
amend. The text of the paragraphs sought to be struck are attached as Appendix A to this judgment.

[2] At the same time, Greenpeace refuses to consent to Resolute amending their Reply by adding a new paragraph to this Reply (the “**New Paragraph**”).

Background Facts

[3] Resolute’s claim pleads causes of action in defamation, malicious falsehood, and intentional interference with economic relations.

[4] The facts giving rise to Resolute’s claims involve the publication by Greenpeace of certain documents that the plaintiffs allege are defamatory of it. The claim specifically pleads a number of purportedly false and defamatory publications. The references with the applicable paragraph numbers noted are:

- a) a Feature Story, disseminated on or about December 6, 2012 (para. 7);
- b) a video embedded within the Feature Story (para. 11);
- c) a backgrounder published on the Greenpeace Canada website on or about December 6, 2012 (para. 13);
- d) a publication on a Greenpeace Canada website dated December 11, 2012 (para. 15);
- e) a letter to certain non-parties disseminated December 14, 2012 (para. 25);
- f) a publication on a third party website called “The Petition Site” published on or about December 18, 2013;
- g) a publication on the Greenpeace Canada website on or about January 16, 2012 (para. 29);
- h) a blog post on the Greenpeace Canada website published on or about January 17, 2013 (para. 30);

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- i) a publication on the Greenpeace Canada website entitled Resolute Forest Destroyer published in or around May 2013 (para. 41); and
 - j) a report entitled “Resolute’s False Promises: the [un]sustainability report 2013”, published on or about May 15, 2013 (para. 44).

[5] Resolute further alleges that Greenpeace sent communications to their customers, investors, and stakeholders for the purpose of causing injury to them and tortiously interfering with their economic relations.

[6] As part of an amended amended demand for particulars, Resolute further alleged that Greenpeace’s unlawful activity:

includes trespass, unlawful picketing, defamation and other unlawful activities engaged in by Greenpeace and other radical ENGOs in previous campaigns. The threatened conduct serves notice upon Resolute’s customers that if they do not accede to demands to remove Resolute from their supply chain, they will be the target of unlawful activity, which is intended to cause the customers harm.

[7] Greenpeace delivered a Statement of Defence (the “**Defence**”) to the Resolute’s claim on or about August 20, 2014.

[8] In very broad terms, the Greenpeace’s defence:

- a) defends the allegations of defamation on the basis of truth (justification), fair comment, qualified privilege, and responsible communication;
- b) provides a background to the factual allegations regarding Resolute’s sourcing and harvesting of materials in the Boreal Forest;
- c) alleges that the litigation is SLAPP (strategic litigation against public participation); and
- d) pleads that Greenpeace acted in good faith and without malice.

[9] Resolute filed a reply to the statement of defence on or about October 9, 2014 (the “Reply”).

[10] By letter dated April 10, 2015, Resolute indicated its intention to amend the Reply to plead the New Paragraph. The New Paragraphs states:

As admitted in paragraph 2 of the statement of defence, “Greenpeace Canada was founded in Vancouver on September 15, 1971 and is now one of the national and international Greenpeace entities that constitute the world’s largest independent environmental organization.” When referencing its “40-year history” as part of its threats and intimidation of Resolute’s customers, the defendant, Greenpeace Canada, references campaigns and tortious conduct undertaken both by itself and by affiliated Greenpeace offices (a term that Greenpeace itself uses to describe its organization). In doing so, the defendant, Greenpeace Canada, adopts, invokes and approves of actions and campaigns that were undertaken as part of the broader Greenpeace movement or under the Greenpeace banner or brand, whether or not those actions and campaigns were carried out by Greenpeace Canada itself.

[11] Greenpeace did not file any affidavit material in support of this motion. It concedes that for the purpose of this motion the allegations in the Reply must be taken to be true. Resolute did file affidavit material in response to this motion. This was met by a motion by Greenpeace to strike it out. I agreed with Greenpeace on that narrow issue and my reasons for not considering the content of that affidavit material were given on April 27, 2015, in *Resolute Forest Products Inc. v. 2471256 Canada Inc.*, 2015 ONSC 2751.

The Law

[12] This motion is brought under Rules 25.08 and 25.11 of the *Rules of Civil Procedure*.

[13] Rule 25.08 prescribes that a Reply is only available in limited circumstances:

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- a) where a party intends to prove a version of the facts different from that pleaded in the opposite party's defence; or
 - b) on any matter that might, if not specifically pleaded, take the opposite party by surprise or raise an issue that has not been raised by a previous pleading, subject to subrule 25.06(5).

