

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL
CORPORATION

Plaintiffs

and

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC.
C.O.B. ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE
VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON
INVESTMENTS MASTER FUND LP, AIMF GP, ANSON CATALYST MASTER
FUND LP, ACF GP, MOEZ KASSAM, ADAM SPEARS, SUNNY PURI,
CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB
COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT,
RICHARD MOLYNEUX, GERALD DUHAMEL, GEORGE WESLEY VOORHEIS,
BRUCE LIVESEY and JOHN DOES #4-10

Defendants

**BRIEF OF AUTHORITIES OF THE MOVING PARTIES / DEFENDANTS,
CLARITYSPRING INC. AND NATHAN ANDERSON
(Motion pursuant to s. 137(1) of the *Courts of Justice Act*)**

May 5, 2021

LERNERS LLP
225 King Street West, Suite 1500
Toronto, ON M5V 3M2

Lucas E. Lung LSO#: 52595C
llung@lernalers.ca
Tel: 416.601.2673

Rebecca Shoom LSO#: 68578G
rshoom@lernalers.ca
Tel: 416.601.2382

Lawyers for the Defendants,
ClaritySpring Inc. and Nathan Anderson

TO: **GOWLING WLG (CANADA) LLP**
1 First Canadian Place
100 King Street West, Suite 1600
Toronto, ON M5X 1G5

Richard G. Dearden
richard.dearden@gowlingwlg.com

John E. Callaghan LSO#: 29106K
john.callaghan@gowlingwlg.com

Benjamin Na LSO#: 40958O
benjamin.na@gowlingwlg.com

Matthew Karabus LSO#: 61892D
matthew.karabus@gowlingwlg.com

Tel: 416.862.7525

MOORE BARRISTERS
Barristers and Solicitors
393 University Avenue, Suite 1600
Toronto, ON M5G 1E6

David C. Moore LSO#: 16996U
david@moorebarristers.ca
Tel: 416.581.1818, Ext. 222

Kenneth G.G. Jones LSO#: 29918I
kenjones@moorebarristers.ca
Tel: 416.581.1818, Ext. 224

Lawyers for the Plaintiffs/Defendants by Counterclaim,
The Catalyst Capital Group Inc. and Callidus Capital
Corporation and the Defendants to the Counterclaim,
Newton Glassman, Gabriel De Alba and James Riley

AND TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
155 Wellington Street West, 40th Floor
Toronto, ON M5V 3J7

Kent Thomson LSO#: 24264J
kthomson@dwpv.com
Tel: 416.863.5566

Matthew Milne-Smith LSO#: 44266P
mmilne-smith@dwpv.com
Tel: 416.863.5595

Andrew Carlson LSO#: 58850N
acarlson@dwpv.com
Tel: 416.367.7437

Maura O'Sullivan
mosullivan@dwpv.com
Tel: 416.367.7481

Main Line Tel: 416.863.0900

Lawyers for the Defendants, Plaintiffs by Counterclaim,
West Face Capital Inc. and Gregory Boland

AND TO: **TORYS LLP**

Barristers and Solicitors
79 Wellington Street West, Suite 3000
Box 270, TD South Tower
Toronto, ON M5K 1N2

Linda M. Plumpton LSO#: 38400A

lplumpton@torys.com
Tel: 416.865.8193

Andrew Bernstein LSO#: 42191F

abernstein@torys.com
Tel: 416.865.7678

Leora Jackson

ljackson@torys.com
Tel: 416.865.0040

Stacey Reisman LSO#: 72184U

sreisman@torys.com
Tel: 416.865.7537

Lawyers for the Defendants, M5V Advisors Inc. c.o.b.
Anson Group Canada, Admiralty Advisors LLC, Frigate
Ventures LP, Anson Investments LP, Anson Capital LP,
Anson Investments Master Fund LP, AIMF GP, Anson
Catalyst Master Fund LP, ACF GP, Moez Kassam,
Adam Spears and Sunny Puri

AND TO: **MATHERS McHENRY & CO.**

161 Bay Street, Suite 2700
Toronto, ON M5J 2S1

Devin M. Jarcaig LSO#: 62223U

devin@mathersmchenryandco.com
Tel: 647.572.2147

Lawyers for the Defendant, Bruce Langstaff

AND TO: **ST. LAWRENCE BARRISTERS LLP**
144 King Street East
Toronto, ON M5C 1G8

Phil Tunley LSO#: 26402J
Phil.Tunley@stlbarristers.ca
Tel: 647.245.8282

Alexi N. Wood LSO#: 54683F
Alexi.Wood@stlbarristers.ca
Tel: 647.245.8283

Lawyers for the Defendant, Rob Copeland

AND TO: **KEVIN BAUMANN**
Box 109
Bluffton, AB T0C 0M0
Email: pekiskokb@gmail.com

Defendant, Acting in Person

AND TO: **DARRYL LEVITT**
100-400 Applewood Crescent
Vaughan, ON L4K 0C3
darryl@dlevittassociates.com

Defendant, Acting in Person

AND TO: **SOLMON ROTHBART GOODMAN LLP**
Barristers
375 University Avenue, Suite 701
Toronto, ON M5G 2J5

Melvyn L. Solmon LSO#: 16156J
msolmon@srglegal.com
Tel: 416.947.1093, ext 333

Nancy Tourgis LSO#: 37349I
ntourgis@srglegal.com
Tel: 416.947.1093, ext 342

Lawyers for the Defendant, Richard Molyneux

AND TO: **WHITTEN & LUBLIN LLP**
141 Adelaide St. West
Suite 1100

Toronto, ON M5H 3L5

Ben Hahn LSO#: 64412J

ben@whittenlublin.com

Tel: 416.640.2667

Lawyers for the Defendant, Gerald Duhamel

AND TO: **MCCARTHY TÉTRAULT LLP**

Suite 5300, Toronto Dominion Bank Tower

Toronto, ON M5K 1E6

R. Paul Steep LSO#: 21869L

psteep@mccarthy.ca

Tel: 416.601.7998

Erin Chesney

echesney@mccarthy.ca

Tel: 416.601.8215

Lawyers for the Defendant, George Wesley Voorheis

AND TO: **JEFFREY MCFARLANE**

220 Dominion Drive

Suite B

Morrisville, NC 27560

jmcfarlane@triathloncc.com

Defendant, Acting in Person

AND TO: **A. DIMITRI LASCARIS LAW PROFESSIONAL CORPORATION**

360, Rue St. Jacques, Suite G101

Montreal, QC H2Y 1P5

A. Dimitri Lascaris LSO#: 50074A

Tel: 514.941.5991

Lawyer for the Defendant, Bruce Livesey

INDEX

Case Law

1. *1704604 Ontario Ltd. v Pointes Protection Association*, 2020 SCC 22
2. *Able Translations Ltd. v Express International Translations Inc.*, 2016 ONSC 6785, aff'd 2018 ONCA 690
3. *Adroit Resources Inc. v HMTQ (British Columbia)*, 2010 BCCA 334, leave to appeal to SCC ref'd 2011 CanLII 6309 (SCC)
4. *Bradford Travel and Cruises Ltd. v Viveiros*, 2019 ONSC 4587
5. *Dank v Whittaker (No. 1)*, [2013] NSWSC 1062
6. *Fraleigh v RBC Dominion Securities Inc.* (1999), 99 OR (3d) 290
7. *Hung v Gardiner*, 2003 BCCA 257
8. *Levant v Day*, 2019 ONCA 244, leave to appeal to SCC ref'd 2019 CanLII 101530 (SCC)
9. *Mazhar v Farooqi*, 2020 ONSC 3490
10. *Nanda v McEwan*, 2020 ONCA 431
11. *Nazerali v Mitchell*, 2015 BCSC 2560
12. *Paramount v Johnston*, 2018 ONSC 3711
13. *R v National Post*, 2010 SCC 16
14. *RTC Engineering Consultants Ltd v Ontario (Ministry of the Solicitor General and Correctional Services)*, 2002 CanLII 14179 (Ont CA)
15. *Sandu v Fairmont Hotels and Another*, 2014 ONSC 5919
16. *Thompson v Cohodes*, 2017 ONSC 2590
17. *Unifund Assurance Co. v Insurance Corp. of British Columbia*, 2003 SCC 40

Other Authorities

18. CSA Consultation Paper 25-403 *Activist Short Selling*, Canadian Securities Administrators (3 December 2020)

TAB 1



SUPREME COURT OF CANADA

CITATION: 1704604 Ontario Ltd. v. Pointes
Protection Association, 2020 SCC 22

APPEAL HEARD: November 12, 2019
JUDGMENT RENDERED: September 10, 2020
DOCKET: 38376

BETWEEN:

1704604 Ontario Limited
Appellant

and

**Pointes Protection Association, Peter Gagnon, Lou Simionetti, Patricia Grattan,
Gay Gartshore, Rick Gartshore and Glen Stortini**
Respondents

- and -

**British Columbia Civil Liberties Association, Greenpeace Canada, Canadian
Constitution Foundation, Ecojustice Canada Society, Centre for Free
Expression, Canadian Association of Journalists, Communications Workers of
America / Canada, West Coast Legal Education and Action Fund, Atira
Women’s Resource Society, B.W.S.S. Battered Women’s Support Services
Association, Women Against Violence Against Women Rape Crisis Center,
Canadian Civil Liberties Association, Ad IDEM / Canadian Media Lawyers
Association, Canadian Journalists for Free Expression, CTV, a Division of Bell
Media Inc., Global News, a division of Corus Television Limited Partnership,
Aboriginal Peoples Television Network and Postmedia Network Inc.**
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe,
Martin and Kasirer JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 129)

Côté J. (Wagner C.J. and Abella, Moldaver, Karakatsanis,
Brown, Rowe, Martin and Kasirer JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final
form in the *Canada Supreme Court Reports*.

1704604 ONTARIO LTD. v. POINTES PROTECTION ASSN.

1704604 Ontario Limited

Appellant

v.

**Pointes Protection Association,
Peter Gagnon, Lou Simionetti,
Patricia Grattan, Gay Gartshore,
Rick Gartshore and Glen Stortini**

Respondents

and

**British Columbia Civil Liberties Association,
Greenpeace Canada,
Canadian Constitution Foundation,
Ecojustice Canada Society,
Centre for Free Expression,
Canadian Association of Journalists,
Communications Workers of America / Canada,
West Coast Legal Education and Action Fund,
Atira Women's Resource Society,
B.W.S.S. Battered Women's Support Services Association,
Women Against Violence Against Women Rape Crisis Center,
Canadian Civil Liberties Association,
Ad IDEM / Canadian Media Lawyers Association,
Canadian Journalists for Free Expression,
CTV, a Division of Bell Media Inc.,
Global News, a division of Corus Television Limited Partnership,
Aboriginal Peoples Television Network and
Postmedia Network Inc.**

Intervenors

Indexed as: 1704604 Ontario Ltd. v. Pointes Protection Association

2020 SCC 22

File No.: 38376.

2019: November 12; 2020: September 10.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Dismissal of proceeding that limits debate — Freedom of expression — Matters of public interest — Proper interpretation and application of Ontario’s framework for dismissal of strategic lawsuits against public participation (SLAPPs) — Courts of Justice Act, R.S.O. 1990, c. C. 43, s. 137.1.

In 2015, Ontario amended the *Courts of Justice Act* (“CJA”) by introducing ss. 137.1 to 137.5, occasionally referred to as anti-SLAPP legislation. These provisions were aimed at mitigating the harmful effects of strategic lawsuits against public participation (“SLAPPs”), a phenomenon used to describe lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression and deter that party, or other potential interested parties, from participating in public affairs.

Pointes Protection Association, a not-for-profit corporation, and six of its members (collectively, “Pointes Protection”) relied on s. 137.1 of the *CJA* to bring a pre-trial motion to have a \$6 million action for breach of contract initiated against them by a land developer dismissed. The action was brought in the context of Pointes Protection’s opposition to a proposed subdivision development by the developer. The developer claimed that the testimony of the association’s president, at a hearing of the Ontario Municipal Board, to the effect that the developer’s proposed development would result in ecological and environmental damage to the region, breached an agreement between the developer and Pointes Protection that imposed limitations on Pointes Protection’s conduct in respect of the approvals sought by the developer from the relevant authorities for its development. Pointes Protection’s s. 137.1 motion was dismissed by the motion judge, who allowed the developer’s action against Pointes Protection to proceed. The Court of Appeal allowed Pointes Protection’s appeal, granted its s. 137.1 motion, and dismissed the developer’s lawsuit.

Held: The appeal should be dismissed.

Freedom of expression is a fundamental right and value; the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society. Section 137.1 of the *CJA* was enacted to circumscribe proceedings that adversely affect expression made in relation to matters of public interest, in order to protect that expression and safeguard the fundamental value that

is public participation in democracy. Applying this framework in this case, Pointes Protection’s s. 137.1 motion should be granted and the developer’s underlying breach of contract action dismissed.

Section 137.1(3) places an initial burden on the moving party — the defendant in a lawsuit — to satisfy the motion judge that the proceeding initiated against them arises from an expression relating to a matter of public interest. This burden is a threshold one, meaning it is necessary for the moving party to meet in order to even proceed to s. 137.1(4) for the ultimate determination of whether the underlying proceeding should be dismissed. While the term “expression” is expressly defined in the statute, other terms are in need of elaboration. First, in accordance with the jurisprudence interpreting the word, “satisfies” requires the moving party to meet its burden on a balance of probabilities. Second, a broad and liberal interpretation of “arises from” is warranted, which does not limit proceedings arising from an expression to those directly concerned with expression, such as defamation suits. Third, the text of s. 137.1(2) makes it abundantly clear that “expression” is defined expansively. Fourth, and finally, the term “relates to a matter of public interest” should be given a broad and liberal interpretation, consistent with the legislative purpose of s. 137.1. Importantly, it will not be legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest — there is no qualitative assessment of the expression at this stage. The only question is whether the expression pertains to any matter of public interest, defined broadly. The principles from *Grant v. Torstar*, 2009 SCC 61, [2009] 3 S.C.R.

640, apply in the present context. Ultimately, the inquiry is a contextual one that is fundamentally asking what the expression is really about.

To the extent that the threshold burden under s. 137.1(3) is met by the moving party (i.e. the defendant in the underlying proceeding), then the burden shifts to the responding party — (i.e. the plaintiff) — to avoid having their proceeding dismissed. Under s. 137.1(4), the plaintiff must satisfy the motion judge that (a) there are grounds to believe that their underlying proceeding has substantial merit and the defendant has no valid defence, and that (b) the harm likely to be or have been suffered and the corresponding public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. If either (a) or (b) is not met, then this will be fatal to the plaintiff discharging its burden and, as a consequence, the underlying proceeding will be dismissed. However, if the plaintiff can show that both are met, then the proceeding will be allowed to continue.

Unlike with s. 137.1(3), s. 137.1(4)(a) — the merits-based hurdle — is statutorily circumscribed by an express standard: “grounds to believe”. These words plainly refer to the existence of a basis or source (i.e. “grounds”) for reaching a belief or conclusion that the legislated criteria have been met. Accordingly, “grounds to believe” requires that there be a basis in the record and law — taking into account the stage of litigation at which a s. 137.1 motion is brought — for finding that the underlying proceeding has substantial merit and that there is no valid defence. This assessment must be made from the motion judge’s perspective.

In consideration of the statutory text, the statutory context, and legislative intent, for an underlying proceeding to have “substantial merit” under s. 137.1(4)(a)(i), it must be legally tenable and supported by evidence that is reasonably capable of belief such that it can be said to have a real prospect of success — in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. This standard is more demanding than the one applicable on a motion to strike, which requires that the claim have some chance of success or a reasonable prospect of success. It is, however, less stringent than the likely to succeed standard, the strong *prima facie* case threshold, or the test for summary judgment. It is critical to recall that a s. 137.1 motion is not a determinative adjudication of the merits of the proceeding and the motion judge should be acutely aware of the stage of the litigation process at which a s. 137.1 motion is brought. Motion judges should engage in only limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage, where judicial powers of inquiry are broader and pleadings more fully developed. It must be borne in mind that even if a lawsuit clears the merits-based hurdle at s. 137.1(4)(a), it remains vulnerable to summary dismissal as a result of the public interest weighing exercise under s. 137.1(4)(b), which provides courts with a robust backstop to protect freedom of expression.

Under s. 137.1(4)(a)(ii), the plaintiff must also satisfy the motion judge that there are “grounds to believe” that the defendant has “no valid defence” in the

underlying proceeding. The word “no” is absolute, and the corollary is that if there is any defence that is valid, then the plaintiff has not met its burden and the underlying claim should be dismissed. Mirroring the “substantial merit” prong, the “no valid defence” prong requires the plaintiff to show that there are grounds to believe that the defences put in play by the defendant have no real prospect of success.

The final weighing exercise under s. 137.1(4)(b) is the fundamental crux of the analysis. Section 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them: it is intended to optimize the balance between the public interest in allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public interest by open-endedly engaging with the overarching public interest implications that this statute, and anti-SLAPP legislation generally, seek to address.

Harm is principally important in order for the plaintiff to meet its burden under s. 137.1(4)(b). As a prerequisite to the weighing exercise, the statutory language requires (i) the existence of harm and (ii) causation — the harm was suffered as a result of the defendant’s expression. Either monetary harm or non-monetary harm can be relevant, and harm is not synonymous with the damages alleged. Since s. 137.1(4)(b) is a weighing exercise, there is no threshold requirement for the harm to be worthy of consideration: the magnitude of the harm simply adds weight to one side of the weighing exercise. The plaintiff need not prove harm or causation, but must simply provide evidence for the motion judge to draw an

inference of likelihood in respect of the existence of the harm and the relevant causal link.

Once harm has been established and shown to be causally related to the expression, s. 137.1(4)(b) requires that the harm and corresponding public interest in permitting the proceeding to continue be weighed against the public interest in protecting the expression. The term “public interest” is used differently here in s. 137.1(4)(b) than in s. 137.1(3). Under s. 137.1(3), the query is concerned with whether the expression relates to a matter of public interest; the assessment is not qualitative. Under s. 137.1(4)(b), in contrast, the public interest must be relevant to specific goals: permitting the proceeding to continue and protecting the impugned expression. Therefore, not just any matter of public interest will be relevant. Instead, the quality of the expression, and the motivation behind it, are relevant. While judges should be wary of conducting a moralistic taste test, not all expression is created equal, thus the weighing exercises can be informed by considerations underlying s. 2(b) of the *Charter of Rights and Freedoms*, such as the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing: the closer the expression is to any of these core values, the greater the public interest in protecting it.

