *Newman* cited above, at para. 87; and *Wagner* v. *Lim*, [1994] A.J. No. 637, at para. 69; and *WIC Radio Ltd.* v. *Simpson*, 2008 SCC 40, at para. 45.

[34] Having made this determination, it is unnecessary for me to consider the submissions of defence counsel on the potential lesser included meanings which he says the words might reasonably bear, based on authorities such as *Pizza Pizza Ltd.* v. *Toronto Star Newspapers*, [1998] O.J. No. 4702; and *Polly Peck (Holdings)* v. *Telford*, [1986] 2 All E.R. 84 at 102 (C.A.).

[35] As I am satisfied that the plaintiff has proven publication of defamatory statements by the defendants, it is presumed that the statements are false, and the onus shifts to the defendants to either justify the statements or to establish their claim of qualified privilege. Defence counsel clearly indicated in his oral submissions that he has not pled and does not rely on a defence of “justification”. Further, although “fair comment” was pled in the statement of defence, counsel similarly informed me at the hearing that he was not arguing that defence either, and it was not referred to in his outline. I have taken that to be a *de facto* withdrawal of the defence and have given it no consideration.

[36] Thus, I must now move to a consideration of whether the defendants have satisfied their onus of establishing the defence of qualified privilege.

***2. If any of the words were defamatory, does the defence of qualified privilege apply?***

[37] As noted by R.E. Brown in *The Law of Defamation in Canada*, 2d ed. (Toronto: Thomson Canada Limited, 1999) Vol. 2 at 13-4, there are occasions on which a person may publish untrue statements about another and avoid liability even though the publication is defamatory. One such occasion is called qualified privilege. An occasion is privileged if a statement is fairly made by a person discharging a public or private duty, provided it is made to a person who has a corresponding interest in receiving the information. The duty may be either legal, social or moral. The test is whether persons of ordinary intelligence and moral principle, or the great majority of right-minded persons, would have considered it a duty to communicate the information to those to whom it was published. Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself: see *Hill* v. *Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 143. Thus, one may be protected from liability for making a statement on an occasion of qualified privilege, but held liable for those very same words on another occasion which is not privileged.

[38] The legal effect of the defence of qualified privilege is to rebut the inference of malice, which normally arises from the publication of defamatory words ("malice in law"). Where an occasion is established as being privileged, the good faith of the defendant is presumed and he or she is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff: see *Hill*, cited above, at para. 144.

[39] It was formerly settled law that if the publication was to the public generally, such as in a newspaper, the reciprocity between the maker and receiver of the statement, essential in proving qualified privilege, would be lost, and so to the privilege: see

*Douglas* v. *Tucker*, [1952] 1 S.C.R. 275, at para. 287; and *Jones* v. *Bennett*, [1969] S.C.R. 277; and in *Globe and Mail Ltd.* v. *Boland*, [1960] S.C.R. 203. However, a more recent line of cases, beginning with *Stopforth* v. *Goyer*, [1979] O.J. No. 4128, recognized that dissemination to the world at large of a matter truly in the public interest should nevertheless attract a qualified privilege defence. In *Stopforth*, the Ontario Court of Appeal considered the defence of qualified privilege in relation to a statement made by a federal cabinet minister to the media following a very similar statement made just minutes earlier in the House of Commons. That statement addressed a senior civil servant who had been removed from his position for providing misinformation to the minister and for being grossly negligent. At para. 4, Jessup J.A. referred to the defence of qualified privilege as stated in *Halsbury's Laws of England*, (3d ed.), where it was said that "it is not easy to mark off with precision those occasions which are [privileged] from those which are not" and that "the trend of modern decisions is in the direction of a more liberal application or interpretation of the rule [of reciprocity]." At para. 5 (D.L.R.), Jessup J.A. continued:

> "In my opinion the electorate, as represented by the media, has a real and bona fide interest in the demotion of a senior civil servant for an alleged dereliction of duty.. The appellant had a corresponding public duty and interest in satisfying that interest of the electorate…"

[40] *Stopforth* was referred to with approval by the British Columbia Court of Appeal in *Parlett* v. *Robinson*, [1986] B.C.J. No. 594. In that case, Sven Robinson was a Member of Parliament and the official spokesperson for his party on Corrections Canada. He learned that a prison official was purchasing violin chin rests carved by an inmate and then reselling them for a profit through a violin shop in which he had an interest. Following some discussions with corrections officials about the issue, Mr. Robinson urged the

Solicitor General to initiate a public inquiry into the allegations, which was refused. He then held a press conference in his constituency office and made statements about the prison official, for which he was ultimately sued in defamation. Hinkson J.A., speaking for the British Columbia Court of Appeal in allowing Mr. Robinson's appeal, referred to the *Douglas* v. *Tucker* line of cases, but preferred the reasoning in *Stopforth*. At para. 30 he noted the duty of Mr. Robinson to declare his concern in the matter as the official spokesperson for his party on corrections issues, and the corresponding interest of the electorate in Canada in knowing whether the administration of the correctional service was being properly conducted. In addressing whether the publication of his remarks through the media was too broad in the circumstances, Hinkson J.A. said this at paras. 39 and 40:

> "… if the Member of Parliament has a duty to ventilate the subject matter and the electorate has an interest in knowing of the matter, then the only remaining question is whether or not, in the circumstances, the publication "to the world" was too broad.
>
> In my opinion the statements to the media and on the television program which were reported in newspapers and through the media cannot be said to have been unduly wide. That is because the group that had a bona fide interest in the matter was the electorate in Canada. Hence the privilege was not lost."

Leave to appeal *Parlett* to the Supreme Court of Canada was refused, [1986] S.C.C.A. No. 322.

[41] *Stopforth* was also referred to with approval by the British Columbia Court of Appeal in *Ward* v. *Clark*, 2001 BCCA 724, at paras. 62 and 63.