[14] Rule 25.06(5) provides: "An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading."

[15] Rule 25.11 further provides that portions of a reply may be struck in certain circumstances:

The Court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

- (a) may prejudice or delay the fair trial of the action;
- (b) is scandalous, frivolous or vexatious; or
- (c) is an abuse of the process of the court.

Positions of the Parties

[16] Greenpeace argues the Impugned Paragraphs and the New Paragraph raise allegations that are utterly irrelevant to the matters pled in the claim and can serve no purpose other than to delay the trial of this action and prejudice Greenpeace. As the right of reply is a qualified right, a reply is only proper if it pleads a version of the facts that is different from that alleged in the defence or in response to the defence. Greenpeace argues the Impugned Paragraphs are neither. The Reply is not responsive to the actual defence raised by Greenpeace. Rather the Reply is an attempt to introduce new causes of action and involve parties which are not actually before the Court.

[17] Greenpeace also submits the Impugned Paragraphs are scandalous, frivolous, or vexatious. They represent a collateral attack on other Greenpeace entities who have not been sued and that the essence of the Impugned Paragraphs are for colour and will have the effect of radically expanding the scope litigation thereby unduly delaying the progress of the action.

[18] For its part, Resolute argues the Reply is a direct response to the version of the facts raised by the defence. In particular, Resolute points to the one occasion in the defence where Greenpeace refers to its 40 year history. This appears in paragraph 1 of the defence which states, in part:

Greenpeace Canada was founded in Vancouver on September 15, 1971 and is now one of the national and international Greenpeace entities that constitute the world's largest independent environmental organization.

[19] This reference permits Resolute to respond to the characterization of the 40 year history of Greenpeace, Resolute says is made in the defence. Resolute also refers to 13 instances in the defence where Greenpeace refers to acting in the public interest or out of a social or moral duty. These specific references appear in paragraph 3, 8, 9, 22(c), 23, 25, 35, 36, 37, 41, 68, 86, and 87. The Reply is the “other side of the story” as set out in the Greenpeace defence.

Analysis

[20] The test for striking out a pleading at the preliminary stage of litigation is a high one. This is acknowledged by both parties. Rule 25.08 does not contain a remedy. In order to strike the Impugned Paragraphs, the Greenpeace must rely on Rule 25.11. This rule gives the Court discretion as it holds that a Court may strike a pleading in three circumstances:

-
- a) If it may prejudice or delay the fair trial of the action;
 - b) If it is scandalous, frivolous or vexatious; or
 - c) If it is an abuse of the process of the court.

[21] While the right of reply is a qualified right, I agree that the jurisprudence indicates that courts are reluctant to exercise a severe remedy of striking out a pleading, except in the most obvious of cases. For example, in *Freeman-Maloy v. Marsden*, [2005] O.J. No. 1730 (S.C.J.), Hoy J. held at para. 7 that “[t]he test under Rule 25.11 to strike a pleading is the same or higher than the “plain and obvious” standard on a motion to strike under Rule 21.”

[22] Regarding the first branch of the test under Rule 25.11(a), the scope of the litigation will potentially be expanded by the particulars of events set out in the Impugned Paragraphs. However, Greenpeace has clearly put in issue by its defence, its motivation, methodology, and justification for its actions and words by pleading at more than one place its “moral and social duty and public interest reasons” for doing what it did to Resolute. It does not seem fair that Resolute should be restricted from testing those aspects of the defence despite the fact it may increase the parameters of the litigation.

[23] I agree that while the Reply appears at first blush to be expansive, it is necessarily so because of the manner Greenpeace has characterized its actions. While Greenpeace complains it will be required to lead evidence or respond to evidence in regard to seven other campaigns alleged to be sensational and twenty two other campaigns where tortious or illegal conduct is alleged, I expect proof of Greenpeace’s allegation of its “moral or social duty” upon which it relies in its defence will require reference to particular matters that arise outside of the particular

matters complained of by Resolute. This may require the entire litigation to take on a very broad area of inquiry. However, Greenpeace has pled its case in that particular fashion.