Additional factors may also prove useful in guiding the weighing exercise. For example, the following factors, in no particular order of importance, may be relevant to consider: the importance of the expression, the history of litigation

between the parties, broader or collateral effects on other expressions on matters of public interest, the potential chilling effect on future expression either by a party or by others, the moving party's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation. However, because the s. 137.1(4)(b) stage is fundamentally a public interest weighing exercise and not simply an inquiry into the hallmarks of a SLAPP, the only factors that might be relevant in guiding the weighing exercise are those tethered to the text of s. 137.1(4)(b), which calls for a consideration of: the harm suffered or potentially suffered by the plaintiff, the corresponding public interest in allowing the underlying proceeding to continue, and the public interest in protecting the underlying expression.

Fundamentally, s. 137.1(4)(b) allows judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit — a fundamental value in its own right in a democracy — affects, in turn, freedom of expression and its corresponding influence on public discourse and participation in a pluralistic democracy. The burden is on the plaintiff to show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is a result of the expression established under s. 137.1(3), and that the corresponding public interest in allowing the underlying proceeding to continue outweighs the deleterious

effects on expression and public participation. The provision expressly requires that one consideration outweigh the other; this is substantively different than simply balancing the considerations against one another.

In the present case, Pointes Protection meets its threshold burden under s. 137.1(3) with little difficulty, as the relevant expression — testimony on the environmental impact and ecological consequences of the proposed development — relates to a matter of public interest and the land developer’s breach of contract action arises from that expression. The land developer’s action must be dismissed, however, as the developer cannot meet its burden under s. 137.1(4).

First, the developer’s action lacks substantial merit: it is not legally tenable and not supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success. The land developer’s claim is based solely on an alleged breach of a contract by Pointes Protection, but the interpretation advanced by the land developer does not flow from the plain language of the contract or the factual matrix surrounding it; the reading urged by the land developer would distort the ordinary meaning of the words in a manner that exceeds the bounds of appropriate judicial intervention in matters of contractual interpretation.

Second, regardless, the land developer’s underlying action can nonetheless be dismissed on the independent ground that the developer cannot establish on a balance of probabilities that the weighing of the public interest favours permitting the proceeding to continue under s. 137.1(4)(b). The harm likely to be or

have been suffered by the developer as a result of Pointes Protection's expression lies at the very low end of the spectrum and, correspondingly, so too does the public interest in allowing the proceeding to continue. Indeed, the land developer's theory of harm is conjecture and its interest in finality is dependent entirely on the correctness of its interpretation of the contract. In contrast, the public interest in protecting Pointes Protection's expression is significant and falls at the higher end of the spectrum. The public has a strong interest in the subject matter — which relates to the ecological impact and environmental degradation associated with a proposed large-scale development — and strengthening the integrity of the justice system by encouraging truthful and open testimony is inextricably linked to the freedom of participants to express themselves in the forums concerned without fear of retribution.

For these reasons, Pointes Protection's s. 137.1 motion should be granted on either of the independent grounds that the land developer's action lacks substantial merit and that the land developer is unable to demonstrate that the weighing of the public interest favours permitting the proceeding to continue. Consequently, the land developer's underlying action should be dismissed.

Cases Cited

By Côté J.

Referred to: *Galloway v. A.B.*, 2019 BCCA 385, 30 B.C.L.R. (6th) 245; *Klepper v. Lulham*, 2017 QCCA 2069; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1

S.C.R. 27; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575; *R. v. Topp*, 2011 SCC 43, [2011] 3 S.C.R. 119; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Shannon v. 1610635 Alberta Inc.*, 2014 ABCA 393, 588 A.R. 76; *R. v. Driscoll* (1987), 79 A.R. 298; *Allstate Insurance Co. of Canada v. Aftab*, 2015 ONCA 349, 335 O.A.C. 172; *Sheppard v. Co-operators General Insurance Co.* (1997), 33 O.R. (3d) 362; *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100; *Ontario (Alcohol and Gaming Commission) v. 751809 Ontario Inc.*, 2013 ONCA 157, 115 O.R. (3d) 24; *Ontario (Environment and Climate Change) v. Geil*, 2018 ONCA 1030, 371 C.C.C. (3d) 149; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785, 410 D.L.R. (4th) 380, aff'd 2018 ONCA 690, 428 D.L.R. (4th) 568; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60; *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, 144 O.R. (3d) 211; *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686, 426 D.L.R. (4th) 1; *Veneruzzo v. Storey*, 2018 ONCA 688, 23 C.P.C. (8th) 352; *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689, 143 O.R. (3d) 54; *Housen*

v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688; *London Artists, Ltd. v. Littler*, [1969] 2 All E.R. 193; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Avery v. Pointes Protection Assn.*, 2016 ONSC 6463, 60 M.P.L.R. (5th) 70; *Amato v. Welsh*, 2013 ONCA 258, 362 D.L.R. (4th) 38.

Statutes and Regulations Cited

Bill 52, *Protection of Public Participation Act, 2015*, 1st Sess., 41st Leg., 2015.

Canadian Charter of Rights and Freedoms, ss. 2(b), 15.

Conservation Authorities Act, R.S.O. 1990, c. C.27.

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 137.1, 137.2, 137.3, 137.4, 137.5.

Planning Act, R.S.O. 1990, c. P.13, ss. 2, 51(24).

Protection of Public Participation Act, 2015, S.O. 2015, c. 23.

Authors Cited

Black's Law Dictionary, 11th ed. by Bryan A. Garner. St. Paul, Minn.: Thomson Reuters, 2019, "substantial".

Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 2, 5th ed. Supp. Toronto: Thomson Reuters, 2019 (loose-leaf updated 2019, release 1).

Ontario. Legislative Assembly. *Official Report of Debates (Hansard)*, No. 41A, 1st Sess., 41st Parl., December 10, 2014, pp. 1971-75.

Ontario. Legislative Assembly. *Official Report of Debates (Hansard)*, No. 112, 1st Sess., 41st Parl., October 27, 2015, pp. 6017, 6021, 6025-27.

Ontario. Ministry of the Attorney General. *Anti-Slapp Advisory Panel: Report to the Attorney General*. Toronto, 2010.

Sheldrick, Byron. *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression*. Waterloo, Ont.: Wilfrid Laurier University Press, 2014.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Brown and Huscroft JJ.A.), 2018 ONCA 685, 142 O.R. (3d) 161, 23 C.P.C. (8th) 312, 426 D.L.R. (4th) 233, 46 Admin. L.R. (6th) 70, 50 C.C.L.T. (4th) 173, 79 M.P.L.R. (5th) 179, [2018] O.J. No. 4449 (QL), 2018 CarswellOnt 14179 (WL Can.), setting aside a decision of Gareau J., 2016 ONSC 2884, 84 C.P.C. (7th) 298, [2016] O.J. No. 2395 (QL), 2016 CarswellOnt 7322 (WL Can.). Appeal dismissed.

Orlando M. Rosa, Paul R. Cassan and Tim J. Harmar, for the appellant.

Mark Wiffen, for the respondents.

Peter Kolla, Amanda Bertucci and Maia Tsurumi, for the intervener the British Columbia Civil Liberties Association.

Nader R. Hasan and Priyanka Vittal, for the intervener Greenpeace Canada.

Adam Goldenberg and *Simon Cameron*, for the intervener the Canadian Constitution Foundation.

Julia Croome, *Joshua Ginsberg* and *Sue Tan*, for the intervener the Ecojustice Canada Society.

Justin Safayeni and *Pam Hrick*, for the interveners the Centre for Free Expression, the Canadian Association of Journalists and the Communications Workers of America / Canada.

David Wotherspoon, *Rajit Mittal* and *Amber Prince*, for the interveners the West Coast Legal Education and Action Fund, the Atira Women's Resource Society, the B.W.S.S. Battered Women's Support Services Association and the Women Against Violence Against Women Rape Crisis Center.

Alexi N. Wood and *Jennifer P. Saville*, for the intervener the Canadian Civil Liberties Association.

Iain A. C. MacKinnon and *Justin Linden*, for the interveners the Ad IDEM / Canadian Media Lawyers Association, the Canadian Journalists for Free Expression, CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, the Aboriginal Peoples Television Network and Postmedia Network Inc.

The judgment of the Court was delivered by

CÔTÉ J. —

[1] Freedom of expression is a fundamental right and value; the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society. This case is about what happens when individuals and organizations use litigation as a tool to quell such expression, which, in turn, quells participation and engagement in matters of public interest. More specifically, this Court is being asked to decide whether an action brought by 1704604 Ontario Limited (“170 Ontario”) against the Pointes Protection Association and six of its members (collectively “Pointes Protection”) can proceed, or whether it must be dismissed under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (“CJA”). For the reasons that follow, I am of the view that 170 Ontario’s lawsuit must be dismissed. I would accordingly dismiss the appeal before this Court.

I. Introduction

[2] Strategic lawsuits against public participation (“SLAPPs”) are a phenomenon used to describe exactly what the acronym refers to: lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest. SLAPPs are generally initiated by plaintiffs who engage the court

process and use litigation not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claim is merely a façade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party’s speech and deter that party, or other potential interested parties, from participating in public affairs.

[3] In light of the increased proliferation of SLAPPs, provincial legislatures (in Ontario, British Columbia, and Quebec) have enacted laws to mitigate their harmful effects. These laws are occasionally referred to as “anti-SLAPP” legislation (2018 ONCA 685, 142 O.R. (3d) 161; *Galloway v. A.B.*, 2019 BCCA 385, 30 B.C.L.R. (6th) 245; *Klepper v. Lulham*, 2017 QCCA 2069 (CanLII); B. Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression* (2014)).

[4] At issue here is such a law. In November 2015, the Ontario *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23 (“Act”), came into force. The Act amended the *CJA*, by introducing, in relevant part, ss. 137.1 to 137.5.

[5] In this appeal, the Court is effectively being asked to shed light and offer guidance on how to properly apply the framework set out in s. 137.1 of the *CJA*. Accordingly, I endeavour to do so below, but not without first providing some background on the legislation at issue in Part II. Subsequently, in Part III, I set out the proper legal framework for dealing with s. 137.1 motions. Finally, in Part IV, I apply the established legal framework to the facts of this case.

II. Background

[6] Before I explain the parameters of the s. 137.1 framework, it is necessary, as part of the exercise of statutory interpretation, to outline the legislative background of the bill which brought s. 137.1 into effect. Such legislative background and history offer contextual clues to and insight into the legislative purpose of the bill, as well as indicia of the proper interpretation of the provisions at issue, which will be explored in turn below. Indeed, this Court has reiterated on numerous occasions that the modern approach to statutory interpretation requires that the words of a statute be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

[7] In 2010, the Attorney General of Ontario mandated an Anti-SLAPP Advisory Panel (“Panel”) to advise the government on how to respond to the proliferation of SLAPPs. The Panel was chaired by experts and examined a plethora of materials, including legal articles, relevant statutes from other jurisdictions, and advocacy documents. The Panel also invited comments and submissions from the public and interested parties. All of this culminated in the *Anti-Slapp Advisory Panel: Report to the Attorney General* (“APR”), which was published in October 2010.

[8] The APR “concluded that it is desirable for Ontario to enact legislation against the use of legal processes that affect people’s ability or willingness to express

views or take action on matters of public interest” (para. 10). The APR looked extensively at the need for such legislation (paras. 6-16), then provided suggestions on the content of the legislation and outlined the concerns underlying that content.

[9] The APR advocated a “broad scope of protection” (para. 29) that would “ensure that the full scope of legitimate participation in public matters is made subject to the special procedure” (para. 31). Fundamental to the APR’s proposal was the theme of balancing and proportionality. While “an adverse effect on the ability of persons to participate in discussion on matters of public interest should not be sufficient to prevent the plaintiff’s action from proceeding” (para. 36), “the fact that a plaintiff’s claim may have only technical validity should not be sufficient to allow the action to proceed” (para. 37). To reconcile these considerations, the APR proposed a multi-step test that ended up being substantively similar to the one later adopted by the legislature.

[10] In November 2015, Ontario brought into force Bill 52, *Protection of Public Participation Act, 2015*, 1st Sess., 41st Leg., 2015, which, as noted above, amended the *CJA* by introducing ss. 137.1 to 137.5. The purposes of those provisions were specified in the legislation itself, in s. 137.1(1) of the *CJA*:

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

[11] This was prompted by the APR, which stated that the “legislation should include a purpose clause for the benefit of judicial interpretation” (Summary of Recommendations, para. 2). While legislative purpose bears on the exercise of statutory interpretation regardless of whether a purpose clause exists, the fact that the APR explicitly urged legislators to include such a clause for the *benefit of judicial interpretation*, and that legislators consciously obliged, demonstrates that the purpose clause in s. 137.1(1) commands considerable interpretative authority.

[12] Further indications of legislative intention can be gleaned from the debates in the Legislative Assembly of Ontario. At second reading of the bill, the Attorney General of Ontario at the time, the Hon. Madeleine Meilleur, stated the following:

If passed, this legislation will allow courts to quickly identify and deal with strategic lawsuits, minimizing the emotional and financial strain on defendants, as well as the waste of court resources.

...

Our proposed legislation strikes a balance that will help ensure abusive litigation is stopped, but legitimate action can continue.

This proposed legislation is about preventing strategic lawsuits. Anyone who has a legitimate claim of libel or slander should not be discouraged by this legislation.

(Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 41A, 1st Sess., 41st Parl., December 10, 2014, at p. 1975)

[13] Ultimately, the legislative debates preceding the passage of the Act echoed the same concerns expressed by the Panel in the APR. Indeed, parliamentarians acknowledged as much: “[t]his bill came forward as a result of a report from 2010” (p. 1975 (Ms. Sylvia Jones)); “a made-in-Ontario approach to address the issue of strategic lawsuits based on consensus, recommendations of an expert advisory panel and extensive stakeholder consultation” (p. 1975 (Hon. Madeleine Meilleur)). Accordingly, it should come as no surprise that the final test adopted in the legislation was very similar substantively to the test proposed in the APR. This makes it clear that the APR had a considerable influence on the legislation which was enacted and which is now at issue before this Court.

[14] For this reason, the Panel and its APR are persuasive authority for the purposes of statutory interpretation. It must be remembered that “[l]egislative history includes material relating to the conception, preparation and passage of the enactment”, and this “may often be [an] important par[t] of the context to be examined as part of the modern approach to statutory interpretation” (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 43 (“*CHRC*”). Indeed, the late Peter W. Hogg defined legislative history as including the following:

1. [T]he report of a royal commission or law reform commission or parliamentary committee recommending that a statute be enacted;

...

3. a report or study produced outside government which existed at the time of the enactment of the statute and was relied upon by the government that introduced the legislation

(*Constitutional Law of Canada* (5th ed. Supp. (loose-leaf)), vol. 2, at pp. 60-1 to 60-2)

While reports like the APR are generally “admissible for any purpose the court thinks appropriate”, the weight accorded to them depends on the circumstances (R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 685; see also *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at para. 51). As I have explained, the APR was the clear impetus for the legislation, and was relied upon heavily by the legislature in drafting s. 137.1 of the *CJA*. Accordingly, it is a persuasive source that “provide[s] helpful information about the background and purpose of the legislation” (*CHRC*, at para. 44).

[15] In light of the foregoing, I turn in Part III below to the interpretation of the statutory text of s. 137.1(3) and (4), informed by the legislative history and the purposes that animate these provisions. As already mentioned, this is in accordance with what this Court has referred to as the modern approach to statutory interpretation.

III. Framework

[16] As indicated above, s. 137.1 is the provision in the *CJA* that is meant to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions. The final statutory language adopted makes it clear how the APR and the legislative debates informed the drafting of the provision: there is an invocation of the need for the expression to relate to a matter of public interest; the underlying proceeding must have substantial merit (beyond “technical validity”, as the APR noted, at para. 37); and the public interest in protecting the expression must be weighed against the public interest in permitting the underlying proceeding to continue (echoing the importance of balance repeatedly noted in the APR and the legislative debates).

[17] The relevant portions of s. 137.1 are reproduced below:

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding;
and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that

the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[18] In brief, s. 137.1 places an initial burden on the moving party — the defendant in a lawsuit — to satisfy the judge that the proceeding arises from an expression relating to a matter of public interest. Once that showing is made, the burden shifts to the responding party — the plaintiff — to satisfy the motion judge that there are grounds to believe the proceeding has substantial merit and the moving party has no valid defence, and that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. If the responding party cannot satisfy the motion judge that it has met its burden, then the s. 137.1 motion will be granted and the underlying proceeding will be consequently dismissed. It is important to recognize that the final weighing exercise under s. 137.1(4)(b) is the fundamental crux of the analysis: as noted repeatedly above, the APR and the legislative debates emphasized balancing and proportionality between the public interest in allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public interest. Section 137.1(4)(b) is intended to optimize that balance.

[19] In the following section, I offer an explanation of each step of the s. 137.1 analysis, including what is expected of each party and how the relevant terms used in the provision must operate. This analysis of the framework is grounded in the words of the statute read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, while remaining mindful of the

legislative background and informed particularly by the APR and the legislative debates.

A. *Section 137.1(3) — Threshold Burden on the Moving Party*

[20] Section 137.1(3) is reproduced for convenience below, with my own emphasis placed on the terms requiring further illumination:

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

[21] Fundamentally, this is a two-part analysis. The burden is on the moving party to show that (i) the proceeding arises from an expression made by the moving party and that (ii) the expression relates to a matter of public interest. This is a threshold burden, which means that it is necessary for the moving party to meet this burden in order to even proceed to s. 137.1(4) for the ultimate determination of whether the proceeding should be dismissed.

[22] However, while the term “expression” is expressly defined in the statute, other terms are in need of elaboration in order to understand how the moving party can satisfy its threshold burden.