[42] The Nova Scotia Court of Appeal, in *Campbell* v. *Jones*, 2002 NSCA 128, at para. 50, concluded that it is incorrect to suggest that the defence of qualified privilege is unavailable when the publication is to the world at large. In support of that statement, the

Court cited, at para. 48, *Parlett*, as well as *Camporese* v. *Parton*, [1983] B.C.J. No. 2464; *Silva* v. *Toronto Star Newspapers Ltd*., [1998] O.J. No. 6491; and, *Dhami* v. *Canadian Broadcasting Corp.*, 2001 BCSC 1811.

[43] The plaintiff's counsel did not argue that the old law in this area should continue to govern. Although, he did refer to a 2008 case from the Alberta Court of Appeal, *Angle* v. *LaPierre*, cited above, which supported a finding by the trial judge that the defence of qualified privilege failed because the publication in that case had been excessive and gave rise to a risk of significant exposure to people who did not have an interest in the information. However, that case seemed to have turned on its facts and the Court clearly recognized, at para. 13, that publication "to the world" does not invariably defeat qualified privilege.

[44] The plaintiff's counsel also did not seriously challenge the proposition that the perceived failure of the Premier and Mr. Atkinson to consult on such an important educational issue gave rise to a public duty to publish the statements. Rather, counsel submitted that, even if this was an occasion of qualified privilege, the privilege should only extend to communications to school officials or parents of the students at WLSS, but not to members of the public outside the school context. I disagree.

[45] The suggestion in the press release that Mr. Atkinson met privately with the Premier and made a joint decision on the curriculum change was clearly untrue. Nevertheless, given that the Premier mentioned Mr. Atkinson's name in the context of his announcement, it is understandable how Chief McMillan, who attended the all candidates meeting, might have formed that impression. It is also understandable why Chief McMillan and the LFN would have taken umbrage with the apparent lack of consultation

on an issue which was so important to its members. I accept the submission of defence counsel that this apparent transgression by the Premier would have been of interest to the Yukon public at large, especially during an election campaign. Therefore, I am satisfied that the words published by the LFN and spoken by Chief McMillan were for the purpose of furthering LFN's legitimate interests in being consulted with respect to the education of LFN students, and that Yukon citizens, soon to be voting in a territorial election, had a corresponding interest in receiving the information. Accordingly, the defendants have met their onus in establishing the defence of qualified privilege.

***3. If qualified privilege applies, has the defence been defeated by either:***
***a) malice; or***
***b) by exceeding the limits of the duty or interest giving rise to the privilege?***

[46] Qualified privilege is not absolute. It can be defeated if the plaintiff can show either:

a) that the dominant motive for publishing the statement was actual or express malice ("malice in fact"); or

b) that the limits of the duty or interest giving rise to the privilege in the first place have been exceeded, in the sense that the statement went beyond what was germane and reasonably appropriate in the circumstances of the occasion. In other words, if the statement goes beyond the exigency of the occasion, the privilege can be defeated.

See *Hill*, cited above, at paras. 144-147; and *The Law of Defamation in Canada*, cited above, at 13-9 and 13-10.

[47] In deciding whether the qualified privilege in this case is defeated by malice, the onus shifts back to Mr. Atkinson to prove, on a balance of probabilities, that the dominant

motive of the defendants for publishing the statements was actual or express malice. In *Hill*, cited above, Cory J. briefly discussed how malice may be established at para. 145:

> "Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes, as Dickson J. (as he then was) pointed out in dissent in *Cherneskey*, supra, at p. 1099, "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created. See, also, *Taylor* v. *Despard*, [1956] O.R. 963 (C.A.). Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth. See *McLoughlin*, supra, at pp. 323-24, and *Netupsky* v. *Craig*, [1973] S.C.R. 55, at pp. 61-62."

[48] In *Horrocks* v. *Lowe*, [1974] 1 All E.R. 662, Lord Diplock, at p. 671, spoke about the type of recklessness which needs to be proven to show malice:

> "… If "reckless" here means that the maker of the statement has jumped to conclusions which are irrational, reached without adequate enquiry or based on insufficient evidence, this is not enough to constitute malice if he nevertheless does believe in the truth of the statement itself. The only kind of recklessness which destroys privilege is indifference to its truth or falsity."

[49] The plaintiff has a considerable burden in proving malice. In jury trials, it is a question of law for the judge to determine whether there is sufficient evidence to submit the issue of malice to the jury. Before doing so, the judge must be of the opinion that the evidence adduced raises a "probability" of its existence: *Campbell* v. *Jones*, cited above, at para. 34.

[50] In *Adam* v. *Ward*, [1917] All E.R. 157, Lord Atkinson commented about the use of strong language in the context of qualified privilege, at 173:

> "These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, <u>even though his language should be violent or excessively strong</u>, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed

> that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so." (my emphasis)

[51] The reference by Lord Atkinson to "reasonable grounds" in the passage above might suggest that a negligent statement could give rise to malice. However, that is not the case. In *Loos* v. *Robbins*, [1987] S.J. No. 237, at p. 13 (Q.L.), Gerwing J.A., speaking for the Saskatchewan Court of Appeal about the malice test, cited *Adam* v. *Ward*, and continued:

> "There remains the question of whether the appellant had shown a probability of the existence of malice under its only other guise possibly relevant to these facts – that is, lack of genuine belief in the truth of the statement. (This species of malice is described at page 329 of the 7th Ed. of *Gatley*). That learned author goes on to note that mere carelessness or negligence is not malice and nor is failure to inquire to the truthfulness of his statement…" (my emphasis)

[52] In *Botiuk*, cited above, Cory J. definitively addressed the difference between carelessness and recklessness in regard to malice, at para. 96.