[24] Unfortunately, Greenpeace did not choose to file any evidence from which I could actually find that the scope of the litigation will be so unnecessarily widened that the matters in the Reply will actually prejudice or unfairly delay the trial. Also, I cannot find from the pleadings themselves that probative value of the matters raised in the Reply are outweighed by any prejudicial effect. I accept the argument of Resolute that the Impugned Paragraphs respond to Greenpeace's assertion that they are public interest actors and collaborators that are motivated solely by a moral duty to spread truth. The Reply is the other side of the story told by Greenpeace. It fits within the parameters of Rule 25.08(1).

[25] The lack of any evidence from Greenpeace on this motion also makes it difficult to accept a bald assertion that the entities referred to in the Reply are not actually parties to the action when Greenpeace refers to itself in paragraph 1 of the defence as "one of the national and international Greenpeace entities that constitute the world's largest independent environmental organization." "Organization" is used in the singular. A plain reading of the language of the defence indicates that Greenpeace is made up of national and international entities that constitute one entity.

[26] At this stage in the process the pleadings must be taken to be true unless they are patently ridiculous or incapable of proof.

[27] Therefore, as this matter has not advanced beyond the pleadings stage, and the moving party has chosen not to put forward any evidence on this motion, it is not plain and obvious to

me that the entities referred to in the Reply, such as “Greenpeace USA”, “Greenpeace India”, “Greenpeace Australia”, “Greenpeace International” are not one and the same as the entity that is a defendant in the action. I do not find that Greenpeace will be prejudiced by having to deal with the matters raised in the Impugned Paragraphs.

[28] With regard to the second branch of the test under Rule 25.11(b), I do not accept the argument that the Impugned Paragraphs are irrelevant or scandalous, frivolous, or vexatious. I was concerned about the use in various places in the Impugned Paragraphs by Resolute of the words “illegal” when referring to the actions of Greenpeace. However, taking the Reply to be true at this point, particulars are given in the Impugned Paragraphs of persons alleged to be acting on behalf of Greenpeace to having been arrested, charged, and convicted. I therefore do not find that the Impugned paragraphs are scandalous. They may not be how Greenpeace, or any organization, likes to be referred to, but Greenpeace has asserted a moral and social duty as a defence for their actions at issue in this matter, which, in my view, can be tested in litigation by an opposing party who takes issue with this characterization. I do not agree with the argument that the Impugned Paragraphs are hopeless factually such that they warrant being struck.

[29] Greenpeace did not assert that the Impugned Paragraphs constituted an abuse of process so there is no need to deal with the third branch of the test under Rule 25.11(c).

[30] Greenpeace’s motion to strike the Impugned Paragraphs of the Reply is dismissed.

[31] Greenpeace also opposes the proposed amendment to the Reply. This is done on the basis that the New Paragraph is directed at the connection between the Greenpeace defendant and other Greenpeace entities. Taking the pleadings as true, I have found that it is not plain and

obvious that there is more than one Greenpeace entity in the world separate from that which is a defendant in this action. Therefore, the New Paragraph is proper reply in my view. Given the direction of Rule 26.01 that leave shall be granted on such terms that are just unless prejudice would result that could not be compensated by costs or an adjournment, I can see no prejudice to Greenpeace in granting Resolute leave amend its Reply.

[32] Order to go granting Resolute leave to amend as per its Notice of Motion.

[33] Resolute shall have its costs of this motion to amend and the motion to dismiss. Greenpeace shall have its costs for the motion to strike the affidavits which was heard on April 23, 2015. It appears to me the degree of work done on both motions was similar which would lead to a possible conclusion that the costs for each party may set off.

[34] If costs cannot be agreed within ten business days of the release of this decision, the parties may make an appointment to address the issue by way of a chambers teleconference which will last no more than 30 minutes. At least five days prior to the date of the teleconference the parties may make written submissions of no more than two type written pages. If this appointment is not requested on or before June 26, 2015 costs will be deemed to have settled.

“original signed by”
The Hon. Mr. Justice F.B. Fitzpatrick

Released: June 15, 2015

APPENDIX ‘A’ TO JUDGMENT ON GREENPEACE MOTION TO STRIKE

[19] During its 40-year history, Greenpeace has learned that collaborative and constructive work with the private sector does not appeal to its donor base and does not produce donations to the same extent as radical action and sensationalized distortions of events. Accordingly, Greenpeace, and its affiliate chapters across the world, have strategically decided to spread sensationalized misinformation and to engage in radical, often illegal, activity for the purpose of generating publicity and generating increased donations.