[23] First, what does “satisfies” require? I am in agreement with Doherty J.A. of the Court of Appeal for Ontario that “satisfies” requires the moving party to meet

its burden on a balance of probabilities (C.A. reasons, at para. 51). This is in accordance with the jurisprudence interpreting the word “satisfied” (*R. v. Topp*, 2011 SCC 43, [2011] 3 S.C.R. 119, at paras. 24-25; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at paras. 49 and 53; *Shannon v. 1610635 Alberta Inc.*, 2014 ABCA 393, 588 A.R. 76, at paras. 14-15; *R. v. Driscoll* (1987), 79 A.R. 298, at paras. 17-18). Accordingly, the moving party must be able to demonstrate on a balance of probabilities that (i) the proceeding arises from an expression made by the moving party and that (ii) the expression relates to a matter of public interest.

[24] Second, what does “arises from” require? By definition, “arises from” implies an element of causality. In other words, if a proceeding “arises from” an expression, this must mean that the expression is somehow causally related to the proceeding.¹ What is crucial is that many different types of proceedings can arise from an expression, and the legislative background of s. 137.1 indicates that a broad and liberal interpretation is warranted at the s. 137.1(3) stage of the framework. This means that proceedings arising from an expression are not limited to those *directly* concerned with expression, such as defamation suits. A good example of a type of proceeding that is not a defamation suit, but that nonetheless arises from an expression and falls within the ambit of s. 137.1(3), is the underlying proceeding here, which is a breach of contract claim premised on an expression made by the defendant (this is explored in further detail in Part IV of these reasons). Indeed, the

¹ I do not believe that a precise level of causation needs to be identified, as courts have consistently been able to grapple with and apply the “arising from” standard (*Allstate Insurance Co. of Canada v. Aftab*, 2015 ONCA 349, 335 O.A.C. 172; *Sheppard v. Co-operators General Insurance Co.* (1997), 33 O.R. (3d) 362 (C.A.); *New Brunswick v. O’Leary*, [1995] 2 S.C.R. 967; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420).

APR explicitly discouraged the use of the term “SLAPP” in the final legislation in order to avoid narrowly confining the s. 137.1 procedure (para. 22), and the legislature obliged.

[25] Third, what does “expression” mean? The term “expression” is defined broadly in s. 137.1(2) of the *CJA* itself: “In this section, ‘expression’ means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.” This is not in need of further clarification, as the text makes it abundantly clear that “expression” is defined expansively.

[26] Fourth, and finally, what does “relates to a matter of public interest” mean? These words should be given a broad and liberal interpretation, consistent with the legislative purpose of s. 137.1(3). Indeed, the APR clearly stated that a “broader test will ensure that the full scope of legitimate participation in public matters is made subject to the special procedure” (at para. 31) and that therefore a “broad scope of protection” is preferable (para. 29).

[27] In *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, this Court considered the question of how public interest in a matter is to be established. While that case concerned the defence of responsible communication to a defamation action, it also involved determining what constitutes a “matter of public interest”. The same principles apply in the present context. The expression should be assessed “as a whole”, and it must be asked whether “some segment of the community would have a

genuine interest in receiving information on the subject” (paras. 101-2). While there is “no single ‘test’”, “[t]he public has a genuine stake in knowing about many matters” ranging across a variety of topics (paras. 103 and 106). This Court rejected the “narrow” interpretation of public interest adopted by courts in Australia, New Zealand, and the United States; instead, in Canada, “[t]he democratic interest in such wide-ranging public debate must be reflected in the jurisprudence” (para. 106).

[28] The statutory language used in s. 137.1(3) confirms that “public interest” ought to be given a broad interpretation. Indeed, “public interest” is preceded by the modifier “*a matter of*”. This is important, as it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest — there is no qualitative assessment of the expression at this stage. The question is only whether the expression pertains to any matter of public interest, defined broadly. The legislative background confirms that this burden is purposefully not an onerous one.

[29] Nonetheless, expression that *relates* to a matter of public interest must be distinguished from expression that simply *makes reference* to something of public interest, or to a matter about which the public is merely curious. Neither of the latter two forms of expression will be sufficient for the moving party to meet its burden under s. 137.1(3) (see *Torstar*, at para. 102).

[30] Ultimately, the inquiry is a contextual one that is fundamentally asking what the expression is really about. The animating purpose of s. 137.1 should not be

forgotten: s. 137.1 was enacted to circumscribe proceedings that adversely affect expression made in relation to matters of public interest, in order to protect that expression and safeguard the fundamental value that is public participation in democracy. If the bar is set too high at s. 137.1(3), the motion judge will never reach the crux of the inquiry that lies in the weighing exercise at s. 137.1(4)(b). Thus, in light of the legislative purpose and background of s. 137.1, it is important to interpret an “expression” that “relates to a matter of public interest” in a generous and expansive fashion.

[31] In conclusion, s. 137.1(3) places a threshold burden on the moving party to show on a balance of probabilities (i) that the underlying proceeding does, in fact, arise from its expression, regardless of the nature of the proceeding, and (ii) that such expression relates to a matter of public interest, defined broadly. To the extent that this burden is met by the moving party, then s. 137.1(4) will be triggered and the burden will shift to the responding party to show that its underlying proceeding should not be dismissed. I proceed to analyze that provision below.

B. *Section 137.1(4) — Shifting of the Burden to the Responding Party*

[32] Section 137.1(4) is reproduced for convenience below:

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

- (i) the proceeding has substantial merit, and
 - (ii) the moving party has no valid defence in the proceeding;
- and
- (b) the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[33] As the text of this provision makes explicit, the burden is on the *responding party* (i.e. the plaintiff in the underlying proceeding) to satisfy the motion judge of *both* (a) *and* (b). Therefore, if *either* (a) *or* (b) is not met, then this will be fatal to the plaintiff² discharging its burden and, as a consequence, the underlying proceeding will be dismissed. However, if the plaintiff can show that both (a) *and* (b) are met, then the proceeding will be allowed to continue. While (a) directs a judge’s specific attention to the merit of the proceeding and the existence of a valid defence, (b) is open-endedly concerned with what is at the heart of the legislation at issue and anti-SLAPP legislation generally: the weighing of the public interest in vindicating legitimate claims through the courts against the resulting potential for quelling expression that has already been determined under s. 137.1(3) to be related to a matter of public interest.

(1) Section 137.1(4)(a) — Merits-Based Hurdle

² I will refer to the “moving party” as the “defendant”, and the “responding party” as the “plaintiff” in these reasons interchangeably. This is for convenience and clarity, and should not be taken as restricting the statutory language in any future case.

[34] In brief, s. 137.1(4)(a) requires the plaintiff to “satisf[y] the judge” that there are “grounds to believe” that (i) its underlying proceeding has “substantial merit” and that (ii) the defendant has “no valid defence”.

[35] Unlike with s. 137.1(3), “satisfies” is statutorily circumscribed in s. 137.1(4)(a) by an express standard: “grounds to believe”. In other words, since the statutory language of s. 137.1(3) required that the motion judge simply be “satisfie[d]”, this necessitated a determination of what is sufficient to satisfy the motion judge. What is sufficient for the motion judge to be satisfied for the purposes of s. 137.1(4)(a)? Here, the legislature has expressly answered the question — the motion judge must be satisfied that there are *grounds to believe*. Therefore, at this juncture, before I explore what exactly is required by s. 137.1(4)(a)(i) and (ii), it must be determined what “grounds to believe” requires. This necessitates a consideration of the words themselves and their statutory context.

[36] The words “grounds to believe” plainly refer to the existence of a basis or source (i.e. “grounds”) for reaching a *belief* or conclusion that the legislated criteria have been met. In the context of a s. 137.1 motion, that basis or source must be anchored in the nature of the procedure and record contemplated by the legislative scheme. It must be borne in mind that a s. 137.1 motion can be brought at “any time” after a proceeding has commenced (see s. 137.2(1)).

[37] Accordingly, in determining whether there exist grounds to believe at the s. 137.1(4)(a) stage, courts must be acutely aware of the limited record, the timing of

the motion in the litigation process, and the potentiality of future evidence arising. Introducing too high a standard of proof into what is a preliminary assessment under s. 137.1(4)(a) might suggest that the *outcome* has been adjudicated, rather than the *likelihood* of an outcome. To be sure, s. 137.1(4)(a) is not a determinative adjudication of the merits of the underlying claim or a conclusive determination of the existence of a defence.

[38] Section 137.1(4)(a) may therefore be interpreted by distinguishing a motion made under s. 137.1 from a motion to strike and a motion for summary judgment, both of which are tools that remain available to parties notwithstanding the existence of s. 137.1. The very fact that the legislature created s. 137.1 as a mechanism indicates that a s. 137.1 motion was meant to fulfil a different purpose than these other motions. While a summary judgment motion allows parties to file a more extensive record and a motion to strike is adjudicated solely on the pleadings, s. 137.1 contemplates that the parties will file evidence and permits limited cross-examination. This suggests that the parties are expected to put forward a record, commensurate with the stage of the proceeding at which the motion is brought, that lends itself to the inquiry mandated under s. 137.1(4)(a). Thus, although the limited record at this stage does not allow for the ultimate adjudication of the issues, it necessarily entails an inquiry that goes beyond the parties' pleadings to consider the contents of the record (the extent of such consideration will be explored further in the next section).

[39] Accordingly, I conclude that “grounds to believe” requires that there be a basis in the record and the law — taking into account the stage of litigation at which a s. 137.1 motion is brought — for finding that the underlying proceeding has substantial merit and that there is no valid defence.

[40] The foregoing conclusion is consistent with the interpretation this Court has given to the expression “grounds to believe” in other contexts. Indeed, this standard has been found to require “something more than mere suspicion, but less than . . . proof on the balance of probabilities” (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, at para. 114). This interpretation has been adopted in the regulatory context as well (see, e.g., *Ontario (Alcohol and Gaming Commission) v. 751809 Ontario Inc.*, 2013 ONCA 157, 115 O.R. (3d) 24, at paras. 18-24; *Ontario (Environment and Climate Change) v. Geil*, 2018 ONCA 1030, 371 C.C.C. (3d) 149).

[41] Importantly, the assessment under s. 137.1(4)(a) must be made from the motion judge’s perspective. With respect, I am of the view that the Court of Appeal for Ontario incorrectly removed the motion judge’s assessment of the evidence from the equation in favour of a theoretical assessment by a “reasonable trier” (para. 82). The clear wording of s. 137.1(4) requires “the judge” hearing the motion to determine if there exist “grounds to believe”. Making the application of the standard depend on a “reasonable trier” improperly excludes the express discretion and authority

conferred on the motion judge by the text of the provision. The test is thus a subjective one, as it depends on the motion judge's determination.

[42] Taking all of the foregoing together, what s. 137.1(4)(a) asks, in effect, is whether the motion judge concludes from his or her assessment of the record that there is a basis in fact and in law — taking into account the context of the proceeding — to support a finding that the plaintiff's claim has substantial merit and that the defendant has no valid defence to the claim.

[43] I turn now to consider what s. 137.1(4)(a)(i) and (ii) mean in substantive terms and how the plaintiff can satisfy its burden under s. 137.1(4)(a).

(a) *Section 137.1(4)(a)(i) — Substantial Merit*

[44] The question under s. 137.1(4)(a)(i) is whether the underlying proceeding has “substantial merit”. I proceed to elucidate what “substantial merit” means and what the responding party (i.e. plaintiff) needs to show in order to satisfy its burden.

[45] I begin with an analysis of the statutory text. The legislature's express choice to use the specific word *substantial* as a qualifier must be given effect. Indeed, the use of the word *substantial* functions markedly differently than a qualifier such as having *some* merit, *any* merit, or just *merit* absent a qualifier. *Black's Law Dictionary* acts as an interpretive aid in discerning the exact meaning of “substantial”, which it defines as follows:

1. Of, relating to, or involving substance, material <substantial change in circumstances>. 2. Real and not imaginary; having actual, not fictitious, existence <a substantial case on the merits>. 3. Important, essential, and material; of real worth and importance <a substantial right>.

(*Black's Law Dictionary* (11th ed. 2019), at p. 1728)

[46] This definition of “substantial” must be read in the context of s. 137.1(4)(a)(i), in which this word modifies “merit”. Accordingly, it must be asked what is meant by “merit”. The use of the word “merit” in the context of a s. 137.1 motion fundamentally calls for a determination of the prospect of success of the underlying proceeding. Indeed, what is at stake here is the potential dismissal of the proceeding without any opportunity to amend it: while the threshold burden under s. 137.1(3) is concerned with identifying an expression relating to a matter of public interest for protection, s. 137.1(4) engages the competing interest at play — ensuring that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it; this is why the burden is on the *plaintiff* to ensure that its claim is not dismissed. Thus, given its ordinary meaning and when read in context, “merit” refers fundamentally to the strength of the underlying claim, as a stronger claim corresponds with a weaker justification to dismiss the underlying proceeding.

[47] Legislative intent provides a further indication of how “substantial merit” ought to be interpreted. Indeed, “statutory interpretation cannot be founded on the wording of the legislation alone” (*Rizzo & Rizzo Shoes*, at para. 21). The APR did not offer much guidance on the meaning of “substantial merit”. It stated, however, that “the fact that a plaintiff’s claim may have only technical validity should not be

sufficient to allow the action to proceed” (para. 37 (emphasis added)). This was echoed in the Legislative Assembly of Ontario: “I do not believe that a mere technical case — without actual harm — should be allowed to suppress the kind of democratic expression that is crucial for our democracy” (at p. 1972 (emphasis added) (Hon. Madeleine Meilleur)); “[i]t is also important that we recognize the strain that frivolous lawsuits place on our province’s busy court system” (at p. 1973 (emphasis added) (Mr. Lorenzo Berardinetti)); “this legislation protects the people from frivolous lawsuits” (at p. 1975 (emphasis added) (Mr. Randy Pettapiece)); “if someone does have a legitimate claim that is not frivolous . . . you can still bring that type of lawsuit” (*Official Report of Debates (Hansard)*, No. 112, 1st Sess., 41st Parl., October 27, 2015, at p. 6025 (emphasis added) (Mr. Jagmeet Singh)). While I acknowledge that the above excerpt from the APR is from the “Balancing interests” section of that report, the consistency of the language used in the legislative debates shows that the same concern informed the legislature’s understanding of how s. 137.1 would operate. It was clearly of the view that even if a proceeding was not merely frivolous or vexatious, or was technically valid, this should not be sufficient to allow the proceeding to continue. This is fundamentally a question that depends on the *merits* of the underlying proceeding, which makes the foregoing references well-suited as an interpretive aid under s. 137.1(4)(a)(i) given the statutory language ultimately used in the provision. Accordingly, it is clear from the legislative context that the words “substantial merit” are animated by a concern with making sure that, at a minimum, neither “frivolous” suits nor suits with only “technical” validity are

sufficient to withstand a s. 137.1 motion. Substantial merit must mean something more.

[48] However, while frivolous suits are clearly insufficient, “something more” cannot require a showing that a claim is likely to succeed either, as some parties have posited. Neither the plain meaning nor the legal definition of “substantial” comports with a “likely to succeed” standard. The legislative and statutory context does not support such a standard either. If “substantial merit” requires a showing of being likely to succeed, this could unduly prevent cases from proceeding to the crux of the inquiry that is the weighing exercise under s. 137.1(4)(b). Given the importance of the weighing exercise in the legislative history, this cannot possibly be what the legislature contemplated. Indeed, nothing in the legislative history — whether in the APR or in the legislative debates — points to a “likely to succeed” standard as the threshold for the plaintiff to prevail at the merits-based hurdle of s. 137.1. While the plaintiff need not definitively demonstrate that its claim is more likely than not to succeed, the claim must nonetheless be sufficiently strong that terminating it at a preliminary stage would undermine the legislature’s objective of ensuring that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to vindicate that claim.

[49] Therefore, I conclude from the foregoing exercise of statutory interpretation that for an underlying proceeding to have “substantial merit”, it must have a real prospect of success — in other words, a prospect of success that, while not

amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. In context with “grounds to believe”, this means that the motion judge needs to be satisfied that there is a basis in the record and the law — taking into account the stage of the proceeding — for drawing such a conclusion. This requires that the claim be legally tenable and supported by evidence that is reasonably capable of belief.

[50] Importantly, this standard is more demanding than the one applicable on a motion to strike, which requires that the claim have *some* chance of success under the “plain and obvious” test (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959). It is also more demanding than requiring that the claim have a *reasonable* prospect of success, which is a standard that this Court has also used to animate the “plain and obvious” test (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 17-20). In light of the existence of a record, the substantial merit standard calls for an assessment of the evidentiary basis for the claim — this is why the claim must be supported by evidence that is reasonably capable of belief. This is consistent with the APR’s references to “substantive” merit, which inherently calls for an assessment of the basis or evidentiary foundation for a claim. I reiterate, however, that a claim with merely *some* chance of success will not be sufficient to prevail. Nor will a claim that has been merely nudged over the line of having some chance of success. A real prospect of success means that the plaintiff’s success is more than a possibility; it requires more than an arguable case. As I said in the preceding paragraph, a real prospect of success requires that the claim have a prospect of

success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. For a judge undertaking this inquiry, it is critical to recall that a s. 137.1 motion is not a determinative adjudication of the merits of the proceeding and, rather than having to be established on a balance of probabilities, substantial merit is instead tempered by a “grounds to believe” burden.

[51] The substantial merit standard is less stringent, however, than the “strong *prima facie* case” threshold, which requires a “strong likelihood of success” (*R. v. Canadian Broadcasting Corp.*, 2018 SCC 5, [2018] 1 S.C.R. 196), or the test for summary judgment, under which a legally sound claim supported by evidence reasonably capable of belief may nonetheless raise “no genuine issue requiring a trial” (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87). While *Hryniak* was admittedly decided in the context of summary judgment motions, which call for an ultimate determination of the merits of a proceeding, that case is relevant at this juncture in order to assess the role of s. 137.1 motions: such motions do not exist in a vacuum and must necessarily be fulfilling a function different than other motions. Although too low a standard risks defeating the purpose of the distinct process for dismissal established by s. 137.1, too high a standard risks promoting a counter-productive culture whereby parties are forced to routinely compile detailed records similar to those expected on summary judgment motions or even trials.

[52] It is therefore important to recognize how s. 137.1 motions differ from summary judgment motions, as briefly touched on in the preceding section.