> "A distinction in law exists between "carelessness" with regard to the truth, which does not amount to actual malice, and "recklessness", which does. In *The Law of Defamation in Canada*, supra, R. E. Brown refers to the distinction in this way (at pp. 16-29 to 16-30):
>
> > . . . a defendant is not malicious merely because he relies solely on gossip and suspicion, or because he is irrational, impulsive, stupid, hasty, rash, improvident or credulous, foolish, unfair, pig-headed or obstinate, or because he was labouring under some misapprehension or imperfect recollection, although the presence of these factors may be some evidence of malice."

[53] The plaintiff's counsel only made oral submissions on malice at the hearing. He explained in his outline that the plaintiff's arguments with respect to privilege would be offered at the reply stage, and therefore provided no written argument in response to the defendants' assertion of qualified privilege. While I do not wish to be unduly critical, I found that approach to be less helpful in assisting me with my deliberations. The

plaintiff's counsel knew from the pleadings that the defence of qualified privilege would be raised and, if established, the burden would shift back to the plaintiff to prove either malice or that the defamatory statements exceeded the privileged occasion. Therefore, written arguments on these points could have been provided in advance of the hearing, and would have been of greater assistance to me in deciding these issues, which have a number of legal and factual complexities.

[54] In any event, on the issue of malice, the plaintiff's counsel made two arguments: first, that the defendants were recklessly indifferent to the truth; and second, that the statements were made for the ulterior purpose of defeating the Fentie government.

[55] With respect to the first justification for malice, the plaintiff's counsel pointed to the implicit suggestion in the press release that Mr. Atkinson was incompetent and the explicit statement that the Department of Education was fully aware of Mr. Atkinson's "shortcomings". In fact, says counsel, the defendants had only made a single complaint about Mr. Atkinson, because of his treatment of Mr. Dickson on June 15, 2005. Neither Chief McMillan nor David Dickson could point to any other examples of specific "shortcomings" or particular instances where Mr. Atkinson had exhibited incompetence or cultural insensitivity. Therefore, says counsel, the defendants' suggestion that Mr. Atkinson was incompetent and had shortcomings was untrue and the defendants knew the suggestion was untrue. Similarly, went the argument, the expressed suggestion in the press release that Mr. Atkinson had "no idea" of the needs of LFN members or their children's needs was factually untrue to the knowledge of the defendants. Thus, since the LFN had no specific concerns about Mr. Atkinson leading up to the press release, one cannot objectively connect the defamatory comments made by the defendants in the

press release with any specific incidents at the WLSS. In short, the plaintiff's counsel says that the defendants were not aware of any facts to support their defamatory remarks and, therefore, those remarks exhibit a reckless disregard for the truth.

[56] I agree that the defamatory remarks were untrue and were largely unsupported by any facts known to the defendants. However, the statements were not made in a factual vacuum and it is important to view the entirety of the circumstances from the defendants' perspective. First of all, there was the incident with Mr. Dickson on June 15, 2005. Despite the virtual silence of LFN on the issue of Mr. Atkinson's competence and suitability until the all candidates meeting, which would indicate that the incident was resolved and forgotten, it appears that the LFN and Chief McMillan nevertheless continued to feel concerned over the ensuing months about the extent to which the incident might have been evidence of Mr. Atkinson's cultural insensitivity. The fact that the relationship between the LFN and Mr. Atkinson was to be an agenda item at the meeting on April 4, 2006, between the Department of Education, LFN and the WLSS Council, is some evidence of this.

[57] Secondly, if Chief McMillan and other members of the LFN continued to feel concerned about Mr. Atkinson's cultural sensitivity at the time of Premier Fentie's announcement at the all candidates meeting, then it becomes more understandable how Chief McMillan might have formed the honest impression that Mr. Atkinson met privately with the Premier and participated in a decision to add the vocational stream to the school curriculum. That, of course, would have logically added to the defendants' concerns.

[58] Indeed, the plaintiff's counsel seemed to have conceded that the latter was one of the possible impressions that an observer at the all candidates meeting might have been

left with. He submitted that, since it was common knowledge that Mr. Atkinson was promoting the building of a mechanical arts facility for the school, when Premier Fentie mentioned Mr. Atkinson's name in the context of the vocational stream announcement, there were two possible interpretations which could have been made: one, that Mr. Atkinson had promoted the mechanical arts facility with the Premier, just like he had publicly done with many other visitors to the school; or two, that Mr. Atkinson met in private with the Premier and participated in a decision on the school's curriculum without consulting the LFN.

[59] The plaintiff's counsel raised a further argument that related to the defendants' alleged reckless indifference for the truth. Here, counsel submitted that, if the defendants honestly felt that something of concern was said by Premier Fentie at the all candidates meeting, then they had a duty to verify their concerns before using the Premier's election promise as a springboard to criticize Mr. Atkinson. It is my understanding that this notion of an obligation to "verify" information before making public statements arises from the "responsible journalism" cases, beginning with the English cases of *Reynolds* v. *Times Newspapers Ltd*., [2001] 2 AC 127; and *Jameel* v. *Wall Street Journal Europe Sprl*, [2007] 1 AC 359 (HL). In *Cusson* v. *Quan*, 2007 ONCA 771, the Ontario Court of Appeal applied *Reynolds* and *Jameel* and created a new defence of "public interest responsible journalism" in Canadian law. *Cusson* has been appealed to the Supreme Court of Canada and is currently under reserve. Similarly, in *Grant* v. *Torstar Corp.*, 2008 ONCA 796, the Ontario Court of Appeal allowed an appeal and ordered a new trial because the trial judge had failed to consider responsible journalism as a defence separate from the

traditional defence of qualified privilege. That case is also under reserve with the Supreme Court of Canada.

[60] In *Reaburn* v. *Langen*, 2008 BCSC 1342, Grauer J. discussed *Reynolds*, *Jameel* and *Cusson*. At para. 63, he quoted Sharpe J.A. in *Cusson*, who stated that the public interest responsible journalism defence is:

> "…a sensible halfway house between the two extremes of the traditional common law no fault liability on the one hand, and the traditional qualified privilege requirement for the proof of malice on the other. Public interest responsible journalism defence recognizes that in relation to matters of public interest, the traditional common law unduly chills freedom of expression but, at the same time, rejects the notion that media defendants should be afforded a license to defame unless the innocent plaintiffs can prove deliberate or reckless falsehood…" (see para. 139).

