

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tilbury v. Coulson*,  
2023 BCSC 189

Date: 20230209  
Docket: S33294  
Registry: Chilliwack

Between:

**Nelson Tilbury and Sandy Tilbury**

Plaintiffs

And

**William Coulson, Jennifer Lee and 0909361 B.C. Ltd.**

Defendants

- and -

Docket: S39394  
Registry: Chilliwack

Between:

**Jennifer Lee**

Plaintiff

And

**Nelson Tilbury, Sandy Tilbury and Randy Hawes**

Defendants

Before: The Honourable Madam Justice Walkem

## **Reasons for Judgment**

The Plaintiffs/Defendants, appearing on  
their own behalf:

N. Tilbury  
S. Tilbury

The Defendants/Plaintiff, appearing on  
their own behalf, and as representatives of  
090361 B.C. Ltd.:

W. Coulson  
J. Lee

Counsel for the Defendant, Randy Hawes:

D.T. McKnight  
C.F. Nisbett

Place and Dates of Trial:

Chilliwack, B.C.  
September 20-23 & 26-29, 2022  
October 11-12, 2022

Place and Date of Judgment:

Chilliwack, B.C.  
February 9, 2023

Table of Contents

**INTRODUCTION ..... 5**

**THE PARTIES ..... 5**

**PROCEDURAL HISTORY ..... 5**

**CREDIBILITY ..... 6**

**FACTUAL BACKGROUND..... 8**

    Initial Meeting ..... 8

    Easement Demand Letter ..... 9

    Sidewalk Incident ..... 9

    Other Third-Party Disputes..... 10

    Security Cameras..... 11

    Axis Land Survey ..... 11

    Fall 2016: Fencing of Tilbury Parking Lot, Disabling of Security Cameras, Deck Construction and Gutter Removal ..... 12

    Other Litigation Between the Tilburys and Ms. Lee and Mr. Coulson..... 12

    August 6, 2017: Escalation and Exposure Incident ..... 14

    August 22–29, 2017: The Display ..... 20

    Meetings with Mr. Hawes ..... 24

    Ms. Lee and Mr. Hawes Meeting and Correspondence ..... 25

    Removal of the Display ..... 26

    Support Group..... 27

**ISSUES..... 29**

**LAW..... 31**

    Defamation ..... 31

        Overview..... 31

        Can Images be Defamatory?..... 33

**DEFENCES TO DEFAMATION..... 35**

**ANALYSIS..... 36**

    First Action: Where the Tilburys are the Plaintiffs..... 36

    Statement 1 ..... 37

    Statements 2, 3, 4, 5 and 7 ..... 38

    Statement 6..... 41

    Statement 8..... 42

    Do the Statements refer to the Plaintiffs?..... 42

---

Were the Statements Published? ..... 42

**DEFENCES ..... 43**

Justification..... 43

Statements 2, 4 and 7 ..... 44

Statement 8..... 45

**FAIR COMMENT ..... 45**

Summary of First Action ..... 46

Damages ..... 47

**SECOND ACTION: WHERE MS. LEE IS THE PLAINTIFF, THE TILBURYS ARE  
DEFENDANTS, TOGETHER WITH FORMER MAYOR, MR. RANDY HAWES ..... 48**

Sufficiency of Pleadings and Lack of Evidence ..... 48

Remaining Issues in the Second Action ..... 51

Defamation ..... 51

Invasion of Privacy ..... 54

**LAW..... 55**

Statutory Exceptions ..... 57

Analysis ..... 58

**CONCLUSION..... 59**

**COSTS ..... 59**

**INTRODUCTION**

[1] The dispute began as a disagreement between neighbours Jennifer Lee, William Coulson, Sandy Tilbury, Nelson Tilbury, and their respective numbered companies, concerning a canopy overhang at the front of their adjacent properties in Mission, B.C.

[2] The dispute escalated and evolved quickly. It grew to include allegations of defamation and invasion of privacy. It is these allegations that are currently before the court.

**THE PARTIES**

[3] The Tilburys, through their numbered company, 488519 B.C. Ltd. (“488”), owned a building located at 33186 First Avenue (the “Tilbury Property”). The Tilburys purchased the Tilbury Property around February 2015, and intended to renovate and operate their Mission Realty business from there. Both Nelson and Sandy Tilbury are real estate agents. Mr. Tilbury served as a city councillor in the City of Mission (the “City”) for approximately four years, from 2011–2014.

[4] Ms. Lee and Mr. Coulson and their numbered company, 0909361 B.C. Ltd. (“090”), owned 33192 First Avenue (the “Lee/Coulson Property”), which they bought in 2011. It was formerly a hardware store, and they were renovating it. The building was largely an empty shell during the relevant time. Ms. Lee and Mr. Coulson are business people and involved in dog training.

[5] The lots are side by side and extend from First Avenue (in the front) to Railway Avenue (in the back). The Lee/Coulson building occupies the whole lot. The Tilbury building extends midway through the lot, leaving a parking area at the back. Highway 7 (Lougheed) splits in different directions on either side of the properties.

**PROCEDURAL HISTORY**

[6] Chilliwack Action No. S33294 (the “First Action”) was brought by the Tilburys against Ms. Lee, Mr. Coulson, and 090 for defamation through the posting of a display on the storefront of the Lee/Coulson Property (the “Display”).

[7] Chilliwack Action No. S39394 (formerly Vancouver Action No. S199250) (the “Second Action”) was brought by Ms. Lee against Mr. Tilbury, Ms. Tilbury, and Mr. Randy Hawes (Mayor of Mission from 1993–2001 and 2014–2018), alleging defamation and invasion of privacy through the publication and distribution of a video of Ms. Lee where she appears topless.

[8] The First Action was originally scheduled to be heard before me on February 21, 2021. Per an earlier order, the Tilburys’ application for summary trial was heard prior to the commencement of the trial. No mention was made of the Second Action. I granted the application and ordered the matter heard as a summary trial. Immediately after, in opening arguments, it was brought to my attention that the Second Action, stemming from the same dispute, was proceeding concurrently through the Vancouver Registry. I raised the concern that having the matters heard separately risked having two decisions from this Court about substantially the same subject matter, a situation not in the interests of fairness or efficiency. The matter was adjourned.

[9] On May 19, 2021, with the consent of the parties, the two matters were ordered to be heard together. On June 1, 2022, I ordered that the matters proceed by trial proper. I later directed that the witnesses at the trial were to be those individuals for whom the parties had already filed affidavits in the summary trial, unless a party applied to call an additional witness. No such applications were made.

[10] The matters were heard together in a 10-day trial. The parties were self-represented, with the exception of Mr. Hawes.

### **CREDIBILITY**

[11] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff’d 2012 BCCA 296, as including “the trustworthiness of a witness’ testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides”. Specific factors include a witness’:

[186] "... ability and opportunity to observe events, the firmness of [their] memory, the ability to resist the influence of interest to modify [their] recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes [their] testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally...."

[12] A significant amount of documentary, video, and photographic evidence was introduced on key points. Each of the parties testified, as did a number of witnesses. There was substantial agreement among the parties and the witnesses on the chronology and basic facts of this case. For example, each party ordered transcriptions of the different videos presented, and they agreed on the content of those transcriptions. The parties often disagreed, however, on the importance, interpretation or inference to be drawn from the evidence.

[13] I found the parties' partly inconsistent memories or evasiveness on some matters to reflect an attempt to minimize their responsibility or actions in certain areas.

[14] In her testimony, Ms. Lee admitted to instances where she was not truthful, even though this was to her own detriment. For example, Ms. Lee had told police that she had put up the Display. During her testimony, she said she lied to the police because she wanted to take responsibility and not get her teenaged employee, or Mr. Coulson, in trouble. Ms. Lee also testified that some of the information she had included in emails to Mr. Hawes was incorrect and reflected her efforts to get him to meet with her and Mr. Coulson, who was himself unaware of these efforts. I find that this raises questions with respect to her credibility.

[15] Mr. Coulson's assertion that he could not remember many of the events was not convincing.

[16] Mr. and Ms. Tilbury both sought to minimize the degree to which they formed or participated in a support group for individuals dealing with Ms. Lee, whom they perceived as a common adversary, of sorts. I find this raises questions with respect to their credibility.

[17] I found Mr. Hawes' evidence to be credible, for the most part. However, aspects of his testimony, such as what he meant to convey when forwarding an email to Mr. Tilbury, were not believable.

[18] Overall, I found the parties to be credible on some points, while not on others. Where there is an issue about witness credibility on specific points, I outline where I have preferred specific testimony below.

## **FACTUAL BACKGROUND**

### **Initial Meeting**

[19] The parties' initial meeting, shortly after the Tilburys bought the Tilbury Property in 2015, was cordial. Ms. Lee went to the Tilbury Property to introduce herself. The parties discussed their mutual renovation projects—both were looking to make changes to their building façades, as well as other updates.

[20] Ms. Lee mentioned difficulties she was experiencing in getting approvals for renovations with Mission. Mr. Tilbury shared that he was a former City councillor and former employee of Mission, and suggested that he may be able to help Ms. Lee, given his familiarity with the system. This offer was made as a neighbourly gesture.

[21] At that meeting, or shortly thereafter, Ms. Lee mentioned that the canopy at the front of the Tilburys' building encroached onto the Lee/Coulson Property, and said she would like to see the overhang corrected. The Tilburys agreed to look into the canopy encroachment issue. Mr. Tilbury said that in the process of investigating the overhang issue he became aware of other neighbour disputes Ms. Lee and Mr. Coulson were involved in elsewhere in Mission.

[22] The Tilburys received approvals for their renovations, and a façade grant available to all building owners. Ms. Lee understood that Mission required her to have a fireguard for the renovations she had planned, and there appeared to be some dispute about façade requirements for the Lee/Coulson Property. The nature of the Tilbury Property renovations required no fireguard. Ms. Lee believed there



was an unfairness in requirements for the façade and fireguard between her renovation and that of the Tilburys.

### **Easement Demand Letter**

[23] Several weeks after their initial meeting, around March 3, 2015, the Tilburys received a letter from a lawyer for Ms. Lee and Mr. Coulson about the encroachment (the “Easement Demand Letter”). The letter suggested either:

1. The Tilburys purchase the Lee/Coulson Property for \$800,000;
2. The Lee/Coulsons purchase the Tilbury Property for \$150,000; or
3. The Tilburys purchase an easement from Ms. Lee and Mr. Coulson for \$20,000.

[24] Ms. Lee says the \$800,000 purchase price proposed was calculated on a square foot basis given the size of the three-story building on the Lee/Coulson Property. The offer to buy the Tilbury Property for \$150,000 was based on a proposed purchase price Ms. Lee had discussed with the previous owner.

[25] The Tilburys say they were shocked to receive the Easement Demand Letter, and viewed it as a form of extortion or shake-down. They were further surprised by the disparity in the proposed purchase prices because the building on the Tilbury Property was largely finished while the building on the Lee/Coulson Property was not.

[26] The Easement Demand Letter was the catalyst for the rapid disintegration of the relationship between the parties.

### **Sidewalk Incident**

[27] Shortly after receiving the Easement Demand Letter, the Tilburys drove to the Tilbury Property, and there was an interaction on the sidewalk (“Sidewalk Incident”).

[28] According to Ms. Lee, Mr. Tilbury parked his truck haphazardly with one wheel on the sidewalk in his haste to confront her, and “charged” at her on the sidewalk. Ms. Lee described Mr. Tilbury as hostile, and said she was frightened at the time.

[29] Mr. Tilbury acknowledged he was upset, but denied charging at Ms. Lee. Mr. Tilbury said he was talking with Mr. Barkhausen, the contractor renovating their building, when Ms. Lee approached them. Mr. Tilbury described his attitude as “firm” but not abusive or angry. Ms. Tilbury described Mr. Tilbury as “firm”, perhaps “irritated”, but denied he was hostile.

