SUPREME COURT OF YUKON

Citation: *Robertson* v. *Alp*, 2009 YKSC 65

Date: 20091102
S.C. No. 06-A0067
Registry: Whitehorse

Between:

IAN ROBERTSON &
INUKSHUK PLANNING & DEVELOPMENT LTD.

Plaintiffs

And

BRYAN ALP

Defendant

Before: Mr. Justice D.M. Cooper

Appearances:

Richard A. Buchan	Counsel for the plaintiffs
Bryan Alp	Self-represented

REASONS FOR JUDGMENT

[1] This is an action in defamation. Specifically, the Plaintiffs say that the Defendant made libellous statements in two emails which he sent to Yukon Government politicians and officials on July 19th and 20th, 2006.

[2] Among other things, the Defendant, Bryan Alp, wrote that the Plaintiff, Ian Robertson, was being unfairly biased, that he had a track record of omitting items, he lacked due diligence, that he blatantly misrepresented the truth and that his work was shoddy and incomplete. Attached as Appendix A is a document containing the Defendant's first email, Robertson's reply and the Defendant's second email.

[3] The issues before me are:

a) Were the statements defamatory?

b) If so, does s. 2(b) of the *Charter of Rights and Freedoms* operate as a defence?

c) If not, are the defences of qualified privilege and fair comment (or either of them) available to the Defendant?

d) If they are, can the Plaintiffs demonstrate malice such as to negate the defences?

e) If so, what would be the proper assessment of damages?

[4] Robertson is a professional planning consultant who has been carrying on business in Yukon for the past 18 years under the name of the corporate Plaintiff in which he is the sole shareholder. The Defendant is a resident of the Grizzly Valley subdivision (GVS) located in a rural area north of Whitehorse. It is small, consisting of 15 or so properties and approximately 32 residents.

[5] In May 2005, Inukshuk entered into a consulting contract with the Government of Yukon (YTG), Department of Community Services (DCS), to investigate the feasibility of a proposed residential subdivision approximately 1.5 kilometres north of the GVS. The Plaintiffs were mandated to evaluate whether or not the proposed development would be suitable according to various criteria, to conduct a public consultation process, to perform environmental screening and to prepare and present a final report. Responsibility for certain tasks, such as distribution of public consultation materials, advertising and arranging for public meetings was retained by the Department.

[6] On July 19, 2006, the Defendant sent the first email alleged to be defamatory to Keith Maguire and Diane Gunter about the proposed subdivision. Maguire is a Project Assessment Officer for the Yukon Environmental & Socio-economic Assessment Board (YESAB), and Diane Gunter is an Environmental Analyst for YTG, Department of the Environment. This email was copied to Robertson and to Brad Cathers, the Member of the Legislative Assembly for the riding in which Grizzly Valley is situated. Cathers was also Minister of Health at the time. In it, the Defendant asked that his statements be posted to the YESAB website for greater exposure.

[7] On July 20, 2006, Robertson replied by email demanding a complete retraction and apology. Alp in turn sent a reply with an expanded distribution list of approximately 20 people including politicians, senior bureaucrats and other officials. In this email, he allegedly further defamed Robertson and accused him of attempting to threaten and bully him. No apology or retraction was forthcoming then or ever. The Plaintiffs seek damages for defamation and the Defendant pleads the defences of qualified privilege and fair comment.

Nature of the Case

[8] Defamation cases are very fact-specific and courts have said that the full context of the situation and events leading up to the making of the statements must be understood. [See *Peterkin* v. *UNW*, 2006 NWTSC 34, at para. 54; *WIC Radio Ltd.* v. *Simpson*, 2008 SCC 40 at para. 56]

[9] Further, in these cases, courts are called upon to balance competing values - the right of freedom of speech and expression against that of reputation.

[10] While the law recognizes the critical importance of citizens in a democratic society having the right to freely express their opinions, it does not countenance those opinions which go beyond acceptable limits and unjustly damage a person's reputation. [See *Hill* v. *Church of Scientology,* [1995] 2 S.C.R. 1130 at paras. 104, 105*; Wells* v. *Sears*, [2006] N.J. No. 145]

Background

[11] Since 1976, Robertson has been a member of the Canadian Institute of Planners, a self-governing body, and is bound by a code of professional ethics; one which calls for thoroughness and integrity. Prior to entering private practice in Whitehorse, he worked in the private sector in Edmonton and with the Governments of Canada, the Northwest Territories and Yukon in the field of parks and regional planning. In recent years, fifty per cent of his work had come from various departments of YTG.

[12] The Defendant has been employed with a major communications company in Whitehorse as a products manager for the past year and in the year prior had a position as a financial analyst. Before then, he had been a manager in the customer service centre. He holds a Bachelor of Commerce degree which he obtained in 1980 and worked for Rogers Communications in Calgary before arriving in Yukon in 1998.

[13] In March 2005, the Director of the Department of Community Service (DCS), Brian Ritchie, contacted Robertson. He advised Robertson that Al Falle, who lived in Grizzly Valley and who purported to represent the residents there, had approached him about developing another rural residential subdivision in an area a few kilometres north

of the GVS. Ritchie had surmised that Falle, who had been a member of the Yukon legislature at one time, had been directed to speak to him by higher authority.

[14] In any event, the YTG had decided to proceed with the development, there being a perceived need for rural lots. Ritchie had indicated it would be necessary to conduct a feasibility study and complete a consultation process with interested parties. In particular, he advised Robertson that the consultation with Grizzly Valley residents would be done through Mr. Falle and the Grizzly Valley Residents Association, hereafter the GVA.

[15] Initially, it was understood that the Plaintiffs would submit a proposal for the work which was to include, in the early stages, site reconnaissance, the retaining of sub-consultants, and preparation of a local knowledge questionnaire. The YTG and Ritchie were to be responsible for obtaining names and addresses of GVA residents, drafting a cover letter to accompany the questionnaire, talking to the GVA President about consultation and doing the mail out of the consultation documents. (Emphasis mine.)

[16] Robertson gave evidence, which I accept, that many projects can be controversial and interested parties will make claims about the impacts they will have. Some claims will be accurate and some exaggerated or untrue. One of his responsibilities or that of any consultant with his mandate would be to attempt to assess and independently verify the accuracy of statements and claims of interveners, including those made by the Defendant.

[17] A detailed proposal was submitted and a formal sole source contract was entered into on May 25, 2005, for the sum of $23,800.00. It is of note that the essence

of the Plaintiffs' retainer was "to confirm the development suitability and identify how the development may be phased." The YTG had chosen this site for the new subdivision and the job of the Plaintiffs was to confirm its suitability and not to otherwise question the choice of locations or recommend other potential areas. On May 13, 2009, Robertson and Ritchie went to the site and did a preliminary assessment of its acceptability for development.

[18] Robertson recommended to Ritchie that the questionnaire and cover letter, which would lead to public consultation, should go to all residents in the GVS individually. Contrary to this advice and unknown to Robertson, Ritchie sent the questionnaire by ordinary post to Mr. Falle on June 25, 2005, for distribution to residents.

[19] Completed questionnaires were to be returned to Robertson. He received none but assumed that either people were too busy in the summer to respond or that he would ultimately receive one consolidated response.

[20] Sometime in September, Ritchie discovered that his original mailing had been sent to the wrong address so he again conveyed the material for distribution to Mr. Falle and a Mr. Braconnier whom he understood to be the President of the GVA. For reasons which are unexplained, it does not appear that any residents received the questionnaire until March 2006. Ritchie never followed up on his mailings to ensure they were received and Robertson was unaware of any problems with the distribution until the summer of 2006.