Similarly, in *Reaburn*, at paras. 64-75, Grauer J. treated the defence of public interest responsible journalism as something distinct from the traditional common law analysis associated with the qualified privilege defence.

[61] With the responsible journalism defence, the question is whether there has been publication about a matter of public interest. As Grauer J. put it in *Reaburn*, that is, something that would be in the public's interest to know, rather than something that would interest the public (para. 65). If so, then the occasion becomes one of privilege and it is no longer necessary for the plaintiff to proceed to prove malice in order to defeat the privilege. Rather, the onus remains with the defendant to establish responsible journalism and, in that regard, one of the factors which can be taken into account is whether the defendant had taken steps to verify the information published.

[62] Pending clarification from the Supreme Court of Canada in the *Cusson* and *Grant* cases, I also understand the responsible journalism cases to be distinguishable from those involving the traditional qualified privilege approach. The distinction is important

because, with respect to the latter, there is no obligation on a defendant to verify facts before making public statements about them. On the contrary, as R.E. Brown noted in *The Law of Defamation in Canada*, cited above, at 16-29 to 16-30, a defendant is not malicious merely because he relies solely on gossip and suspicion, or because he is impulsive and rash, or because he was labouring under some misapprehension or imperfect recollection. Also, in *Horrocks* v. *Lowe*, quoted above at para. 50 of these reasons, Lord Diplock expressly stated that the absence of “adequate enquiry” is not enough to constitute malice, so long as the maker of the statement believes in its truth. Therefore, I reject the suggestion that the defendants ought to have taken steps to verify the facts implied by Premier Fentie at the all candidates meeting before making public statements in response.

[63] In the result, I am not satisfied that Mr. Atkinson has met his onus of proof in establishing malice on the basis of a reckless disregard for the truth. The defendants’ defamatory statements may well have been impulsive and based on nothing more than mere suspicion. However, in the context of their apparently long memory of the June 15, 2005 incident, combined with a possible impression left by the Premier that he had met with Mr. Atkinson privately to make significant curriculum changes, the defamatory statements could have been based on an honest belief that put Mr. Atkinson in the worst possible light.

[64] The second reason the plaintiff’s counsel put forward to establish malice is that the statements in the press release were for the ulterior purpose of prompting LFN members to vote against Premier Fentie. It is clear from the examination for discovery of Chief McMillan that he was no fan of the Premier and would have welcomed a change in

government with the territorial election on October 10, 2006. Here, counsel appeared to argue that there was no connection, beyond the tangential, between what Premier Fentie implied about having private discussions with Mr. Atkinson, and the defendants' attack on Mr. Atkinson in the press release. Consequently, the plaintiff's counsel submitted that the press release was not issued in the spirit of public debate and that it was intended to have political consequences. I agree that the dominant purpose of the press release was to have a negative political impact on Premier Fentie during the upcoming election. Indeed, the title of the document is "Dennis Fentie Making Up Yukon Party Platform On The Fly". In the process, Mr. Atkinson's reputation became "regrettable but unavoidable road kill on the highway of public controversy", to use the language of Binnie J. in *WIC Radio Ltd.*, cited above, at para. 2. The defendants' political interest in the apparent lack of consultation by the Premier was the very type of thing that the defence of qualified privilege is designed to protect. Thus, the political purpose of the press release was not ulterior, it was front and centre.

[65] The last argument put forward by the plaintiff's counsel to defeat the claim of qualified privilege was that the manner in which the defendants conducted themselves exceeded the limits of the duty or interest which the occasion of privilege was intended to protect. In *Hill*, cited above, Cory J. explained this notion as follows, at paras. 146 and 147:

> "Qualified privilege may also be defeated when the limits of the duty or interest have been exceeded. See *The Law of Defamation in Canada*, supra, at pp. 13-193 and 13-194; Salmond and Heuston on the *Law of Torts* (20th ed. 1992), at pp. 166-67. As Loreburn E. stated at pp. 320-21 in *Adam* v. *Ward*, supra:
>
> > . . the fact that an occasion is privileged does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or the exercise of the right or

> the safeguarding of the interest which creates the privilege will not be protected.
>
> In other words, the information communicated must be reasonably appropriate in the context of the circumstances existing on the occasion when that information was given. For example, in *Douglas* v. *Tucker*, [1952] 1 S.C.R. 275, the defendant, during an election campaign, stated that the plaintiff, who was the officer of an investment company, had charged a farmer and his wife an exorbitant rate of interest causing them to lose their property. The plaintiff maintained that the allegation was without foundation. In response, the defendant asserted that the plaintiff was facing a charge of fraud which had been adjourned until after the election. This Court held that the defendant had an interest in responding to the plaintiff's denial, thereby giving rise to an occasion of qualified privilege. However, it ruled that the occasion was exceeded because the defendant's comments went beyond what was "germane and reasonably appropriate" (p. 286).”

