

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Crookes v. Yahoo***,  
2007 BCSC 1325

Date: 20070904  
Docket: S071482  
Registry: Vancouver

Between:

**Wayne Crookes and West Coast Title Search Ltd.**

Plaintiffs

And

**Kathryn Holloway, Hayley Easto, Catherine Johannson,  
Gareth White, Frank Cameron, Mark Francis, Coceve, Inc.,  
Myspace, Inc., Yahoo! Inc. and Anonymous**

Defendants

And

**Andrew Shadrack**

Defendant by Counterclaim

Before: The Honourable Madam Justice Stromberg-Stein

## **Reasons for Judgment**

Counsel for the Plaintiffs:

R.A. Kasting

Counsel for the Defendants, Kathryn  
Holloway, Hayley Easto, Catherine  
Johannson, Gareth White, Frank Cameron,  
Mark Francis and Coceve, Inc.:

D. W. Burnett

Counsel for the Defendant, Myspace, Inc.:

L. Martz  
A. Cameron

Counsel for the Defendant, Yahoo! Inc.:

J. Sullivan  
J. Goheen

Date and Place of Trial/Hearing:

August 29, 2007  
Vancouver, B.C.

[1] The defendant Yahoo! Inc. (Yahoo) seeks to have the action brought by the plaintiffs, Wayne Crookes and West Coast Title Search Ltd., dismissed on the ground that the Court does not have jurisdiction; or alternatively, stayed on the ground that the Court ought to decline to exercise jurisdiction.

[2] Yahoo is a corporation incorporated in the state of Delaware with its head office and operations situated in Sunnyvale, California. The meetings of the directors of Yahoo are held in Sunnyvale or elsewhere in California. Yahoo has no offices in Canada, is not registered to do business in Canada and does not pay Canadian taxes. Yahoo does not do business and has no physical presence or bank accounts in British Columbia. The servers for Yahoo's internet services, and specifically for the GPC-Members Group, are not located in Canada. The fact Yahoo can be accessed on the internet from a computer in British Columbia is not evidence it is carrying on business in British Columbia.

[3] Yahoo provides various internet services, including Yahoo! Groups, a free service that allows individual internet users to create topic-orientated online discussion groups. The postings can be emailed to individual members of the group, or can be accessed at the group's website by members of the particular group.

[4] Under the Yahoo! Groups service, the individual who creates the group is the "Owner", and has all the powers to control and change the group parameters, including the group website. The Owner can delegate certain powers of control over the group to one or more individuals, called a "Moderator". The Owner can control

who can be a member of the group and who can access the postings for each group. The Owner can establish the group so that, unless the particular internet user is logged in as a member of the group, the user cannot access the group home page and cannot view the postings to that group. In such a case, the individual can join the group only if they are invited by way of an email from the Owner or a Moderator. The user can then enrol in the group by clicking a hyperlink embedded within the email and following the directions provided. Alternatively, the Owner can establish the group so that all internet users may access the group homepage, but unless the particular user is logged in as a member of the group, he or she cannot access any of the postings or information, both current and archived, available to the group. An individual can join a restricted group by applying to the Owner or a Moderator of the group, who is then free to accept or reject that individual as a member of the group. The individual can only become a member of a restricted group by obtaining acceptance from the Owner or a Moderator.

[5] Yahoo does not pre-screen the postings on any of the Yahoo! Groups websites; nor is it feasible for Yahoo to do so. If there is a complaint about a posting, Yahoo will review the posting and assess whether it is in violation of the Yahoo! Terms of Service; Yahoo will remove any posting it deems in violation. Once it removes a particular posting, Yahoo has no way of ensuring it will not be reposted later.

[6] The subject matter of this action concerns a Yahoo! Groups website with respect to the GPC-Members Group, a discussion forum about the Green Party of Canada created on March 27, 2005.

[7] Access to the postings and the information on the GPC-Members Group is restricted. The postings and information are not available to the general public; nor can internet users search and retrieve the material by way of an internet search engine. The postings and information on the GPC-Members Group are only made available to individuals who are invited by the individuals in charge of the group, or who request and obtain the permission of the individuals in charge of the group.

[8] The GPC-Members Group has two types of members. The majority are full registered users of Yahoo who have applied for and obtained a Yahoo! ID and who have acknowledged and agreed to the Yahoo! Terms of Service. A few are invited members who receive the postings for the group by email but do not have access to the website, but who have been notified by email that they are governed by the Yahoo! Terms of Service.

[9] The plaintiff, Wayne Crookes, is not a member of the GPC-Members Group. Although he has no present recollection, he is a registered user of Yahoo! Groups and has agreed to the Yahoo! Terms of Service.