[21] A public consultation meeting was finally held on March 29, 2006, in the Grizzly Valley area with 19 members of the public in attendance, 10 of whom appeared to be

residents of the GVA. Robertson and Ritchie explained the preliminary proposal with Robertson providing technical information. Mr. Alp was there although he testified he arrived late and did not participate in the meeting. Robertson, however, recalls him making a comment about the extensive use of trails by GV residents and buttressed his testimony by reference to notes he made of the meeting in which the comment was noted although not attributed to Alp. Mr. Falle spoke on his own behalf and for the members of the GVA indicating general support for the development.

[22] Keith Maguire from YESAB was in attendance. It is noted that a relatively new regime was then in place whereby any proposed rural development would, after completion of a feasibility study, be submitted to YESAB for review. This Board would in turn make recommendations to the appropriate Minister who retained the decision making power regarding a particular project.

[23] In proposed developments such as this, there are many issues to be considered some of which include:

- number, size and cost of lots
- road access
- effect upon wildlife habitat
- effect upon recreational usage of the area (if any)
- zoning restrictions
- availability of potable water
- capacity of nearby schools
- effect of potential land speculation

[24] Approximately four questionnaires were received after the meeting none of which indicated opposition to the development, per se. Based on what transpired at the

meeting, Robertson felt that, although there were various concerns and issues discussed, there was no substantive opposition to the project.

[25] On April 21, 2006, the Defendant sent an email to the Plaintiffs, Ritchie and his MLA, Cathers. Attached was a letter of opinion and a completed questionnaire. The second paragraph of the letter reads:

> "First, I oppose this development in the strongest possible terms. In all my years in the Yukon I have never seen such a ridiculous proposal."

[26] He reiterated this statement on the questionnaire. The Defendant raised a number of valid concerns relating to density, environmental community and cost. Robertson took no issue with the opinions or how they were expressed. It is of note that the Defendant wrote, "I use this area regularly for running my dogs ..."

[27] In early June 2006, the Plaintiffs submitted a 25-page report entitled "Project Description" which was the feasibility study containing their recommendations. This was posted on the YTG website and was to have largely concluded the Plaintiffs' involvement as the project was then to be evaluated by YESAB.

[28] On June 25th the Defendant sent an email to Cathers, Robertson and Ritchie with copies to several others including the Premier. The language used by the Defendant was somewhat deprecating and caustic and belied a rising frustration, even desperation, over his sense that his opinions were not being adequately considered and adopted. Among other things he wrote:

> "I'm not sure of the level of expertise of the consultants that have been employed by YTG but it is clear they don't have the slightest idea of what rural residential means."

If the Plaintiffs were offended by this remark, they appear to have not reacted to it.

[29] As well, the Defendant wrote:

> "Also, in the assessment on the YTG website there were a number of inconsistencies. First, there was no request for input from residents in July 2005 as was stated. This is a complete falsehood."

[30] Ritchie responded by email to the Defendant and all other recipients the following day where he dealt with the stated concerns. On the issue of the July mailing he wrote:

> "Actually, I did send an information package to Al Falle on June 25/05 with a comment sheet to be circulated to the Grizzly Valley residents. After I had heard nothing back, in early September I called Al Falle and found out that the mailing address was incorrect so I resent [sic] the package to Al Falle and Arnold Braconnier on September 23/05."

[31] On June 27th Robertson wrote a letter to Maguire with a copy to the Defendant. He referred to Mr. Alp's point about the inaccuracy in the Project Description concerning public consultation and, in particular, wrote:

> "On June 28th, Brian Ritchie sent this material to Arnold Braconnier ... for distribution. We later learned that the letter had an incorrect mailing address and never arrived. When this was discovered [an] e-mail with the original letter and information material was re-sent on September 23rd, 2005. It was our understanding that the material would be distributed to all residents. It is apparent this did not happen."
>
> .....
>
> "Mr. Alp has requested that the information posted on the web site be revised and it is the intent of this letter to do just that."
>
> .....
>
> "I trust this clarifies what actually occurred and would appreciate this clarification be posted to the file as requested by Mr. Alp."

[32] An objective reading of this letter, taking Ritchie's email response into account, would lead a reasonable person to conclude one of two things:

1. That Robertson, as he testified, knew nothing of the failed mail outs in June and September until he read Ritchie's email in June of 2006; or
2. He knew of the failed June mailing but was unaware of the failed distribution in September.

[33] In any event, at its worst, the reference in the Project Description to having sought input of residents in July of 2005 would have been an inadvertent error. Robertson immediately acknowledged the error and took steps to correct the public record. He had nothing to hide and this "issue" was resolved – or should have been.

[34] Alp responded by email the same day thanking Robertson for his attention to the issue. He also referred to comments made by Ritchie in his email. There is no question that the Defendant read and understood the letter and the email; and he knew that it was Ritchie, not Robertson, who had been responsible for the mail out and its attendant problems and Robertson who took concrete steps to correct the public record. The Defendant conceded all of this under cross-examination but maintained that the Plaintiffs, Ritchie and the YTG were one and the same.

[35] Further, in an email to the Defendant on June 28, Robertson advised him of three opportunities he would have for further participation including a meeting to be held by YESAB as part of its screening process on July 6.

[36] Only three members of the public attended the meeting, one of whom was the Defendant. Robertson testified that he advised the meeting that Ritchie was unable to

attend and consequently he was there to listen on his behalf. The Defendant raised questions and criticized the project in general and the inadequacy of the consultation process but focused on trail use and made a slide show presentation where he called for the project to be suspended pending further study and consultation.

[37] He also took issue with a passage in the Project Description dealing with regular recreational use of the trails where it was stated:

> "No anecdotal information could be found to confirm this hypothesis"; and "there is no evidence of any substantive use of this site at the present time."

He referred to the fact he had stated he used the trails regularly for running his dogs in his submission in April and stated that this was more than sufficient anecdotal information.

[38] On July 14, Robertson sent Ritchie an email largely to respond to concerns about the proposed wildlife corridor. In it he also wrote:

> "In addition to walking the site in all four seasons, we have flown 0.5 mile transects of this area in winter and spring at heights of 500 and 1,000 feet AGL and observed no wildlife activity ... It was also clear that the area within the subdivision does not receive any significant winter recreation activity as has been suggested by at least one Grizzly Valley resident as no tell tale signs of dog sled or snow machine use were observed either during these flights." (Emphasis mine.)

Robertson was not aware this email would be made public but it was posted to the YTG website where it was read by Alp.

[39] On July 19th as referenced earlier, the Defendant sent the first email alleged to be libellous. It contains two statements the Plaintiffs take exception to:

1. “I feel that Mr. Robertson and his company are being unfairly biased in order to fulfill a specific agenda. On several occasions I have stated that I have use [sic] these trails ...”

2. “Given Mr. Robertson’s track record for omitting items of record, his lack of due diligence and his blatant misrepresentation of the truth regarding the public consultation process in 2005, I would hope you would give very limited weight to any of the input he or his company brings forward.”

As well, the Defendant asked Maguire to add his email to the public record.

[40] Robertson replied by email asking for a written and public apology and threatened legal action if same were not forthcoming.

[41] The Defendant responded later on July 20th. Statements here which the Plaintiffs say are libellous are:

1. “Mr. Robertson and his employer Inukshuk Consulting are acting as advocates on behalf of Community Services who are the proponents for the Grizzly Valley Residential Subdivision expansion. This is verified by the fact that in a number of instances where I have asked specific questions of Brian Ritchie the response came from Mr. Robertson. In addition, the Inukshuk Brand is prominently displayed on the proponents proposal.”