[66] The plaintiff’s counsel submitted that the facts in *Hill* are an interesting parallel to the case at bar. In *Hill*, Morris Manning acted as legal counsel for the Church of Scientology of Toronto. Casey Hill (now an Ontario superior court judge) was a Crown attorney employed by the Province of Ontario. He had been involved in a search of premises occupied by the Church of Scientology in which about 250,000 documents were seized. Just over 230 of those documents were subsequently determined to be subject to solicitor-client privilege and were ordered sealed by Justices of the Supreme Court of Ontario. In a separate legal proceeding, the Church made an application to the Deputy Registrar General of the Ministry of Consumer and Commercial Relations for the Province of Ontario requesting that the Church’s president be granted authorization to solemnize marriages. The Deputy Registrar believed that it would help her to assess the application if she could review the seized documents. A solicitor on behalf of the Deputy Registrar approached Casey Hill in that regard and was informed by Mr. Hill that access would only be granted if a court order was obtained. Mr. Hill further indicated that notice

should probably be given to the Church of Scientology. The solicitor proceeded to obtain an order granting access to all the seized documents, but did not provide notice to the Church. When the Church learned of this development, it assumed that Casey Hill had been instrumental in facilitating access to the sealed documents. The Church retained Mr. Manning who prepared an application to have Casey Hill found in contempt of court. On the day the notice of motion was filed, Mr. Manning held a press conference on the courthouse steps, wearing his barrister's gown, read from and commented upon the allegations contained in the notice of motion, which included that Casey Hill had misled a judge and had breached court orders sealing certain documents belonging to the Church.

[67] The previous year, the Church had arranged for one of its members to attend at the offices of the Ontario Provincial Police on a regular basis for the purpose of reviewing the seized materials and ensuring that the privileged documents remained sealed. As of the day of the press conference by Mr. Manning, that review was well advanced and neither then nor later was there any indication that the Deputy Registrar had gained access to the sealed documents.

[68] At the contempt trial, the allegations against Casey Hill were found to be untrue and without foundation. He then commenced an action for damages in libel against the Church. The Church raised the defence of qualified privilege. At paras. 155 and 156, Cory J. addressed the question of whether Morris Manning's conduct had exceeded the limits of the occasion of privilege:

> "…Morris Manning's conduct far exceeded the legitimate purposes of the occasion. The circumstances of this case called for great restraint in the communication of information concerning the proceedings launched against Casey Hill. As an experienced lawyer, Manning ought to have taken steps to confirm the allegations that were being made. This is particularly true since he should have been aware of the Scientology

> investigation pertaining to access to the sealed documents. In those circumstances he was duty bound to wait until the investigation was completed before launching such a serious attack on Hill's professional integrity. Manning failed to take either of these reasonable steps. As a result of this failure, the permissible scope of his comments was limited and the qualified privilege which attached to his remarks was defeated.
>
> The press conference was held on the steps of Osgoode Hall in the presence of representatives from several media organizations. This constituted the widest possible dissemination of grievous allegations of professional misconduct that were yet to be tested in a court of law. His comments were made in language that portrayed Hill in the worst possible light. This was neither necessary nor appropriate in the existing circumstances. While it is not necessary to characterize Manning's conduct as amounting to actual malice, it was certainly high-handed and careless. It exceeded any legitimate purpose the press conference may have served. His conduct, therefore, defeated the qualified privilege that attached to the occasion."

[69] Thus, in both *Hill* and the case at bar it appeared to the defendants that some wrongdoing had occurred. In *Hill*, the supposed wrongdoing was the opening of sealed documents by a Crown prosecutor in breach of a court order. In the case at bar, the apparent wrongdoing was the private meeting between the Premier and Mr. Atkinson for the purpose of making a curriculum decision without consulting the LFN. However, the specific reference by the plaintiff's counsel to Cory J.'s comments that Morris Manning ought to have taken steps to confirm the allegations against Casey Hill seemed to be intended to suggest that Chief McMillan and the LFN similarly ought to have taken steps to confirm their suspicions before making their public statements. If that was indeed the argument, I disagree. *Hill* is distinguishable from the case at bar in that the Church of Scientology had already commenced an investigation to determine whether any of the sealed documents had in fact been opened, and that investigation was well advanced by the time of Morris Manning's press conference. That combined with the fact that Mr. Manning was an experienced lawyer who ought to have known better before making

grievous allegations of professional misconduct against Casey Hill, led Cory J. to conclude that Mr. Manning's conduct had exceeded the occasion of the privilege by failing to either confirm the allegations or waiting until the investigation was completed. As Cory J. said in the passage I just quoted, the circumstances of the case called for "great restraint" in the communication of information about the contempt proceedings. Read carefully then, I do not view *Hill* as authority for the general proposition that every time a defendant fails to take steps to verify information published on a privileged occasion, he or she will have exceeded the privilege.

[70] In the case at bar, Premier Fentie had apparently announced the idea of introducing a vocational stream into the curriculum at WLSS in the same breath as mentioning his previous discussions with Mr. Atkinson. As I said earlier, in that context, it was not necessarily unreasonable for Chief McMillan and members of the LFN to conclude as they did that Mr. Atkinson had in fact met privately with the Premier for the purpose of making this decision on curriculum without consulting the LFN. For the plaintiff's counsel to suggest that the defendants ought to have taken steps to confirm their fears is tantamount to repeating his earlier argument, which I have already rejected, that the defendants had an obligation to verify the information received at the all candidates meeting before making their public statements.

[71] The plaintiff's counsel also argued that the qualified privilege was exceeded by the defendants because they went further than they had to in criticizing the lack of consultation prior to the Premier's announcement. In particular, counsel focused on the defendants' references to Mr. Atkinson's shortcomings, his inadequate performance as a principal and his employer's awareness of the same.

[72] In *Ward* v. *Clark*, 2001 BCCA 724, the British Columbia Court of Appeal dealt with the issue of whether disproportionate language can defeat qualified privilege. At para. 56, Esson J.A., for the Court, quoted Lord Atkinson in *Adam* v. *Ward*, whom I referred to earlier in these reasons at para. 52, and agreed that even violent or excessively strong language, if based on an honest belief, might still receive the protection of the privilege. Esson J.A. continued, "…The law does not require either blandness or accuracy as a condition of successfully invoking qualified privilege…"

[73] In *Horrocks* v. *Lowe*, cited above, Lord Diplock said this at p. 670 All E.R.:

> "…Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty wearing protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express" malice can properly be found." (my emphasis)

Although those remarks were directed more to the question of malice, they are in my view equally applicable to the question of whether the limits of the privileged occasion have been exceeded.