[10] The statement of claim alleges that certain postings made on the GPC-Members Group by the individual defendants defamed Mr. Crookes. The statement of claim alleges Yahoo is the “host internet service provider for the GPC-Member website” and “it has control over the content on the GPC-Members’ website”.

[11] Yahoo did not author the postings. Yahoo is joined in this action on the basis that it provided the means by which the defamatory material was published and it failed to remove the postings.

[12] On August 4, 2006, Mr. Crookes emailed Yahoo about three postings on the GPC-Members website that defamed him and demanded that Yahoo remove these postings. That same day, following an exchange of emails and Mr. Crookes providing Yahoo with the necessary, detailed information required by Yahoo to deal with Mr. Crookes' concerns, a copy of the full headers and the message, Yahoo removed the postings. Yahoo asked Mr. Crookes to notify it of any further questionable content he found in Yahoo! Groups. Mr. Crookes was satisfied with Yahoo's prompt response and thanked Yahoo for its assistance.

[13] The statement of claim alleges that later in August 2006 the impugned postings were reposted with other allegedly defamatory material. Instead of following his previously successful method of complaint by email, Mr. Crookes claims that on December 8, 2006, he had his lawyer send a "legal letter" by fax and courier addressed to "Sir/Madam" at Yahoo! Inc. Mr. Crookes' counsel complained that Mr. Crookes "has not received your ongoing diligence in making certain that this website does not either repost the libellous comments or post equally venomous remarks". Mr. Crookes' counsel requested Yahoo "shut down this site and in its place, post an apology for the libellous comments made about him, which the moderators have, to date either reposted, ignored, and sometimes even republished with commentary". The letter did not provide the information that Yahoo had previously told Mr. Crookes it needed in order to take steps to deal with questionable material; that is, a copy of the full headers and the impugned messages.

[14] A receipt of confirmation was requested in the letter. There was no receipt of confirmation. No effort was made by Mr. Crookes or his lawyer to ascertain if Yahoo received the letter.

[15] Yahoo claims it has been unable to locate this letter in its correspondence records. In addition, no effort was made to ascertain the appropriate individual, or even the appropriate department, who should receive such a letter. No effort was made to correspond with Yahoo by email, as Mr. Crookes had done, successfully, in the past. Instead of following up with Yahoo, Mr. Crookes commenced this action against Yahoo on March 2, 2007.

[16] Plaintiffs' counsel argues knowledge can be imputed to Yahoo based on counsel's letter which was faxed, and then couriered and signed for by "K. Kerins". However, the manner in which counsel contacted Yahoo, having regard to Mr. Crookes' prior email contact with Yahoo, which was successful in having the impugned postings removed efficiently, raises suspicions and concerns.

[17] It is the position of the plaintiff that cyberspace is cowboy country with few rules. Counsel asserts that in Canada, there is no legislation regulating the internet and there are holes in the developing jurisprudence. Counsel argues the beneficiaries of this sorry state of affairs are the cyber-smearers and the big internet service providers like Yahoo, who are reluctant to accept responsibility for its creation. Counsel submits the plaintiffs claim against Yahoo is based on the fact Yahoo was aware of the alleged defamatory material and did not remove it from the website.

[18] **Rule 13(1)** of the *Rules of Court* permits a party to serve an originating process on a person outside British Columbia without leave in circumstances enumerated in s. 10 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (**CJPTA**). In this case, there is an endorsement on the writ of summons and statement of claim indicating the plaintiffs are relying on s. 10(g) of the **CJPTA** as the basis for service without leave. That is, the plaintiffs assert that this court has territorial competence because there is a presumed real and substantial connection between British Columbia and the facts on which the proceeding against Yahoo is based, because the proceeding concerns a tort committed in British Columbia.

[19] **Rule 14(6)(a)** permits a party to apply to strike out a pleading, or to dismiss or stay the proceeding, on the ground that the originating process or other pleading does not allege facts that, if true, would establish that the court has jurisdiction over that party in respect of the claim made against that party in the proceeding. **Rule 14(6)(b)** permits a party to make an application to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.

[20] In proceeding on a motion with respect to **Rule 14(6)**, the court assumes the facts in the statement of claim are true. However, supplemental affidavit material can be received from the defendant to contradict jurisdictional facts pled and to demonstrate the claim is tenuous and without merit, and the court can weigh such evidence. See *Furlan v. Shell Oil Co.* (2000), 77 B.C.L.R. (3d) 35, 2000 BCCA 404; *Roth v. Interlock Services Inc.* (2004), B.C.L.R. (4th) 60, 2004 BCCA 407.