[20] There are numerous occasions on which Greenpeace and its affiliates have been caught or admitted to sensationalizing or misrepresenting the truth:

(a) In 1995, Greenpeace and its affiliates launched an international public relations campaign against Shell Oil, claiming the company was planning to dump over 5,500 tons of oil and toxic waste in the ocean by sinking its Brent Spar platform as an artificial reef. Months later, Greenpeace admitted its claim that Spar contained 5,500 tonnes of oil was inaccurate and apologized to Shell;

(b) In 2003, the executive director of Greenpeace USA explained that “There are many organizations out there that value credibility, but I want Greenpeace first and foremost to be a credible threat.”;

(c) In 2006, Greenpeace USA mistakenly issued a press release stating “In the twenty years since the Chernobyl tragedy, the world’s worst nuclear accident, there have been nearly [FILL IN ALARMIST AND ARMAGEDDONIST FACTOID HERE]”;

(d) In 2008, as part of a fundraising email, Greenpeace USA disseminated an inaccurate report based on selective facts and demonstrably inaccurate assertions about the Alaskan pollock fishery. Despite claiming that the fishery was on the “verge of collapse”, Greenpeace later admitted that the sustainability of fishing was actually unknown and that “there is still a great deal of information missing, which increases uncertainty for decision maker.”;

(e) In 2009, Gerd Leipold, former leader of Greenpeace International, admitted that recent claims by the organization that Arctic ice will disappear by 2030 was “a mistake”, but defended the sensationalist claims by asserting that Greenpeace, as a pressure group, has “to emotionalize issues and we’re not ashamed of emotionalizing issues.”;

(f) In 2011, as part of its campaign against Asia Pulp & Paper, Greenpeace claimed that “forensic testing shows that packaging used by leading toy brands regularly contains Indonesian rainforest fibre.” The forensic company that conducted the testing revealed: “We have not, and are unable to identify country of origin of samples. This type of assertion would need to be based on data outside of our findings. There for we are unable to comment on the credibility of the statements Greenpeace has made regarding the country of origin”; and

(g) In 2014, Greenpeace India made sensational statements concerning trace elements of pesticides in tea. These statements were rebutted by the Tea Board of India, which explained “to imply, by sensational use of wording that a mix of PPFs implies there is a synergetic effect of the residues of multiple PPFs ... is contrary to the established science.” Crop Care Federation of India has since filed a defamation lawsuit against Greenpeace. The status of the lawsuit is pending.

[21] Greenpeace’s strategy of eschewing collaboration, while disseminating alarmist and sensational information, has allowed it to grow into a significant brand for radical activity that, along with its international affiliates, generates over \$300,000,000 in donations on an annual basis. According to Greenpeace Canada’s most recent audited financial statements, the organization had total revenue of \$11,494,934 in 2012, the majority of which is from donor contributions.

[22] Further, Greenpeace’s most recent audited financial statements indicate that in 2012, the organization spent more money on fundraising than on any of its campaigns, including its “forests” campaign.

[31] In addition to spreading alarmist and sensational misinformation, Greenpeace’s 40-year history of campaigns involves a litany of illegal and tortious conduct. In particular, over the past 15 years:

(a) In December, 2001, a group of Greenpeace Australia protesters penetrated the area outside the perimeter fence surrounding the Lucas Heights nuclear plant in Australia. These members of Greenpeace were arrested for trespass;

- (b) In 2009, two Greenpeace Japan activists, dubbed the “Tokyo Two” were charged and ultimately convicted of theft and trespass;
- (c) In July, 2008, Greenpeace protesters gained access to Syncrude’s Aurora mine site in Alberta and attempted to block two pipes. The protesters were charged with trespass;
- (d) In September, 2009, Greenpeace protesters broke into Shell’s Muskeg River mine site north of Fort McMurray, Alberta;
- (e) In October, 2009, Greenpeace’s protesters vandalized the French oil company Total SA’s billboard in Edmonton;
- (f) In November, 2009, Greenpeace hosted and promoted an activists’ boot camp at Evans Lake, British Columbia that provided civil disobedience training to protesters;
- (g) In December, 2009, 19 Greenpeace protesters were charged with mischief after scaling the Canadian Parliament buildings;
- (h) In April 2010, the Greenpeace India “Climate Rescue” blog posted threats and advocated for illegal activity;
- (i) In August, 2010, four Greenpeace protesters were arrested after rappelling down the Calgary Tower and hanging a banner protesting Alberta’s Oil sands;
- (j) In September 2010, four protesters from Greenpeace USA, Germany, Poland and Finland were arrested after they boarded and halted drilling on a Cairn Energy oil exploration rig off the coast of Greenland. A Greenpeace spokesman stated “We take full responsibility for what we’re doing. We certainly wouldn’t expect to up anchor and high tail it out”;
- (k) In May, 2011, Greenpeace International protesters again scaled an oil rig off Greenland to interfere with drilling. Two protesters including Greenpeace International executive director Kumi Naidoo, were arrested;
- (l) In July, 2011, four Greenpeace Australia protesters scaled a fence at an experimental CSIRO farm in Ginninderra, Australia wearing full-body Hazmat protective clothing and destroyed an entire crop of genetically modified wheat;
- (m) In September, 2011, Greenpeace hosted a civil disobedience workshop in Vancouver, British Columbia teaching protesters to place U-locks around their necks to attach themselves to objects, erect blockades or linked human bodies and go limp when arrested;
- (n) In December 2011, Kumi Naidoo, executive director of Greenpeace International, publically promoted civil disobedience at the UN climate conference in Durban, South Africa;