Section 137.1 motions are made at an earlier stage in the litigation process, with much more limited evidence and corresponding procedural limitations (see s. 137.2). As a result, a motion judge deciding a s. 137.1 motion should engage in only limited weighing of the evidence and should defer ultimate assessments of credibility and other questions requiring a deep dive into the evidence to a later stage, where judicial powers of inquiry are broader and pleadings more fully developed. This is not to say that the motion judge should take the motion evidence at face value or that bald allegations are sufficient; again, the judge should engage in limited weighing and assessment of the evidence adduced. This might also include a preliminary assessment of credibility — indeed, the legislative scheme allows limited cross-examination of affiants, which suggests that the legislature contemplated the potential for conflicts in the evidence that would have to be resolved by the motion judge. However, s. 137.1(4)(a)(i) is not an adjudication of the merits of the underlying proceeding; the motion judge should be acutely conscious of the stage in the litigation process at which a s. 137.1 motion is brought and, in assessing the motion, should be wary of turning his or her assessment into a *de facto* summary judgment motion, which would be insurmountable at this stage of the proceedings.

[53] Finally, in determining the ambit of “substantial merit”, the statutory context of s. 137.1 must be borne in mind: even if a lawsuit clears the merits-based hurdle at s. 137.1(4)(a), it remains vulnerable to summary dismissal as a result of the public interest weighing exercise under s. 137.1(4)(b), which provides courts with a robust backstop to protect freedom of expression.

[54] In summary, in light of the foregoing analysis, to discharge its burden under s. 137.1(4)(a)(i), the plaintiff must satisfy the motion judge that there are grounds to believe that its underlying claim is legally tenable and supported by evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success.

(b) *Section 137.1(4)(a)(ii) — No Valid Defence*

[55] Section 137.1(4)(a)(ii) requires the responding party (i.e. plaintiff) to satisfy the motion judge that there are “grounds to believe” that the moving party (i.e. defendant) has “no valid defence” in the underlying proceeding.

[56] While the burden has admittedly shifted to the plaintiff under s. 137.1(4), it would be unreasonable to encumber the plaintiff at the s. 137.1(4)(a)(ii) stage with the task of anticipating every defence the defendant might raise and then rebutting those defences. Instead, s. 137.1(4)(a)(ii) operates as a *de facto* burden-shifting provision in itself, under which the moving party (i.e. defendant) must *first* put in play the defences it intends to present and the responding party (i.e. plaintiff) must *then* show that there are grounds to believe that those defences are not valid.

[57] In other words, once the moving party has put a defence in play, the onus is back on the responding party (i.e. plaintiff) to demonstrate that there are grounds to believe that there is “no valid defence”.

[58] The word *no* is absolute, and the corollary is that if there is *any* defence that is valid, then the plaintiff has not met its burden and the underlying claim should be dismissed. As with the substantial merit prong, the motion judge here must make a determination of validity on a limited record at an early stage in the litigation process — accordingly, this context should be taken into account in assessing whether a defence is valid. The motion judge must therefore be able to engage in a limited assessment of the evidence in determining the validity of the defence.

[59] I interpret the query on *validity* under s. 137.1(4)(a)(ii) as mirroring the query on substantial merit under s. 137.1(4)(a)(i). Fundamentally, both entail an assessment by the motion judge of the strength of the claim or of any defences as part of an overall assessment under s. 137.1(4)(a) of the prospect of success of the underlying claim. Having (i) and (ii) mirror each other to the extent possible makes sense given the fact that a prototypical s. 137.1 motion will be made in relation to a defamation or tort action and that affirmative defences to such an action normally involve well-articulated tests. The legislative drafting that nests both (i) and (ii) under s. 137.1(4)(a) confirms this interpretation. Indeed, in a defamation action, for example, a claim must be made out, and then the burden shifts to the defendant to identify any affirmative defences to the claim. The way that (i) and (ii) are nested under (a) reflects this: the substantial merit of the claim is analyzed and then the validity of any potential defences. For this reason, I interpret (ii) as an extension of (i), and I would analyze both in a similar fashion whereby the motion judge must first determine whether the plaintiff's underlying claim is legally tenable and supported by

evidence that is reasonably capable of belief such that the claim can be said to have a real prospect of success, and must then determine whether the plaintiff has shown that the defence, or defences, put in play are not legally tenable or supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success. In other words, “substantial merit” and “no valid defence” should be seen as constituent parts of an overall assessment of the prospect of success of the underlying claim.

[60] In summary, s. 137.1(4)(a)(ii) operates, in effect, as a burden-shifting provision in itself: the moving party (i.e. defendant) must put potential defences in play, and the responding party (i.e. plaintiff) must show that *none* of those defences are valid in order to meet its burden. Mirroring the “substantial merit” prong, under which the plaintiff must show that there are grounds to believe that its claim has a real prospect of success, the “no valid defence” prong requires the plaintiff, who bears the statutory burden, to show that there are grounds to believe that the defences have no real prospect of success. This makes sense, since s. 137.1(4)(a) as a whole is fundamentally concerned with the strength of the underlying proceeding.

(2) Section 137.1(4)(b) — Public Interest Hurdle

[61] At last, I arrive at what is the crux of the analysis. Section 137.1(4)(b) provides that, to avoid having its proceeding dismissed, the responding party must satisfy the motion judge that

the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[62] As I have often mentioned in these reasons, this provision is the core of s. 137.1. The purpose of s. 137.1 is to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions. While s. 137.1(4)(a) directs a judge's specific attention to the merit of the proceeding and the existence of a valid defence in order to ensure that the proceeding is meritorious, s. 137.1(4)(b) open-endedly engages with the overarching concern that this statute, and anti-SLAPP legislation generally, seek to address by assessing the public interest and public participation implications. In this way, s. 137.1(4)(b) is the key portion of the s. 137.1 analysis, as it serves as a robust backstop for motion judges to dismiss even technically meritorious claims if the public interest in protecting the expression that gives rise to the proceeding outweighs the public interest in allowing the proceeding to continue.

[63] Statutory interpretation is a contextual exercise that requires reading a provision with and in light of other provisions: accordingly, if the bar is set too high at s. 137.1(4)(a)(i) or (ii), a motion judge will never reach s. 137.1(4)(b) — this cannot possibly be what the legislature contemplated given the legislative history and intent behind s. 137.1. The legislature repeatedly emphasized proportionality as the paramount consideration in determining whether a lawsuit should be dismissed. Weighing the public interest in freedom of expression and public participation against

the public interest in vindicating a meritorious claim is a theme that runs through the entire legislative history, and this informs how s. 137.1 should be judicially understood.

[64] The import of s. 137.1(4)(b) is made abundantly evident by looking at the context in which s. 137.1 was enacted. For example, the APR urged that “[t]here should be no special safeguards to prevent abuse. The balancing of interests at the heart of the remedy will allow appropriate disposition of cases” (Summary of Recommendations, para. 20 (emphasis added)). This goal of achieving balance was echoed during the readings of the bill in the Legislative Assembly of Ontario. At second reading, the Attorney General of Ontario stated the following:

[TRANSLATION] Balance has been a recurring theme: the need to strike a balance that will dismiss abusive lawsuits while permitting legitimate actions. I can assure you that we have heard everything that has been said to us. Balance is a key feature of this bill.

(Legislative Assembly of Ontario (2014), at p. 1971 (Hon. Madeleine Meilleur))

The theme of balance was raised frequently throughout the debates by multiple members across party lines (Legislative Assembly of Ontario (2014), at pp. 1972-74 (Mr. Lorenzo Berardinetti); p. 1974 (Mr. Chris Ballard); p. 1975 (Hon. Madeleine Meilleur)). (See also Legislative Assembly of Ontario (2015), at p. 6017 (Hon. Madeleine Meilleur); p. 6021 (Mr. Lorenzo Berardinetti); pp. 6025-27 (Mr. Jagmeet Singh).)

[65] I pause here to explain my use of the expression “weighing exercise” and to briefly address whether there is a substantive difference between a *weighing* exercise and a *balancing* exercise, and which exercise s. 137.1(4)(b) requires. This concern was raised by the British Columbia Civil Liberties Association as an intervener before this Court.

[66] Here, the provision *expressly* requires that one consideration “outweig[h]” the other. I am of the view that this is substantively different than if the statute had required that the two considerations be *balanced* against one another. The difference can be illustrated by the following quantification of weighing and balancing: where one factor must *outweigh* the other, the ratio between the two must be at least 51/49; in contrast, where one factor must be *balanced* against the other, a ratio of 50/50, or even 45/55, might be sufficient for a judge to rule in favour of the former. The word “outweighs” necessarily precludes such a conclusion.

[67] While I do not purport to decide for all statutes the definitive difference between weighing and balancing, the fact that the statute *here* requires that one consideration outweigh the other, and not simply that the considerations be balanced against one another, should be relevant to a motion judge’s consideration of whether the plaintiff has satisfied its burden under s. 137.1(4)(b).

(a) *Harm Analysis*

[68] Harm is principally important in order for the plaintiff to meet its burden under s. 137.1(4)(b). The statutory provision expressly contemplates the *harm* suffered by the responding party *as a result* of the moving party’s expression being weighed against the public interest in protecting that expression. As a prerequisite to the weighing exercise, the statutory language therefore requires two showings: (i) the existence of harm and (ii) causation — the harm was suffered *as a result* of the moving party’s expression.

[69] Either monetary harm or non-monetary harm can be relevant to demonstrating (i) above. I am in agreement with the Attorney General of Ontario at the time the legislation was debated, who recognized at second reading “that reputation is one of the most valuable assets a person or a business can possess” (Legislative Assembly of Ontario (2014), at p. 1971 (Hon. Madeleine Meilleur)). Accordingly, harm is not limited to monetary harm, and neither type of harm is more important than the other. Nor is harm synonymous with the damages alleged. The text of the provision does not depend on a particular *kind* of harm, but expressly refers only to *harm* in general.

[70] Further, since s. 137.1(4)(b) is, in effect, a weighing exercise, there is no threshold requirement for the harm to be sufficiently worthy of consideration. The magnitude of the harm becomes relevant when the motion judge must determine whether it is “sufficiently serious” that the public interest in permitting the proceeding

to continue outweighs the public interest in protecting the expression. In other words, the magnitude of the harm simply adds weight to one side of the weighing exercise.

[71] This does not mean that the harm pleaded by the plaintiff should be taken at face value or that bald assertions are sufficient. But I would not go so far as to require a fully developed damages brief, nor would I require that the harm be monetized, as the question here relates to the *existence* of harm, not its quantification. The statutory language employed in s. 137.1(4)(b) is “harm likely to”, which modifies both “be” and “have been”; this indicates that the plaintiff need not *prove* harm or causation, but must simply provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link. The evidentiary burden might depend on the nature of the substantive law that is applied, although it must be borne in mind that a s. 137.1 motion is not an adjudication on the merits: for example, in a defamation action, harm (and therefore general damages) is presumed, but the plaintiff would still have to support a claim for special damages. Importantly, though, no definitive determination of harm or causation is required.

[72] I add that, naturally, evidence of a causal link between the expression and the harm will be especially important where there may be sources other than the defendant’s expression that may have caused the plaintiff harm (C.A. reasons, at para. 92). Causation is not, however, an all-or-nothing proposition, in the sense that while the causal chain between the defendant’s expression and the harm suffered by

the plaintiff may be weaker for *some* elements of the harm suffered, it might nonetheless be strong for *other* elements. This is a case-by-case inquiry undertaken by the motion judge.

(b) *Weighing of the Public Interest*

[73] Once harm has been established and shown to be causally related to the expression, s. 137.1(4)(b) requires that the harm and corresponding public interest in permitting the proceeding to continue be weighed *against* the public interest in protecting the expression. Therefore, as under s. 137.1(3), public interest becomes critical to the analysis.

[74] However, the term “public interest” is used differently in s. 137.1(4)(b) than in s. 137.1(3). Under s. 137.1(3), the query is concerned with whether the expression relates to a *matter* of public interest. The assessment is not qualitative — i.e. it does not matter whether the expression helps or hampers the public interest. Under s. 137.1(4)(b), in contrast, the legislature expressly makes the public interest relevant to specific goals: permitting the proceeding to continue and protecting the impugned expression. Therefore, not just *any matter* of public interest will be relevant. Instead, the *quality* of the expression, and the *motivation* behind it, are relevant here.

[75] Indeed, “a statement that contains deliberate falsehoods, [or] gratuitous personal attacks . . . may still be an expression that relates to a matter of public

interest. However, the public interest in protecting that speech will be less than would have been the case had the same message been delivered without the lies, [or] vitriol” (C.A. reasons, at para. 94, citing *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785, 410 D.L.R. (4th) 380, at paras. 82-84 and 96-103, aff’d 2018 ONCA 690, 428 D.L.R. (4th) 568).

[76] While judges should be wary of the inquiry descending into a moralistic taste test, this Court recognized as early as *R. v. Keegstra*, [1990] 3 S.C.R. 697, that not all expression is created equal: “While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b)” (p. 760).

[77] The weighing exercise under s. 137.1(4)(b) can thus be informed by this Court’s s. 2(b) *Canadian Charter of Rights and Freedoms* jurisprudence, which grounds the level of protection afforded to expression in the nature of the expression (*R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 181). For example, the inquiry might look to the core values underlying freedom of expression, such as the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing (*Sharpe*, at para. 182; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 24). The closer the

expression is to any of these core values, the greater the public interest in protecting it.

[78] I outline below some further factors that may bear on the public interest weighing exercise under s. 137.1(4)(b). I note that in *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, at para. 99, Doherty J.A. made reference to recognized “indicia of a SLAPP suit” (emphasis omitted). He recognized four indicia in particular: (1) “a history of the plaintiff using litigation or the threat of litigation to silence critics”; (2) “a financial or power imbalance that strongly favours the plaintiff”; (3) “a punitive or retributory purpose animating the plaintiff’s bringing of the claim”; and (4) “minimal or nominal damages suffered by the plaintiff” (para. 99). Doherty J.A. found that where these indicia are present, the weighing exercise favours granting the s. 137.1 motion and dismissing the underlying proceeding. The Court of Appeal for Ontario has since applied these indicia in a number of cases (see, e.g., *Lascares v. B’nai Brith Canada*, 2019 ONCA 163, 144 O.R. (3d) 211).

[79] I am of the view that these four indicia may bear on the analysis *only to the extent* that they are tethered to the text of the statute and the considerations explicitly contemplated by the legislature. This is because the s. 137.1(4)(b) stage is fundamentally a public interest weighing exercise and not simply an inquiry into the hallmarks of a SLAPP. Therefore, for this reason, the only factors that might be relevant in guiding that weighing exercise are those tethered to the text of s. 137.1(4)(b), which calls for a consideration of: the harm suffered or potentially

suffered by the plaintiff, the corresponding public interest in allowing the underlying proceeding to continue, and the public interest in protecting the underlying expression.

[80] Accordingly, additional factors may also prove useful. For example, the following factors, in no particular order of importance, may be relevant for the motion judge to consider: the importance of the expression, the history of litigation between the parties, broader or collateral effects on *other* expressions on matters of public interest, the potential chilling effect on *future* expression either by a party or by others, the defendant's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group or a group protected under s. 15 of the *Charter* or human rights legislation. I reiterate that the relevance of the foregoing factors must be tethered to the text of s. 137.1(4)(b) and the considerations explicitly contemplated by the legislature to conduct the weighing exercise.

[81] Fundamentally, the open-ended nature of s. 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them: s. 137.1(4)(b) effectively allows motion judges to assess how allowing individuals or organizations to vindicate their rights through a lawsuit — a fundamental value in its own right in a democracy — affects, in turn, freedom of

expression and its corresponding influence on public discourse and participation in a pluralistic democracy.

[82] In conclusion, under s. 137.1(4)(b), the burden is on the plaintiff — i.e. the responding party — to show on a balance of probabilities that it likely has suffered or will suffer harm, that such harm is *a result* of the expression established under s. 137.1(3), and that the corresponding public interest in allowing the underlying proceeding to continue *outweighs* the deleterious effects on expression and public participation. This weighing exercise is the crux or core of the s. 137.1 analysis, as it captures the overarching concern of the legislation, as evidenced by the legislative history. It accordingly should be given due importance by the motion judge in assessing a s. 137.1 motion.

IV. Application to This Case

[83] In the following section, I apply the s. 137.1 framework to the facts of this case. I provide first an overview of the facts and procedural history, and subsequently apply the s. 137.1 framework to those facts. I ultimately reach the conclusion that Pointes Protection’s s. 137.1 motion should be granted and consequently that 170 Ontario’s underlying action should be dismissed.

A. *Factual Overview*

[84] The appellant, 170 Ontario, wanted to develop a 91-lot subdivision in the city of Sault Ste. Marie. In order to do so, it was necessary for 170 Ontario to obtain the approval of both the Sault Ste. Marie Region Conservation Authority (“SSMRCA”) and the Sault Ste. Marie City Council (“City Council”).

[85] Pointes Protection Association and six members of its executive committee are the respondents before this Court. Pointes Protection Association is a not-for-profit corporation created to provide a coordinated response to 170 Ontario’s development proposal on behalf of affected residents. Pointes Protection opposed the proposed development, particularly on environmental grounds.

[86] 170 Ontario successfully obtained the SSMRCA’s approval, which Pointes Protection then contested by bringing an application for judicial review of the SSMRCA’s decision. While that application was pending, 170 Ontario sought approval from the City Council. Its application to the City Council was rejected, and it appealed to the Ontario Municipal Board (“OMB), which granted Pointes Protection standing to participate.

[87] This context is important, because while Pointes Protection’s application for judicial review of the SSMRCA’s decision and 170 Ontario’s appeal to the OMB were both pending, the parties settled the judicial review proceeding by way of minutes of settlement (“Agreement”).

[88] Under the terms of the Agreement, Pointes Protection’s judicial review application was to be dismissed on consent without costs. Crucial to this appeal, however, is the fact that the Agreement also imposed limitations on Pointes Protection’s future conduct. In particular, arts. 4 and 6 of the Agreement provided as follows:

4) The Pointes Protection Association (hereinafter the “PPA”) and its executive committee members comprised of Peter Gagnon, Lou Sim[i]onetti, Pat Gratton and Gay Gartshore together with Rick Gartshore, and Glen Stortini (the named individuals hereinafter referred to collectively as the “PPA members”) undertake and agree not to take any further court proceeding seeking the same or similar relief as set out in the within Notice of Application;

...