[30] Mr. Barkhausen testified he was speaking with Mr. Tilbury when Ms. Lee approached them on the sidewalk. Mr. Barkhausen agreed that there was a disagreement between the parties, but said he did not witness any aggression on anyone’s part, and does not recall Mr. Tilbury charging at Ms. Lee.

[31] The parties agree that Mr. Tilbury advised Ms. Lee that the Tilburys were taking the Easement Demand Letter “under advisement”. Ms. Lee was advised not to speak with the Tilburys, or any of their workers or contractors on site, and, instead, to communicate through the Tilburys’ legal counsel in the future.

### **Other Third-Party Disputes**

[32] Within the same relative timeframe, Ms. Lee and Mr. Coulson were involved in disputes with neighbours at other properties around Mission. The City, and police, were involved in these disputes through complaints or calls made by these parties.

[33] Mr. Hawes testified that, as Mayor, he was aware of the other disputes because the City was often brought into disputes between neighbours.

[34] At the same time that the dispute between the parties was escalating. The Tilburys began to be in touch with other neighbours that Ms. Lee and Mr. Coulson were involved in disputes with. Ms. Lee argued that these efforts equated with the Tilburys forming a support group with these individuals. Ms. Lee alleges that the

support group mounted a concerted effort to call police and make false allegations against Ms. Lee and Mr. Coulson. The support group allegations are discussed further below.

### **Security Cameras**

[35] Within several weeks of the Sidewalk Incident, in March 2015, Ms. Lee and Mr. Coulson had a security camera installed on the side of their building, roughly above the Tilburys' back deck.

[36] The Tilburys' perspective was that this camera was aimed at their building, could record them and their employees' and clients' comings and goings, and violated their privacy.

[37] Ultimately, both properties had security cameras installed, focussing on an area that included the Lee/Coulson sidewall and the Tilburys' back parking lot. Each party also had additional security cameras affixed to their buildings, which were not in dispute. Both buildings had experienced incidents of vandalism, unrelated to the parties, and each of the parties said the cameras were installed for security purposes. As the Lee/Coulson building was vacant, Ms. Lee said their insurance company requested that they install a system to monitor their building.

### **Axis Land Survey**

[38] A survey commissioned by the Tilburys in May 2015 (the "Axis Land Survey") showed mutual encroachments of the parties' buildings. The Tilburys' front canopy and the front of their building encroached on the Lee/Coulson Property. The Lee/Coulson building encroached on the Tilbury Property at the back of the lot.

[39] The Axis Land Survey showed the Tilburys' back deck (roughly mid-way through their lot) encroaching the Lee/Coulson Property by 0.13 and 0.09 feet. The Lee/Coulson security cameras and downspouts that came to be the focus of disagreement between the parties were located, in part, above the Tilburys' deck area. The parties disagreed about whose property the downspouts and security cameras, affixed to the side of the Lee/Coulson building, actually overhung.

**Fall 2016: Fencing of Tilbury Parking Lot, Disabling of Security Cameras, Deck Construction and Gutter Removal**

[40] In September 2016, the Tilburys hired Mr. Earl Sam to help fence and gate their back parking lot. This had the impact of restricting access to the west side of the Lee/Coulson Property.

[41] Ms. Lee and Mr. Coulson photographed Mr. Sam working on the Tilbury Property, and also photographed his truck and licence plate. One photograph shows Mr. Sam digging near a gas meter for the Tilbury building. This photo was later posted on the Display with the suggestion Mr. Sam was digging near the Lee/Coulson gas meter.

[42] Later that day, Ms. Lee came into the Tilbury building where Mission Realty was operating. Ms. Tilbury described Ms. Lee as “yelling” and “screaming” and refusing to leave. A third party called the police. Ms. Lee did not leave until the police arrived.

[43] In the process of constructing a canopy on their back deck, in September 2016, the Tilburys removed downspouts and gutters on the Lee/Coulson building. Though some downspouts/gutters were reattached, they were not properly put back. The Lee/Coulson building was damaged due to water ingress as a result. This became the subject of other litigation between the parties, discussed below.

[44] In and around November 2016, the Tilburys began to disable the Lee/Coulson security cameras. These efforts included covering the cameras with duct tape, caution tape, a tarp, and repeatedly smearing peanut butter on the cameras.

[45] Around December 2016, the Tilburys, concerned with the ongoing conflict, made the decision to rent the Tilbury Property to a retailer and moved their Mission Realty business to their home.

**Other Litigation Between the Tilburys and Ms. Lee and Mr. Coulson**

[46] Over the course of two years, from 2015–2017, the Tilburys and Ms. Lee and Mr. Coulson each initiated court cases against the other stemming from their various

disputes. A summary of this litigation illustrates the *quid pro quo* escalation of the dispute that the parties engaged in.

[47] On September 21, 2015, in *0909361 B.C. Ltd. v. 488519 B.C. Ltd.*, Vancouver File No. S157688, Ms. Lee and Mr. Coulson sued the Tilburys over the canopy encroachment at the front of the Tilbury building. On November 7, 2016, the Tilburys, through their numbered company, filed action *488519 B.C. Ltd. v. William Coulson, Jennifer Lee and 0909361 B.C. Ltd.*, Chilliwack File No. S31862, alleging trespass in mounting the Lee/Coulson security cameras, a violation of privacy in the operation of the security cameras, and trespass of the gutter system. They further alleged the Lee/Coulson gutters were draining in a way that damaged the Tilbury Property.

[48] On April 1, 2016, the parties agreed to an easement which allowed for the mutual encroachment of each party's building onto the lot of the other. The interpretation of the easement agreement, and whether it applies to security cameras and gutters, led to further disagreements between the parties. The easement agreement provided that access to the side of the Lee/Coulson building for repairs would not be unreasonably withheld upon ten days' written notice.

[49] A survey attached to the easement (unlike the Axis Land Survey) did not show that the Tilbury's back deck encroached the Lee/Coulson Property. The Tilburys believed that because the security cameras and downspouts/gutters were specifically excluded from the easement, at their request, and because the survey attached to the easement did not show that their back deck encroached the Lee/Coulson Property, they could remove or disable the Lee/Coulson security cameras and downspouts/gutters at will. Ms. Lee believed that the downspouts/gutters and security cameras were at least partially on the Lee/Coulson Property, per the Axis Land Survey, so no easement agreement was required for where they were located.

[50] From May 2017–August 2017, Ms. Lee requested access to the downspouts/gutters on the Lee/Coulson building per the terms of the easement

agreement. Mr. Tilbury denied or put conditions on that access for a number of months, which meant that Ms. Lee and Mr. Coulson could not address water damage to their building. Ultimately, Ms. Lee brought an application in Chilliwack File No. S31862 on October 24, 2017, requesting access to the side of the Lee/Coulson building to repair the downspouts/gutters. Access was allowed through an order of Master Muir in November 2017, made by consent.

### **August 6, 2017: Escalation and Exposure Incident**

[51] The interactions between the parties became increasingly tense and culminated in early August 2017. Videos from early August show Mr. Coulson raising his two middle fingers (what the parties referred to as a “two finger salute”) at the Tilburys from a window casing of the Lee/Coulson building, and throwing debris onto the Tilbury Property. Other videos show Mr. Coulson wiping off peanut butter that Mr. Tilbury had smeared on a Lee/Coulson security camera, and unplugging a Tilbury security camera. Hostilities were heightened on August 6, 2017 and much evidence was tendered about what occurred.

[52] At approximately 11:00 a.m. on August 6, 2017, Ms. Lee parked on Railway Avenue outside the back gate of the Tilbury Property. Ms. Lee was waiting for police to arrive in response to her call about the disabled Lee/Coulson security cameras. Mr. Tilbury, Ms. Tilbury, and Ms. Tilbury’s nephew, Mr. Grey, were working in the Tilbury parking lot. Each party commenced filming the other.

[53] Ms. Lee and Mr. Tilbury both testified about a statement made by Mr. Grey, at some point during the interactions between the parties on August 6, 2017, suggesting that “20Gs” would “fix this”, referring to Ms. Lee. The comment seems to suggest money could be paid to harm Ms. Lee or otherwise remove the problem she posed to the Tilburys. Mr. Tilbury dismissed the statement as a joke made in frustration. Ms. Lee, understandably, did not take this comment as a joke. I find the conversation did occur based upon the testimony of both Mr. Tilbury and Ms. Lee.

[54] Footage of Mr. Grey’s and Ms. Lee’s cell phones, were played multiple times in evidence. Transcripts were provided of those videos. The parties agreed about

what was said (i.e., the content of the transcripts), but disagree about its meaning and significance. The following transcript is of the first interactions between Ms. Lee and the Tilburys on August 6, 2017:

Jennifer Lee: I wish you guys would stop bullying me. I wish you guys would give me access to maintain my building. That is my right.

Nelson Tilbury: Do you have permission to—

Jennifer Lee: You do not have a right –

Nelson Tilbury: —film us?

Jennifer Lee: —to cover up my security camera. You do not have a right to damage—

Nelson Tilbury: Is your name Jennifer Lee?

Jennifer Lee: —my building. You do not have a right to put the drainage on my footing and damage my—

Nelson Tilbury: Yes, we do.

Jennifer Lee: Stop bullying me, Mr. Nelson Tilbury of Mission Realty. Please stop bullying me, Mr. Nielsen [*sic*] Tilbury. I—

Sandy Tilbury: I think you've got it wrong—

Jennifer Lee: You are a bully.

Sandy Tilbury: —Jennifer. I don't see where you—

Jennifer Lee: Well, I haven't done anything to your building. I've never done anything—

Sandy Tilbury: What gives you the right—

Jennifer Lee: What is it that you're hiding?

Sandy Tilbury: to videotape us?

Nelson Tilbury: Sandy. Sandy. Sandy.

Jennifer Lee: I have damage to my building, and I'm trying to—

Nelson Tilbury: Sandy.

Jennifer Lee: —find—do—

Sandy Tilbury: Damages?

Jennifer Lee: —an investigation. What exactly are you guys doing down there—

Nelson Tilbury: Will you leave?

Jennifer Lee: —that you don't want to be videotaped?

Nelson Tilbury: Will you leave?  
Jennifer Lee: Is it legal to even have a deck—  
Nelson Tilbury: Sandy. Sandy.  
Sandy Tilbury: Please leave.

[55] Ms. Lee indicated she was waiting for the police to attend. Mr. Tilbury suggested “all three of us” (himself, Ms. Tilbury, and Mr. Grey) should call 911 to report “assault” and “harassment”. The police did not consider it an emergency where a 911 call was appropriate and told Ms. Tilbury to call the regular non-emergency line:

Nelson Tilbury: If she thinks she’s just gonna sit there all day and fucking harass us, she’s got another [thing] coming. Just keep on.  
Sean Grey: Don’t do anything too crazy now; all right? All right. All right.  
Sandy Tilbury: [apparently speaking with a 911 dispatcher] About my neighbour in Mission. The address is ... There might be eventually. Who knows? [Indiscernible].  
[apparently speaking to Mr. Tilbury and Mr. Grey] Now they tell me I have to call the Mission regular thing. They won’t come.  
Sean Grey: Oh, okay.  
Nelson Tilbury: That’s okay. It just gets registered as a file. That’s all I care about right now, ...

[56] Later that same day, Ms. Lee and Mr. Coulson were moving their security cameras at the request of the RCMP, and noticed a security camera on the roof of the Tilbury building pointing at their building. They indicated they were surprised by the siting of this camera, as the Tilburys were suing them in Chilliwack Action No. S31862 for invasion of privacy in the location of their own security cameras.

[57] After working on the property, Mr. Tilbury went home. Ms. Tilbury remained with Mr. Grey to clean the site.

