

April 2, 2012

Reply To: **Tim W. Froese**
Direct Dial: **306 664 1363**
Email: **t.froese@mckercher.ca**

Assistant: **Jennifer Buhs**
Direct Dial: **306 664 1295**

McIntosh & Hale
201 - 12 Cheadle Street West
Swift Current SK
S9h 0A9

“PERSONAL AND CONFIDENTIAL”

ATTENTION: JOHN MCINTOSH

Dear Sir:

Re: George Laliberte - Law Society Complaint

Please accept this as my response to the complaint brought by George Laliberte. I received a copy of Mr. Laliberte's complaint on March 30, 2012. The following account of my involvement with Mr. Laliberte's file is based on information contained in the file as well as my recollection of events.

My first involvement with this file was in August of 2011. The lead lawyer on the file, Joel Hesje, Q.C., asked me to appear in Chambers to oppose an application for summary judgment brought by the plaintiff, Mr. Vellacott. I note that the Notice of Motion was dated August 2, 2011, returnable August 18, 2011. I signed the Acknowledgement of Service on August 10, 2011.

Mr. Hesje advised that the last step in the litigation had been mediation in early 2007, and that to his knowledge our firm had no contact with Mr. Laliberte since that time. He further advised that McKercher had been handling Mr. Laliberte's defence *pro bono* based on a belief that Mr. Laliberte was impecunious. He asked me to review the file and contact Mr. Laliberte for instructions and to discuss the possibility of payment for the upcoming Chambers appearance. He advised me that I was under no obligation to attend at Chambers *pro bono* but could assess that based on my discussions with Mr. Laliberte and my view of the importance of the principles at stake in the application for summary judgment.

On August 10, 2011, I reviewed the file. I noted that in the Statement of Defence, Mr.

A Member of Risk Management Counsel of Canada

Offices in Saskatoon and Regina

Please reply to Saskatoon Office:
374 Third Avenue South
Saskatoon, SK Canada S7K 1M5
Telephone: 306 653 2000 : Fax: 306 653 2669

www.mckercher.ca

Laliberte admitted to making impugned statement. His defence was that the question was not defamatory, and that the plaintiff had not suffered damages. The Statement of Defence did not raise any privilege defences.

The file contained an exhaustive research memo dated May 31, 2006 that reached the following conclusions:

- (1) the asking of a question can be defamatory;
- (2) repeating a rumour is not a defence to defamation;
- (3) no defences to defamation could be established on the facts of this case, even considering the political context;
- (4) damages are presumed;
- (5) damages were likely in the range of \$20,000 - \$40,000; and,
- (6) an apology issued at this time would likely be too late to mitigate damages.

Also in the file was a memo prepared by Mr. Hesje describing the 2007 mandatory mediation. At mediation, Mr. Laliberte apologized for making the defamatory statement, but stated that he had no means to pay an award of damages. The Plaintiff offered to settle for \$5,000 and an apology, but Mr. Laliberte was unable to agree to such a settlement.

My response to the application for summary judgment was guided by the contents of the file as set out above, as well as my own research and judgment.

On August 11, 2011, I conducted additional research into potential defences. I initially considered whether the defences of qualified privilege or fair comment might be extended to cover questions asked of a campaigning politician. I considered whether Mr. Laliberte's defence might be strengthened by amending the Statement of Defence to plead one of these defences or a new form of privilege. However, I concluded that such a defence could not be made out on the facts. I came to the conclusion that the analysis in the 2006 research memo was sound and that the only issue was the appropriate damages award. I further concluded that additional factual information from Mr. Laliberte would be of no assistance in opposing summary judgment.

Also on August 11, 2011, I attempted to contact Mr. Laliberte by telephone. There were several phone numbers on the file, some of which had been previously crossed out, apparently by other persons within McKercher that were unable to reach him at those telephone numbers. My notes indicate the following:

- I spoke to someone at 668-7725, which was Mr. Laliberte's home phone number at the time of mediation in 2007. The person I spoke with advised me that they had this phone number for approximately 5 years, and there was no George Laliberte at that number.
- 880-0382 had been disconnected.
- A "G Laliberte" was listed in the Saskatoon phone book at 652-1800. There was no answer at that number on August 11.
- I could not find a G Laliberte in any online telephone directory, including canada411.ca.
- Mr. Hesje advised me that Mr. Laliberte sometimes went by the name of George Aubichon. I was unable to find a listing for G Aubichon in the Saskatoon phone book or any online telephone directory.

I observed that there was a mailing address in Saskatoon on file, but did not expect it to be current. I viewed the disconnection of Mr. Laliberte's home phone number as an indication

that he had changed residences. In addition, it is not my practice to seek instructions by mail. I could not think of any further steps to locate Mr. Laliberte, short of hiring a private investigator, which I did not consider necessary in the circumstances.