6) The PPA and the PPA members undertake and agree that in any hearing or proceeding before the Ontario Municipal Board (OMB) or any other subsequent legal proceeding that they will not advance the position that the Resolutions passed by the SSMRCA on December 13th 2012 in regards to the Pointe Estates Development under subsection 3(1) of Ontario Reg. 176/06 are illegal or invalid or contrary to the provisions of the Conservation Authorities Act R.S.O. 1990 c. C.27 and Ontario Reg. 176/06 being the Regulation of Development, Interference with Wetlands and Alterations to Shorelines and Watercourses or that the SSMRCA exceeded its jurisdiction by passing the above noted Resolutions with no reasonable evidence to support its decision and considered factors extraneous to those set out in subsection 3(1) of Ont. Reg. 176/06 [Emphasis added.]

(A.R., vol. II, at pp. 196-97)

[89] At the OMB hearing of 170 Ontario’s appeal from the City Council’s refusal, Peter Gagnon, the president of Pointes Protection Association and a signatory of the Agreement, testified. This testimony is the root of the breach of contract action

later initiated by 170 Ontario against Pointes Protection, which gives rise to this appeal. Mr. Gagnon testified that 170 Ontario's proposed development would result in a loss of wetland area and in environmental damage to the region. Though 170 Ontario objected at the time to Mr. Gagnon's testimony, the OMB Member hearing the appeal permitted him to give evidence on the wetland issue insofar as it was relevant to the planning merits question and not to the conservation question, which was within the purview of the SSMRCA. Following the hearing, the OMB eventually dismissed 170 Ontario's appeal and thereby upheld the City Council's refusal of its development plan. 170 Ontario has accordingly not moved forward with that plan.

[90] What gives rise to this appeal is what followed the OMB's dismissal of 170 Ontario's appeal: 170 Ontario initiated a breach of contract action against Pointes Protection. In its statement of claim, 170 Ontario took the position that Mr. Gagnon's testimony at the OMB hearing on behalf of Pointes Protection breached the Agreement because (1) the defendants sought the same relief as in their judicial review application, (2) the defendants gave evidence regarding the wetland issue, which had been "[i]mplicit[ly]" (A.R., vol. II, at p. 33) settled by the Agreement, and (3) the defendants advanced the position that the SSMRCA approval was contrary to the *Conservation Authorities Act*, R.S.O. 1990, c. C.27. 170 Ontario claimed \$6 million in damages, that is, \$5 million in general damages and \$1 million in punitive and aggravated damages.

[91] Pointes Protection, for its part, did not file a statement of defence, but instead brought a motion under s. 137.1 of the *CJA* to have the action dismissed.

B. *Procedural History*

- (1) Ontario Superior Court (Gareau J.), 2016 ONSC 2884, 84 C.P.C. (7th) 298

[92] The motion judge, Gareau J., dismissed Pointes Protection's s. 137.1 motion and allowed 170 Ontario's action to proceed. First, on the threshold burden, he concluded that Mr. Gagnon's testimony concerning the potential environmental impact of the proposed development constituted an expression relating to a matter of public interest as required by s. 137.1(3) (paras. 29-40). However, turning to the merits-based and public interest hurdles in s. 137.1(4)(a) and (b), Gareau J. found that 170 Ontario had met its burden (paras. 41-56).

- (2) Court of Appeal for Ontario (Doherty, Brown and Huscroft JJ.A.)

[93] Pointes Protection's appeal was heard together with five other appeals³ before a single panel of the Court of Appeal for Ontario. This was in light of the fact that the Court of Appeal had not previously considered s. 137.1 of the *CJA* and that each of the appeals involved the proper interpretation of the s. 137.1 framework. Therefore, while each of the appeals raised discrete issues, the Court of Appeal's

³ Those appeals were *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686, 426 D.L.R. (4th) 1; *Platnick; Veneruzzo v. Storey*, 2018 ONCA 688, 23 C.P.C. (8th) 352; *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689, 143 O.R. (3d) 54; and *Able Translations (C.A.)*.

reasons in Pointes Protection’s appeal were controlling as regards the appropriate analysis of the s. 137.1 framework.

[94] Doherty J.A., writing for a unanimous court, allowed Pointes Protection’s appeal, granted its s. 137.1 motion, and dismissed 170 Ontario’s lawsuit (para. 124). First, on the threshold burden, he noted that 170 Ontario was not challenging Gareau J.’s finding that Mr. Gagnon’s testimony constituted an expression relating to a matter of public interest under s. 137.1(3), and therefore it was not in dispute that Pointes Protection had met its burden on this prong.

[95] Doherty J.A. disagreed with the motion judge’s findings on s. 137.1(4)(a) and (b). With regard to substantial merit, Doherty J.A. found that the motion judge had erred by not examining the record and considering the relevant principles of contractual interpretation. Turning to substantial merit himself, he held that 170 Ontario’s action lacked substantial merit (paras. 113-17). Acknowledging that this alone would be sufficient to dismiss the action, he nonetheless analyzed the other prongs of s. 137.1(4) for completeness (para. 117). He quickly disposed of the motion judge’s finding that there was no valid defence by pointing out that the judge had “wrongly put the onus on Pointes [Protection]” (para. 119). Finally, on the public interest hurdle, Doherty J.A. identified no harm to 170 Ontario aside from interference with its reasonable expectation of finality in the litigation, an expectation that was dependent entirely on the correctness of its interpretation of the Agreement

(paras. 120-21). Therefore, Doherty J.A. found that 170 Ontario could not meet its burden on any of the s. 137.1(4) prongs.

[96] The Court of Appeal for Ontario accordingly allowed Pointes Protection's appeal, set aside the motion judge's order, and entered an order dismissing 170 Ontario's action (para. 124).

C. *Application of the Section 137.1 Framework*

[97] Applying the framework set out in Part III of these reasons, I ultimately reach the same conclusion as the Court of Appeal: 170 Ontario's action lacks substantial merit, and the harm likely to be or have been suffered by 170 Ontario and the corresponding public interest in allowing the proceeding to continue do not outweigh the public interest in protecting Pointes Protection's expression. I review the findings of both the motion judge and the Court of Appeal on a standard of correctness because — as the reasons outlined in Part III made clear — their interpretation of the s. 137.1 framework raises questions of law (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8 and 36; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, at para. 78).

(1) Section 137.1(3) — Threshold Burden

[98] Mr. Gagnon's testimony constitutes an expression that relates to a matter of public interest, and 170 Ontario's breach of contract action arises from that

expression. Therefore, Pointes Protection meets its threshold burden under s. 137.1(3) with little difficulty.

[99] First, Mr. Gagnon’s testimony is captured by the statutory definition of expression, as it is a verbal communication made publicly (s. 137.1(2)).

[100] Second, the materials before the motion judge support a finding that the expression relates to a matter of public interest. Mr. Gagnon’s testimony focused on the environmental impact of a proposed private development. A large group of residents and voters was deeply invested in the ecological consequences of the Pointe Estates development. There was extensive evidence in the record concerning the broad local media coverage of the development proposal itself, as well as the proceedings of the SSMRCA, the City Council, and the OMB. This was a matter that affected “people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others” (per Lord Denning in *London Artists, Ltd. v. Littler*, [1969] 2 All E.R. 193 (C.A.), at p. 198, cited in *Torstar*, at para. 104).

[101] Accordingly, I am in agreement with both the motion judge and the Court of Appeal that Mr. Gagnon’s testimony at the OMB constitutes an expression on a matter of public interest.

[102] I also agree with the courts below that the proceeding brought by 170 Ontario “arises from” that expression. It is a breach of contract action premised

on an alleged breach of the Agreement resulting from Mr. Gagnon’s testimony at the OMB. There is thus a clear nexus between Mr. Gagnon’s expression and the underlying proceeding.

[103] Therefore, I am satisfied on a balance of probabilities that 170 Ontario’s breach of contract action arises from an expression that relates to a matter of public interest.

(2) Section 137.1(4)(a) — Merits-Based Hurdle

[104] Since Pointes Protection has met its onus on the threshold question, the burden now shifts to 170 Ontario to show that there are grounds to believe that its breach of contract action has substantial merit and that Pointes Protection has no valid defence.

[105] I agree with the Court of Appeal’s conclusion that 170 Ontario’s action lacks substantial merit. 170 Ontario’s claim is based solely on a breach of the Agreement. Accordingly, whether or not the action has “substantial merit” rests solely on the interpretation of the Agreement, which is fundamentally a contract. Applying the customary principles of contractual interpretation, which the motion judge failed to do, I find that 170 Ontario’s action is not legally tenable and supported by evidence that is reasonably capable of belief such that its claim can be said to have a real prospect of success; it thus does not have substantial merit.

[106] It is well established that the interpretation of a written contractual provision must be grounded in the text and that the provision must be read in light of the entire contract. The surrounding circumstances can be relied on in the interpretive process, but not to the point that they distort the explicit language of the agreement (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 57).

[107] In this case, the interpretation advanced by 170 Ontario does not flow from the plain language of the Agreement or from the factual matrix surrounding it. The reading urged by 170 Ontario would distort the ordinary meaning of the words in a manner that exceeds the bounds of appropriate judicial intervention in matters of contractual interpretation.

[108] The language of the Agreement is clear on its face: it restricts Pointes Protection's expression only as it relates to the SSMRCA's decision and to judicial review of that decision. 170 Ontario's argument is tantamount to asking this Court to read in *ex post* a term that does not exist in the Agreement. The Agreement expressly bars Pointes Protection from "advanc[ing] the position" that the SSMRCA's decision was "illegal or invalid or contrary to" the *Conservation Authorities Act* (A.R., vol. II, at p. 197). The Agreement also prohibits Pointes Protection from "seeking the same or similar relief as set out in the within Notice of Application", in which it was alleged that the SSMRCA had erred in the course of its decision-making process (p. 196). The Agreement is expressly limited to settling and foreclosing the foregoing.

There is *nothing* in its plain language which could possibly foreclose Pointes Protection from advancing an argument, as here, that does not pertain to the SSMRCA's decision. That argument might admittedly depend on the same evidence, but there is nothing in the Agreement that suggests that the evidentiary foundation of Pointes Protection's challenge to the SSMRCA's decision is precluded from being used in a proceeding unrelated to that decision.

[109] 170 Ontario's submission that any argument raised with the SSMRCA is covered by an *implied* term of the Agreement stretches the Agreement beyond any reasonable parameter. Pointes Protection specifically sought to preserve its right to participate in the OMB proceeding during the negotiations leading to the Agreement (A.R., vol. II, at pp. 192-93). Common sense indicates that its purpose in participating in the OMB proceeding would have been to advance its ultimate position against 170 Ontario's proposed land development. It is unclear what Pointes Protection would have raised at the OMB hearing other than the issues that were its primary concern: wetland destruction, flooding, drainage, and other environmental impacts. The Agreement expressly settled the application for judicial review of the SSMRCA's decision and, correspondingly, prevented any future use of arguments to the effect that the SSMRCA had erred in that decision; the Agreement did not contemplate or preclude Pointes Protection's advancement of its concerns generally.

[110] In my view, Doherty J.A.'s characterization of the situation at para. 114 of his reasons was apt and correct:

170 Ontario’s reliance on an “implicit” term in the agreement to preclude the defendants from raising the wetlands issue in testimony before the OMB is not, in my view, an interpretation of the agreement that flows reasonably from the language or the factual context of the agreement. When the parties entered into the agreement, Pointes had standing at the OMB and 170 Ontario knew that the defendants would oppose the development at the OMB. Nothing in the agreement touched on the defendants’ participation in the OMB proceedings. Specifically, nothing in the agreement suggested that Pointes could not oppose 170 Ontario’s development at the OMB. 170 Ontario must be taken to have known full well the range of factual issues that could be raised on its appeal before the OMB. Those issues included some that had been considered, albeit in a different regulatory context, by the SSMRCA. [Emphasis added.]

[111] Accordingly, 170 Ontario’s breach of contract action cannot be seen as legally tenable and supported by evidence that is reasonably capable of belief such that its claim can be said to have a real prospect of success.

[112] I therefore reach the conclusion under s. 137.1(4)(a)(i) that there is no substantial merit to 170 Ontario’s action. Given this conclusion, it is not necessary to consider s. 137.1(4)(a)(ii) and the defences raised by Pointes Protection (absolute privilege and estoppel). This is because 170 Ontario’s failure to satisfy s. 137.1(4)(a)(i) is sufficient to say that it has failed to satisfy s. 137.1(4)(a) as a whole. In any case, the conclusion that 170 Ontario’s interpretation of the Agreement has no substantial merit inevitably leads to the conclusion that it would not be able to show that Pointes Protection’s interpretation of the Agreement is not valid (C.A. reasons, at para. 119).

(3) Section 137.1(4)(b) — Public Interest Hurdle

[113] Even if there were grounds to believe that 170 Ontario's action has substantial merit, and setting aside the issue of whether there are grounds to believe that Pointes Protection has no valid defence available, I would nonetheless conclude independently that the action should be dismissed because the harm, if any, to 170 Ontario resulting from the expression and the corresponding public interest in permitting the proceeding to continue do not outweigh the public interest in protecting Pointes Protection's expression in this particular case.

(a) *Harm Allegedly Suffered and Public Interest in Permitting 170 Ontario's Action to Continue*

[114] 170 Ontario claims two sources of harm that arise from Mr. Gagnon's testimony at the OMB. The first harm alleged is financial. Not only has 170 Ontario claimed \$6 million in damages, but it also points out that it gave up its right to costs on the security for costs motion when it settled the judicial review application. The second harm is non-pecuniary and rests on the importance of courts fostering the principle of finality of litigation through contractual mechanisms, such as the Agreement here.

[115] Turning first to the financial damages alleged to have been suffered, I note that 170 Ontario has not provided any theory concerning the nature or quantum of those damages. I acknowledge that a fully developed damages brief is not necessary on a s. 137.1 motion. I also acknowledge that a motion judge is not required to make definite findings of fact on issues of causation. However, in this

case, there is simply a dearth of evidence on the motion linking Mr. Gagnon's testimony to any of the undefined damages that are claimed.

[116] Assuming quantifiable and demonstrable harm, 170 Ontario's argument presupposes that 170 Ontario suffered a loss as a result of Mr. Gagnon's testimony at the OMB (i.e. the expression). However, it is nearly impossible to conjecture that Mr. Gagnon's testimony was the reason why the OMB upheld the City Council's refusal of 170 Ontario's development application. Indeed, Mr. Gagnon was only one of six witnesses who testified in opposition to the development (A.R., vol. III, at p. 31). Moreover, the OMB identified several grounds for dismissing the appeal in its entirety: the development application did not have appropriate regard for matters of provincial interest, was not consistent with the Provincial Policy statement, was contrary to the Official Plan of the City of Sault Ste. Marie, did not have appropriate regard for the provisions of s. 51(24) of the *Planning Act*, R.S.O. 1990, c. P.13, and the development application in its entirety did "not represent good planning" (A.R., vol. III, at pp. 13-14). Though the OMB explicitly accepted Mr. Gagnon's evidence, that evidence was merely one of many contributing factors in its ultimate dismissal of 170 Ontario's appeal, and may not have been a factor at all in the constellation that comprise of why the City Council refused 170 Ontario's development plan in the first place.

[117] To be absolutely clear, the preceding paragraph should not be taken to be an affirmation of the reasonableness of the OMB's decision, which is not before this

Court and in respect of which leave to appeal to the Divisional Court was denied (*Avery v. Pointes Protection Assn.*, 2016 ONSC 6463, 60 M.P.L.R. (5th) 70). Rather, it is simply meant to demonstrate that 170 Ontario cannot convincingly show that any harm it might have suffered as a result of Mr. Gagnon’s expression was in fact sufficient to establish any significant public interest in allowing its breach of contract action to proceed.

[118] The second harm alleged by 170 Ontario has to do with finality in litigation, which is undoubtedly an important value. However, the value of finality in litigation is relevant at the s. 137.1(4)(b) stage only to the extent that it relates to harm suffered by the plaintiff, not harm in general. Here, I am willing to accept that this is the case, since 170 Ontario alleges that it is being deprived of a benefit for which it bargained in settling the judicial review proceeding with Pointes Protection. Nonetheless, in my view, finality in litigation is not compromised by dismissing 170 Ontario’s breach of contract action: the Agreement continues to be binding between the parties, and Pointes Protection continues to be foreclosed from advancing the position that the SSMRCA’s decision was invalid or illegal. I am in agreement with the Court of Appeal that “170 Ontario’s reasonable expectation of finality is dependent entirely on the correctness of its interpretation of the agreement” (para. 120). As I discussed above, the Agreement cannot reasonably be read as precluding Mr. Gagnon’s testimony before the OMB. Therefore, finality in litigation is not squarely engaged and cannot be given any significant weight at this stage.

[119] In summary, in light of the foregoing, I must conclude that the harm likely to be or have been suffered by 170 Ontario as a result of Mr. Gagnon's expression lies at the very low end of the spectrum and, correspondingly, so too does the public interest in allowing the proceeding to continue.

(b) *Public Interest in Protecting Pointes Protection's Expression*

[120] The public interest in protecting Mr. Gagnon's expression is significant for two reasons. First, the public has a strong interest in the subject matter of the expression, which relates to the ecological impact and environmental degradation associated with a proposed large-scale development. Second, the form of the expression, namely testimony before an adjudicative tribunal, militates in favour of protecting it.

[121] First, with respect to the subject matter of the impugned expression in this case, it must be borne in mind that Mr. Gagnon was providing evidence regarding a matter of local and ecological significance. The express purpose of s. 137.1 is to "encourage" and "promote" public participation in debates on matters which invite this kind of public attention.

[122] Further, the OMB is required to carry out its obligations under the *Planning Act* with regard to "matters of provincial interest", which are defined as including the protection of ecological systems, the conservation of features with significant interest, and the orderly development of safe and healthy communities

(s. 2). These “matters of provincial interest” intersect to a large degree with the public interest, and the opportunity to express an opinion on these issues during what is a public deliberative process ought to be encouraged.