[58] Additional video recordings were taken of the events that followed, which I refer to overall as the “Exposure Incident”. These included, first, a without-sound



recording from the Tilbury's security camera located on the roof of the Tilbury building; second, a recording from Ms. Lee's cell phone, which was taken by Mr. Coulson from inside the Lee/Coulson building; and, third, a recording from Ms. Tilbury's cell phone which was taken by Mr. Grey. The first and second videos were entered into evidence, the third was not. Ms. Tilbury testified that her phone did not have storage space, beyond roughly 90 seconds, so the Exposure Incident was not, in fact, captured.

[59] One further video entered into evidence was created by Mr. Tilbury holding his cell phone in front of a monitor playing security camera footage and recording the video. In essence, a video of a video.

[60] The transcript introduced at trial came from the recording made on Ms. Lee's phone.

[61] This video showed Ms. Tilbury hosing down the back parking lot of the Tilbury Property. The plywood window covering was removed from inside the Lee/Coulson building. Mr. Coulson and Ms. Lee then appeared in the window opening and began yelling insults at Ms. Tilbury. Mr. Coulson and Ms. Lee called Ms. Tilbury "fat", "ugly" and a "pig" and made snorting noises and other comments of this sort.

[62] At that time, Ms. Tilbury instructed Mr. Grey to use her cell phone to record the interaction. Ms. Tilbury testified she wanted a record of what Ms. Lee and Mr. Coulson were yelling at her, and hoped they may behave better if they knew they were being recorded.

[63] Mr. Coulson then directed Ms. Lee to lift up her shirt and expose her breasts. This was an attempt to show that the Tilburys' security camera, and Mr. Grey in the parking lot, could record people and activities inside the Lee/Coulson building.

[64] Ms. Lee then lifted her shirt and exposed her breasts for approximately three seconds. Mr. Coulson's first attempt to capture an image of Ms. Lee topless, within sight of the Tilbury security camera, did not work due to the lack of lighting in the Lee/Coulson building and bright outside light. Mr. Coulson then moved to the same

window casing where Ms. Lee was, and they determined to stage another exposure incident. Ms. Lee leaned out the window and again lifted her top to expose her breasts for about two to three seconds. Mr. Coulson extended his arm out of the window to film the incident, trying again to capture an image of a topless Ms. Lee with the Tilbury security camera in the background. The transcript is as follows:

William Coulson: [Speaking to Mr. Grey] You're film—filming on private property.

Jennifer Lee: Hmm?

William Coulson: [Indiscernible]. Take your top off [indiscernible].

Jennifer Lee: Yeah.

William Coulson: Take your top off.

Jennifer Lee: Kay. Do you want to take a picture of me with my top off?

William Coulson: Yeah.

Jennifer Lee: Kay.

William Coulson: Yeah.

Jennifer Lee: Well, you're gonna have to come over here and take over the camera.

William Coulson: I got him already.

Jennifer Lee: Okay.

William Coulson: Just do it right now.

Jennifer Lee: What's that?

William Coulson: Do it right now, and I'll back off [indiscernible].

Jennifer Lee: Okay. But how do you show that I'm not with the top?

William Coulson: I'm gonna back up.

Jennifer Lee: Okay. Do it right now?

William Coulson: Yeah.

Jennifer Lee: Okay. Yeeooo [phonetic]. Yeah. That's right, baby. Get that on film.

William Coulson: Is he filming you?

Jennifer Lee: Yeah, he's filming me. Look at him. He's filming me.

William Coulson: Oh, he is. Okay.

Jennifer Lee: Thank you. Shooting into a private residence, into a window.

William Coulson: Yeah. [Indiscernible].

Sandy Tilbury: What?

William Coulson: [Indiscernible] should call the police [indiscernible] and said, take your top off while you're working on this. Did you—you call the police? He's filming you.

You can't film on private property, and you're on—you're on somebody else's property right now, bucko.

You too.

Jennifer Lee: You're in serious trouble dude.

[65] Ms. Lee said the Exposure Incident was a bad choice, and represents one of the worst days of her life, which she finds humiliating and regrets. Ms. Lee says her frustration with the ongoing dispute led her to participate in staging the Exposure Incident.

[66] During the course of his testimony, Mr. Coulson apologized to Ms. Tilbury for the comments he made on the video. I understood this to be the first apology offered over the name-calling.

[67] There was some argument that the footage was so blurry that Ms. Lee was unidentifiable. In the security camera footage of the Exposure Incident introduced in evidence, though the camera is at some distance, I find that Ms. Lee is identifiable.

**August 22–29, 2017: The Display**

[68] On August 22, 2017, the Display, which consisted of four large posters was affixed to the storefront window of the Lee/Coulson building. Each poster was roughly four feet by five feet in width. The Display remained affixed until August 29, 2017.

[69] The Display contained several statements which, in the Tilburys' Amended Notice of Civil Claim, they allege to be libelous and defamatory. The impugned statements are:

- (1) A picture of Nelson Tilbury with the words: "Nelson Tilbury, Please STOP bullying me!" ("Statement 1");
- (2) Words that said: "ABOVE THE LAW?" ("Statement 2");
- (3) Words that said: "When I first met Mr. Tilbury in February of 2015, he told me that he could help me get things done with my renovation because of his status in the city." ("Statement 3");
- (4) Words that said: "He said he was above the law. He seemingly is above the law." ("Statement 4");
- (5) Words that said: "He did not have to follow the façade for the theme of the city for this building (below)." ("Statement 5");
- (6) Words that said: "Through physically charging me on the side-walk in February 2015 and saying that you will "get rid" of me in October 2016. I forgive you." ("Statement 6");
- (7) Words that said: "I am scared of the powers that you have in this city." ("Statement 7");
- (8) Words that said: "Mrs. Tilbury I forgive you the bad things you said about me, and for recording me topless inside my building." ("Statement 8");

(9) The Defendant's name, Jennifer Lee.

(The "Statements", where I refer to these collectively.)

[70] Additional statements on the Display included:

- "In Fall of 2016 you started a civil litigation against me for my cameras and gutters trespassing on your property."
- "The gutters that we speak of predate my ownership."
- "You have two security cameras in the same vicinity as my single camera."
- "We are both protecting our property. Why are you taking away my right to protect my property?"
- "You have built a fence across the back of your building which prevents me from accessing the west side of my building since November 2016."
- A picture of an apparently damaged security camera and the words "why are my cameras shot out with a bb gun (above)?"
- "I am pleading with the public; anyone who knows Mr. Tilbury, will you please help me talk to him if you can. I have voluntarily relocated my cameras. Please, just let me fix my building."
- "We cannot continue to cost the tax payers of Mission, the revitalization of downtown, and the tens of hours that our conflict has cost the RCMP. Please give me access to my building so I can do maintenance work and renovate this building once and for all."
- A picture of Mr. Sam near a gas meter with the words: "Why is this man digging by my gas meter without my consent (below)?"

[71] The Display itself was signed “Sincerely, Jennifer Lee”.

[72] Ms. Lee admitted she wrote the content of the Display. She said she intended part of it to be used as an exhibit, or visual aid, in a court case she was involved in against the Tilburys seeking access to fix the gutters and downspouts on the Lee/Coulson building. She claimed another part of the Display was created to be used as part of a public “survey” to get support for her renovations with Mission, and to pressure the Tilburys to allow access to the downspouts/gutters on the Lee/Coulson building.

[73] Ms. Lee said she affixed the words to several of the panels. She claimed that a teenaged summer student took the text she wrote and finished pasting it to one or two of the panels. Ms. Lee said she did not intend the statement about Ms. Tilbury (Statement 8) to be affixed where it was, but rather to another panel she had planned.

[74] Mr. Coulson’s evidence was that he was preparing for a national dog training competition and was unaware of, and uninvolved with, the creation and initial posting of the Display. Ms. Lee’s testimony agreed with this. Their relationship broke down, in part, over these incidents.

[75] Ms. Lee said her summer student put up the Display in the Lee/Coulson windows without her permission. The student was not called as a witness. Ms. Lee knew the Display was up from August 22 onward and did not remove it until August 29. I was not convinced of her assertion that she did not either put it up herself, or direct her teenaged employee to do that. Mr. Coulson testified he was unaware of the Display until it had been put up, however I find this as unlikely and, in any case, he took no steps to remove the Display when he became aware of it shortly after it was posted.

[76] In a letter statement to Cst. Robinson of the Mission RCMP, Ms. Lee claimed she herself had posted the Display. At trial, she explained this discrepancy by saying

she told the police this because she did not want her student employee or Mr. Coulson to get in trouble.

[77] I find, on a balance of probabilities, that Ms. Lee, Mr. Coulson, and their numbered company 090 were responsible for posting the Display. The Display was published in the storefront window of their property and they did not remove it for a week. Ms. Lee and Mr. Coulson owned the numbered company that owns the property where the Display was posted. In addition, the Display is attributed to Ms. Lee as it is signed in her name.

[78] A tenant at the Tilbury Property called the Tilburys on August 22, 2017, and informed them about the Display. Mr. and Ms. Tilbury each said that when they first saw the Display there was a group of two or three people looking at it. They each recalled one person saying something to the effect of “I would not vote for that asshole again”.

[79] First Avenue, where the Display was posted, is a main thoroughfare in Mission. The post office is across the street, and a major bank is sited kitty-cornered to the Display. The Display and many of the Statements it contained were large and visible from vehicles driving by. The Statements were also visible to pedestrians. Several witnesses, including Mr. Hawes, Mr. Barkhausen, and Ms. Morton testified that they personally saw the Display and also saw others stopping to read it. Mr. Hawes said he received a call from media and the downtown business association about the Display.

[80] On August 22, 2017, Mr. Tilbury sent a letter to Ms. Lee and Mr. Coulson’s legal counsel, copied to Ms. Lee, demanding that the Display be removed immediately. In response, on August 25 and 27, 2017, Ms. Lee wrote to Mr. Tilbury asking if he was willing to participate in mediation. Mr. Tilbury felt the Display was an attempt to pressure the Tilburys to mediate and settle the dispute about the downspouts/gutters. Ms. Lee testified that she had been encouraged by Mr. Hawes to mediate and was following that advice in contacting Mr. Tilbury, not attempting to pressure the Tilburys into settlement discussions. On August 29, 2017, Ms. Lee

wrote: “As per your Maybe exceptance [*sic*] of a mediation I have already taken down the posters.”

**Meetings with Mr. Hawes**

[81] On or around August 22, 2017, Mr. Tilbury met with Mr. Hawes, who was then Mayor, and Deputy Chief Administrative Officer (“DCAO”), Mr. Mike Younie.

Mr. Hawes could not recall if there were others, including Chief Administrative Officer Mr. Ron Poole, present at the meeting, though he agreed there may have been. Mr. Tilbury recalls Mr. Younie being present at the meeting and believes there may have been several others, including possibly Mr. Poole and one or two bylaw officers.

[82] Mr. Tilbury and Mr. Hawes were not on City council at the same time. The relationship between Mr. Hawes and the Tilburys was described as “friendly” or of being “acquaintances”. They said they do not see each other socially outside of the context of events surrounding the hearing of these matters.

[83] At the meeting, Mr. Hawes was shown video clips on Mr. Tilbury’s phone, including of Mr. Coulson giving a “two-finger salute”, and of the Exposure Incident. There was no commentary, voiceover, or any images added to the video clips Mr. Hawes was shown.

[84] Mr. Tilbury testified that he showed the video clips to Mr. Hawes, in part, in response to Statement 8 in the Display which indicated Ms. Tilbury had filmed Ms. Lee topless, and to show that this was not how the incident had occurred.

[85] Mr. Hawes testified that he asked Mr. Tilbury to have the City’s IT Department copy the video onto a USB stick. Mr. Hawes did not otherwise recall showing the video to City staff, but did give the USB stick to the DCAO.

[86] Mr. Hawes said he asked for a copy of the video to provide to Mr. Younie because he was concerned Ms. Lee was litigious and may make false claims against City bylaw officers as he felt she had done against the Tilburys. Mr. Hawes



indicated he felt bylaw officers should always have a witness present when interacting with Ms. Lee after watching the video.