[74] In *DDI Diamonds Direct Inc.* v. *Raney*, 2006 BCSC 952, Wong J. explored the issue raised in *Douglas* v. *Tucker*, cited above, of whether the words used were "germane and reasonably appropriate". After applying the Court of Appeal decision in *Ward* v. *Clark*, which I just mentioned, he concluded, at para. 43, that "germane and reasonably appropriate" refers to the scope of the comments and their relation to the matters in controversy:

> "…What is relevant is not the choice of language but its connection to the matters in controversy. The question, then, is not whether the letter

> contained intemperate language - from my reading, it surely did - but whether that language was directed to the subject matter [that] gave rise to the privilege in the first place."

In other words, said Wong J., the defence of qualified privilege can be defeated if the publication "strays beyond the subject matter that gave rise to the privilege" (para. 41).

[75] I agree with this analysis. In applying it to the case at bar, it is important to note that it was the theory of the defendants that the decision on the vocational stream was a joint decision between the Premier and Mr. Atkinson. Therefore, the defendants' unhappiness about not being consulted applied to both the Premier and Mr. Atkinson. With respect to the latter, it is therefore not surprising then that the defendants used this supposed transgression as exemplifying what they perceived to be other shortcomings in Mr. Atkinson's leadership in the school. Thus, the comments were not so unrelated to the complaint about lack of consultation - which gave rise to the privilege - that their inclusion in the press release defeats the defence.

[76] In summary, I find that the plaintiff has not met his onus in establishing malice in fact; nor has he established that the limits of the occasion of privilege were exceeded by the defendants. Therefore, the plaintiff's defamation claim must fail.

### *4. Whether or not the defence of qualified privilege applies, to what extent can the defendants rely upon the Canadian Charter of Rights and Freedoms in their defence to this action?*

[77] Having made the above conclusion, it is unnecessary to deal with the *Charter* issues raised by the defendants, but I will attempt to do so as summarily as I can, in the event I have been wrong elsewhere in these reasons.

[78] Unfortunately, I found the arguments of defence counsel in this area difficult to follow. This may have been due in part to the fact that defence counsel made only brief

oral submissions on these arguments, preferring to rely primarily on his written outline. It would have been more helpful if counsel had clarified, at the hearing, the points discussed below.

[79] I begin by looking to the pleadings. In the statement of defence, the defendants say that the freedom of expression and the equality rights in ss. 2(b) and 15 of the *Charter*, respectively, apply to the law of defamation generally and to the defence of qualified privilege in particular. Then, the pleadings go on to say that "… to the extent those fundamental freedoms are engaged by the facts of this case, the Defendants' invoke Section 24 of the *Charter* and apply to the Court for [a] remedy…". Section. 24(1) provides that anyone whose rights or freedoms have been "infringed or denied" may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. Therefore, the statement of defence seems to suggest that the defendants' rights and freedoms have somehow been infringed or denied by the plaintiff and, accordingly, they are entitled to an appropriate remedy. Yet, there is absolutely no evidence of any such infringement or denial.

[80] Then the defendants go further in pleading that s. 32 of the *Charter* applies to the Government of Yukon, the Department of Education, WLSS and Mr. Atkinson "in respect of all acts and omissions of the Plaintiff in his role … as the Principal" of WLSS. However, s. 32 only applies to government action and not to private activity, and there has been no specific allegation of what acts or omissions of Mr. Atkinson are capable of constituting "government action". This limitation to the application of the *Charter* was addressed by

Cory J. in *Hill*, cited above, at paras. 67 and 68:

> "In *RWDSU* v. *Dolphin Delivery Ltd*., [1986] 2 S.C.R. 573, McIntyre J., with regard to the application of the *Charter* to the common law, stated at pp. 598-99:
>
> > It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation. . . . It will apply to the common law, however, only in so far as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right or freedom. [Emphasis added.]
>
> La Forest J., writing for the majority in *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229, stressed the importance of this limitation on the application of the *Charter* to the actions of government. He said this at p. 262:
>
> > The exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected. We do not really know why this approach was taken, but several reasons suggest themselves. Historically, bills of rights, of which that of the United States is the great constitutional exemplar, have been directed at government. Government is the body that can enact and enforce rules and authoritatively impinge on individual freedom. Only government requires to be constitutionally shackled to preserve the rights of the individual."

Furthermore, neither the Government of Yukon nor the Department of Education are parties to this action and no allegations have been made that either took any government action against the defendants which infringed or denied their freedom of expression or equality rights.

[81] The defendants have also pled, in the alternative, that "*Charter* Principles" apply on the facts of this case to the law of defamation generally, and to the law of qualified privilege in particular. They then go on to plead and rely upon the principles enunciated by the Supreme Court of Canada in *Hill*, at paras. 91-99. As I interpret those passages, the Supreme Court was stating that the common law must be interpreted in a manner

which is consistent with *Charter* principles, as part of the ongoing obligation of courts to modify or extend the common law in order to comply with prevailing social conditions and values. However, the Supreme Court was careful to point out that, in the context of civil litigation involving only private parties, the *Charter* will apply to the common law only to the extent that the common law is found to be inconsistent with *Charter* values. Further, the party who is alleging that the common law is inconsistent with the *Charter* bears the onus of proving both that the common law fails in that regard and that, when those values are balanced, it should be modified. The Court distinguished cases involving the constitutionality of government action from those in which no government action is involved. At para. 95, Cory J. stated:

> "Private parties owe each other no constitutional duties and cannot found their cause of action upon a *Charter* right. The party challenging the common law cannot allege that the common law violates a *Charter* right because, quite simply, *Charter* rights do not exist in the absence of state action. The most that the private litigant can do is argue that the common law is inconsistent with *Charter* values. It is very important to draw this distinction between *Charter* rights and *Charter* values. Care must be taken not to expand the application of the *Charter* beyond that established by s. 32(1), either by creating new causes of action, or by subjecting all court orders to *Charter* scrutiny…"

[82] I repeat, in the case at bar, the defendants have not established that government action is involved. Nor have they satisfied the onus of proving that the common law of defamation generally, or qualified privilege in particular, fails to comply with *Charter* values. Therefore, I do not see how the defendants are entitled to any relief arising from the *Charter*.