[123] Second, with respect to the form of expression, courts have closely guarded the principle of participation in the process of tribunal decision making. Where a claim is founded on evidence to be provided before a tribunal, there is a risk that witnesses will be deterred from participating in the adjudicative process because of a fear of legal retaliation. For this reason, courts recognize, for example, an absolute privilege that attaches to testimony given “in the ordinary course of any proceedings”, regardless of whether it is relevant or irrelevant, malicious or not (*Amato v. Welsh*, 2013 ONCA 258, 362 D.L.R. (4th) 38, at para. 34, citing *Halsbury’s Laws of England* (4th ed. 1997), vol. 28, at para. 97). Indeed, here, reducing the “risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action” is an express statutory purpose set out in s. 137.1(1).

[124] Strengthening the integrity of the justice system by encouraging truthful and open testimony is inextricably linked to the freedom of participants to express themselves in the forums concerned without fear of retribution. I accordingly consider that the public interest in protecting Pointes Protection’s expression falls at the higher end of the spectrum.

(c) *Weighing of the Public Interest*

[125] As I have discussed, the harm likely to be or have been suffered by 170 Ontario lies at the very low end of the spectrum, and so too then does the public interest in allowing the proceeding to continue. On the other hand, the public interest in Pointes Protection's expression is at the higher end of the spectrum.

[126] It is thus clear that 170 Ontario cannot establish on a balance of probabilities that the harm suffered as a result of Pointes Protection's expression is sufficiently serious that the public interest in permitting the proceeding to continue *outweighs* the public interest in protecting that expression.

(4) Conclusion on the Application of the Framework

[127] For the foregoing reasons, I would grant Pointes Protection's s. 137.1 motion on either of the independent grounds that 170 Ontario's action lacks substantial merit and that 170 Ontario is unable to demonstrate that the weighing of the public interest favours permitting the proceeding to continue. Accordingly, the Court of Appeal for Ontario was correct in dismissing 170 Ontario's underlying breach of contract action.

V. Conclusion

[128] The appeal is dismissed.

[129] With regard to costs, the legislature expressly contemplated a costs regime for s. 137.1 motions. Indeed, s. 137.1(7) sets out an award of costs as the default rule if a s. 137.1 motion is granted, unless a judge determines that “such an award is not appropriate in the circumstances.” That would not be the case here. I would therefore simply award party-and-party costs to the respondents, as per this Court’s ordinary practice.

Appeal dismissed with costs.

Solicitors for the appellant: Wishart Law Firm, Sault Ste. Marie.

Solicitors for the respondents: Wiffen Litigation, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Goodmans, Toronto; Maia Tsurumi, Vancouver.

Solicitors for the intervener Greenpeace Canada: Stockwoods, Toronto; Greenpeace Canada, Toronto.

Solicitors for the intervener the Canadian Constitution Foundation: McCarthy Tétrault, Toronto.

Solicitors for the intervener the Ecojustice Canada Society: Ecojustice Canada Society, Toronto; Ecojustice Environmental Law Clinic at the University of Ottawa, Ottawa.

Solicitors for the interveners the Centre for Free Expression, the Canadian Association of Journalists and the Communications Workers of America / Canada: Stockwoods, Toronto.

Solicitors for the interveners the West Coast Legal Education and Action Fund, the Atira Women's Resource Society, the B.W.S.S. Battered Women's Support Services Association and the Women Against Violence Against Women Rape Crisis Center: Dentons Canada, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: St. Lawrence Barristers, Toronto.

Solicitors for the interveners the Ad IDEM / Canadian Media Lawyers Association, the Canadian Journalists for Free Expression, CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, the Aboriginal Peoples Television Network and Postmedia Network Inc.: Linden & Associates Professional Corporation, Toronto.

TAB 2

CITATION: Able Translations Ltd. v. Express International Translations Inc., 2016 ONSC
6785

COURT FILE NO.: CV-15-536821

DATE: 20161108

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Able Translations Ltd., Plaintiff/Responding Party

AND

Express International Translations Inc. and Philippe Vitu, Defendants

BEFORE: S. F. Dunphy, J.

COUNSEL: *David McGhee*.for the Defendants/Moving Parties

Jeffrey Radnoff and Charles Haworth, for the Plaintiff/Responding Party

HEARD: October 21, 2016

ENDORSEMENT

[1] This motion is one of the first opportunities this court has had to consider s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Section 137.1 of the *CJA* was the main element of the reforms to the law of defamation recently introduced by the *Protection of Public Participation Act, 2015*, 2015 S.O. c. 23 following a long process of public consultation. I am called upon to consider the proper scope and application of this new and largely untested statute.

[2] The defendant moving parties Express International Translations Inc. and its principal Mr. Philippe Vitu are moving to strike the plaintiff's defamation suit against them with costs pursuant to s. 137.1 of the *CJA*. In so doing, they bear the burden of establishing that the suit arises "from an expression made [by the defendants] that relates to a matter of public interest". If they are successful in establishing this, the onus shifts to the plaintiff to satisfy me: (a) that there are grounds to believe both that the proceeding has "substantial merit" and that the defendants have "no valid defence"; and (b) that the harm suffered or likely to be suffered by the

plaintiff is “sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression”.

[3] The claim arises from a blog posting made by Mr. Vitu on August 31, 2015 during the course of the 2015 Federal election. In the blog posting, Mr. Vitu drew attention to the association between a candidate for office and the plaintiff corporation in terms that suggested that affiliation with the plaintiff reflected badly upon the candidate’s fitness for office. The blog sought to attract support from like-minded individuals to call a press conference to highlight this connection to the broader public. The plaintiff reacted swiftly with a lawyer’s letter demanding immediate retraction and threatening a law suit. Ultimately the press conference was never held and the blog was deleted from the site where it had been posted within a few days.

[4] For the more detailed reasons that follow, I am granting the defendant’s motion. The action must therefore be dismissed with the costs consequences provided for in s. 137.1(7) of the *CJA* that I have found no grounds to depart from.

[5] There was never any basis to have brought the suit against the corporate defendant whose name was in no way associated with the expression in question. The action against the corporate defendant was and is entirely baseless and must be dismissed under the test prescribed by s. 137.1 of the *CJA*. As regards, the individual defendant, the blog posting expressed the opinion of its disclosed author (Mr. Vitu) concerning the fitness for office of a candidate in a general election. I find that this was an expression regarding a matter of public interest. The plaintiff has failed to satisfy me that there are grounds to believe that the proceeding has “substantial merit”. The defamatory “sting” of the blog posting itself was oblique and slight except to those already familiar with the numerous public allegations made by others concerning the plaintiff that were not republished by the plaintiff. I cannot find that the claim as pleaded has “*substantial*” merit. I also cannot find that the plaintiff has given me reason to believe that the defences raised of truth, fair comment and qualified privilege are not valid. Having conducted an objective examination of the evidence presented, I cannot conclude that there is a reasonable probability that none of these defences would succeed if examined in depth following a full trial. Finally, I cannot find that the public interest in permitting the proceeding to continue outweighs

the public interest in protecting the defendant's expression. The evidence of the harm allegedly attributable to the blog posting is entirely implausible. The blog was but a pale echo of substantial charges publicly made by others and there is no evidence that the blog itself was even seen by more than a handful of people before the plaintiff's efforts saw it removed from the internet site. On the other hand, there is compelling evidence of the direct chilling impact the threat of this suit had upon the activities of the defendant in expressing honestly held opinions in the course of an election campaign. The moving parties have satisfied their burden of proof under s. 137.1 of the *CJA* while the responding party plaintiff has failed to discharge its burden of proof.

Overview of Facts

(i) The parties

[6] The moving party defendant Mr. Philippe Vitu lives in Mississauga. He is an officer and director of the corporate defendant Express International. Mr. Vitu and his wife Dora are the sole shareholders and employees of Express International, a small business they operate out of their Mississauga home. Express International is in the business of providing interpreting and translation services.

[7] The plaintiff Able is also in the interpretation and translation business on a much larger scale. It provides services in numerous languages and has a number of large, institutional clients. By contrast, the clientele of Express International contains very few institutional clients of that sort. While they are in the same business, by reason of the difference in scale and clientele, Mr. Vitu claims that Express International is not actually a competitor of Able.

[8] Nothing turns on the precise degree to which the two businesses compete. I accept that they are in the same business but I also accept that their clientele has relatively little overlap in fact. However, they are certainly competitors to some degree.

[9] Mr. Peter Fonseca is not a party to this proceeding. He was however an officer of the plaintiff Able with the title of Executive Vice-President, Strategy and Business Development from 2011 to 2014. He had been an MPP from 2003 to 2011, having been defeated as a

candidate in the Federal election that year. In 2015 he was the nominated candidate for the Liberal Party of Canada in the riding of Mississauga East-Cooksville in the Federal election scheduled to be held in October 2015.

(ii) The August 31, 2015 blog posting

[10] On August 31, 2015, Mr. Vitu made a posting to a web site known as “N49.com”. No party has put any evidence before me as to the nature of this web site or what sort of traffic it generates. From the material before me, it appears that it is possible to post comments on the web site in response to entries made by others. It also appears that the site is monitored by Able who posts replies to various posts made about it on that site.

[11] Mr. Vitu’s posting has been referred to as a “blog”. Whether it was a blog in the sense of a page of his own writings, supplemented and updated from time to time or simply a comment posted on a site permitting such postings is not clear although the latter appears to be the case. I refer to it as a “blog” for convenience only – nothing turns on the distinction.

[12] The blog posting was as follows:

“Press Conference to Denounce ABLE...

PETER FONSECA is the liberal candidate for Mississauga-East Cooksville (sic). He has good chances of being elected in October. His red signs are popping up almost everywhere on our larger streets; furthermore, this riding has always been liberal-leaning and lastly, he will benefit from the aura of his wife, Chris Fonseca, who is a municipal counsellor here and does excellent for our community.

It so happens that PETER FONSECA (<https://peterfonseca.liberal.ca/>) is intimately connected with ABLE (<http://www.thisonline.com/cgi/page.cgi/membership.html/1004-Able-Translations-Ltd-Able-Transport-Ltd>) as “VP Strategy”.

Some interpreters met him here as recently as a year ago.

He must know about ALBE’s business and image and is part of it. Therefore, his claims as a candidate here have no credibility.

I suggest that we organize and hold a press conference in Mississauga about 10 days to 2 weeks before the election (end of Sept., first days of October) to denounce FONSECA. We would invite a report from the Toronto Star, the Toronto Sun and Mississauga News. I would need as many of you as possible to

enlighten the press about your experience with ABLE because people have to know.

I would be p***ed that a guy that is part of the ALBE clique be elected to Ottawa.

If you are interested, please email me at [reference deleted].

Thank you.

Philippe Vitu”

[13] Mr. Vitu’s posting generated at least one response (not produced in evidence) from a Mr. Faysal Mohammed who appears to have been an interpreter with some experience with Able. In response to Mr. Mohammed’s comment, Mr. Vitu made a further posting on the N49.com web site, allegedly on the same day (August 31, 2016), as follows:

“Hello Faysal:¹

I sympathize with your well-written account of your business with ABLE’s attitude with interpreters is absolutely deplorable, the action of interpreters is timid. Very little beyond complaining on sites such as this one, nothing that change the situation.

TAKEACTION posted here on Aug. 31 that we (sic) went to ABLE’s client to complain and that ABLE immediately issued a cheques with an apology (the client must have called ABLE).

Did you do any such thing?

In a post on the same day, I suggested organizing a press conference to denounce ABLE. Two interpreters (only) got back to me, but then balked (sic) out.

I wish you guys would be more dynamic in taking action instead of just complaining on this site. Remember: UNITED WE STAND. “

[14] The plaintiff reacted to Mr. Vitu’s posting swiftly. A demand letter of September 8, 2015 was sent by Mr. Radnoff (attaching and referencing only the first post of August 31, 2015). A further formal notice, doubtless intended to comply with the notice requirements of s. 5 of the

¹ The plaintiff claims the response to the comment of Mr. Mohammed was posted on the same day (August 31, 2015). A review of the contents of Mr. Vitu’s response that refers to August 31 in the past tense suggests the dating may be somewhat off. However nothing turns on the chronology to that level of detail – it was either the same day or some number of days afterwards.

Libel and Slander Act, R.S.O. 1990, c. L.12 was also sent. This notice also referred expressly only to the first of the two postings alleged to have been made by Mr. Vitu on August 31, 2015. The Statement of Claim, issued on September 21, 2015 similarly quoted only the initial August 31 post and made no explicit reference to the further public correspondence with Mr. Mohammed.

[15] Mr. Vitu's evidence is that his original blog posting was removed shortly after it was posted. The plaintiff has not disputed this allegation. I infer that the removal was likely at or about the time of the initial lawyer's letter sent to Mr. Vitu on September 8, 2015.

(iii) Context of the publication

[16] Mr. Vitu's affidavit and Ms. Teixeira's responding affidavit engage in considerable debate about whether in point of fact Able has a practice of paying its freelance interpreters and translators slowly. Able submits that it has nothing to answer in this regard. Complaints are promptly investigated and dealt with when they arise according to Ms. Teixeira. Mr. Vitu submits that there is a systematic refusal to pay Able's freelance interpreters and translators on time or without compulsion.

[17] Whatever the truth of the matter, one thing is perfectly clear. There was a considerable body of material circulating on the internet in that time frame alleging that Able is systematically slow (or worse) in paying its freelance interpreters and translators. Mr. Vitu assembled approximately 100 pages of various signed and unsigned postings made on the internet by parties claiming to be translators or interpreters working for Able. The frustration level and indeed bitterness of some of the parties posting complaints is palpable and their language is often extreme and inflammatory. Not all were unfavourable of course. Some posts defended Able.

[18] The largest number of complaints compiled by the moving party were posted on the N49.com web site. Many of them appear to have been the object of specific responses by Able who clearly monitored and responded to adverse comments on this web site. While it is true that some of the complaints produced date from a time after Mr. Vitu's post, many others clearly date from before.

[19] There is nothing in the evidence to support the inference that these numerous complaints were in any way orchestrated by or even connected to Mr. Vitu or the post that he made. Ms. Teixeira's suspicions expressed in her affidavit are accompanied by no concrete facts and are worthy of no weight. Mere suspicion of a state of affairs is not evidence.

[20] Mr. Vitu's public posting did not repeat the allegations contained in the numerous complaints - both attributed and anonymous - that his subsequent affidavit filed on this motion compiled. His blog would have brought them to mind for anyone familiar with them; it would have been a cipher to those who were not.

(iv) Damages alleged by Plaintiff

[21] The plaintiff's responding affidavit of Ms. Teixeira contains two paragraphs (paragraphs 21 and 22) outlining damages allegedly attributable to Mr. Vitu's posts of August 31, 2015. Paragraph 21 simply recites the names of four institutional clients allegedly lost "due to the Defamatory Blogs" while paragraph 22 claims that "[u]ltimately ABLE has lost 30% of its revenue following the Defamatory Blogs" without making an explicit claim to a causation link. No documentary evidence to substantiate or detail these claims was provided. There is also no concrete evidence as to how or why these claims might be attributed to Mr. Vitu's short-lived post on the N49.com web site is provided.

Issues

[22] The following issues are raised by this application:

- a. Was the expression in respect of a matter of public interest?
- b. What is the standard of proof required under s. 137.1(4)(a) of the *CJA*?
- c. Has the plaintiff discharged its onus of proving there are "grounds to believe that... the proceeding has substantial merit"?
- d. Has the plaintiff discharged its onus of proving that there are "grounds to believe that... the moving party has no valid defence in the proceeding"?

- e. Is the harm suffered or likely to be suffered by the plaintiff sufficiently serious that the public interest in allowing the proceeding to continue outweighs the public interest in the communication?

Analysis and Discussion

(i) Was the communication in respect of a matter of public interest?

[23] The plaintiff's position is that the blog posting was purely a matter of private interest. The plaintiff submits that the communication was intended to advance the defendants' commercial interests as competitors of the plaintiff. The plaintiff claims that the blog posting was directed at it and did not involve Mr. Fonseca and further claims that there is no public interest in the various claims of unpaid freelance interpreters who had done work for Able in the past that were said to lie beneath the allegations made in the blog.

[24] It is the subject-matter of the communication, determined objectively and reasonably, that is the object of the inquiry in s. 137.1(3) of the *CJA* and not the motives of the speaker or writer. The objects of s. 137.1 of the *CJA* are set forth in s. 137.1(1) and include to "encourage individuals to express themselves on matters of public interest", "to promote broad participation in debates on matters of public interest" among others.

[25] Mr. Vitu is not disentitled from holding opinions or expressing them simply because they involve a competitor directly or indirectly. Competitors are not disentitled from having opinions on matters of public interest or from expressing them. If the subject matter of the communication is objectively and reasonably found to relate to a matter of public-interest in its pith and substance, the defendants have met their evidentiary burden. In such cases, the issue of motive arises in relation to the second phase of the inquiry under s. 137.1(4) of the *CJA* and in particular s. 137.1(4)(b). There is no reason to fear that wolves in sheep's clothing will pass by undetected. The determination of the true subject matter of the expression is to be made objectively and reasonably. Where the pith and substance of the matter is a defamatory personal attack thinly veiled as a discussion of matters of public interest, the court has all the tools it requires to determine the true nature of the expression and rule accordingly.

[26] The Supreme Court of Canada recently considered the issue of defining “public interest” in the defamation context in *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII). The guiding principles regarding the definition of “public interest” that I would draw from a review of *Grant* include:

- a. “...the judge must consider the subject matter of the publication as a whole. The defamatory statement is not to be scrutinized in isolation” (*Grant* at para. 101);
- b. “The authorities offer no single “test” for public interest, nor a static list of topics falling within the public interest” (*Grant* at para. 103);
- c. “...the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject.” (*Grant* at para. 102); and
- d. “Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a “public figure”, as in the American jurisprudence since *Sullivan*. Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.” (*Grant* at para. 106).

[27] The first part of the analysis is thus to determine objectively what the subject matter of the communication as a whole is and then to consider whether that subject matter can fairly be described as a matter of public interest.

[28] Viewing the blog posting as a whole, it is clear that the subject matter of the post was the merits of the candidacy of Mr. Fonseca in Mississauga East-Cooksville in light of his past business connections. While the title to the blog refers to a “press conference to denounce

Able”, the text underneath makes it quite clear that the press conference being suggested was to denounce *Mr. Fonseca* by reason of his *connection* to Able. Indeed, the “Able” discussed is not even identified exclusively with the plaintiff to any reader not already armed with that information.