2. “<u>For Clarification, my comments are not a reflection of Mr. Robertson’s character. I don’t know him and am not in a position to make that judgment</u>. My comments are based on my opinion that the work that Mr. Robertson did on behalf of Inukshuk Consulting for Community Services (as well as in his role as an advocate for Community Services) is shoddy, incomplete and unfairly biased against myself and other residents of the community. I stand by this position and would be more than happy to defend it in civil court if this is ultimately where you choose to have this resolved.” (Emphasis that of the Defendant.)

3. “My position is that the submission ... was deliberately misleading.”

4. “A written & public apology will not be forthcoming. I will not be bullied into changing my position or viewpoint by threats and intimidation.”

[42] A formal letter was forwarded by counsel for the Plaintiffs to the Defendant demanding an apology on terms. No apology was forthcoming and the Defendant has maintained throughout that he was merely expressing his opinion as he was entitled to do as fair comment and under a duty to do given the occasion of qualified privilege.

Analysis

Were the statements defamatory?

[43] In a defamation action, the plaintiff has the burden of proving that the words were published and that they referred to the plaintiff. This is established here. As well, the statements must be found to be defamatory.

[44] On a fair reading, the words written speak to the Plaintiffs’, but mainly, Robertson’s, lack of professional and personal integrity, competence and particularly his deliberate dishonesty. I am satisfied that the natural and ordinary meaning of certain of the words used would be clearly understood by ordinary persons in such a way as to lower the reputations of the Plaintiffs in their estimation and to expose them to contempt. I therefore find that this aspect of the test has been satisfied and the statements are defamatory. [See *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at para. 62; *Peterkin v. U.N.W.*, *supra*, at para. 55]

Application of the Charter

[45] The Defendant did not specifically plead the *Charter* but at trial argued that the Plaintiffs were “employees” of the YTG or so closely connected with them in the project that his statements are protected under s. 2(b), the “freedom of expression” provision.

[46] It is not necessary to determine whether the Plaintiffs were acting as agents in this enterprise. The Plaintiffs’ action is not “government action” which would bring the *Charter* into play. This was and is a private tort action and the Defendant cannot shelter under the *Charter*. [See *Hill v. Church of Scientology*, *supra*]

Qualified Privilege

[47] The Defendant says that his statements were made on occasions of qualified privilege and he is therefore not liable.

[48] The Plaintiffs concede this plea with respect to the email of July 19th but say that in sending the email of July 20th, the Defendant exceeded the privilege adding addressees who did not have an interest in receiving it. Specifically, the Plaintiffs say that while certain ministers, deputy ministers and government officials had a legitimate interest in receiving criticisms concerning the proposed subdivision, the same cannot be assumed of politicians of the party in opposition. This argument would extend to one recipient who was running in the upcoming territorial election. I cannot agree. In a case where the government is intending to proceed with a subdivision, it may be that members of the opposition party and those running for election would have a greater interest in receiving the communication. [See *Wells v. Sears*, 2007 NLCA 21 at para.

12] I therefore conclude that the defence of qualified privilege is available to the Defendant.

[49] However, the Plaintiffs strongly assert that the Defendant was actuated by malice which negates the privilege. If the Plaintiffs can prove malice then the defence would fail.

Fair Comment

[50] First, it is said about this defence that the comment need not be fair. It may be exaggerated, biased, prejudiced, irrational, bitter or tasteless.

[51] Nevertheless, there is a 5-point test that must be applied to determine if the defence can succeed. The court will examine the statements and determine whether the comment:

1. is made on a matter of public interest
2. is recognizable as comment or opinion
3. is based on fact
4. satisfies an objective test; namely, could any person honestly express that opinion on the proved facts; and
5. it is not actuated by malice.

Public Interest

[52] Traditionally, any matter that members of the public are invited to comment on fits into this category. On the facts in this case, I have no difficulty in finding that this was a matter of public interest.

The Comment is Recognizable as Opinion

[53] The facts upon which the comment or opinion is based must be sufficiently set out or notoriously known to enable the audience to determine that it is comment not a

statement of fact and allow persons to decide whether they agree or disagree. Not every fact must be stated but there must be a sufficient substratum to anchor the defamatory comment. [*WIC Radio*, *supra*, at para. 59]

[54] The facts in the email of July 19th are either sufficiently stated or well known to this audience that the Defendant's impugned statements would be considered as comment.

[55] The same cannot be said in reference to his email of July 20th. The distribution list was widened to include many politicians, deputy ministers, executive assistants and other government officials. However, the Defendant set out the facts upon which he made comment and therefore I find this branch of the test is satisfied. But were the facts true?

The Comment is Based on Fact - Are the Facts True?

[56] As it has evolved, the law relating to the defence of fair comment provides great latitude to those wishing to express their opinions on issues of public interest no matter how hurtful or insensitive or ill-considered they may be. However, "the writer must get his facts right." The facts must be true. [Brown, *The Law of Defamation in Canada*, 2nd ed., at para. 15.4(2)]

[57] I have carefully reviewed the contents of the statements. Many of the facts are true or, to put it another way, are not untrue. Some facts, however, are not true or are misstated by omission, exaggeration or a result of erroneous and unwarranted assumptions on the part of the Defendant.

[58] In the Project Description, Executive Summary, the Plaintiffs refer to having made site inspections. It is also apparent from a reading of the passage on “Existing Land Use” that the report could not have been prepared without an in depth examination of the site. In his email to Ritchie of July 14th, Robertson wrote:

> “In addition to walking the site in all four seasons, we have flown 0.5 mile transects of this area in winter and spring ...” (Emphasis mine.)

The Defendant stated in his email of July 19th:

> “The fact that he [Robertson] has flown over this area 4 times does not constitute a proper evaluation ...”

[59] This statement of fact is a significant underpinning for the Defendant’s opinion that Robertson was guilty of lack of due diligence, that his work was shoddy and that he was biased. And yet it ignores, completely, information in the Project Description and Robertson’s clear statement that he walked the site in all four seasons, all of which would have given his observations more credence. This is a misstatement of fact.

[60] Further, the Defendant attacked Robertson’s credibility because he appeared to be ignoring his persistent assertions that “I use these trails regularly for running my dogs.” (Emphasis mine.)

[61] Ordinarily, using the present tense would seem innocuous enough unless the context called for greater precision and accuracy or explanation which this situation did.

[62] Robertson testified he had looked for the trails while walking the site himself and was unable to detect any recent or substantive use of them in the subject area. (He also testified that, after receiving Alp’s emails of July 19th and 20th, he sent a summer student to the site to explicitly look for evidence of trail use but none could be found.)

[63] He found no “anecdotal” information to support the Defendant’s assertion that he used the trails regularly and was of the view that the area did not receive any significant winter recreation activity as was suggested by the Defendant. The use of the word “anecdotal” may not have been entirely accurate, however, I am of the view that nothing turns on this. In the context in which he was writing, the word connotes a lack of objective, empirical or independent verification or it means no other information apart from that provided by the Defendant.

[64] In his examination for discovery, the Defendant gave the following evidence:

> Q. Does anyone else use those trails that you know of?
> A. Not to my knowledge, no.
> Q. Never seen anybody out there?
> A. Never seen anybody out there, no.

Regarding his use of the subject trails:

> A. No, in fact, I’ve stopped using them...
> Q. When did you stop using them?
> A. The last time I used them was in March of 2005 ... or February 2005, somewhere in there.
> Q. So you didn’t do any dog mushing, at all, in the winter of 2005/2006?
> A. Not there, no.

[65] The Defendant had suggested he was expressing his opinions on his behalf and other Grizzly Valley residents and was asked:

> Q. But you weren't speaking on behalf of any other residents?
> A. No.