[87] In her Amended Notice of Civil Claim, Ms. Lee alleges that Mr. Hawes distributed copies of the video to Mr. Younie and Mr. Mike Rhodes, a building inspector. In support of this allegation, Ms. Lee introduced into evidence a document she obtained through a Freedom of Information request to the City concerning a meeting where it was alleged a video of the Exposure Incident was shown. The document's author, Ms. Russell, did not testify. The document is therefore inadmissible for the truth of its contents. I do not consider the content of this document in my reasons.

[88] Based on the evidence of Mr. Tilbury and Mr. Hawes, I find, on a balance of probabilities, that video of the Exposure Incident was played by Mr. Tilbury to Mr. Hawes, Mr. Younie, and at least one other staff member. A copy of the video was saved to a USB stick at the IT Department. The USB stick was then provided to Mr. Younie, who did not testify.

[89] Ms. Lee asserted that Mr. Hawes communicated with police to influence Ms. Lee's arrest. She based this on the fact that the RCMP communicated with an unnamed person at City Hall. Mr. Hawes' evidence was that he did not communicate with the RCMP, nor is it something he would do as Mayor. I accept Mr. Hawes' testimony on this point.

[90] The Tilburys also provided a copy of the video of the Exposure Incident to the Mission RCMP as part of a complaint they made regarding the Display.

#### **Ms. Lee and Mr. Hawes Meeting and Correspondence**

[91] Mr. Hawes and Mr. Younie met with Ms. Lee on August 23, 2017. Mr. Hawes advised Ms. Lee that he had seen the video of the Exposure Incident and the "two-finger salute" incident, and encouraged her to take down the Display and resolve the dispute with the Tilburys.

[92] On August 25, 2017, Ms. Lee and Mr. Hawes exchanged a series of emails. Ms. Lee sought a further meeting with Mr. Hawes, that Mr. Coulson, could also attend. Mr. Hawes responded that the fact that the Display is still up does “not bode well for any discussion”, and pointed out that “some of the videos ... paint a very different picture of what is purported on your signs in the window.” Mr. Hawes labeled Ms. Lee’s approach in disputes with other neighbours, as “combative and punitive” and “abnormal and abhorrent”. Mr. Hawes encouraged Ms. Lee to apologize to the Tilburys. He suggested Ms. Lee explore mediation with the Tilburys, saying: “I would most certainly not meet with you one on one because bluntly, I do not trust you or anything you have to say.” Ms. Lee wrote that she would remove the Display “on the condition that I speak with you to clarify a few things in person.” Mr. Hawes advised that he was meeting with a number of neighbours Ms. Lee had disputes with, and reiterated: “I will not meet with you because I do not trust or believe you.”

[93] This entire email chain was forwarded by Mr. Hawes to Mr. Tilbury on August 25, with the message: “As discussed here’s my exchanges with this beauty.”

[94] On cross-examination, Mr. Hawes was asked why the Mayor would forward private correspondence to another citizen, and refer to a citizen as “this beauty”. Mr. Hawes explained that he forwarded the email to Mr. Tilbury because he wanted to show that he was encouraging mediation and attempting to address the Display. He said he was being “sarcastic” and referencing the difficult situation itself, and not Ms. Lee, as “this beauty”. Mr. Hawes acknowledged he could have picked “better terminology”. I do not accept Mr. Hawes’ assertion that he intended the “this beauty” reference to be about the situation rather than a pejorative reference to Ms. Lee.

### **Removal of the Display**

[95] Ms. Lee removed the Display on August 29, 2017.

[96] In late December 2017 or early January 2018, Ms. Lee sold the Lee/Coulson Property. She also sold two other properties where she was involved in neighbour disputes. Ms. Lee claims these sales were done at a loss, in part because she was

embarrassed to deal with City employees who may have seen the Exposure Incident video. Ms. Lee also claimed water damage from the moved downspouts/gutters lowered the price. Ms. Lee bought a house six houses away and in the same neighbourhood as her previous house.

[97] Mr. Tilbury said he was embarrassed about the allegations in the Display. He sees himself as an anti-bullying advocate and was upset to be called a bully in the Display. Though Mr. Tilbury subsequently ran unsuccessfully for City Council, he was concerned about fallout from the Display in weighing options to stand for public office. Mr. Tilbury was concerned about his reputation as a realtor as well.

[98] Ms. Tilbury said she cried uncontrollably and was deeply embarrassed upon seeing the allegation that she had recorded Ms. Lee topless inside her building. Ms. Tilbury said she could no longer operate her real estate practice using “cold calls” to approach potential clients in Mission as she was afraid they had seen the Display.

### **Support Group**

[99] Before addressing the issues between the parties, it is useful to discuss the support group.

[100] Ms. Lee alleged in her Amended Notice of Civil Claim that the Tilburys formed a “support group” of sorts composed of other individuals with whom Ms. Lee had past litigious disputes. Ms. Lee alleged this group was nicknamed “Victims of Jennifer Lee”. Ms. Lee further alleged that the name of this group, as well as their actions, were defamatory. The precise nature of the support offered, or group formed, was a matter of contention between the parties. Ms. Lee suggested the Tilburys were part of an organized and calculated effort to “get rid of her” by forcing her to sell her properties. She alleged support group efforts included repeatedly calling police on her.

[101] The Tilburys denied the existence of an organized support group, characterizing it more as a group of neighbours offering informal emotional support to each other.

[102] Mr. Tilbury initially said he had met others who were involved in disputes with Ms. Lee while on City Council. On cross-examination, he agreed that the neighbour disputes arose after his time on council, so he could not have heard of them in that way. He suggested instead:

... people talk in Mission, it's a small town, and they all share what's going on. ... Mission is a small place, and I know a lot of people, a lot of people in Mission, and as I say, my name is a household name out there, everybody knows who I am. You know, to speculate, they could have talked to neighbours, they could have talked to different people. Everybody shares information. Not too much happens in Mission without everybody knowing about it.

[103] Mr. Tilbury said, in an effort to avoid violence, they and other members of the group determined to “work with authorities. Give them the tools they need to do the job”, the result of which included that Ms. Lee “got a ride in a police car.”

[104] Ms. Tilbury suggested this group met “five or six times”, and said it was “not a group” *per se*; there were no “membership cards”, but rather people who got together to talk.

[105] It seemed to me, on hearing Ms. Lee’s evidence, that her impetus in bringing the Second Action stemmed from what she perceived to be a targeted effort of the Tilburys, through (or together with) the support group, to attack her. Some of the evidence introduced by Ms. Lee (for example, that dead chickens and fecal matter were dumped on her property) concern other members of the informal support group rather than the Tilburys.

[106] I find it likely the Tilburys downplayed their involvement with the group of eight to ten neighbours also involved in disputes with Ms. Lee and Mr. Coulson. Overall, I am satisfied, on a balance of probabilities, that there was a group of people, including the Tilburys, involved in neighbour disputes with Ms. Lee and Mr. Coulson,

who met five or six times, talked on the phone regularly, and coordinated their efforts in response to disputes they were each involved in with Ms. Lee and Mr. Coulson. The lack of membership cards or formal structure does not negate the existence of an informal, loosely organized group with a common purpose. Some of these efforts included making repeated phone calls to the police about Ms. Lee and Mr. Coulson.

## **ISSUES**

[107] The events chronicled above led to the Tilburys filing the First Action against Ms. Lee, Mr. Coulson and 090, alleging they had been defamed by the Statements included on the Display, and seeking damages and declaratory relief.

[108] Ms. Lee then filed the Second Action against the Tilburys and Mr. Hawes, alleging defamation and invasion of privacy through the publication, distribution, and circulation of the Exposure Incident video, and seeking damages and injunctive relief. In her Amended Notice of Civil Claim filed on May 12, 2022, Ms. Lee made further allegations regarding the Tilburys and the support group. These allegations included that the support group took actions to harass Ms. Lee and damage her property, and provided false information to police. The allegations also included that the Tilburys provided the video of the Exposure Incident to the RCMP along with false information about Ms. Lee and Mr. Coulson, and that the Tilburys gathered other videos and pictures of Ms. Lee in compromising situations and posted these to YouTube.

[109] Many of the allegations made by Ms. Lee in her Amended Notice of Civil Claim, and the material facts set out therein, were not dealt with in the evidence. Not all of the allegations made by Ms. Lee were pursued at trial. While Ms. Lee herself testified about a number of these issues, and cross-examined the Tilburys about some issues including their reporting and interactions with police, there was no evidence about the nickname or other specifics of the support group.

[110] While I find that the support group did exist, their precise actions, and who undertook those actions was not clear on the evidence. There was often a disconnect between the pleadings themselves (particularly aimed at the Tilburys and

Mr. Hawes) and some of the alleged actions of the support group which appear to be beyond the pleadings and parties.

[111] The issues raised in the pleadings are as follows:

- a) First Action brought by the Tilburys:
  1. Are the Statements in the Display defamatory?
  2. If so, are the defences of justification and/or fair comment available?
  3. If no defences are available, are Ms. Tilbury and Mr. Tilbury entitled to damages or other relief?
  
- b) Second Action brought by Ms. Lee:
  1. Is the publication, distribution or circulation of the video of the Exposure Incident (a) from the Tilburys to Mr. Hawes, and (b) from Mr. Hawes to City of Mission staff, defamatory?
  2. Is the provision of the video of the Exposure Incident along with other information from the Tilburys to the RCMP defamatory?
  3. Did the Tilburys publish, distribute or otherwise circulate the video of the Exposure Incident to the alleged support group or others; and if so, was the publication, distribution or circulation defamatory?
  4. Are the alleged actions of a support group, formed or participated in by the Tilburys and Mr. Hawes, defamatory?
  5. Did the publication, distribution, or circulation of the video of the Exposure Incident and/or other videos and pictures of Ms. Lee by the Tilburys and/or Mr. Hawes breach Ms. Lee's privacy contrary to the *Privacy Act*, R.S.B.C. 1996, c. 373?

[112] Each of the parties have denied the allegations raised against them.

## **LAW**

### **Defamation**

#### **Overview**

[113] Defamation has been defined as “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”: *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at para. 62.

[114] The overall purpose of the law of defamation is to protect and vindicate a person’s reputation from unjustified harm: *Weaver v. Corcoran*, 2017 BCCA 160 [Weaver BCCA] at para. 62; and *Northwest Organics, Limited Partnership v. Fandrich*, 2019 BCCA 309, [Northwest Organics BCCA] at para. 57.

[115] Madam Justice Abella, then of the Ontario Court of Appeal, in *Color Your World Corp. v. Canadian Broadcasting Corp.* (1998), 156 D.L.R. (4th) 27 (Ont. C.A.), leave to appeal ref’d [1998] S.C.C.A. No. 170, (at para. 58 cited to the D.L.R.) [Color Your World] adopted the following definition of defamation:

A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him [or her] in the estimation of right-thinking members of society generally and in particular to cause him [or her] to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem. The statement is judged by the standard of an ordinary, right-thinking member of society. Hence the test is an objective one ...

(R.F. Hueston & R.A. Buckley, *Salmond on the Law of Torts*, 21st ed. (London: Sweet & Maxwell, 1996) at p. 140 [citations omitted]).

[116] There are two kinds of defamation, libel and slander. Libel concerns written communication and slander concerns spoken communications.

[117] In *Hill v. Church of Scientology Toronto*, [1995] 2 S.C.R. 1130 at paras. 165–166, the Supreme Court of Canada contemplated the “invidious” costs to an individual’s reputation that may result from defamation:

[166] ... Every time that person goes to the convenience store, or shopping centre, [they] will imagine that the people around [them] still retain the erroneous impression that the false statement is correct. A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation. It is members of the community in which the defamed person lives who will be best able to assess the damages. ...