[83] In his outline, defence counsel wrote that LFN students have *Charter* rights "to have accessible education, in a social context that can be effective." Presumably, he is asserting that those rights arise under the equality provisions in s.15 of the *Charter*.

However, defence counsel has still failed to establish how there has been any government action infringing or denying those rights.

[84] Defence counsel also sought to establish a clear comparison between the case at bar and *Campbell* v. *Jones*, cited above. There, the Nova Scotia Court of Appeal held that two lawyers, representing three young black girls who had been stripped searched, were protected by qualified privilege from making critical statements about the police officer who conducted the search. At para. 56, Roscoe J.A., for the majority said:

> "…a lawyer faced with a patent injustice, such as the violation of her clients' Charter rights by law enforcement officers, has a substantial and compelling duty to ensure such injustice is remedied in an effective and timely manner. Such duty may well provide a basis for qualified privilege."

While I have no difficulty with that conclusion, *Campbell* is distinguishable from the case at bar because it involved governmental action by a police officer.

[85] A further point argued by defence counsel, along with the other constitutional arguments, arose out of the notion of the Yukon Government's "duty to consult" the LFN in matters of education policy. In particular, counsel pointed to s. 55 of the *Education Act*, R.S.Y. 2002, c. 61, as the "key" provision triggering the duty to consult. That section states:

> "Every school administration in consultation with the local Indian education authority or, if there is no local Indian education authority, the Yukon First Nation, shall include in the school program activities relevant to the culture, heritage, traditions, and practices of the Yukon First Nation served by the school."

Thus, the section suggests that Mr. Atkinson, as the school principal in charge of "school administration", had a duty to consult with the LFN on cultural programs, and the like. There is no evidence to suggest that this was not done. Therefore, once again, I am left puzzled as to the relevance of s. 55 to this action. Presumably, defence counsel

assumed that this section gave rise to LFN's entitlement to be consulted on the proposed "vocational stream", however that is not a topic which is necessarily "relevant to the culture, heritage, traditions and practices" of the LFN. Furthermore, the *Education Act* does not have constitutional status.

[86] The final point raised by defence counsel in this area, was to assert that the Government of Yukon had a duty to consult with the LFN arising out of the honour of the Crown, as stated in *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73. In *Haida Nation*, McLachlin J., speaking for the Court, said at para. 35:

> "But, when precisely does a duty to consult arise? The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, *per* Dorgan J."

However, I repeat that the Government of Yukon is not a party to this action. Furthermore, I agree with the plaintiff's counsel that the defendants have not pleaded a duty to consult on educational matters based on an asserted aboriginal right. Therefore, I give no weight to this argument.

### *5. If there is no defence to the alleged defamation, what is the appropriate measure of damages?*

[87] As I have found that the defendants have established the defence of qualified privilege and that the plaintiff's claim must therefore fail, there is no need to consider the question of damages.

## CONCLUSION

[88] Mr. Atkinson has met his onus in establishing that the public statements made by the defendants on October 3 and 4, 2006, were defamatory. However, the defendants

have, in turn, established that the defence of qualified privilege applies. Mr. Atkinson has failed to meet his onus in attempting to defeat the defence of qualified privilege. In particular, he has not established that the defendants acted with malice or otherwise exceeded the limits of their duty and interest on this occasion of qualified privilege. Having made these conclusions, it is unnecessary for me to make any determinations on whether the common law of defamation generally, and of qualified privilege in particular, is inconsistent with *Charter* values. In any event, the defendants have not alleged that is the case, nor have they satisfied the onus of proving that the common law fails in that regard and should be modified. This is not a case involving government action and therefore no remedy under s. 24 of the *Charter* is available.

**COSTS**

[89] Normally, under Rule 60(9) of the *Rules of Court*, costs shall follow the event, unless the court otherwise orders. In other words, the unsuccessful party is usually required to pay the taxable court costs of the successful party. However, the court has discretion in making such orders and, in exercising that discretion, I feel compelled to comment on the simple unfairness of the defendants' conduct in this matter.

[91] In that regard, it is ironic that the defendants and their counsel have often spoken of the importance of respect and tolerance in the culture of the Liard First Nation. For example, in Chief McMillan's letter to Colin Kelly dated June 17, 2005, he stated "It is the Dena way to remain respectful of each other as we attempt to find solutions, despite our differences." Defence counsel focussed on that statement in his outline, and similarly in his oral submissions he stated that it was "not the Dena way to denounce, except in extraordinary circumstances". Further, there were repeated references in the evidence to

the desire of LFN to develop and maintain an effective relationship between Mr. Atkinson and the LFN members. Given these stated ideals, I find it difficult to understand why Chief McMillan and the LFN proceeded in the way they did.

[92] I accept the fact that there was an unfortunate, but brief, heated exchange between Mr. Atkinson and Mr. Dickson on June 15, 2005. Chief McMillan understandably took prompt action in writing to Colin Kelly two days later to complain about the incident and to seek a resolution. A courtesy copy of that letter was appropriately sent to Mr. Atkinson, and he responded with his letter of June 23, 2005, in which he apologized to Mr. Dickson and to Chief McMillan for having raised the issues in the manner in which he did on June 15th. According to Mr. Atkinson, he and Mr. Dickson subsequently "shook hands and carried on without any further animosity". That allegation was undisputed by Mr. Dickson. Indeed, in his examination for discovery he admitted that he was never treated in a similar fashion by Mr. Atkinson on any other occasion and that every time he tried to talk to Mr. Atkinson they would greet each other as if they were "old friends". For his part, Chief McMillan admitted at his discovery that, apart from the June 15th incident, he never received any specific information about Mr. Atkinson continuing to demonstrate that he was culturally insensitive or unable to deal with LFN members as the school principal. Further, on a personal level, Chief McMillan admitted that Mr. Atkinson had never done anything to cause the Chief to have a negative opinion of him and that his interactions with him were "friendly and upbeat". Therefore, Mr. Atkinson had every reason to believe that the June 15th incident was resolved and forgotten.