[66] At trial he testified:

> At no time did I say I represent “we” or any global entity that was using the trails. I always said it was me. If I did say anything else, it was conjecture.

[67] Further he was cross-examined at trial on a comment he was thought to have made at the YESAB meeting of July 6th. Referring to minutes of the meeting, counsel for the Plaintiffs asked:

> Q. It says “the areas’ topography and minimal snow fall are not conducive to dog mushing.” That’s your input, isn't it?
>
> A. It could be, yeah.
>
> Q. Well, there was nobody else there that...
>
> A. Okay, fair enough.

[68] And again on cross-examination:

> Q. And then, Mr. Alp, in ... under the heading “Environmental” ... you say “I use the trails in this area for running my dogs ...”
>
> A. Mm-hmm.
>
> Q. Okay, well, that wasn’t true at the time, was it?
>
> A. I’m not sure I follow the question.
>
> Q. Well, it’s a fairly ... straightforward. At that time you made that statement, that wasn’t true, you weren’t running your dogs regularly, you hadn’t run your dogs for over a year.
>
> A. Because of the snow, not for lack of will though.

[69] The Defendant’s justification, in large measure, for stating that the Plaintiffs were unfairly biased, had a track record for omitting items of record, lacked due diligence and blatantly misrepresented the truth is directly linked to Robertson’s objective

observations of the site and what he found to be a lack of scientific, empirical or other independent evidence to substantiate the Defendant's assertions of regular use.

[70] I note that Robertson was a volunteer spotter and navigator with the Civil Air Search and Rescue Association (CASARA) and had made four training flights over the subject area between the winter of 2005 and summer of 2006. This activity was incidental to his consulting contract but was mentioned by him as an added and unique opportunity to make observations relating to wildlife and recreational use of the area.

[71] In any event, the Defendant's assertion – "I use the trails regularly" - was untrue. As of July 19th and 20th, 2006 he had not used the trails since March or February of 2005 with one possible exception when he thinks he started out but turned back. There is no reason to disbelieve his explanation that he stopped using the trails due to snow conditions but this is not what he said. Given that the Defendant had not been using the trails and no one else did, Robertson's observations and statements regarding use of the trails was accurate. As well, it does not bolster the Defendant's position that he advised the gathering at the YESAB meeting that "the area's topography and minimal snow fall are not conducive to dog mushing." Quite the opposite. At trial, he testified that he had not used the trails in the area at all over the past three years. From this, I conclude that in July 2006, the Defendant was concerned with stopping the project and not with his use of the trails. This was a canard - an excuse to discredit the project. Robertson became the target of enmity when he appeared to be questioning the accuracy of the Defendant's assertions and by attacking the Plaintiffs and the quality of their work, the Defendant could take dead aim at the feasibility of the project and hope

the YTG had sober second thoughts. So, to be clear, I find the Defendant's statement of fact concerning his regular use of the trails was inaccurate, misleading and untrue.

[72] Accordingly, the Defendant has failed to establish on a balance of probabilities the truth of the key facts upon which he relies to express his opinions and he cannot therefore rely on the defence of fair comment.

Malice

[73] Given that I have found the Defendant's statements were made on occasions of qualified privilege, the Plaintiffs' case fails unless they establish malice on his part.

[74] It is incumbent upon the Plaintiffs to prove that the dominant motive in publishing the defamatory statements was malice, spite or ill-intent and the primary consideration is his statement of mind at the time of publication.

[75] The Defendant pleaded and testified at trial that he honestly believed that what he stated was true. However, the mere fact that the Defendant believed his statements to be true does not necessarily mean they were not expressed with malice. A court can infer malice where the Defendant wilfully misstated the facts, either by exaggeration or omission. Negligence alone is not evidence of express malice however, being reckless, disregarding the consequences and not caring whether what one says is true or false is strong, if not conclusive, evidence of malice. Courts have held that a failure to investigate or make inquiries to confirm the accuracy of impugned statements can be evidence of malice in appropriate circumstances. [Brown, *supra*, at paras. 16.3(3) and 16.3(5)]

[76] From the outset the Defendant was vehemently opposed to the proposed development. He expressed a number of legitimate concerns in his email of April 22nd

and in the questionnaire. Other citizens had raised issues for discussion and clarification at the meeting held on March 29th including number, size and subdividing of lots to name a few. However, the evidence discloses that, from the outset, only Mr. Alp voiced unqualified opposition and by the time of the YESAB meeting, he seemingly was the only member of the public who remained deeply engaged in the process and adamantly hostile to the project unless it was drastically scaled back - something Robertson said would have made the project unfeasible.

[77] As evidenced by his email of June 25th the Defendant was becoming strident and frustrated. As counsel for the Plaintiffs put it, he began to "ratchet up" the level of discourse by saying:

> "I was disappointed to see that none of the issues that we had agreed upon were even remotely addressed." (in the Project Description)
>
> .....
>
> "I'm not sure of the level of expertise of the consultants ... but it is clear they don't have the slightest idea of what rural residential means."
>
> .....
>
> "Also, I'm offended by the statement that the socio-economic impact will be positive."
>
> .....
>
> "... in the assessment of the YTG website there were a number of inconsistencies. First, there was no request for input from residents in July of 2005 as was stated. This is a complete falsehood."

[78] Details of the response of Ritchie have been set out earlier. The Defendant knew that it was Ritchie who did the mail out, not Robertson. And then there was Robertson's follow-up letter in which he indicated he had reviewed the file and advised Maguire that

the Defendant raised a valid point, explained how the mail out failed and asked that his letter of clarification be posted on the YESAB website.

[79] Alp knew that Robertson was the person acknowledging the inaccuracy and looking to set the record straight.

[80] Just before the end of the YESAB meeting, Robertson was asked by Maguire if he had anything to add to clarify some of the issues raised. He explained what happened on the consultation process and how they had followed up when it was clear that not all residents were aware of what was going on; and that he was attending at the request of YESAB because Ritchie was unavailable. So as early as July 6, the Defendant had heard from Robertson directly as to how the mail out failed and why he was at the meeting.

[81] It is noted that the Defendant was the main public participant at this meeting. During his presentation, he took objection to the statements in the Project Description that “... no anecdotal information can be found to confirm this hypothesis” and “there is no evidence of any substantive recreational use of this site at the present time.” The Defendant said that his previous advice that he used the trails regularly was sufficient anecdotal evidence and that it was “another example where the proponent is attempting to misrepresent the impact this project will have on the local population.”

[82] From the context, as I found earlier, Robertson was using the word “anecdotal” to mean independent evidence apart from the assertions of the Defendant. Alp felt he was being ignored or his information discounted.

[83] Given the Defendant's own evidence, it is clear that Robertson's observations were correct. Alp did not use the trails in the winter of 2005 and 2006 and knew of no one else who did.

[84] Leaving aside for a moment the issue of actual trail usage, it must be asked if the use of the trails by one person translates to "significant use" when considering the overall public interest in this development? Was it to be abandoned because Mr. Alp ran his dogs in the area? The Defendant was determined to stop this development and had convinced himself that if he could only establish that he used the trails regularly, the project would collapse or be put on hold. He had lost all perspective and objectivity and with that any constraints on the expression of his opinions. I would observe that, considering Alp was the only person, voicing the opinion that the new subdivision would destroy a valuable recreational area, and taking into account all of the other complicated issues he was considering, Robertson gave the trail usage issue undue and fully adequate attention.

[85] It is apparent that the Defendant chose to interpret Robertson's observations above as meaning that he was personally insignificant and that Robertson was lying because he had provided him with anecdotal information. These are the worst possible interpretations and assumptions that could have been made and were unwarranted.