[118] To establish defamation, a plaintiff must prove that:

1. the impugned statement is defamatory, in that it would tend to lower the reputation of the plaintiff in the eyes of a reasonable and right-thinking person;
2. the statement refers to the plaintiff (this is typically established with identifying information or an image that portrays an obvious likeness of the person); and
3. the statement was published, in that it was shared with (or communicated to) at least one person other than the plaintiff.

[See *Grant v. Torstar*, 2009 SCC 61.]

[119] Two questions must be answered in order to determine if a statement is defamatory:

- (1) Are the words reasonably capable of having a defamatory meaning?
- (2) If so, do the words used have a defamatory meaning?

The first is a question of law, and the second a question of fact: *Level One Construction Ltd. v. Burnham*, 2019 BCCA 407 [*Level One*], at para. 33.

[120] The question of whether the threshold for defamation has been met requires an assessment of the potential meanings conveyed. The impugned statement can be assessed in one or more of the following ways: its literal meaning; its “legal” or “true” innuendo meaning (i.e., the words in their natural and ordinary meaning may



not be defamatory, but their meaning based on extrinsic circumstances unique to certain readers is defamatory); and/or its “false” or “popular” innuendo meaning (i.e., its inferential meaning or the impression left): *Lawson v. Baines*, 2012 BCCA 117 at para. 13; *Level One* at para. 35.

[121] To establish publication, the plaintiff must only show that “by any act” the defendant(s) conveyed the defamatory statement to a third party: *Crookes v. Newton*, 2011 3 S.C.R. 269 at para. 16.

[122] In *Northwest Organics, Limited Partnership v. Roest*, 2018 BCSC 866 [*Northwest Organics BCSC*], Justice Iyer noted that a contextual assessment is needed, highlighted that not all negative statements about a person are defamatory, and distinguished between “merely derogatory, offensive or insulting statements and defamatory ones that give rise to legal remedies” (at para. 171).

### **Can Images be Defamatory?**

[123] Though defamatory statements are most often attributed to the publication of words, photographs, videos, or images have been found to be defamatory in some circumstances. The Supreme Court of Canada reflected this potential in *Crookes*:

[16] To prove the publication element of defamation, a plaintiff must establish that the defendant has, *by any act*, conveyed defamatory meaning to a single third party who has received it (*McNichol v. Grandy*, [1931] S.C.R. 696, at p. 699). Traditionally, the form the defendant’s act takes and the manner in which it assists in causing the defamatory content to reach the third party are irrelevant:

There are no limitations on the manner in which defamatory matter may be published. Any act which has the effect of transferring the defamatory information to a third person constitutes a publication.

(*Stanley v. Shaw*, 2006 BCCA 467, 231 B.C.A.C. 186, at para. 5, citing Raymond E. Brown, *The Law of Defamation in Canada* (2nd ed.), vol. 1, at No. 7.3.)

[Emphasis added.]

[124] Further, in *Crookes*, at para. 19, the Supreme Court of Canada adopted this list of potentially defamatory conduct, including by way of publication of a photograph:

[19] The publication rule has also captured the following range of conduct:

[The defamatory meaning] may be communicated directly by the defendant either orally, or in some written or printed form, or by way of a symbolic ceremony, dramatic pantomime, mime, brochure, gesture, handbill, letter, photograph, placard, poster, sign, or cartoon. It may be inscribed on a blackboard, posted on a mirror or a telephone pole, or placed on the wall of a building or the gable wall of the defendant's property, or on the front of a cheque, or entered in a database, or accessed on or downloaded from a website on the internet. It may appear on an ariel banner flown behind an airplane, or someone's attention may be drawn by the defendant to a poster, or a defamatory writing already in circulation. A third person may be given access to defamatory material, or defamatory matter may be left in a place where others can see it, or the defendant may request others to go to a place where the defamatory information is available to see and read it, or it may be set into motion as a result of the defendant's death. In each case there is a publication. [Footnotes omitted.]

(Raymond E. Brown, *Brown on Defamation* (2nd ed. (loose-leaf)), at para. 7.3)

[Emphasis added.]

[125] In *Chopra v. Hodson*, 2001 ABQB 380, a “mug shot” of the defendant, taken as part of an incident at a mall where the defendant was charged but ultimately acquitted of all charges, was shown to a group of police and loss prevention/security personnel in a training session. The plaintiff alleged the distribution of a picture, in the circumstances, was defamatory by inference. Justice Hembroff found that because the meetings where the video was shown “were not at all intended as crime alerts or warnings of criminal activity” that they could not “find that the mere passing around of an untitled, undesignated, undescribed picture of a male person can be taken as a false or defamatory statement ...” (at para. 23). The fact that the pictures were distributed without comment, and for informational purposes, was considered relevant in a finding that their publication did not constitute defamation.

[126] In *St. Pierre v. Pacific Newspaper Group Inc. and Skulsky*, 2006 BCSC 241, a newspaper mistakenly published a picture of former legal counsel for Ali Adham Amhaz with the headline “Charges of supporting Hezbollah were dropped against Burnaby's Ali Adham Amhaz”. The court found that the article and headline,

published together with the picture, defamed the plaintiff as it suggested he was a terrorist. Conversely, in *Beg v. Precious by Maira*, 2021 ONSC 3664, where the plaintiff alleged defamation when a video purportedly of her stealing money was shown to several people, the court found no defamation because it was not shown that the videos were false or illegally recorded: (at para. 79).

[127] In summary, images, including photographs or video representations, may be defamatory, depending on the circumstances of each case. The lack of modification of images (i.e., the video is a true representation) and the context in which they are presented, may prevent a finding that they are defamatory.

### **DEFENCES TO DEFAMATION**

[128] Defamation is generally considered a strict liability tort with regard to the statement itself. It is not necessary to determine whether the defendant intended the statement to be defamatory. Once a *prima facie* case of defamation is established, the onus shifts to the defendant to establish a potential defence. Defences available include justification or truth, qualified privilege, and fair comment: *Grant* at paras. 28–35.

[129] In *Wilson v. Switlo*, 2011 BCSC 1287, aff'd in *Wilson v. Williams*, 2013 BCCA 471 [*Wilson*] Justice Punnett confirmed that, once a defamatory statement was found, if it could be shown that the “gist or sting of the defamation was true” that could provide a full defence:

[441] The defendants must only prove on a balance of probabilities that the gist or sting of the defamation was true (*Smith v. Cross*, 2007 BCSC 1757 at para. 37, aff'd 2009 BCCA 529). In other words, it is sufficient for the defendants to establish that a defamatory expression was substantially true; minor inaccuracies do not preclude a defence of justification so long as the publication conveyed an accurate impression. The test is whether the defamatory expression, as published, would have a different effect on a reader or listener than what the pleaded truth would have produced (*Jay v. Hollinger Canadian Newspapers*, 2002 BCSC 1840 at para. 4).

[130] The court, at paras. 442 and 443, cited *Miller v. Canadian Broadcasting Corp.*, 2003 BCSC 258 as an example where even if the alleged defamatory report

is not literally true in the details it set out, the defence of truth is available if its “gist” or “sting” is substantially true. In *Miller*, a CBC report alleged that the plaintiff had “dressed their kids up in pint-sized Klan uniforms for the celebratory cross burning”. The court found that although the children were not dressed in Klan costumes or attending a meeting of the Ku Klux Klan, they did attend an Aryan Nation gathering promulgating racism and the plaintiff did share racist ideology with them. Therefore, “the sting of the libel” was “justified or substantially true” (at para. 423).

[131] A number of defences to defamation may be defeated by a finding that the defendant(s) acted with malice: *Grant* at para. 28. Malice can be established by showing the defendant was dishonest, or acted with a “reckless disregard for the truth”: *Botiuk* at paras. 79–80.

## **ANALYSIS**

### **First Action: Where the Tilburys are the Plaintiffs**

[132] The Tilburys allege that the Statements contained on the Display were defamatory in that they were designed to ruin their reputations, referred to them by name and (with regard to Statement 1) included a photograph of Mr. Tilbury, were published in a high-profile location, and were viewed by bystanders, business owners, and passersby along First Avenue. The Tilburys allege that the Statements have caused damage to their reputations.

[133] The Tilburys allege the Statements were made with malice, for the dominant purpose of causing harm to the Tilburys out of spite or animosity. Alternatively, they allege that Statements 3–8 were made to pressure the Tilburys to agree to a mediation of a separate claim by publicly shaming them, including in front of potential clients.

[134] The Tilburys allege Ms. Lee and Mr. Coulson affixed the Display. Alternatively, they allege that a Lee/Coulson employee affixed the Display. They also allege that 090 is directly or vicariously liable for Ms. Lee and Mr. Coulson’s actions.

[135] I will deal first with the issue of whether the Statements are capable of bearing a defamatory meaning, whether they in fact bear the meanings plead, then whether the Statements refer to the Tilburys, and finally, whether the Statements were published.

**Statement 1**

[136] Statement 1 is a picture of Mr. Tilbury with the words: “Nelson Tilbury, Please STOP bullying me!”: The Tilburys plead that the Statement is likely to lower Mr. Tilbury’s reputation as it describes him as a bully.

[137] The act of “bullying” has been defined as follows:

*Black’s Law Dictionary:*

*vb.* 1. To threaten, intimidate, embarrass, or pressure (a person) by force, taunt, or derision. 2. To use abusive language or behavior against.

*The Oxford English Concise Dictionary:*

*v.tr.* 1. persecute or oppress by force or threats. 2. pressure or coerce (a person) to do something (*bullied him into agreeing*).

[138] The word “bully” has been found to bear a defamatory meaning: *Newman v. Halstead*, 2006 BCSC 65 at para. 83.

[139] The words in Statement 1, used in their plain meaning, suggest someone who uses their strength or power to coerce or pressure others, particularly those weaker than themselves. I find that the words in Statement 1 are capable of bearing defamatory meaning and would tend to lower the reputation of a person in the eyes of an ordinary, reasonable person.

[140] I find that the words “Nelson Tilbury, Please STOP bullying me” mean that Mr. Tilbury, whose name was included in the Statements and whose picture was posted alongside them, had been using strength, pressure, or intimidation to threaten or oppress Ms. Lee. I find Statement 1 did, in fact, have the defamatory meaning plead.

**Statements 2, 3, 4, 5 and 7**

[141] Statements 2, 3, 4, 5 and 7 generally reflect an allegation that Mr. Tilbury used his status in the City and was not subject to the same laws as others. Established case law recognizes the importance of reputation to public officials or professionals. Allegations of dishonesty or moral fault are particularly damaging to public officials as they rely on public trust to perform their duties effectively; therefore, allegations against a professional of dishonourable or dishonest conduct typically are defamatory: *Botiuk* at paras. 69 and 92. Allegations that a public official is guilty of dishonest conduct exceeds the limits of legitimate criticism of public officials: *Wilson* at paras. 153–154.

[142] Neither Statement 3, which states that Mr. Tilbury said he “could help [Ms. Lee] get things done with [her] renovation because of his status in the city”, nor Statement 5, which states that Mr. Tilbury “did not have to follow the façade for the theme of the city” are, on their face, defamatory. The further question arises of whether they may be defamatory when read in the context of other Statements in the Display.

[143] The Tilburys say Statement 3 is likely to lower Mr. Tilbury’s reputation by conveying that he receives special privileges on account of his status as a former City councillor and that he was offering to use those privileges corruptly.

[144] The Tilburys also argue that, in the context of the entire Display, a reasonable person would read the statement that Mr. Tilbury could “get things done ... because of his status in the city” and infer corruption, specifically when read in conjunction with Statement 7 (“I am scared of the powers that you have in this city”).