[29] It is not my role under s. 137.1 of the *CJA* to assess how interested the public might be in considering particular past business affiliations of a candidate for public office. It is sufficient that I should be able to determine, as I have, that the subject matter of discussion relates to a matter of public interest. The assessment of how central or peripheral to the public interest the discussion may be is more properly done under s. 137.1(4)(b) of the *CJA* when weighing the public interest in permitting the litigation to proceed against the public interest in protecting the expression in question.

[30] The plaintiff has suggested that the reference to Mr. Fonseca should be construed as mere cover for what was in fact a direct attack on Able as a competitor of Mr. Vitu or his company. I can find nothing in the evidence that lends support to that construction. Mr. Fonseca was a candidate in the election that was then in full swing. Reading the publication as a whole, I can find no basis to suppose that the reference to Mr. Fonseca was nothing but a thinly-disguised pretext as suggested.

[31] I find that the subject matter of the blog posting was an expression relating to a matter of public interest within the meaning of s. 137.1(3) of the *CJA*. Accordingly, subject to s. 137.1(4) of the *CJA*, I am *required* to dismiss this claim.

(ii) *What is the standard of proof required under s. 137.1(4)(a) of the CJA?*

[32] The *PPPA* was enacted by the Legislature in 2015 following a process of study and review spanning several years. It amended three statutes: the *CJA*, the *Libel and Slander Act*, R.S.O. 1990, c. L.12 and the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22.

[33] The procedure mandated is a “fast-track” procedure. This is because s. 137.2 provides that the motion to dismiss can be made at *any* time after the proceeding has commenced (s. 137.2(1) *CJA*), a motion brought pursuant to s. 137.1 must be heard within 60 days (s. 137.2(2)

CJA) and there are limits set upon the amount of cross-examination permitted (s. 137.2(4) *CJA*). Even appeals are directed to be heard “as soon as practicable” (s. 137.3 *CJA*). As a result, a defendant may choose to strike a proceeding utilizing this procedure before even filing a statement of defence.

[34] In addition to creating a fast-track process for summary dismissal of defamation claims arising from expressions of public interest, the reforms apply significant costs sanctions to the plaintiff who is unsuccessful in preventing the claim from being dismissed (s. 137.1(6) *CJA*).

[35] The purposes of the reforms intended by the *PPPA* are quite clearly stated in s. 137.1(1) of the *CJA* as follows:

- (a) to encourage individuals to express themselves on matters of public interest;
- (b) to promote broad participation in debates on matters of public interest;
- (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
- (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

[36] A fast-track to summary disposition coupled with costs sanctions is the remedy the Legislature has chosen to counteract the problem of “libel chill” where debates on matters of public interest are concerned.

[37] There is ample evidence in the present case of the libel chill effect of this law suit upon the defendant. The offending post was swiftly removed by the web site to which it was posted and Mr. Vitu’s efforts to organize a press conference to illustrate what he saw as a material fact relating to Mr. Fonseca’s candidacy fizzled before it got going.

[38] By intentionally creating a fast-track and relatively summary procedure, the Legislature has implicitly accepted that *some* potentially meritorious defamation claims may nevertheless be dismissed without a full hearing on the merits. To this degree, it might be said that the *PPPA* combats “libel chill” with its own form of “litigation chill”. However, the *PPPA* does not create a “safe space” for defamation without limit simply because the subject matter is one of public interest. Claims that are able to pass the review mandated by s. 137.1(4) are entitled to proceed. The question is how high was that threshold intended to be placed?

[39] The words the Legislature has used must be the starting point. Section 137.1(4) of the *CJA* provides that the judge “shall not dismiss a proceeding” if the responding party “satisfies the judge that, (a) there are grounds to believe that, (i) the proceeding has substantial merit, and (ii) the moving party has no valid defence in the proceeding”. The same “grounds to believe” standard is applied both to the question of “substantial merit” and that of “no valid defence”.

[40] This reference to both the merits of the claim and of the defences must be understood in the context of the law of defamation to which it relates. The plaintiff advancing a defamation claim bears the burden of establishing only that the words were published, that they refer to him or her and that they would have the effect of lowering his or her reputation in the eyes of a reasonable person. The plaintiff need not prove the words were untrue. It is defendant who has the burden of establishing any affirmative defences pleaded, including truth or justification. Section 137.1(4) of the *CJA* thus puts the plaintiff to the burden of addressing both the likelihood that it would be able to meet its own burden at trial *and* to address the likelihood that the defendant will not.

[41] The plaintiff suggests that it bears the onus of establishing that the claim is neither “frivolous nor fleeting”. In support of this the plaintiff cites the case of *1704604 Ontario Ltd. v Pointes Protection Association et al.*, 2016 ONSC 2884 (CanLII), being the only reported case on s. 137.1 of the *CJA* that the parties were able to locate and cite to me. In *170*, Gareau J. found that the claim before him “involves the sanctity of agreements made between parties” and was “not a claim that is frivolous or fleeting...In other words, it is a claim of substance” (at para. 47).

[42] The problem for the plaintiff in proposing that I adopt such a low standard to the assessment of the merits of its claim is that same standard must also be applied to the assess the strength of the affirmative defences raised by the moving party. If a claim that is neither “frivolous nor fleeting” is sufficient to create “grounds to believe that...the proceeding has substantial merit”, then an affirmative defence that is neither “frivolous nor fleeting” will not provide grounds to believe that such a defence is not valid. If anything, the plaintiff’s case to meet its own burden must be stronger (by requiring “substantial” merit”) than that applied to the defendant’s affirmative defences (there is no qualifier similar to “substantial” attached to “no valid defence”).

[43] The “not frivolous or fleeting” and “low threshold” approaches to the burden of proof under s. 137.1(4)(a) of the *CJA* suggested by the plaintiff would in my view eviscerate s. 137.1 of the *CJA* of any concrete meaning, rendering it little more than a restatement of Rule 25.11 or Rule 21.01(3)(d) of the *Rules of Civil Procedure*. I reject this approach.

[44] Section 137.1 of the *CJA* is a new enactment that alters the pre-existing framework of defamation law as evolved over time by both common law and statute. Section 64(1) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Sched. F, requires me to interpret s. 137.1 of the *CJA* “as being remedial and [it] shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects”. My role as judge is not to fight a rear-guard action against legislation validly enacted to amend the common law when the intent and purpose of the legislation is clearly expressed.

[45] In my view, when the legislator required the responding party to satisfy *the judge* that there are “grounds to believe” (both that the claim has “substantial” merit and that the defences raised have none), the standard implied thereby is that of “*reasonable* grounds to believe”.

[46] The Supreme Court of Canada interpreted the phrase “reasonable grounds to believe” in the context of s. 19(1)(j) of the *Immigration Act*, R.S.C. 1985, c. I-2, to require “something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities”: *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100, 2005 SCC 40 (CanLII) at para. 114. The determination requires that “there is an objective

basis for the belief *which is based on compelling and credible information*”: *Mugesera* at para. 114 (emphasis added).

[47] I find the approach in *Mugesera* to be a compelling one. The standard was adopted (albeit in quite different contexts) in two further cases cited to me by the plaintiff: *Lyras v. Heaps*, 2008 ONCJ 524 (CanLII) and *Ontario (Registrar of Alcohol and Gaming Commission) v. 751809 Ontario Inc.*, 2013 ONCA 157 (CanLII).

[48] There is a spectrum to which the merits of claims or affirmative defences may be subjected that extends from the very low threshold of not being frivolous or vexatious to the relatively high threshold of proof on the balance of probabilities. It is enough for present purposes that I conclude that the required standard under s. 137.1(4)(a) of the *CJA* is somewhat higher than the one and somewhat lower than the other. The *Mugesera* test of requiring the judge to look for “credible and compelling evidence” both of the substantial merits of the claim and the validity of the affirmative defences proposed commends itself to me as striking the appropriate balance. The Legislature clearly intended the *PPPA* to tilt the balance somewhat further towards protecting freedom of expression than the common law has accomplished with its gradual evolution but it is equally clear that the Legislature did not intend to provide a shield for unrestrained defamation in the public interest sphere. The “frivolous and vexatious” test filters few if any claims; the proof on the balance of probabilities standard would filter a large number and run the risk of turning s. 137.1 *CJA* motions into compressed (and expensive) summary judgment dry-runs. I am satisfied that the Legislature intended the courts to develop a standard that lies between the two extremes so as to give effect to the goals expressed in s. 137.1(1) of the *CJA*.

(iii) Has the plaintiff established “grounds to believe that the proceeding has substantial merit”?

[49] It is in my view notable that the Legislature has added the qualifier “substantial” to modify “merit”. The qualifier “substantial” means that something more than “some” merit needs to be demonstrated. This qualifier provides a further indication that a level of scrutiny higher than the low threshold of not being frivolous and vexatious is intended. Satisfying a judge that

there are grounds to believe the claim has “substantial merit” requires that the judge be satisfied that there is credible and compelling evidence supporting the claim as being a serious one with a reasonable likelihood of success. A claim that appears to be marginal or dubious, for example, would not satisfy the standard even if it would be immune to being struck as frivolous or vexatious.

[50] This assessment must be undertaken while remaining vigilant of the risk of applying the higher civil standard of proof. Apart from the unfairness of applying such a standard, the outcome of applying too high a standard on what is intended to be a summary fast-track procedure would potentially be to front-end load significant expense as plaintiffs feel compelled to attempt a full summary judgment hearing. Instead of sparing defendants the costs of litigation, the risk would be a magnification of those costs.

[51] The plaintiff in a libel action bears the burden of proving that (a) the words complained of were defamatory in the sense of tending to lower the plaintiff’s reputation in the eyes of a reasonable person; (b) the words complained of refer in fact to the plaintiff; and that (c) the words were published by being communicated to at least one other person: *Torstar* at para. 28.

[52] There is simply no basis in the evidence to attribute either of the blog postings to the corporate defendant. Mr. Vitu personally signed both posts and neither make any reference to the company of which he is principal.

[53] There are no grounds to believe that the claim as against the corporate defendant has substantial merit. The plaintiff has not discharged its burden as regards the corporate defendant and, as regards such defendant, the claim must accordingly be dismissed.

[54] There is however no dispute regarding the publication of the blog by Mr. Vitu. The comments that the post attracted establish that at least somebody saw the post.

[55] Were the words written “of the plaintiff”? There can be little doubt that in fact this was the case even if it is not at all evident from the face of the blog posting (Able’s full legal name not being mentioned, it could be said to refer to any number of “Able” entities). Mr. Vitu’s

affidavit and indeed paragraph 10 of the Statement of Defence admit of no other conclusion but that the “ABLE” referenced in the blog was intended to refer to the plaintiff. Mr. Fonseca, the alleged “main” target of the blog, was an officer of the plaintiff from 2011-2014.

[56] I conclude that there are grounds to believe that the plaintiff will be able to establish that the words were published and were said of the plaintiff.

[57] The main issue as regards Mr. Vitu is whether the words were defamatory in their usual and ordinary meaning. As proof of the defamatory nature of the publication, the plaintiff has gone to great lengths in its evidence to attempt to refute the allegation made by Mr. Vitu in his affidavit that the plaintiff is notorious for not paying its freelance interpreters and translators in a timely way.

[58] However, that is not the defamation that is actually pleaded in the Statement of Claim. The plaintiff is not permitted to amend its pleadings in response to a motion under s. 137.1 of the *CJA* in any event: s. 137.1(6) *CJA*. The only defamation to which I may have reference is that pleaded.

[59] What precisely was said of Able in the August 31, 2015 blog postings?

[60] Firstly it is said that Mr. Fonseca “must know about ABLE’s practices and image and is a part of it. Therefore his claims as a candidate have no credibility”.

[61] Secondly it is said “I would be p****d that a guy that is part of the ABLE clique be elected to Ottawa”.

[62] Thirdly, in response to a third-party response to his post, Mr. Vitu responded “ABLE’s attitude with interpreters is absolutely deplorable” – this last, separate post not having been specifically referenced in the Statement of Claim or the Notice of Libel.

[63] In the Statement of Claim (para. 10) it is pleaded that the “express and implied meanings in their full context are meant to mean that Able was disreputable in its business dealings and insolvent”.

[64] There is simply no evidence to substantiate the claim that *blog postings* could in any way suggest that Able was insolvent. Plaintiff's counsel was unable to explain the allegation and I have not considered it further. The hundred or so complaints of interpreters and translators published on the internet – none of which were repeated by Mr. Vitu – might suggest such a view but they are not the object of the claim before me.

[65] Can it be said that the two posts attributed to Mr. Vitu suggest that the plaintiff is disreputable in its business dealings?

[66] The two blog postings would leave an uninformed spectator wondering what they were about. Taken at their highest, the two postings collectively suggest that Able *already* has a questionable reputation that reflects badly upon Mr. Fonseca and suggest that the author, Mr. Vitu, shares that view. They do not make any concrete suggestions as to what the source of that unfavourable reputation might be nor do they provide any basis beyond Mr. Vitu's implicit endorsement to suggest that the reader ought to share in it.

[67] Does the mere public suggestion that a business already has a bad reputation among a particular category of people amount to defamation? Would such a suggestion tend to lower Able's reputation in the eyes of a reasonable person?

[68] A reasonable person would know that the suggestion is made on the internet and that the internet is replete with claims – both true and false, both attributed and anonymous. I have no evidence before me from which I could conclude that a reasonable person visiting the N49.com web site would form any view at all about the reputation of the plaintiff based only on the evanescent posting of Mr. Vitu. No particulars of the nature of Able's alleged reputation being provided, a reasonable person would have no basis on which to form any view at all beyond learning that the author has formed a negative view and appears to be looking to contact others with similar negative views to seek greater publicity of the grounds for those views.

[69] The "sting" of the words used is slight to non-existent for those unfamiliar with the allegations of the translators and interpreters assembled by Mr. Vitu in his affidavit; for those

familiar with them, Mr. Vitu's words provided no basis for a reasonable person's opinion of Able's reputation to be raised or lowered.

[70] A claim premised on such a weak "sting" does not meet the required standard of possessing "substantial merit". It is to the contrary marginal and dubious.

[71] Failing to satisfy me as to the merits of this essential and material element of its claim, I must therefore find that the plaintiff has failed to discharge its onus under s. 137.1(4)(a)(i) of the *CJA*. The plaintiff has not satisfied me that there are grounds to believe its claim has substantial merit.

(iv) Has the plaintiff established that there are "grounds to believe that...the moving party has no valid defence in the proceeding"?

[72] The plaintiff suggests that it has discharged its onus if it can establish that there is a "reasonable probability that there is no valid defence". Without rejecting that language per se, I am not sure that the formulation and reformulation of the words used by the Legislature is helpful in bringing us closer to the desired mark.

[73] The *Mugesera* test that I have found helpful suggests that I must look for objective and credible evidence that goes beyond the level of mere suspicion but need not rise to the civil standard of proof to ground my belief.

[74] I must also bear in mind that the *same* standard is applied both to measuring whether the plaintiff's claim has "substantial merit" and whether the affirmative defences offered are *not* valid. It is not sufficient that there is some chance the affirmative defence may not succeed. Such a standard would effectively apply a civil standard of proof to the assessment of the defendant's affirmative defences while applying a lesser standard to the plaintiff's own claim. That would turn the statute on its ear and make nonsense of the common "grounds to believe" standard of s. 137.1(4)(a) of the *CJA* to say nothing of the requirement that the claim have "substantial" merit (no similar qualifier being applied to the validity of the affirmative defences).

[75] The Statement of Defence pleads truth, fair comment and qualified privilege as affirmative defences. The plaintiff must show that there are grounds to believe that *each* of these affirmative defences is not valid.

[76] The principal defence relied upon by the moving party on this motion was that of fair comment. The leading case on this defence is *Simpson v. Mair*, 2008 SCC 40 (CanLII) which summarizes the elements of the defence as requiring that (a) the comment be on a matter of public interest; (b) the comment must be based on fact; (c) the comment must be recognizable as comment; (d) the comment must satisfy the objective test – that a person could honestly express the opinion based on the proved facts; and (e) the defence may be rebutted by proof of subjective malice: *Simpson* at para. 28.

[77] The public interest criterion has already been discussed. In *Simpson*, Binnie J. suggested that the onus of demonstrating public interest is “relatively easy to discharge” (at para. 30).

[78] The question of whether the defendant can establish that the comment is based on fact is complicated by the vague and general nature of the defamation alleged in the first place. The comments made reference to Mr. Fonseca’s association with the “practice and image” of Able without saying what they are. However, there is a very large body of evidence before me to suggest that there are facts that were well-known to the audience to whom the blog was directed (other freelance translators and interpreters) that would suggest that the “practice and image” of Able was not positive in the eyes of many in that group due to the large number of cases where payment was slow or made only after complaints. The plaintiff’s response that most complaints are ultimately resolved does not directly contradict this body of evidence. There is no credible reason to suggest that Mr. Vitu did not honestly and reasonably believe that the body of negative reviews and comments from the community of interpreters and translators was largely true. There are grounds to believe that the comments made by Mr. Vitu could be reasonably expressed having regard to the facts.

[79] The plaintiff suggests that it can prove malice. I have seen no evidence that would lead me to expect that the plaintiff can reasonably expect to be able to demonstrate that Mr. Vitu was motivated by malice in making the comments he made. The target of his comment was clearly

Mr. Fonseca and not Able. The mere fact that Able and Mr. Vitu's company Express International are competitors does not lead to an inference of malice in this case. The plaintiff has offered no evidence apart from this single fact to demonstrate the existence of malice.

[80] The plaintiff has failed to satisfy me there are grounds to believe that the defence of fair comment is not valid. The defence pleaded is a serious one that raises issues on which the credible and cogent evidence before me suggests that the defendant has a reasonable chance of success. I am not required to be satisfied that the affirmative defence *will* succeed on the balance of probabilities any more than I am required to be satisfied that the plaintiff's claim will succeed on the balance of probabilities.

[81] In light of my conclusions on the fair comment defence, I do not find it necessary to examine the other defences pleaded, particularly since these received only slight attention from the parties in their written and oral argument.

(v) Is the harm suffered or likely to be suffered by the plaintiff sufficiently serious that the public interest in allowing the proceeding to continue outweighs the public interest in the communication?