On August 12, I contacted Evan Jenkins, counsel for the plaintiff, and advised him that I was unable to get ahold of my client. He consented to an adjournment to August 25. I made several further attempts to contact Mr. Laliberte by telephone at the 652-1800 number. It is my belief that not all of these unsuccessful attempts are recorded in the file. My notes indicate that I ultimately spoke to someone at 652-1800 on August 23, 2011, and was told that there was no George Laliberte there.

Between August 12 and August 24, I considered requesting an additional adjournment, or withdrawing due to an inability to obtain instructions. It was and is my understanding that withdrawal in response to an inability to obtain instructions is optional but not mandatory under the *Law Society of Saskatchewan Code of Professional Conduct*. It was, and still is, my view that I could adequately represent Mr. Laliberte's interests without his express instructions. It was, and still is, my view that there was no information or affidavit material that he could provide at that point that would strengthen his defence, and there was nothing that could be gained by a further adjournment. It was, and still is, my view that it would not have been in Mr. Laliberte's best interests for me to withdraw in the face of an impending application for summary judgment. During this period, I had additional discussions with Mr. Hesje and found he was of a similar view.

I determined that it would be in Mr. Laliberte's best interests for me to appear in Chambers on August 25 to oppose summary judgment. It was my opinion that the plaintiff had not brought a strong case for damages, a weakness that he could rectify at any time by filing a supplemental affidavit. In my opinion, further adjournments or my withdrawal could only increase the risk to Mr. Laliberte.

Contrary to the understanding expressed by Mr. Laliberte in his letter to the Law Society, there was no trial of this action. Rather, the plaintiff asked for summary judgment in Chambers on August 25, requesting a damages award of \$50,000 plus punitive damages of \$50,000.

I advised the Court of my unsuccessful efforts to contact Mr. Laliberte. Justice Popescul asked if I would like a further adjournment, and I responded that such an adjournment was not necessary. In response to the application for summary judgment, I argued that:

- summary judgment was not appropriate because the issue of damages required cross-examination on the plaintiff's affidavit;
- in the alternative summary judgment should be denied because a question asked of a political candidate by a constituent in the course of an election campaign that does not suggest a conclusion is not defamatory; and,
- if summary judgment was granted, the plaintiff had failed to prove damages and therefore only nominal damages should be awarded.

The Court reserved and issued judgment on January 17, 2012. The Chambers Judge found that summary judgment was available as all matters in issue could be resolved on the basis of the pleadings and the affidavit material filed by the plaintiff. He found that the question Mr. Laliberte asked was defamatory, but that the evidence of damages was "scant". Therefore, he awarded damages of \$5,000 with no punitive or aggravated damages.

To my knowledge the plaintiff has not taxed costs, taken out judgment or taken any other steps to enforce the damages award.

Soon after receiving the fiat, I again unsuccessfully attempted to get ahold of Mr. Laliberte at the phone numbers indicated above. I did not attempt to reach Mr. Laliberte by mail.

On Monday, February 13, 2012 I received a voicemail from a Star Phoenix reporter, indicating that he was preparing a story about the judgment. I conducted another search of canada411.ca and discovered a new telephone listing for George Laliberte. I called this number and spoke with Mr. Laliberte for the first time.

Mr. Laliberte indicated that he had just spoken with the reporter. I advised him of my previous attempts to reach him by telephone. He explained that his phone was disconnected because he moved to Isle-a-la-Crosse some time prior to August 2011, and was unable to return to Saskatoon due to his poor health. He said that he obtained a new home phone number after he returned to Saskatoon in October 2011. He told me that he had always retained the ability to receive mail at the Saskatoon address that we had on file. I apologized for not attempting to reach him by mail before or after the hearing.

On February 13 and 14 I discussed the judgment with Mr. Laliberte. He told me that he had been asked to make the defamatory statement by someone within the Liberal Party, and as such expected someone from the Liberal Party to contact him to agree to take responsibility for the damages award. I advised him that nothing was payable yet as the plaintiff had not taken out judgment. I further advised him that I was his lawyer with respect to this matter, and did not represent or take instructions from the Liberal Party. I advised him that he could seek contribution and indemnity from the Liberal Party, either by agreement or if necessary through legal action. I advised him that I was confident that the Liberal Party would agree to indemnify him, and that such agreement would entail fewer costs than litigation. I advised him that if he took action against the Liberal Party, McKercher may have to withdraw. I deferred the matter of the agreement with the Liberal Party to Doug Richardson, Q.C., another lawyer at McKercher.

I believe that I represented Mr. Laliberte competently and ethically, notwithstanding my inability to obtain instructions.

Please advise if you require any further information.

Yours truly,

McKercher LLP

Per:



Tim W. Froese

TWF/jmb