[86] I will examine each of the alleged defamatory statements.

[87] In the July 20th email, Alp stated that "Mr. Robertson and his employer Inukshuk Consulting are acting as advocates on behalf of Community Services who are the proponents ..." He felt this was evident because the Inukshuk logo appeared on the

YTG letterhead in the Project Description (along with the logos of other consultants); that when he wrote to Ritchie on June 25th, Ritchie replied but it was Robertson who wrote to Maguire to clarify the record; and that Robertson seemed to be advocating for the project at the YESAB meeting.

[88] He concluded that Robertson and Ritchie were one and the same and suggested, in so many words, that Robertson was a mere mouthpiece for the YTG hired to sell the project. Alp said he did not really understand the intricacies of consultant and owner relationships and that from his experience in the world of private sector communications, consultants were hired to do specific tasks where the owner does not have the capacity necessary to undertake a piece of work; and that the consultants are fully directed by and on the side of the owner.

[89] I accept that the word “consultant” is not a term of art that can be defined narrowly. A consultant can assume the role of a fully independent analyst, a lobbyist, a fully directed specialist and so on. At no time did Robertson or anyone else explain to the public what his role was in the process or his relationship with the YTG. It was open to the public and the Defendant to speculate about this.

[90] On all of the evidence, I have found that the Defendant’s statement that the Plaintiffs were acting as advocates for the project was defamatory. However, I am unable to find that the Defendant would have been anything more than negligent, if that, in making this statement and accordingly, I concluded he was acting without malice in this regard.

[91] I found earlier that the Defendant's statement in accusing Robertson of trying to bully, threaten and intimidate him was defamatory. But I cannot find that he had ill-motives in making that statement in this context or that he was more than negligent in doing so. So, that statement was not made maliciously.

[92] But it is evident that after the YESAB meeting, the Defendant began to perceive he was losing or had lost his battle to stop or seriously curtail the project. Despite the initial failings of the consultation process, he had been given the opportunity to fully outline his position which he did after the March 29th meeting, in subsequent emails, in his presentation to YESAB and his submission to the YESAB website on July 17th. Still, the project was seemingly proceeding. It is noted that the Defendant was deeply offended and perplexed that his voice was not being heard and that his objections were not being seen as valid; and that his voice could not compete with that of a "powerful" person like Mr. Robertson who had ignored his submissions.

[93] When he saw Robertson's statement regarding "no significant winter recreation activity as has been suggested by one Grizzly Valley resident", the Defendant lost all perspective. He decided to target Robertson for the perceived slight and when Robertson reacted to the first defamatory email, the Defendant escalated matters by bringing his case to the attention of an expanded group politicians and bureaucrats. He was deeply hurt and offended that Robertson had not accepted, without question, his assertions regarding trail usage.

[94] The crux of this matter can be focused on two issues - the failed consultation process and the published findings of Robertson that there was no evidence of significant trail use in the area.

[95] With respect to the consultation, I have already found that the Defendant knew Robertson was not responsible for this and knew what had transpired. The public record had been corrected. If the Defendant had any uncertainty, he was under a duty to inquire to ascertain the facts. This he could have easily done. Instead, being motivated by intense animosity towards Robertson, he decided to misconstrue the facts and accuse Robertson of unfair bias, shoddy work, a track record for omitting items of record and deliberate misrepresentation.

[96] Similarly, the Defendant maintained he used the trails regularly when he had not done so for a period in excess of one year and had represented publicly that these trails were unsuitable for dog mushing. He knew or ought to have known that there was a strong likelihood that Robertson’s observations of the site would not confirm his assertions.

[97] Further, in stating that Robertson’s site examinations were based solely on his CASARA spotting activities, the Defendant blatantly ignored Robertson’s statement that these flights were “in addition to having walked the site in all four seasons.” Prior to denigrating the Plaintiffs’ work as being incomplete in this regard, the Defendant, if in doubt, had a duty to inquire and was reckless in not doing so.

[98] On a plain reading of the email of July 19th, a reasonable person would conclude that the dominant motive of the Defendant in making the statements was malice. His

intention was evident from the first sentence. He was not trying to convince anyone that the project was a bad idea – simply that Robertson was incompetent and untrustworthy.

[99] To explain his motivation for sending the email of July 20th, the Defendant said he thought Robertson was trying to bully and threaten him; not just to retract the statements that impugned his integrity, honesty, and professionalism but also to withdraw his entire opposition to the project. Given Robertson's forbearance in the face of previous slights and his demonstrated willingness to deal with the Defendant's legitimate concerns, I find the Defendant's explanation to be disingenuous.

[100] The Defendant knew he was casting serious and negative aspersions on Robertson's character and tried to shelter behind the qualification:

> For clarification, my comments are not a reflection on Mr. Robertson's character. I don't know him and am not in a position to make that judgement.

[101] He then proceeded to make the judgement and attack Robertson's character. This caveat serves to illustrate that the Defendant knew he was on dangerous ground. But instead of taking some time to reconsider his position, he continued the libellous assault on Robertson and the corporate plaintiff.

[102] In the result, I find that in sending the emails of July 19th and 20th, the Defendant was actuated by malice and find him liable for the tort of libel.

Damages

[103] Robertson testified that, as a result of the libellous statements, his stress level became extremely high and that these events caused problems in his business and personal lives. He worried about the monetary implications; whether his business would

survive and whether his employees would feel insecure and leave. He sought medical assistance and was still taking medication for stress as of trial.

[104] He further said that in 2004-2005 his business from the YTG, DCS had increased to $108,000.00 and as of June 2006, he had received $51,000.00 for the year. Thereafter income from this department plummeted although the Plaintiffs continued working for other branches of the YTG - Tourism, Highways, Housing, Environment and Public Works. They received little or no work from the DCS for the balance of 2006 and 2007 but in 2008 they began getting sole source contracts again. I accept this evidence.

[105] Robertson had no proof that the Defendant's statements resulted in his loss of work and candidly said it was possible this could have been a result of the election in the fall of 2006 or the departure of certain officials from key positions - at least at the beginning of the period.

[106] Most of Inukshuk's work with the YTG was obtained through sole source contracts having a value of under $25,000.00 or through proposal submissions. The former are awarded without competition. The YTG made an effort to "spread the work around" but a consultant's chances of getting these contracts were better if he or she was highly regarded and their work was free of controversy.

[107] Robertson described the YTG and civil servants as being "risk averse" and was of the opinion that anyone embroiled in controversy would be avoided for a time. Further, he said the proposal evaluation process was highly subjective and a consultant could be denied work he was justly due if, for some reason, the evaluators were uncomfortable.

[108] The Plaintiffs called two character witnesses; Donald Flinn, an engineer in Whitehorse for 18 years and Charles McLaren, an architect who has practiced in Yukon for 22 years. Both men stated that Robertson enjoys an excellent reputation for honesty, professionalism, thoroughness, independence and objectivity. They also testified about how narrow the market was for consultants, that the YTG was a “big player” but risk averse and that the consequences to one’s business could be very negative if controversy arose. While I accept that this may be true, much of it is speculation and would depend on the person involved and the nature and extent of the controversy.

[109] More importantly, there is no cogent evidence that links the apparent interruption in work to the Plaintiffs from the DCS to the statements made by the Defendant. In cross-examination, Robertson admitted he was unaware of any contracts for which he was qualified that he did not obtain in 2007. He failed to say whether he had even made submissions on DCS proposal calls or if there were any during the relevant period. He did work for other departments.

[110] No financial statements or evidence of any kind was tendered to indicate or suggest a drop in overall revenues or income for the corporate Plaintiff. Indeed, the company may have prospered during this period.