[93] Nevertheless, the evidence indicates that Chief McMillan and Mr. Dickson remained dissatisfied with Mr. Atkinson's letter of June 23rd. However, no one ever

communicated that to Mr. Atkinson. In particular, no one on behalf of either of the defendants ever specifically complained to Mr. Atkinson that there had been no "atonement" for his inappropriate conduct during the June 15th meeting. Indeed, there was no evidence of any attempt to clarify what it was that the defendants expected by way of atonement. It was only at the hearing on this summary trial that defence counsel offered the submission that atonement, from his clients' perspective, meant that Mr. Atkinson had to do something more than simply say that he was sorry, such as offering or experiencing some "material sacrifice". Yet, neither of the defendants were respectful enough of Mr. Atkinson to let him know directly that they had such an expectation and how it might be satisfied.

[94] Further, while the defendants may have had lingering concerns about Mr. Atkinson's cultural sensitivity between the June 15, 2005 incident and the all candidates meeting on October 3, 2006, the record does not reflect them taking any timely, diligent or respectful steps to bring those concerns to Mr. Atkinson's attention. Then, when Premier Fentie made his announcement and mentioned Mr. Atkinson in the same breath, Chief McMillan and the LFN immediately assumed the worst.

[95] The explanation given by the defendants for their failure to communicate with Mr. Atkinson directly about their concerns is that they viewed the issue as a "government to government" matter, and that they wanted to establish a proper "forum and process" for having their concerns addressed. When I asked defence counsel why neither defendant has apologized to Mr. Atkinson since this action was commenced, the explanation was that "no apology is owed for the performance by a First Nation chief of his duty".

[96] These explanations ring hollow. Firstly, as was made abundantly clear by Deputy Minister McDevitt in his email to Chief McMillan on June 18, 2007, if the “review” of the matters raised by the LFN with respect to Mr. Atkinson was to proceed, it would be “imperative that [he] be advised specifically of the allegations against him and that he be provided an opportunity to have his say in the matter.” No doubt, the Deputy Minister felt notice to Mr. Atkinson was “imperative” because that is a fundamental requirement of the rules of procedural fairness. But more to the point, it was also a matter of simple common sense. How did the defendants imagine they would develop and maintain an effective relationship with Mr. Atkinson if he was not informed of the nature of their concerns and given an opportunity to respond? From Mr. Atkinson’s point of view, the defendants remained totally silent in that regard until the press release of October 3, 2006. He was then bombarded with statements to the effect that he was incompetent in his position as principal, that his employer was fully aware of his shortcomings, and that he had a patronizing and condescending attitude towards First Nations people, similar to those who founded the residential school system on what is widely believed to be a fundamentally racist ideology. These statements came as a ‘bolt from the blue’ for Mr. Atkinson and it is entirely understandable why he deposed that he felt personally devastated by them. Equally upsetting was the effect of the statements, which was to drive a wedge between Mr. Atkinson and LFN members.

[97] Secondly, as for Chief McMillan maintaining to this day that he felt that he was only doing his duty and therefore has no need to apologize, in my view that smacks of a backhanded attempt to justify what was said in the defamatory statements. As the Chief has known for some time in the course of this litigation, the supposition that Mr. Atkinson

met privately with Premier Fentie and participated in a decision to introduce a vocational stream into the WLSS curriculum, without consulting the LFN, is clearly not true.

[98] It is therefore understandable why Mr. Atkinson felt compelled to bring this action. However, it is my opinion that the action could have been avoided altogether had the defendants been more forthright with him. It is even conceivable that the action may have been curtailed or resolved if the defendants had demonstrated a more respectful and tolerant approach.

[99] For these reasons, I conclude that it is appropriate that each party should bear their own costs.

Gower J.

**APPENDIX A**

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October 3, 2006

"Dennis Fentie Making Up Yukon Party Platform On The Fly"

At the all candidate's debate in Watson Lake, MLA Dennis Fentie suddenly announced his decision to establish a "vocational stream" for the Watson Lake High School. As a result of his private discussions with high school principal Carson Atkinson, Mr. Fentie and the principal have decided that this addition to school programming will be the answer to the high drop out rates of students.

In the opinion of the Liard First Nation, Kaska students remain the least well served by the education system, and are the one's most likely to leave school before graduating.

Chief Liard McMillan states, "Mr. Fentie has never discussed the educational needs of our children with us. He doesn't know what our children's needs are because he doesn't understand Kaska people. The current principal has no idea what our needs are either. Mr. Atkinson has demonstrated a remarkable inability to foster a positive working relationship with our citizens and our administration. The Department of Education is fully aware of the principal's shortcomings."

"This demonstrates a patronizing, condescending attitude toward First Nation people.", adds Chief McMillan. "We have our MLA, who has a disintegrating relationship with Kaska people, meeting privately with a principal who has little understanding of our interests, deciding for us what is best for our children."

"This is the same kind of patronizing attitude that laid the foundation for the residential schools. Two non-Kaska policy makers, without input from Kaska citizens or government, deciding to create a Kaska labour force for their idea of our role in their economy."

"This patronizing attitude sets back our ability to work constructively with the Department of Education to resolve serious flaws in their education system."

The Liard First Nation Government will be meeting with Kaska citizens and officials to prepare the appropriate political response.

Contact: Chief Liard McMillan