[145] Statement 3 could also be understood by a reasonable person to mean that Mr. Tilbury, because of his former role as a City councillor, knew the processes used by the City to consider building renovation applications, and could assist Ms. Lee. I do not find the words in Statement 3 to be defamatory. This statement would not tend to lower or injure Mr. Tilbury’s reputation in the mind of an ordinary and right-thinking person, even when read in the context of the Display as a whole. Nor would

it lead an ordinary and reasonable person to feel hatred, contempt, or ridicule towards Mr. Tilbury.

[146] The Tilburys say Statement 5 is likely to lower Mr. Tilbury's reputation by conveying he had received special treatment from the City to make renovations to his building and did not have to follow the same law as others. They say, in the context of the entire Display, a reasonable person could infer that this is an example of the status or powers alleged in Statement 3 and Statement 7. I do not find the words in Statement 5 are capable of bearing defamatory meaning.

[147] Alone, Statement 5 is not inherently defamatory. The Statement is merely that Mr. Tilbury did not follow the usual façade for City buildings. Persons can receive variances or other permissions not to follow the usual course of renovations. I do not find the words in Statement 5 are capable of bearing defamatory meaning.

[148] Overall, I do not find the assertion that Mr. Tilbury said he could help Ms. Lee with a renovation due to his status with the city (Statement 3), or the idea that Mr. Tilbury did not have to follow a city façade guideline (Statement 5), are defamatory.

[149] I now turn to the question of whether Statements 2, 4 and 7 bear the defamatory meanings plead.

[150] It is pleaded that Statement 2 ("ABOVE THE LAW?") is likely to lower Mr. Tilbury's reputation by conveying that he receives special privileges and does not have to follow the law on account of his status as a former City councillor.

[151] Ms. Lee suggests adding a question mark at the end of the Statement makes it a question, not a statement. I do not agree that the question mark prevents Statement 2 from being defamatory. To the contrary, the question mark is an invitation to the reader to question if Mr. Tilbury follows the law.

[152] I find that Statement 2 bears the meaning plead in that, read in the context of the Display as a whole (specifically references to Mr. Tilbury's status as a former

City councillor), it suggests Mr. Tilbury does not have to follow the law or receives special privileges. An ordinary, reasonable person, reading Statement 2 in the context of the Display would draw the inference plead.

[153] The Tilburys say that Statement 4 (“He said he was above the law. He seemingly is above the law.”) is likely to lower Mr. Tilbury’s reputation by conveying that he receives special privileges on account of his status as a former City councillor, and conveying that he does not or is not required to follow the law. The words in Statement 4 are capable of bearing defamatory meaning and would tend to lower the reputation of a person in the eyes of an ordinary, reasonable person. I find that Statement 4 bears the defamatory meaning plead and conveys that Mr. Tilbury receives special privileges as a former City councillor and does not have to follow the law.

[154] The Tilburys say Statement 7 (“I am scared of the powers that you have in this city.”) is false, inflammatory, derogatory, and likely to lower Mr. Tilbury’s reputation by conveying that he has special power and influence due to his status as a former City councillor.

[155] I find, on a balance of probabilities, that Statement 7 is likely to lower Mr. Tilbury’s reputation by conveying that he has special power and influence due to his status as a former City councillor. Statement 7 is defamatory.

[156] Statements 2, 4 and 7 require the reader to draw an inference for a defamatory meaning to be made out. The Statements themselves are reasonably capable of bearing a defamatory meaning in the context of the entire Display, as there is a negative connotation associated with being “above the law”. In terms of the defamatory meaning plead, Statement 2 and Statement 4 infer that Mr. Tilbury does not follow laws, is not required to follow laws, and is potentially corrupt. Statement 7 alleges a willingness or ability to use political power to scare or somehow threaten others. As a real estate professional in the community, and as a former City councillor, these Statements would lower Mr. Tilbury’s reputation and the public’s trust of him.



[157] Overall, the words used in Statements 2, 4, and 7 suggest Mr. Tilbury (a former elected City councillor) uses his status to receive special privileges and to circumvent the law. I find that Statements 2, 4 and 7 would bear the defamatory meanings plead and tend to lower the reputation of a person in the eyes of an ordinary reasonable person.

### **Statement 6**

[158] I turn now to Statement 6 (“Through physically charging me on the side-walk in February 2015 and saying that you will “get rid” of me in October 2016. I forgive you.”). The Tilburys allege Statement 6 is false, derogatory, and likely to lower Mr. Tilbury’s reputation by conveying that he assaulted Ms. Lee and threatened to “get rid” of her, meaning he had threatened her life.

[159] The Amended Notice of Civil Claim does not refer to defamation in the literal sense. At para. 17, the Tilburys say the reference to charging “convey[s] [Mr. Tilbury] as having assaulted” Ms. Lee and that “get rid” of Ms. Lee, means he had threatened her life. This suggests they are relying on popular innuendo. I do not agree that the natural and ordinary meaning of “charging” and the way it would be understood by a reasonable person equates with assault. Charging could mean many things short of assault (*e.g.*, lunging at), and “get rid” could refer to getting rid of the problems Ms. Lee is causing.

[160] I find it would be a stretch to suggest that the reasonable person would understand this as meaning that Mr. Tilbury threatened Ms. Lee’s life. I also do not find that these words could convey the meanings the Tilburys ascribe to them when considering the specific context in which they were published. While there may be an argument of an implied meaning that the “get rid” of Ms. Lee comment meant that Mr. Tilbury threatened Ms. Lee’s life, that requires a stretch in thinking. I therefore do not find Statement 6 to be defamatory.

**Statement 8**

[161] I come now to Statement 8 (“Mrs. Tilbury I forgive you for the bad things you have said about me, and for recording me topless inside my building.”). The Tilburys allege Statement 8 is likely to lower Ms. Tilbury’s reputation by conveying that she intentionally took topless video recordings of Ms. Lee.

[162] I find that the portion of Statement 8 indicating Ms. Tilbury said “bad things” about Ms. Lee to be too vague to tend to lower her reputation in the community, and so not defamatory.

[163] The portion of Statement 8 referring to Ms. Tilbury recording Ms. Lee topless is defamatory in the literal sense in that it suggests Ms. Tilbury is a person who would make topless videos of another person, and bears the defamatory meaning plead. Statement 8 would be understood to mean that Ms. Tilbury knowingly filmed Ms. Lee topless and without her consent. I accept that being associated with this behaviour would lower a person’s reputation in the eyes of a reasonable, ordinary person. I find Statements 1, 2, 4, 7, and the latter part of Statement 8 to be defamatory.

**Do the Statements refer to the Plaintiffs?**

[164] The Statements in the Display refer to the Tilburys, who are referenced by name and, with regard to Statement 1, accompanied by a picture of Mr. Tilbury.

**Were the Statements Published?**

[165] Publication in defamation law is understood to mean that the statement was communicated to or shared with someone other than the plaintiffs. That is the case here. The Display containing the Statements, which consisted of 4 large posters affixed to the front of the Lee/Coulson building, was exhibited on a main thoroughfare in Mission. Several of the witnesses who testified in this proceeding, including Ms. Morton, Mr. Barkhausen, and Mr. Hawes, each saw the Display. The Display was in full view of a public street from August 22–29, 2017. I find that the Display containing the Statements was published.

## DEFENCES

[166] Having found Statements 1, 2, 4, 7 and 8 (in part) were defamatory, I now turn to the defences available.

[167] The defences plead by Ms. Lee, Mr. Coulson and 090 were justification and fair comment.

### Justification

[168] Defamation assumes that a statement is false. The defence of justification is available as a complete defence to a defamation action where the statement is true in substance and fact: *Mann v. International Association of Machinists and Aerospace Workers*, 2012 BCSC 181 at paras. 76–77. The defendant bears the onus of establishing that a statement is true on a balance of probabilities: *Holden v. Hanlon*, 2019 BCSC 622.

[169] The defendant need not prove every word or literal truth of the statement. Instead, the defendant need only prove that the gist or defamatory sting of the statement was true or substantially true: *Casses v. Canadian Broadcasting Corporation*, 2015 BCSC 2150 at para. 550. The court must ask whether the defamatory statement as published would have a different effect on the reader than what the pleaded truth would have.

[170] The defendant's state of mind is irrelevant to the defence of justification: *Newman*, at para. 34. For example, if a statement was published with malice, and with the intent of harming a person's reputation, but is nonetheless true, justification still provides a defence.

[171] The defence of justification depends on the proof of facts. I consider whether this defence is available for each of the proven instances of defamation below.

[172] With regard to Statement 1, the defence of justification could apply if it were proven that Mr. Tilbury "bullied" Ms. Lee. In support of the defence of justification, Ms. Lee argues that Mr. Tilbury's actions: blocking access to the side of the

Lee/Coulson building for repairs until she brought a court action in an attempt to prevent further damage to her building, and repeatedly calling police with exaggerated reports (*i.e.*, that she had assaulted them while sitting in her vehicle), as well as the activities of the support group constitute bullying behaviour. In addition, the Tilburys repeatedly disabled the Lee/Coulson building security cameras and instituted legal proceedings in relation to the security cameras, alleging a breach of their privacy, while at the same time, the Tilburys had their own security camera pointed at the Lee/Coulson building.

[173] There was bad behaviour on all sides of this dispute. The evidence shows neighbours behaving at less than their best in the face of escalating conflict. The *quid pro quo* nature of the behaviour does not negate the fact that an ordinary, reasonable person could have concluded that Mr. Tilbury was behaving in a bullying manner toward Ms. Lee. In particular, effectively denying Ms. Lee access to the Lee/Coulson building to repair damage caused, in large part, by the Tilbury's actions and initiating legal proceedings regarding the Lee/Coulson security camera while having a security camera aimed at the Lee/Coulson building could be characterized as bullying behaviour. I, therefore, find that the defence of justification is available regarding Statement 1.

#### **Statements 2, 4 and 7**

[174] Statements 2, 4 and 7 each suggest that Mr. Tilbury is above the law and gains advantage flowing from his former status as a City councillor.

[175] Ms. Lee agrees Mr. Tilbury did not say he had special powers in the City, nor did Mr. Tilbury say he did not have to follow the law. Ms. Lee says these meanings were implied. Mr. Hawes strenuously denied any corruption within the City or special treatment of Mr. Tilbury. Mr. Hawes said Mr. Tilbury was unhappy with the City because Mr. Tilbury experienced difficulties with another project he was seeking approvals for. Mr. Tilbury points out that he had not been in elected office for some time. In support of her defence, Ms. Lee refers to Mr. Hawes (then Mayor of Mission) sharing her emails with Mr. Tilbury. However, the email was shared after the Display

was posted and in response to the Display. I find that the defence of justification is not available regarding Statements 2, 4 and 7.

### **Statement 8**

[176] Statement 8 suggests Ms. Tilbury filmed Ms. Lee without her consent. However, the facts show Ms. Lee and Mr. Coulson deliberately staged the Exposure Incident so that it would be recorded on the Tilbury's security camera. The security camera was not pointed at an openable window. Instead, it was pointed at a wall and plywood covered window casing (in essence, a decommissioned window). Ms. Lee and/or Mr. Coulson had to remove the window covering to stage the Exposure Incident. The defence of justification is not available to Statement 8.

### **FAIR COMMENT**

[177] The defence of fair comment is available in circumstances where a person expresses their opinion on matters of public interest: *Grant* at para. 105. The defence of fair comment seeks to balance respect for individuals, and the protection of their reputations from unjustified harm, with the freedom of expression and debate.

[178] To be fair comment, the following conditions must be met:

[...]

- a) the comment must be on a matter of public interest;
- b) the comment must be based on fact;
- c) the comment, though it can include inferences of fact, must be recognisable as comment;
- d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?
- e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice ...

[*WIC Radio Ltd. v. Simpson*, 2008 SCC 40 [*WIC Radio*] cited in *Weaver* at para. 104.]