[21] The authorities have held under **Rule 13(1)** that the onus is on a plaintiff who seeks to serve a defendant *ex juris*: **G.W.L. Properties Ltd. v. W.R. Grace & Co.-Conn.**, [1990] B.C.J. No. 2274, 50 B.C.L.R. (2d) 260 (C.A.); **Bushell & T&N, plc** (1992), 92 D.L.R. (4th) 228 (B.C.C.A.); **Borgstrom v. Korean Air Lines Co. Ltd.**, 2007 BCCA 263. The advent of the **CJPTA** in May 2006 has not affected the onus on a plaintiff to establish the right to serve a defendant *ex juris* without leave of the court.

[22] The plaintiffs assert in the statement of claim that they were libelled “in the Province of British Columbia, and as a result of its distribution on the internet, the libel has been published throughout Canada and around the world”. The plaintiffs have not asserted that anyone in British Columbia, including Mr. Crookes, has downloaded or read the alleged libel. The only allegation is that an unnamed friend of Mr. Crookes, at an unknown location, directed Mr. Crookes to the material on the GPC-Members website.

[23] Counsel for the plaintiffs relies on the cases of **Burke v. NYP Holdings Inc.**, 2005 BCSC 1287 and **Wiebe v. Bouchard et al.**, 2005 BCSC 47, to support the proposition that there is a real and substantial connection between the plaintiff and defamatory comments on the internet not originating in British Columbia, if the plaintiff resides in British Columbia, to meet the test of jurisdiction *simpliciter*. Counsel relies on **Wiebe** as authority for the proposition that a plaintiff does not have to name someone in British Columbia who has read the defamatory material.



[24] Both **Burke** and **Wiebe** are distinguishable on their facts. In **Burke**, the defendant wrote the alleged defamatory material, which was on a site accessible to the public; and there was evidence of publication in British Columbia of the alleged defamatory material. In **Wiebe**, the impugned material was under control of the defendants, on a government website, accessible to anyone, anywhere in Canada, and available in print in British Columbia.

[25] None of the individual defendants reside in British Columbia. All the corporate defendants are located in California.

[26] With respect to internet communications, the site of the alleged defamation is where the damage to reputation occurs: **Dow Jones Co. Inc. v. Gutnick**, (2002), 194 Aust. L.R. 433 (H.C.); **Barrick Gold Corp. v. Blanchard and Co.**, [2003] O.J. No. 5817 (S.C.). It is when a person downloads the impugned material from the internet that the damage to the reputation may be done, and it is at that time and place that the tort of defamation is committed.

[27] In **Burke**, Mr. Justice Burnyeat held that defamatory statements published on an internet site, on a server located outside British Columbia, but accessed and read by someone in British Columbia, will constitute a proceeding founded on a tort in British Columbia.

[28] Yahoo is a foreign defendant with no ties to British Columbia. In order for this court to assume jurisdiction over Yahoo, there must be a real and substantial connection between the cause of action against Yahoo and British Columbia. In other words, the alleged defamation must have been committed in British Columbia.

[29] Mr. Crookes must show that alleged defamatory postings on the GPC-Members website, hosted by Yahoo on servers outside British Columbia, were accessed, downloaded and read by someone in British Columbia, thereby damaging his reputation in British Columbia. Mr. Crookes has neither alleged nor tendered any evidence that any individual in British Columbia has downloaded and read the impugned material posted on the GPC-Members website.

[30] Publication is an essential element for an action in defamation. In this case, the pleadings are deficient as there is no pleading alleging the purported defamatory postings were published in British Columbia; that is, communicated to a third person: **Braintech Inc. v. Kostiuk**, [1999] B.C.J. No. 622, 1999 BCCA 169. There is no evidence anyone read the material in British Columbia and there is no basis for this court to draw that inference. As such, there is no basis to find s. 10(g) of the **CJPTA** applicable, that the proceeding concerns a tort committed in British Columbia.

[31] I agree with Yahoo that no tort has been committed in British Columbia and no damages have occurred in British Columbia. As such, there is no basis for this court to assume jurisdiction over Yahoo. I would dismiss the action as against Yahoo with costs.

[32] I do not have to engage in a real and substantial connection analysis. Nor do I have to deal with Yahoo's alternate argument that I should decline to exercise jurisdiction because Mr. Crookes and the personal defendants agreed, by the Terms of Service agreement, that their relationship with Yahoo would be subject to the laws

of California and they would attorn to the jurisdiction of the courts of the county of Santa Clara, California.

“The Honourable Madam Justice Stromberg-Stein”