[111] No witnesses were called to substantiate the claim that the Plaintiffs were being shunned in the aftermath of the Defendant’s emails. Had Ritchie given evidence, many issues could have been resolved with greater certainty. For example, on the issue of damage to Robertson’s reputation, Robertson said Ritchie told him that the Defendant

was just a “crackpot” and suggested he “let it go” and that “people will take it for what it is as somebody sort of mouthing off type thing.”

[112] This suggests that Ritchie did not take the emails seriously but if he had testified he could have said so himself, explained how the project got started, the role of Al Falle, the mail out and mix-up, and whether there was a decision or tacit understanding in his department that the Plaintiffs’ services would not be engaged for a cooling off period. He could have been placed under subpoena to bring with him a list of all sole source contracts and proposal calls his department had issued between August of 2006 and January of 2008 and for which the Plaintiffs may have been qualified.

[113] He was not called and none of this evidence was available. Without cogent evidence to support the Plaintiffs’ speculation and claim of financial harm, I am unable to find that they suffered direct financial loss or incurred special damages as a result of the Defendant’s actions.

[114] It is trite law that in defamation actions, damages are presumed. Where the plaintiff’s reputation has been seriously harmed, damages will be greater. Where the reputation is relatively unaffected, they will be less but will, nevertheless, vindicate the plaintiff and provide partial compensation for a decline in reputation and, among other things, stress.

[115] In some cases, an award of nominal damages may be appropriate. As stated by Brown, *supra*, at para. 25.7, page 1604:

> This is particularly true where special damages have not been proven, but the judge or jury wishes to vindicate the plaintiff’s reputation.

> [They] may also be awarded under circumstances where the actions of the defendant are relatively innocent, and the damage insignificant, but the plaintiff's reputation demands appropriate solace.

[116] Aggravated damages can be awarded where the defendant's conduct has been particularly high-handed or oppressive, thereby increasing the plaintiff's humiliation and anxiety arising from the libellous statement. They are often awarded where there has been a finding of malice. [*Hill*, *supra*]

[117] Punitive damages may be awarded in situations where the defendant's misconduct is so malicious that it offends the court's sense of decency. This is not a case where punitive damages would be appropriate.

[118] As for quantum, the court must strike a balance which ensures that important personal rights are not lightly disregarded while avoiding extravagant awards that bear little or no relation to the actual harm done. Further, the court may reduce damages in circumstances which are mitigating or increase them in aggravating circumstances.

[119] The conduct of the Defendant before and after the event, his motives, the nature and character of the defamation, the extent of publication, the anguish sustained by the Plaintiff, the damage to his reputation, the means of the Defendant and the credence given to the statements are all to be considered.

[120] In mitigation here, I do not consider the words used or the defamatory statements as a whole to be on the more serious end of the scale. The Defendant was virtually a lone voice in total or near total opposition to the project. The extent of the publication was somewhat restricted. It was not in the local newspaper or on local television. The Defendant testified that he was and is a man of modest means. He presented as a loner

and does not appear to have been well known in the community or a person of standing and influence. It seems Ritchie gave little credence to his statements. The good opinions of Robertson's character and reputation as offered by the professional witnesses were unchanged as a result of the statements. The Plaintiffs continued working for the YTG in the aftermath and after an 18-month hiatus, they were working again for the CSD. Today, the project is proceeding in two phases in accordance with the Plaintiffs' recommendations or largely so.

[121] I do not consider Robertson's email in which he demanded an apology to have been an attempt to threaten, bully or provoke the Defendant as alleged such as to put the Defendant's email of July 20th in the category of a response to a provocation and bring into consideration cases cited by the Defendant; namely, *Falk v. Smith* [1941] O.R. 17 and *O'Malley v. O'Callaghan* [1992] 4 W.W.R. 81. However, the Defendant was unfamiliar with the provisions of s. 4 of the *Defamation Act*, R.S.Y. 2002, c. 52, and the common law regarding the importance to be attached to an apology or the consequences of failing to apologize. In the circumstances, he reacted angrily. I do not find his failure to apologize at this juncture to be aggravating. But, in the days and weeks to come, he had the opportunity to review the documentation produced by the Plaintiffs, to consult legal counsel, to confirm any doubts he may have had about Robertson's role in the consultation process, to reconsider his own statements about regular trail use, and generally to try to validate some of the reckless assumptions he made leading up to his publication of the libellous statements. He did not avail himself of the opportunity.

[122] The Defendant reiterated at trial he felt fully entitled to make the statements he did and continued to view his derogatory and defamatory statements as nothing more that an exercise of his freedom of expression. He was and remains utterly unrepentant. The statements he made were actuated by malice. I consider this to be aggravating.

[123] On the question of allocation of damages between the Plaintiffs, counsel was unable to cite any binding or persuasive authorities from the Yukon but did refer to one recent decision. In *Borud et al. v. Robuluk*, 2009 YKSC 59, Mr. Justice Wong awarded each of the two Borud brothers $35,000.00 and their company $10,000.00. He was of the view that the reputation of the business was “allied” with that of the brothers and therefore was not inclined to award damages to the corporation but did so to partially account for pecuniary loss, namely, rental income for 6 months.

[124] The Plaintiffs concede that there is a considerable amount of overlap between Robertson and Inukshuk in this case.

[125] The Plaintiffs seek general and aggravated damages of $115,000.00 and suggest that the $35,000.00 awarded to each Defendant in *Borud* is a “baseline” figure supported by the fact that the Small Claims Court in Yukon is specifically precluded from trying defamation cases but does have a monetary jurisdiction up to $25,000.00; and that this regime reflects the intention of the Yukon legislature that damage awards would not be less than $25,000.

[126] This is an interesting and creative thesis but one that is totally speculative. I cannot infer such intention. Justice Wong stated for the record that *Borud* was the first defamation action in Yukon to go to trial. No other cases were cited to me. He set the

range of damages between $25,000 and $150,000 based on his long experience as a judge in British Columbia.

[127] The Plaintiffs also argue that Robertson is a professional person and, as such, should be entitled to greater damages than businessmen like the Borud brothers. While the calling of the Plaintiff should be considered, I am not aware of a legal principle that says, in all cases, defamation of a professional person is to be treated more seriously than that involving a non-professional.

[128] The Plaintiffs cite *Kerr* v. *Conlogue*, [1992] 4 W.W.R. 258 (B.C.S.C.) and *Hill*, *supra*, as authorities the court should consider on the issue of aggravated damages. I have reviewed these cases.

[129] This is not a case where an award of nominal damages would be appropriate with respect to the Plaintiff, Robertson. However, I am of the view that this is not a case which should attract a substantial damage award. I take into account the understandable stress suffered by Mr. Robertson and the fact that the Defendant has never seen fit to retract, even partially, his libellous statements. However, I have also considered that the Plaintiffs failed to establish that they suffered any pecuniary loss, that they were “blacklisted” by the DCS, and that anything beyond minor and fleeting damage may have been done to their reputations.

[130] The Defendant was entitled to voice his objections to the project forcefully and he contributed to the public debate in a legal manner until he published the impugned statements. The statements themselves, while libellous, were not hateful and vitriolic. Mr. Alp is not a high profile person in the community whose opinions would have

immediately drawn an interested audience, carried considerable weight and effectively damaged the Plaintiffs' reputations. Two professional consultants attested to Robertson being held in high professional esteem and a man of good repute. From the foregoing and the fact that Robertson continued to work for the YTG after July 2006, and the Department of Community Services from 2008 leads me to believe this is not a case where substantial damages should be awarded.