(o) In June 2012, Kumi Naidoo stated that Greenpeace was moving to a “war footing” after becoming dissatisfied with negotiations at the RIO+20 sustainable developments conference. Naidoo proceeded to publically promoted civil disobedience and states that Greenpeace was willing to break an injunction served by Shell;

(p) In July 2012, Greenpeace U.K. protesters shut down 74 Shell stations in England and Scotland by using an emergency shut-off switch to stop the flow of petrol, and removing a fuse to delay the switch from being turned on. At least 24 protesters were arrested;

(q) In July 2012, and RCMP report was released stating “Criminal activity by Greenpeace activists typically consists of trespassing, mischief, and vandalism, and often required a law enforcement response.” The report further stated that “Tactics employed by activist groups are intended to intimidate and have the potential to escalate to violence.”

(r) In May 2013, Kumi Naidoo blogged that “Civil disobedience and direct action are at the heart of what we do here at Greenpeace, part of our heritage and history, our destiny and mission.”

(s) In September 2013, 28 Greenpeace protesters were arrested for piracy and hooliganism after boarding the Prirazolmnya oil rig in the Arctic;

(t) In March 2014, 57 Greenpeace France protesters were arrested in France after using a truck to ram their way into the Fessenheim nuclear power plant;

(u) In March 2014, 9 Greenpeace USA protesters were arrested and face charges of burglary and vandalism for breaking into Procter and Gambles’ offices; and

(v) In March 2014, Greenpeace protesters scaled the Mount Royal Cross in Montreal, Quebec, draping banners disparaging Resolute.

[32] Joanna Kerr, the recently appointed Executive Director of Greenpeace Canada, has made clear that she supports and subscribed to the view that Greenpeace will break laws to achieve its goals. In June 2014, Ms. Kerr stated “If the executive director of Greenpeace getting arrested in a certain place on a certain issue is going to help bring awareness and/or a certain level of urgency towards an issue, of course I would”. Mr. Kerr further stated “I have no fear of radicalism. If calling myself a radical actually helps the cause, go for it.”

[33] Greenpeace has and continues to use its history of illegal and tortious conduct to threaten and intimidate Resolute’s customers. By referencing its history of campaigns, Greenpeace

serves notice to Resolute's customers that, if they do not accede to Greenpeace's demands and remove Resolute as a supplier in their supply chain, they will be victims of such illegal and tortious conduct.

[34] Greenpeace's illegal and tortious conduct is used to generate donations as part of its fundraising campaigns. Through its conduct, Greenpeace attracts media attention that drives its fundraising efforts. As detailed in the statement of claim and herein, Greenpeace's false allegations about Resolute are specifically designed to attract media attention and solicit donations.

CITATION: Resolute Forest Products v. 2471256 Canada Inc., 2015 ONSC 3863
COURT FILE NO.: CV-13-0164
DATE: 2015-06-15

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

Resolute Forest Products Inc., Resolute FP US
Inc., Fibrek General Partnership, Fibrek U.S.
Inc., Fibrek International Inc., and Resolute
FP Canada Inc.

Plaintiffs

- and -

2471256 Canada Inc. DBA Greenpeace
Canada, Richard Brooks and Shane Moffatt

Defendants

REASONS FOR JUDGMENT

Fitzpatrick J.

Released: June 15, 2015

/mls & cs