[179] For statements to be fair comment, they need to be presented as a comment. In addition, the facts must be sufficiently stated, referenced, or notorious so the reader can make their own assessment of the merits of the comment: *Weaver BCCA* at para. 105. Fair comment is not available as a defence if the factual foundation of the comment is unknown or false. The defence of fair comment can be defeated if it can be shown the defendant(s) acted with malice: *Weaver BCCA* at para. 104, citing *WIC Radio* at para. 28.

[180] Ms. Lee defends all the Statements on the basis of fair comment, and, with specific reference to statements 2, 4, and 7, she argues that, as a former City councillor engaging in questionable conduct, and a current public professional, the comments made were in the public interest. The allegations infer dishonest conduct, an allegation that is extremely detrimental to a professional, especially one who relies on reputation. As noted above, to be fair comment the statements must have a known factual foundation.

[181] In this case, there is no factual basis for the statement that Mr. Tilbury received any special treatment as a result of being a former City councillor and employee of Mission. Ms. Lee herself said Mr. Tilbury never said he had any special powers within the City nor did he say that he did not have to follow the law. In addition, Mr. Hawes strenuously denied any special treatment of Mr. Tilbury by the City. Given that the facts are not made out, the defence of fair comment is not available.

[182] I find Statement 8 not to be a comment on a matter of public interest.

### **Summary of First Action**

[183] I find Statements 2, 4, 7 and 8 to be defamatory, and no defences to have been made out. I find Statement 1 to be defamatory, but it is defended by justification. I find Statements 3, 5, and 6 not to be defamatory.

## Damages

[184] The Court of Appeal recently considered the issue of damages in a defamation case in *Pineau v. KMI Publishing and Events Ltd.*, 2022 BCCA 426 [*Pineau*], and I have considered those comments, regarding the basis for general, aggravated and punitive damages.

[185] The purpose of general damages as a remedy for defamation is “to compensate the plaintiff for the loss of reputation and injury to the plaintiff’s feelings, to console the plaintiff, and to vindicate the plaintiff so their reputation may be re-established”: *Pineau* at para. 51. Additionally, the Court of Appeal adopted the criterion for assessing general damages as set out in *Hill* as follows:

[53] In *Hill* at para. 182, the Supreme Court of Canada set out a list of factors that are relevant to the assessment of general damages for defamation: the conduct of the plaintiff, the plaintiff’s position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of a retraction or apology, and the conduct of the defendant. General damages may be awarded not only for the loss of the plaintiff’s reputation, but also to compensate the plaintiff for any stress, embarrassment, humiliation, mental anguish and emotional distress, or personal hurt or injured feelings that the defamation may have caused.

[Citations omitted.]

[186] Here, cases referred to for general damages in a similar situation include *Best v. Weatherall*, 2010 BCCA 202 where \$3,000 (adjusted for inflation) was awarded. The publication there was an email sent to approximately 100 community members by one member of a small community referring to another as “an idiot” and having “a gargantuan ego”, during a municipal dispute over a park project. In *Chase v. Anfinson*, 2018 BCSC 856, this Court awarded \$3,500 (adjusted for inflation). The publication there was three defamatory reviews posted on an American website called “Ripoff Report” between 2014-2016. *Lu v. Shen*, 2020 BCSC 490, involved two countering defamation claims related to a series of posts on two online forums over the series of several months. Justice Adair found that each party had defamed the other and awarded general damages in the sum of \$5,000 to each party. Additional damages in the amounts of \$3,500 and \$4,000 were awarded for breach of privacy.

[187] I note the caution from the Supreme Court of Canada in *Hill* that “there is little to be gained” from a detailed comparison of libel awards, given that the assessment of damages depends on the particular convergence of the nature of the defamation, the circumstances of the publication, and the situation of the plaintiff: as cited in *Pineau* at para. 187.

[188] The Display containing what I have found to be certain defamatory statements was posted on a busy street in Mission, and viewable (to some degree) from passing vehicles. It could be read by pedestrians passing by. It remained up for a period of approximately one week. The defamatory statements were made in the context of an ongoing dispute between the parties. Mr. Tilbury is both a realtor and former City councillor who had an interest in running for office again. Ms. Tilbury is a realtor and suffered severe and ongoing embarrassment about the allegation that she recorded Ms. Lee topless. I award the plaintiffs Mr. and Ms. Tilbury \$5,000 in general damages. I decline to make an award for aggravated or punitive damages.

**SECOND ACTION: WHERE MS. LEE IS THE PLAINTIFF, THE TILBURYS ARE DEFENDANTS, TOGETHER WITH FORMER MAYOR, MR. RANDY HAWES**

[189] In the Second Action, Ms. Lee claims defamation and invasion of privacy. I take a moment to comment on the pleadings themselves and the evidence.

**Sufficiency of Pleadings and Lack of Evidence**

[190] Proper pleadings are critical in defamation cases. The opposing party must know the case that they are required to meet. This is the case even where the party has led evidence and made arguments on certain points. Justice Kent, in *Jordan v. Vancouver (City)*, 2016 BCSC 167 at para. 27, summarized the requirements for pleadings in defamation cases succinctly: “Generally speaking, the plaintiff must expressly plead the proverbial 5W’s: who said what to whom, when and where?”

[191] Justice Iyer, in *Northwest Organics BCSC*, commented on the sufficiency of pleadings as follows:

[124] ... [P]leadings play a critical role in defamation cases. Material facts must be pleaded with precision as they give the opposing parties fair notice of



the case they have to meet and frame the issues for trial: *Weaver v. Corcoran*, at para. 63. If the plaintiff does not properly plead a claim or part of a claim against a defendant the court cannot decide it, even if a party has presented evidence that relates to it and made arguments about it. ...

...

[130] I recognize that dismissing an allegation on the basis that it has been insufficiently pleaded means that the plaintiff's claim will not be adjudicated on the merits, and this may seem unfair. For that reason, "technical frailties" in a pleading may not justify dismissal of an action: *Jordan v. Vancouver (City)*, *supra* at para. 121. But it is also unfair to the defendants if lack of precision in the pleadings means that they do not know exactly what is being claimed against them. This is particularly the case for unrepresented defendants. Evidence led at trial cannot cure that unfairness because the defendant is entitled to know the case that he or she must meet before the trial starts.

[192] Where the matters plead do not match the evidence, it may be necessary to dismiss an allegation for insufficiency of pleading.

[193] Specific allegations made in Ms. Lee's Amended Notice of Civil Claim include that the Tilburys breached her privacy and defamed her by:

- publishing and distributing copies of a video of the Exposure Incident to Mr. Hawes and other departments at City Hall (at para. 17);
- distributing copies of the Exposure Incident video to the "group friends" or support group (paras. 18, 23–24);
- providing a copy of the Exposure Incident video to the Mission RCMP (at para. 35); and
- gathering other photos and videos of Ms. Lee in compromising situations and posting these on YouTube (at para. 36).

[194] Ms. Lee was required, in her pleadings, to specify the who, what, where and when of the alleged defamation. She has failed to do so with regard to several of the above noted allegations; and in particular, those in paragraphs 18 and 36.

Therefore, these parts of Ms. Lee's claim are dismissed on insufficiency of pleadings.

[195] Even if these pleadings were sufficient, for several of the above noted allegations there was insufficient or no evidence put forward to establish the material facts plead. Allegations relating to a support group, its potential nickname, the materials it received, or details of its activities are not made out. Also, there was no evidence the Tilburys published videos to YouTube.

[196] Additionally, at para. 35 of her Amended Notice of Civil Claim, Ms. Lee alleges the Tilburys provided false information about her and Mr. Coulson to the RCMP and that this fraudulent misrepresentation led to her wrongful arrest:

35. The defendants Nelson and Sandy provided the defamatory video to the Mission RCMP intentionally along with false information, including but not limited to Ms. Lee and her partner Mr. Coulson being a terrorist, a thug, extortionist, being aggressive, a pathological liar, delusional, not normal, on drugs, being criminal and having an underground business. Mr. Coulson and Ms. Lee would blackmail and torture people, spit in their face, destroy lives and brag about it, do harm on elderly people. The Tilbury's would state they were scared that Mr. Coulson and Ms. Lee would rob them and burn their house down with their dogs inside. The intentional fraudulent misrepresentation of character along with the video led to the wrongful arrest of Ms. Lee. The arrest was done in an effort to humiliate her and to get" rid of her [*sic*].

[197] The material facts pled in para. 35 of Ms. Lee and Mr. Coulson's Amended Notice of Civil Claim were drawn from information received by Ms. Lee in response to a Freedom of Information ("FOI") request made to the RCMP. There was no proof that the Tilbury's intentionally provided false information, though it is understandable that the allegations contained in the report to the RCMP would be upsetting to Ms. Lee and Mr. Coulson. Nor was there evidence that any representations made by the Tilburys to the RCMP led to Ms. Lee's arrest.

[198] Other than in para. 35 of her Amended Notice of Civil Claim, Ms. Lee does not refer to fraudulent misrepresentation as one of the legal bases for her claim, rather her pleadings focus on defamation and invasion of privacy. Ms. Lee's arrest (though the charges did not proceed) was related to the Exposure Incident, and not to the claims outlined in the report to the RCMP that was obtained via an FOI request. The Tilburys provided the video to the RCMP to counter allegations made in

the Display, including that Ms. Tilbury filmed Ms. Lee topless inside of Ms. Lee's building.

**Remaining Issues in the Second Action**

[199] I now consider the remaining issues from the Second Action, namely:

1. Is the publication, distribution or circulation of the video of the Exposure Incident (a) from the Tilburys to Mr. Hawes and City of Mission staff; and (b) from Mr. Hawes to City of Mission staff, defamatory?
2. Did the publication, distribution, or circulation of the video of the Exposure Incident by the Tilburys and Mr. Hawes breach Ms. Lee's privacy contrary to the *Privacy Act*?

**Defamation**

[200] In the defamation portion of her Amended Notice of Civil Claim Ms. Lee alleges that the Tilburys published and circulated a video of the Exposure Incident to Mr. Hawes and various individuals at the City of Mission. She also alleges Mr. Hawes published and distributed a video of the Exposure Incident to staff at the City of Mission. She alleges that "by way of innuendo" the video of the Exposure Incident was understood to mean that Ms. Lee "should not be taken seriously by employees at City Hall" was "mentally unstable" and "out of control."

[201] As set out earlier, to establish defamation the plaintiff (here Ms. Lee) must show that the impugned words are defamatory in that they tend to lower her reputation in the eyes of a reasonable person; that the words refer to the her; and that they were published/communicated to at least one person other than the plaintiff. If defamation is established, the onus will shift to the Tilburys and Mr. Hawes to establish a potential defence, including justification (or truth), qualified privilege and/or fair comment.

[202] I have some concerns, which I will discuss later, as to whether a video of the Exposure Incident, presented without any additional text, voice-over or comment from the defendants constitutes a statement capable of bearing a defamatory meaning. Ms. Lee's argument, as I understood it, is that because the video was distributed without the context of her side or perspective on the events that occurred (*i.e.*, without explanation for what she was doing), the absence of context constitutes part of the defamation. It is that lack of context that leads to the inuendo meaning plead.

[203] I find that allegations that someone is mentally unstable and out of control could rise to the level of defamation. I do not accept that a suggestion that someone "should not be taken seriously by employees of City Hall" meets the threshold to establish defamation.

[204] The next question is whether the Statement (the video of the Exposure Incident) bears the defamatory meaning plead. In the case of the innuendo meaning plead by Ms. Lee, this means asking whether an ordinary and reasonable person with full knowledge of the facts, could conclude, from watching the video of the Exposure Incident that Ms. Lee is mentally unstable and out of control?

[205] Here, I do not find that a person with full knowledge of the situation—including the history of the relationship between the parties, including regarding the easement, placement of security cameras, difficulties with access, and initiation of various legal proceedings—alters the conclusions an ordinary and reasonable person might draw from the video of the Exposure Incident. The facts show that Ms. Lee worked with Mr. Coulson to stage the Exposure Incident. In my view, the more plausible meaning a reasonable and ordinary person, fully apprised of the facts and context, would draw from watching the video is that Ms. Lee was willing to pose topless to further a dispute with her neighbour. I do not find that the video bears the defamatory meaning plead.