[131] Robertson was and is the directing mind and will of Inukshuk. The statements impugned him personally and any damage to Inukshuk was incidental and minor.

[132] Taking the evidence and my findings of fact into account and applicable legal principles, I award general damages of $19,000.00 to Robertson and $1,000.00 to Inukshuk. Robertson is also awarded $5,000.00 in aggravated damages.

[133] Prima facie, a successful plaintiff is entitled to pre-judgment interest on damages awarded. I see no reason to deny the Plaintiffs this relief with one caveat. Section 35 of the *Judicature Act*, R.S.Y. 2002, c. 128, stipulates that interest is not to be awarded on exemplary or punitive damages. In my mind, aggravated damages would fall into this category. If I am wrong, given the discretion granted to me under ss. (7) of this section, I disallow pre-judgment interest on the aggravated damages but do award pre-judgment interest on general damages commencing July 20, 2006, in accordance with the formula set out in the *Act*.

[134] The Plaintiffs ask for costs and to have the opportunity to speak to costs before I make a final order. My inclination would be to order costs for Robertson to be taxed pursuant to Scale B of the *Rules of Court* but only necessary disbursements for

Inukshuk to avoid duplication. I would invite the parties to resolve the issue of costs based on my comments, but should either of them wish to speak to the matter further, they may contact the Clerk's office to set a date within 30 days of the date of judgment. Failing this, costs shall be awarded in the manner set out above.

_____
Cooper J.

Appendix "A"
2006/07/20

49/50

Ian D. Robertson MCIP

To: Bryan Alp; Keith Maguire; diane gunter

Cc: Brad.Cathers

Subject: RE: Grizzly Valley Rural Residential Subdivision

Bryan:
I appreciate that you may disagree with me and have a different view of the situation in Grizzly Valley. You are entitled to your opinion. However, this time you have gone too far and your statements are slanderous and libelous. Unless you provide a written and public apology within 48 hours I will seek legal redress. We make every effort to provide accurate and unbiased information and give fair consideration to any input we receive. We have no vested interest as you suggest.

Please issue an immediate retraction or be prepared to accept the consequences.

Ian D. Robertson MCIP

-----Original Message-----
From: Bryan Alp [mailto:cooldogs@northwestel.net]
Sent: July 19, 2006 11:19 PM
To: Keith Maguire; diane gunter
Cc: Brad.Cathers; Ian D. Robertson MCIP
Subject: Grizzly Valley Rural Residential Subdivision

50

Hi Keith & Diane,

The following is a quote from Mr. Robertson's response to the Department of the Environments Comments on July 14.

"It was also clear that the area within the subdivision does not receive any significant winter recreation activity as has been suggested by at least one Grizzly Valley resident as no tell tale signs of dog sled or snow machine use were observed either during these flights.

I trust this answers the question.

Ian D. Robertson MCIP"

I will assume Mr. Robertson is referring to me. (It is unfortunate he doesn't have the courage to identify me by name) As with a large part of the submission he prepared this again is inaccurate. The fact that he has flown over this area 4 times does not constitute a proper evaluation given that I have lived here and used the trails for 6 years. Mr. Robertson's assertion would be akin to saying no one lives here because when he flew over he didn't see any people!

I would like to point out that in the winter of 2005-06 there was a very light snow load so you would be hard pressed to see any dog sled trails in this vicinity or any other in the southern Yukon for that matter. (especially from an airplane) Please remember that the Yukon Quest had to turn around in Pelly last winter, in addition the Dash for Cash & the Rendezvous Races were also cancelled and the Carbon Hill was delayed by two months.

Please refer to the GPS map I supplied as part of my submission. These trails are regularly used. I would be happy to show them to anyone including Mr. Robertson in the Winter or Summer. If you would like me

to take you out on a dog sled next winter to prove that I use them I again would be more than pleased to do so.

I feel that Mr. Robertson & his company are being unfairly biased in order to fulfill a specific agenda. On several occasions I have stated that I have use these trails & provided a specific GPS map of the area & have been more than forthcoming with this information. In fact I made these trail maps part of the public record as part of the public consultation for the project to widen the Mayo Rd in the Summer of 2005. I am not sure why Mr. Robertson chose to ignore this or not even have to courtesy to inquire about my knowledge of the area, but rather rely on 4 airplane trips. Dog Sleds leave a 20 inch wide shallow track and are hard enough to see on the ground much less from the air.

Unfortunately, I have few photos from the area from last winter. I have attached a couple of photos that were taken in the area of question in February of 2006.

Given Mr. Robertson's track record for omitting items of record, his lack of due diligence and his blatant misrepresentation of the truth regarding the public consultation process in 2005, I would hope that you would give very limited weight to any of the input he or his company brings forward.

Again, I would be more than happy to be a tour guide, if it would settle the question of whether or not these trails get used.

Thanks in advance for your attention to this.
Keith please add this to the public record.

Bryan Alp
867-633-5599

52

Mark Browning CPT

From: Bryan Alp [cooldogs@northwestel.net]
Sent: July 20, 2006 6:23 PM
To: Marc Tremblay; Pat.Molloy; George.Stetkiewicz; angus.robertson@gov.yk.ca
Cc: Brad.Cathers; Rick Buchan (E-mail); Brian Ritchie; arthur.mitchell@yla.gov.yk.ca; Dennis.Fentie; Ian D. Robertson MCIP; Keith Maguire; Jon.Breen; info@inukshukplanning.ca; archie.lang@gov.yk.ca; glenn.hart@gov.yk.ca; linda.dixon@gov.yk.ca; christopher.young@gov.yk.ca
Subject: Re: Grizzly Valley Rural Residential Subdivision

Gentlemen,

By way of introduction my name is Bryan Alp and I am a resident of the Grizzly Valley subdivision I have recently been involved in the public consultation process for the above project (http://www.community.gov.yk.ca/pdf/GrizzlyValleyEAPD060608.pdf) I have made submissions to both Community Services & YESAB in opposition to the development in it's current form.

I recieved the following E-mail from Mr. Ian Robertson of Inukshuk consulting threatening me with legal action if I did not retract the statements I made as part of the public consultation process for the YESAB proceeding & apologize. The E-mail thread is below. Mr. Robertson and his employer Inukshuk Consulting are acting as advocates on behalf of Community Services who are the proponents for the Grizzly Valley Residential Subdivision expansion. This is verified by the fact that in a number of instances where I have asked specific questions of Brian Ritchie the response came from Mr. Robertson. In addition, the Inukshuk Brand is prominently displayed on the proponents proposal.

First, I was not aware nor was I made aware that in the spirit of open and transparent public consultation that I was putting myself in legal jeopardy for providing a contradictory point of view to that of Community Services and it's advisors & consultants, which is my right as a citizen. Is this truly what the Government of the Yukon and YESAB had envisioned as an open public consultation process?

* For Clarification, my comments are not a reflection of Mr. Robertson's character. I don't know him and am not in a position to make that judgment. My comments are based on my opinion that the work that Mr. Robertson did on behalf of Inukshuk Consulting for Community Services (as well as in his role as an advocate for Community Services) is shoddy, incomplete and unfairly biased against myself and other residents of the community. I stand by this position and would be more than happy to defend it in civil court if this is ultimately where you choose to have this resolved.

* A written retraction & public apology will not be forthcoming. I will not be bullied into changing my position or viewpoint by threat and intimidation.

For clarification, by definition any comments made in an E-mail cannot be slanderous. This is perhaps another example of where Mr. Robertson (in his role as an employee of Inukshuk Consulting and an advocate for the Department Community Services & not as an individual) should have done a little more research.

My position is that in the submission that was prepared (at least in part) by Mr. Robertson (in his role as an employee of Inukshuk Consulting and an advocate for the Department Community Services & not as an individual) was deliberately misleading.

First, the submission indicated that "An initial letter and project information sheet was sent out to all Grizzly Valley area residents with a request for input in July 2005." Based on my input this was later proven to be entirely false & has been admitted to by Mr. Robertson. At best, the earliest this could have happened was September 23rd. the following is a quote from Mr. Robertson to YEASB:

"On June 28th, Mr. Brian Ritchie sent this material to Arnold Braconnier the GVRA President for distribution. We later learned that the letter had an incorrect mailing address and never arrived. When this was discovered e-mail with the original letter and information material was re-sent on September 23rd, 2005. It was our understanding that the material would be distributed to all residents. It is apparent this did not happen. "

Knowing full well that no public consultation could have possibly taken place in July, why was it represented this way in the original proposal? In addition, there was no follow up in September to ensure that the material was properly distributed by Arnold Braconnier. Common sense would dictate that as a minimum gesture of good faith there should have been some follow up.

My second major issue is that without this consultation some very incorrect assumptions were made about the trails in the area & their use. Regardless, of the outcome of this proceeding the simple truth is that I use the trails regularly. To date I have been unable to get the proponents to cede this point and correct the public record. This is not a difference of opinion. It is an omission of fact. As part of Mr. Robertson's E-mail to the Department of the Environment (see below) he goes on to imply that **I am lying** which I believe to be libelous. I believe I have provided enough evidence, GPS maps, photos etc. & I am also willing take any interested party on a tour of the area if that would help resolve this question. The proponents evidence is based on the fact they didn't see any dog sled tracks during 4 flights over the area. Mine is based on 6 years of using the trails.

My final point is that the proponents erred when they recognized Al Falle & Arnold Braconnier as the representatives of the entire community. I have been in contact will Al Falle & he stated in an E-mail that to me "I personally don't like being accused of speaking on some one behalf. Personally I have no problem with the propose lot expansion, as long as we don't have to change our regs, and the new lots not have the ability to subdivide. These are strictly my feelings."

It is clear that Al did not intent to speak on behalf of the community but the proponent never bothered to clarify the issue with anyone in the community. To me this all adds up to a lack of diligence and an unfair bias against myself & the community. If they had done the proper consultation we would not be in this mess & I would not be facing threats of law suits.

So where so go from here? I believe we can settle this like Yukoners and gentlemen. First I would like an apology from Mr. Robertson for his threats & his attempt to intimidate. Second, let's all meet and organize some proper public consultation and move this forward in manner that is works for all the key stakeholders. This is not a black & white issue we can find some middle ground.(Fewer lots or a different location etc.)

If you choose to advocate this malicious legal action & this is all going before the courts, under the access to information act I am requesting the following in order to prepare a defense:

1. A copy of all correspondence (including E-mail) in the past two years between Mr. Robertson & Brian Ritchie with regard to this project.

2. Copies of all internal YTG correspondence (including E-mail) with regard to this project.

21/07/2006

3. Transcripts of all YTG meeting agendas & minutes with regard to this project.

4. Records of any meetings that Inukshuk Consulting or Community Services had with Al Falle or Arnold Braconnier.

5. Copies of all correspondence (including E-mail)between Al Falle, Arnold Braconnier or the GVRA & Community Services &/or Inukshuk Consulting. (my second request)

6. A record of all contracts awarded to Inukshuk Consulting from the government in the past three years.

I leave for a vacation tomorrow and will have limited access to E-mail. If you care to reach me on the weekend I will be at 604-531-5279. I will be back in town on July 27. It would be most appreciated if the information I requested can be made available at that time. Who should I contact to pick it up?

For clarification, Mr. Buchan was copied on the original E-mail. Am I to assume he is acting as legal council for Inukshuk Consulting or Mr. Robertson? If so, should any future communication to Mr. Robertson or Inukshuk consulting go through him. Is he acting on behalf of the government in any capacity?

Thank you in advance for your attention to this and I look forward to hearing from you soon.

Best Regards,

Bryan Alp

867-633-5599

----- Original Message -----

From: Ian D. Robertson MCIP
To: Bryan Alp ; Keith Maguire ; diane gunter
Cc: Brad.Cathers ; Rick Buchan (E-mail) ; Brian Ritchie
Sent: Thursday, July 20, 2006 10:00 AM
Subject: RE: Grizzly Valley Rural Residential Subdivision

Bryan:
I appreciate that you may disagree with me and have a different view of the situation in Grizzly Valley. You are entitled to your opinion. However, this time you have gone too far and your statements are slanderous and libellous. Unless you provide an unconditional, full and complete written retraction and public apology within 28 hours I will seek legal redress. We make every effort to provide accurate and unbiased information and give fair consideration to any input we receive. We have no vested interest as you suggest.

Please issue an immediate retraction or be prepared to accept the consequences.

Ian D. Robertson MCIP

-----Original Message-----
From: Bryan Alp [mailto:cooldogs@northwestel.net]
Sent: July 19, 2006 11:19 PM
To: Keith Maguire; diane gunter
Cc: Brad.Cathers; Ian D. Robertson MCIP
Subject: Grizzly Valley Rural Residential Subdivision

Hi Keith & Diane,

The following is a quote from Mr. Robertson's response to the Department of the Environments Comments on July 14.

"It was also clear that the area within the subdivision does not receive any significant winter recreation activity as has been suggested by at least one Grizzly Valley resident as no tell tale signs of dog sled or snow machine use were observed either during these flights.

I trust this answers the question.

Ian D. Robertson MCIP"

I will assume Mr. Robertson is referring to me. (It is unfortunate he doesn't have the courage to identify me by name) As with a large part of the submission he prepared this again is inaccurate. The fact that he has flown over this area 4 times does not constitute a proper evaluation given that I have lived here and used the trails for 6 years. Mr. Robertson's assertion would be akin to saying no one lives here because when he flew over he didn't see any people!

I would like to point out that in the winter of 2005-06 there was a very light snow load so you would be hard pressed to see any dog sled trails in this vicinity or any other in the southern Yukon for that matter. (especially from an airplane) Please remember that the Yukon Quest had to turn around in Pelly last winter, in addition the Dash for Cash & the Rendezvous Races were also cancelled and the Carbon Hill was delayed by two months.

Please refer to the GPS map I supplied as part of my submission. These trails are regularly used. I would be happy to show them to anyone including Mr. Robertson in the Winter or Summer. If you would like me to take you out on a dog sled next winter to prove that I use them I again would be more than pleased to do so.

I feel that Mr. Robertson & his company are being unfairly biased in order to fulfill a specific agenda. On several occasions I have stated that I have use these trails & provided a specific GPS map of the area & have been more than forthcoming with this information. In fact I made these trail maps part of the public record as part of the public consultation for the project to widen the Mayo Rd in the Summer of 2005. I am not sure why Mr. Robertson chose to ignore this or not even have to courtesy to inquire about my knowledge of the area, but rather rely on 4 airplane trips. Dog Sleds leave a 20 inch wide shallow track and are hard enough to see on the ground much less from the air.

Unfortunately, I have few photos from the area from last winter. I have attached a couple of photos that were taken in the area of question in February of 2006.

Given Mr. Robertson's track record for omitting items of record, his lack of due diligence and his blatant misrepresentation of the truth regarding the public consultation process in 2005, I would hope that you would give very limited weight to any of the input he or his company brings forward.

Again, I would be more than happy to be a tour guide, if it would settle the question of whether or not these trails get used.

Thanks in advance for your attention to this.
Keith please add this to the public record.

Bryan Alp
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