[206] The video of the Exposure Incident records, without alteration or modification, the actual actions of Ms. Lee.

[207] This situation is similar to the cases of *Beg*, *WIC Radio*, and *Hollinsworth v. BCTV, a division of Westcom TV Group Ltd.*, 1996 CarswellBC 2820, [1996] B.C.J. No. 2638 (S.C.) [*Hollinsworth BCSC*]. In *Hollinsworth BCSC*, the plaintiff undertook treatment for baldness, and in the course of that gave permission for video of the procedure to be used for training purposes. Some years later, the video appeared in a story on baldness on BCTV without the plaintiff's permission and they brought a claim for defamation and invasion of privacy. The portion of the plaintiff's case alleging defamation was dismissed as the court found that the video was true—the plaintiff had undergone baldness treatment, so the “plea of justification” was available. The plaintiff's case for invasion of privacy was allowed.

[208] In *Hollinsworth BCSC*, Justice Drake found:

[9] There is no question but that what was published was a true depiction of the plaintiff in a situation which was, to him, of an embarrassing nature. No mention was made of an innuendo, but I suppose such would be that the plaintiff was a vain person: but that is neither here nor there. The evidence called on behalf of the plaintiff establishes the truth of the matter said to be defamatory; consequently the plea of justification advanced by BCTV succeeds; the plaintiff has not met the onus upon him to establish his claim of libel against BCTV.

[209] The plaintiff appealed. Justice Lambert, writing for the Court of Appeal in *Hollinsworth v. BCTV, a division of Westcom TV Group Ltd.*, [1998] B.C.J. No. 2451, 1998 CanLII 6527 (C.A.) [*Hollinsworth BCCA*], dismissed the appeal, saying at para. 20:

The action for defamation cannot succeed. The film was true. No false innuendo has been established or even asserted in this court. Without a false statement or false innuendo the cause of action in defamation must fail.

[210] In this case, the images were first shared with Mr. Hawes, as Mayor, and then with other employees of Mission—by Mr. Hawes—to provide information related to the ongoing dispute between Ms. Lee and Mr. Coulson, and the Tilburys.

[211] Mr. Hawes claims the unaltered video cannot be defamatory on the basis of innuendo, and that it showed a true depiction of Ms. Lee, per the reasoning in *Hollinsworth BCCA*, at para. 20. I agree.

[212] I cannot find that the allegation of defamation is made out in the circumstances.

[213] I find the video of the Exposure Incident falls into the category described in *Hollinsworth BCSC*. It is a true depiction, albeit embarrassing, of Ms. Lee's actions. The evidence establishes the truth of the matter said to be defamatory.

[214] In the alternative, even if the video is defamatory, the parties' defence of justification (truth) would succeed for the same reasons noted above.

### **Invasion of Privacy**

[215] Ms. Lee alleges that the Tilburys and Mr. Hawes intentionally acted in a manner they ought to have known would violate Ms. Lee's privacy by distributing copies of the video of the Exposure Incident without her knowledge or consent to Mr. Hawes and others within City Hall. She alleges this was done to embarrass her and damage her reputation.

[216] Ms. Lee alleges that the Tilburys and Mr. Hawes violated her privacy by distributing the Exposure Incident video without her knowledge or consent. Ms. Lee does not appear to plead they violated her privacy in the recording of the Exposure Incident video, *per se*, but rather through its distribution.

[217] In particular that:

- Ms. Tilbury "circulated footage of [Ms. Lee] topless without her knowledge and consent to the defendant, Mr. Hawes and various departments at City Hall. There was no purpose in circulating this video aside from the defendant [Mr. Tilbury's] intent to embarrass the plaintiff and damage her reputation."
- Mr. Hawes "circulated footage of [Ms. Lee] topless without her knowledge and consent to building inspector Mike Rhodes and Mike Younie, [DCAO] of the City of Mission" with the intent of embarrassing Ms. Lee and damaging her reputation.

- Mr. Tilbury, Ms. Tilbury and Mr. Hawes “gave publicity to [Ms. Lee’s] private life by unnecessarily distributing an intimate, explicit video of [Ms. Lee] without her knowledge or consent.”

[218] Ms. Lee argues that the above actions are a breach of the *Privacy Act*. On the evidence, it was not shown that Ms. Tilbury shared the Exposure Incident video to anyone other than the police, which was admitted by Ms. Tilbury.

[219] Ms. Lee seeks an injunction restraining the Tilburys and Mr. Hawes from (a) further publishing “the alleged or any similar libel concerning [Ms. Lee]”; (b) contacting past or present litigants that either Ms. Lee or Mr. Coulson have been involved with “to get private information and talk disparagingly about them”; and, (c) being within 300 feet from any property line that either Mr. Coulson or Ms. Lee own. Ms. Lee also seeks general, aggravated, punitive, and special damages, as well as costs and special costs.

## **LAW**

[220] There is no common-law tort for breach of privacy in B.C., given the statutory tort for breach of privacy is available under the *Privacy Act*: *Mohl v. University of British Columbia*, 2009 BCCA 249 at para. 13; *Turkson v. TD Direct Investing, A Division of TD Waterhouse Canada Inc.*, 2016 BCSC 732 at para. 180, aff’d 2017 BCCA 147; *Tucci v. Peoples Trust Company*, 2017 BCSC 1525 at para. 49; *Ari v. Insurance Corporation of British Columbia*, 2015 BCCA 468 at para. 8; *Demcak v. Vo*, 2013 BCSC 899 [*Demcak*], at para. 8; and *Hung v. Gardiner*, 2002 BCSC 1234 [*Hung*] at para. 109.

[221] Section 1 of the *Privacy Act* defines an invasion of privacy as:

### *Violation of privacy actionable*

1(1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.

(2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

(3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

(4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping surveillance, whether or not accomplished by trespass.

[222] "Privacy" has been interpreted by the courts to mean the right of the plaintiff "to be let alone": *Davis v. McArthur*, [1969] B.C.J. No. 249; 1969 CanLII 757 (S.C.) at para. 16. For the tort of invasion of privacy to be actionable, the defendant's conduct must be "wilful" in the sense that the defendant knew, or ought to have known that their conduct was violating the privacy of the plaintiff, and that it was done "without a claim of right": *Hollinsworth BCCA* at para. 21; *Watts v. Klaemt*, 2007 BCSC 662 at para. 16.

[223] The common law generally reflects a societal standard that persons should have a reasonable expectation of privacy when in their private residence, and that the degree of privacy one can expect decreases the more public of a space they are in. An interference with this right, subject to certain statutory exceptions, may be considered a breach in law.

[224] The expectation of privacy has been interpreted on a spectrum. For example, an individual in a momentary state of undress in front of an open window in their home has a right to privacy, while another under investigative surveillance, who can be seen through a lighted window in their home does not. In *Milner v. Manufacturers Life Insurance Company doing business as Manulife Financial*, 2005 BCSC 1661 [*Milner*], the court found that a private investigator had not breached a woman's privacy by videotaping her while she was in plain view of her window, but had breached the privacy of her daughter who was not subject to the investigation, and therefore there was no lawful interest in the breach. A relevant factor in the court's decision was the relationship between the woman and her insurer, as per s. 1(3) of the *Privacy Act*.



[225] It has been found that a person is not entitled to privacy if their activities occur on private property, but in plain view of the public—even if the breach involves a trespass: *Silber v. BCTV*, [1986] 2 W.W.R. 609, 69 B.C.L.R. 34 (S.C.)

[226] Courts have a considerable degree of discretion in determining what is a reasonable expectation of privacy in the circumstances: *Ari v. Insurance Corporation of British Columbia*, 2022 BCSC 1475 at para. 31; *Milner*, at para. 79. The court must ask first, was the plaintiff entitled to privacy, and if so, did the defendant(s) violate their privacy, considering “the nature, incidence and occasion of the act” and “the relationship between the parties”.

### Statutory Exceptions

[227] If determined that the plaintiff was entitled to privacy, or had a reasonable expectation of privacy, and that the defendant(s) did violate their privacy, the court must then consider whether there was a statutory exception to the right of privacy. The exceptions to a breach of privacy under the *Privacy Act* provide defences where the alleged breach occurred while the defendant was acting within their statutory authority, or where a publication was privileged in accordance with the defences available under the tort of defamation—specifically fair comment or qualified privilege: *Hung*, at para. 109; *Demcak*, at paras. 10–12.

[228] Exceptions are set out in ss. 2(2) and 2(3) of the *Privacy Act*:

(2) An act or conduct is not a violation of privacy if any of the following applies:

- (a) it is consented to by some person entitled to consent;
- (b) the act or conduct was incidental to the exercise of a lawful right of defence of person or property;
- (c) the act or conduct was authorized or required under a law in force in British Columbia, by a court or by any process of a court;

...

(3) A publication of a matter is not a violation of privacy if

- (a) the matter published was of public interest or was fair comment on a matter of public interest, or

(b) the publication was privileged in accordance with the rules of law relating to defamation.

[229] In *Minicucci v. Liu*, 2021 BCSC 1640, Justice McDonald considered a situation where one party had “high topped” trees on a neighbour’s property. The neighbour then installed security cameras to “monitor and defend” their trees from further damage. The security camera captured footage of the neighbour’s backyard and pool. McDonald J. found:

[70] In light of all the circumstances, I do not find that the installation of the Back Camera was an unreasonable step by the plaintiff taken merely to provoke or annoy the defendants. Rather, I find that the Back Camera was installed as a direct result of the defendants’ trespass and topping of the plaintiff’s cedar trees and the plaintiff’s reasonable fear that the trees were at further risk of being damaged.

### **Analysis**

[230] The Exposure Incident occurred within clear and plain sight of Railway Avenue, a main thoroughfare in Mission with regular vehicular and pedestrian traffic. Ms. Lee was inside her own building, but aware of being filmed. In fact, Ms. Lee deliberately lifted her top so that she would be filmed (on the Tilburys’ security camera and by Mr. Coulson and she also believed Mr. Grey was filming at the time) while topless.

[231] I find that Ms. Lee did not have a reasonable expectation of privacy as understood in the case law in the circumstances outlined above. Ms. Lee was not in a private residence but on a business property. She was standing in a window casing ordinarily covered with plywood, which had to first be removed to stage the Exposure Incident. Ms. Lee exposed herself via an open wall in the side of the building in plain view of others, including a busy street in Mission.

[232] The Exposure Incident video itself reflects the actual actions of Ms. Lee. It is a video recording of events specifically staged by Ms. Lee and Mr. Coulson to be recorded on video.

[233] The Tilburys were aware of the video of the Exposure Incident since August 6, 2017. They did not, on the evidence before me, distribute it or share it until August 22, 2017, in response to the Display. I therefore do not find it was distributed out of spite or malice, but rather in an attempt to counter the suggestion that Ms. Tilbury had filmed Ms. Lee topless.

[234] Given that I have found no expectation of privacy in these circumstances, Ms. Lee's claims for invasion of privacy are dismissed.

### **CONCLUSION**

[235] In conclusion, Ms. Lee's claim for defamation and invasion of privacy have not been made out and are therefore dismissed. None of the relief sought in the Amended Notice of Civil Claim will be ordered.

### **COSTS**

[236] Rule 14-1(9) provides that costs of a proceeding must be awarded to the successful party, unless the court otherwise orders.

[237] In the First Action, the Tilburys were successful in establishing that four of the eight Statements were defamatory. The Tilburys are entitled to their costs in the First Action.

[238] In the Second Action, the claims brought by Ms. Lee for defamation and invasion of privacy were not successful. The Tilburys and Mr. Hawes are entitled to their costs in the Second Action.

"A. Walkem J."