[82] The burden of satisfying s. 137.1(4)(b) of the *CJA* rests squarely with the responding party plaintiff. In the first stage of the analysis, I am required to consider the harm suffered by the plaintiff or likely to be suffered that can reasonably be attributed to the expression in question. In the second stage, I must consider the severity of that harm when weighing the public interest in affording redress for the harm against the public interest in protecting the communication that caused it.

[83] While s. 137.1(4)(b) of the *CJA* does not carry forward the "grounds to believe" language of s. 137.1(4)(a), the summary nature of the proceeding is such that it cannot be presumed that the legislator intended that the plaintiff should be held responsible to prove damages to the full civil standard of proof. However, a "low threshold" is clearly not the appropriate test either. In my view, the evidence of damages suffered or likely to be suffered in consequence of the impugned statements must be such that there is credible and compelling evidence of harm that appears reasonably likely to be proved at trial. In assessing that evidence, I must have regard

both to the fact that this is the plaintiff's burden of proof but also duly appreciate the practical limitations on the plaintiff in a constrained, fast-track summary proceeding.

[84] When weighing the public interest in affording private redress of that harm against the public interest in protecting the expression giving rise to it, I consider that my task is to conduct that weighing exercise in light of the stated objectives of the legislation as set forth in s. 137.1(1) of the *CJA*. In my view, that does not call for a subjective micro-analysis of the public interest in the actual content of the expression. The public interest is not a numbers game. Some members of the public may attribute more importance to an issue than others. I must be primarily focused on the subject matter of the communication and the degree to which the expression cleaves to that public interest (or strays from it as the case may be). I view the intention of the *PPPA* as being to create a safer space, not necessarily a bullet-proof enclosure, for debate and expression of views. Hateful or malicious attempts to inflict harm under the guise of free debate of matters of public interest were never intended to be sheltered.

[85] I therefore turn to consider the question of the harm suffered or likely to be suffered by the plaintiff as a result of the communication. In the present case, the evidence of damages is vanishingly slight and frankly entirely implausible.

[86] Common sense suggests that little to no harm can reasonably be expected to be attributable to the statements of Mr. Vitu. There is no evidence that more than a handful of people saw them. They were taken down from the N49.com web site swiftly. The references to Able and its reputation are oblique and would have been largely meaningless to anyone not already familiar with the profusion of negative views of Able expressed on-line by other members of the freelance translator and interpreter community (both attributed and anonymous).

[87] The potential negative impact comments of Mr. Vitu on Able's reputation frankly pales in comparison to the very public comments of others that would appear to be far more damaging and thus far more likely sources of any actual reputational harm (both by their tenor and their sheer number). A sampling of a few of such comments immediately preceding Mr. Vitu's comments of August 31, 2015 would include:

- a. “Birdslover” on August 27, 2015 wrote: “I strongly believe that legal actions should be done to support the unpaid interpreters like myself. More important is that Anablea Teashee should be in jail”...and “I also request WCB, CHILDREN HOSPITAL, DOCTORS, LAWYERS and/or any company organization please STOP using Able”;
- b. “non-member90664” wrote on August 14, 2015: “They are probably so used to complaints at this point that they really couldn’t care less. Very sad that company like this stays in business”;
- c. “non-member89742” wrote on July 8, 2015: “Unreliable company. They never pay the interpreters”;
- d. “non-member89716” wrote on July 6, 2015 under the bold headline “CHEATERS” that “the booking coordinator will lie to you”, “you get trapped and agree to work despite not being paid” and “it will serve them better if Able is sued for criminal criminal offence for holding money of the interpreters”

[88] It appears to me implausible in the extreme that material damages could be attributed to the briefly-available and oblique comments of Mr. Vitu to the exclusion of the far more numerous comments similar to those quoted above in the midst of which Mr. Vitu’s comments would have had but slight visibility before being removed entirely. I have highlighted only a few of those that preceded Mr. Vitu’s comments. The catalogue of comments from October 2015 and later are to the same effect or more extreme.

[89] The plaintiff has produced no credible *evidence* (not including mere suspicion) that any of these comments were inspired by or organized by Mr. Vitu. The comments of others (including those coming later than August 31, 2015) would logically appear to be a far more likely vector for any actual reputational damage that Able may have suffered in the latter part of 2015 than the deleted comments of Mr. Vitu on August 31, 2015.

[90] If the plaintiff is to demonstrate actual accrued or likely future damages attributable to Mr. Vitu's comments, compelling, credible and cogent evidence would be required to establish both the existence of actual damages (or the basis of estimating future damages) *and* the basis for attributing those damages to Mr. Vitu's comment.

[91] Bare statements of the names of allegedly lost clients have been provided in the plaintiff's affidavit without evidence of the volume of business done with those clients in prior periods nor any explanation as to why, assuming any actual loss of business, the loss of such clients can be attributable to the statements made by the defendant as opposed to some other cause. The causal link to Mr. Vitu's comments is not at all self-evident and a bare statement of opinion from the plaintiff that it is so without any reasoned factual foundation to justify the opinion can be given no weight. The same criticism applies to the bare allegation of a 30% loss of revenue without any documentary back-up and without any basis of attribution to the alleged loss to comments of Mr. Vitu.

[92] I find that the plaintiff has utterly failed to discharge its burden of establishing that it is likely to be able to prove any damages at all still less that such damages can reasonably be said to arise from Mr. Vitu's comments.

[93] I consider the following facts relevant to attributing only a slight public interest in the continuation of the proceeding:

- a. The plaintiff has failed to establish that it is likely that it has suffered or will suffer any damages as a result of Mr. Vitu's expression;
- b. The plaintiff has made an entirely untenable claim as against the corporate defendant who also happens to be a competitor;
- c. The plaintiff has pursued a competitor about comments referring to it only indirectly and that were almost immediately suppressed while providing no evidence that it has taken any similar action against the torrent of far more

inflammatory comments made by others, the bulk of which were on the same web site.

[94] This last factor – that the plaintiff has provided no evidence of having reacted with similar vigour to the far more inflammatory statements of others – leads me to draw the influence that the plaintiff’s motives in this litigation are influenced if not driven by a consideration of who made the comments rather than their effect or their content. In short, the plaintiff’s claim appears to me to be an instance of having seized an opportunistic pretext to inflict harm on a smaller competitor rather than a *bona fide* gesture to preserve reputation.

[95] I find that the public interest in permitting this proceeding to continue is slight.

[96] I turn now to consider the public interest in protecting the expression.

[97] There is a very high level of public importance that attaches to protecting the ability of members of the public to demonstrate or to call public attention to aspects of the candidacy of an individual running for public office. The community of freelance translators and interpreters that is highly dissatisfied with Able may be a small one. Knowing that Mr. Fonseca was intimately associated with Able at a high level however would potentially be of significant interest to them. Other members of the community may sympathize with their situation and be interested to consider the degree to which Mr. Fonseca’s association with Able is relevant to them.

[98] The degree of public interest in protecting a particular communication turns not on a tally of how influential the communication might be or how many may find it important. The degree of public interest in protecting an expression can fairly be measured to some degree at least by a consideration of the quality of the expression. By the term “quality” I refer to where a particular expression can be placed on a spectrum that stretches from considered, reasoned debate to unreasoned hatred even where the subject matter is one of public interest. Factors such as hatred, proven malice or gratuitous insults of a serious nature would tilt the balance away from public interest even if the apparent subject matter itself – the fitness of candidate “X” for office – is itself clearly in relation to a matter of public interest.

[99] In considering the degree of the public interest in protecting this expression, I view the following as relevant factors:

- a. Mr. Vitu's communication did not republish the inflammatory comments of others even if it presumed a level of familiarity with them;
- b. Mr. Vitu's communication was directed primarily at disclosing Mr. Fonseca's association with Able in terms that would have been largely opaque to anyone not familiar with the public controversy surrounding Able among members of the freelance interpreter and translator community;
- c. The suit and threat of suit by the plaintiff clearly asserted a degree of libel chill upon Mr. Vitu and resulted in the suppression of his expression; and
- d. Mr. Vitu's status as an (indirect) competitor of Able – even if smaller in stature – is also clearly relevant.

[100] If not completely to the “virtuous” side of the quality of speech spectrum, the above considerations would not place this particular expression very far to the bad side either. Mr. Vitu's status as an indirect competitor unquestionably casts a shadow over his motives, but it does not by itself tilt the balance against protecting this speech.

[101] Mr. Vitu did not “light the fire” of controversy surrounding Able's reputation in that small community of freelance workers. Mr. Vitu's oblique reference to the controversy added no fuel to the controversy that already burned but primarily served to highlight Mr. Fonseca's association with Able. Able may well claim that it was unjustly vilified. If so, it was the product of the combined efforts of others to which Mr. Vitu made no material contribution.

[102] The public interest in protecting this expression is a reasonably strong one. Mr. Vitu's communication was moderate in tone, particularly in comparison to those assembled in evidence. While few voters may have found it useful to know of Mr. Fonseca's association with Able, there clearly was a community of freelance workers who may have found it useful information. Mr. Vitu's efforts were effectively muzzled by the plaintiff's efforts. It is not for me to say how

many votes may have been influenced by the press conference that was never held or by the contribution to the comments on the N49.com web site that Mr. Vitu was dissuaded from posting by reason of the litigation threats made to him. It is clear that the plaintiff's efforts exerted a material libel chill in this case.

[103] I therefore find that the plaintiff has failed to discharge its burden under s. 137.1(4)(b) of the *CJA*. The public interest in protecting the expression outweighs the interest in permitting this proceeding to continue.

Disposition

[104] In the result, I have concluded that the defendants have satisfied their onus under s. 137.1(3) of the *CJA* while the plaintiff has failed to satisfy its onus under s. 137.1(4) of the *CJA*. Accordingly, this action must be dismissed.

[105] Pursuant to section 137.1(7) of the *CJA*, the defendants are entitled to substantial indemnity costs both for the (successful) motion and for the proceeding itself unless I order otherwise.

[106] The plaintiff suggests that such costs ought not to be awarded in this case because its action was commenced before the date the PPPA received Royal Assent (although the PPPA by its terms applied to all actions commenced after the date it received first reading in December 2014) and because the motion raised novel questions of law affecting matters of public interest. Finally, the plaintiff submits that it has been defamed and costs ought not be awarded to a defendant whose conduct, in effect, brought on the litigation.

[107] I can attach no weight to the last argument advanced by the plaintiff. I have found no credible evidence that the plaintiff has suffered or will suffer any material damage attributable to the comments of Mr. Vitu. The blaze of controversy was well lit and Mr. Vitu contributed little to nothing to it. The defendants can in no way be said to have "brought on" this action.

[108] While I have some sympathy for the plaintiff's position as being the first – or at least among the first – to be subjected to the new regime mandated by the *PPPA*, that consideration

must be mitigated by a consideration of the fact that the effective date of the new legislation was known and the legislation itself received broad public input (including from the bar). I must also consider that the plaintiff's aggressive actions in this case have generated the very sort of libel chill that the *PPPA* was designed to combat. The fact that the plaintiff appears to have singled out a small competitor's comments for litigation while taking no steps (at least none disclosed in evidence) to deal with the far more numerous and extreme expressions of opinion by others has led me to draw an adverse inference regarding the purity of the plaintiff's motives in this case. That adverse inference is strengthened by a consideration of the patently flimsy grounds invoked for having added its direct competitor Express International as a party defendant despite the plaintiff's entire lack of evidence that Express International played any role in the affair at all.

[109] I therefore decline to exercise my discretion to excuse this plaintiff from the operation of s. 131.1(7) of the *CJA*. The moving party defendants are entitled to their costs of the action and motion assessed on a full indemnity basis.

[110] The parties exchanged Outlines of Costs at the conclusion of the hearing and I received their written submissions.

[111] The plaintiff's Outline detailed fees and disbursements for the motion of \$5,450 on a partial indemnity basis. On a full indemnity basis, Mr. Radnoff's Outline provides incomplete data from which an estimate of \$8,450 would be reasonable. He did not provide an Outline applicable to the entire proceeding.

[112] The moving party defendants provided an Outline totaling \$35,086.98 for the entire proceeding. Mr. McGhee's claimed rate of \$450/hr on a full indemnity basis is only slightly higher than the \$425/hr claimed by Mr. Radnoff. Both rates are well within the range of reasonable having regard to the Costs Subcommittee of the Civil Rules Committee from 2005.

[113] The plaintiff suggests that the moving party defendants' claimed hours were excessive and points to the significantly higher number of hours expended by Mr. McGhee as compared to those expended by Mr. Radnoff for the relevant steps in the proceeding where their respective Outlines permit comparison. While I am not inclined to dive into an hour-by-hour comparison

of the efforts expended by each given the entitlement of the defendants to full indemnity costs, I am persuaded by Mr. Radnoff's written submissions that Mr. McGhee's claimed hours appear somewhat unreasonable in all of the circumstances and warrant some modest but downward adjustment.

[114] I am therefore ordering that the plaintiff shall pay the full indemnity costs of the defendant for the proceeding and motion that I fix at \$30,000 all inclusive.

S. F. Dunphy J.

Date: November 8, 2016

TAB 3

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Adroit Resources Inc. v. HMTQ (British Columbia)*,
2010 BCCA 334

Date: 20100629
Docket: CA037314

Between:

Adroit Resources Inc.
(formerly known as Rock Resources Inc.)

Respondent/Plaintiff
Appellant by Cross-Appeal

And

**Her Majesty the Queen in Right of the
Province of British Columbia**

Appellant/Defendant
Respondent by Cross-Appeal

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Levine
The Honourable Mr. Justice Groberman

On appeal from the Supreme Court of British Columbia, June 24, 2009 (*Adroit Resources Inc. v. HMTQ*, 2009 BCSC 841, Vancouver Registry, Docket A980073)

Counsel for the Appellant: A.V.W. Hincks

Counsel for the Respondent: R.D. Holmes
L.J. Muir

Place and Date of Hearing: Vancouver, British Columbia
May 5, 2010

Place and Date of Judgment: Vancouver, British Columbia
June 29, 2010

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Chief Justice Finch:

I. Introduction

[1] The defendant Province appeals, and the plaintiff, a mining exploration company, cross-appeals, from the judgment of the Supreme Court of British Columbia awarding the plaintiff compensation for the expropriation of parts of two mining claims, the injurious affection of the remainder of those two claims and two other adjacent mining claims (together the “Amber Claims #1 - 4”), and disturbance damages consequent on the taking. There was conflicting evidence as to the valuation of the rights lost by the taking, and of any consequent losses. The learned trial judge awarded compensation for the value of the claims in the sum of \$300,000. He awarded compensation for disturbance damages in the sum of \$303,633, including \$3,633 for exploration costs thrown away, and \$300,000 for “loss of reputation and goodwill attributable to the expropriation”. The latter sum was based on the loss in share value following the expropriation.

[2] In its appeal, the Province does not take issue with the overall valuation of the four claims affected. It also concedes that the plaintiff is entitled to compensation for any reduction in value of the remaining portion of the Amber Claims that were injuriously affected. However, the Province says the judge erred in assessing the value of the part taken, and in assessing compensation incorrectly. With respect to the award for disturbance damages, the Province says that the judge erred in using loss of share value as a guide, and that the award under this head is effectively double compensation for the value of the property taken or injuriously affected.

[3] In its cross-appeal, the plaintiff contends that the judge erred in assessing the value of the claims taken or affected. It says the loss under this head, depending upon the method of valuation chosen was either \$4.6 million or \$1.46 million. As to the claim for disturbance damages, the plaintiff maintains the total sum recoverable is \$3,167,958.

[4] Both parties ask this Court to set aside the awards made by the trial judge, and to substitute awards properly founded. Alternatively, both parties seek an order remitting the case to the trial court.

[5] For the reasons that follow, I would allow the appeal in part, and would dismiss the cross-appeal.

II. Background

[6] Adroit Resources Inc. was formerly known as Rock Resources Inc. The name change occurred on 10 February 2004. Rock Resources acquired the four Amber Claims in December 1994, and a bill of sale was filed with the Mining Recorder Office in September 1995 when the conditions of sale were completed.

[7] On 13 July 1995 the Province enacted the *Park Amendment Act, 1995*, S.B.C. 1995, c. 54 creating amongst others, the Goat Range Park. The park's boundary in the area of concern follows the height of land, and encompasses roughly, the south-easterly half of the Amber #2 claim, and the easterly half of the Amber #1 claim. The remainder of those two claims, and all of the Amber #3 and #4 claims lie outside of the park boundary.

[8] These four claims are located in the Slocan Range of the Selkirk Mountains, in the upper part of the Cascade Creek Valley. The Cascade Creek flows roughly from southeast to northwest to the west of Amber Claims #3 and #4. There has been no access by road to this area for a long time, but there was evidence as to the feasibility of constructing a road on either the north or the south side of Cascade Creek.

[9] There was also evidence as to a possible access route to the claims from the northeast, through claims known as the "Sunshine Claims". Creation of the park and the location of its boundary, are said to have precluded access from the northeast.

[10] Access to the claims was an important issue in evaluating the owner's loss due to the taking, and remains an issue on this appeal.

[11] Initially, the Province disputed the owner's right to any compensation. Rock Resources sued the Province claiming entitlement to compensation. That claim was rejected at first instance. However, on appeal to this Court (2003 BCCA 324), the plaintiff succeeded in obtaining a declaration that it was entitled to compensation for the value of the rights lost by the taking. The Court ordered the amount of compensation to be fixed by the Expropriation Compensation Board. A subsequent legislative amendment required the compensation to be assessed by the Supreme Court of British Columbia.

III. The Evidence

[12] In his reasons for judgment the learned trial judge provided a detailed summary of the evidence adduced by both parties. The plaintiff relied on evidence of Mr. John Ostler, a consulting geologist to the plaintiff, and Dr. Ian Weir-Jones, who was qualified to give evidence as to the value of the claims.

[13] The defendant relied upon the evidence of Ellen F. Hodos who was also qualified to give her opinion on the value of the claims. The plaintiff objected to the admissibility of Ms. Hodos' evidence. The admissibility of, or weight to be given to her report and evidence are raised as issues on this appeal. The defendant also relies on the evidence of Dr. Michael Samis, a mining engineer.

[14] Mr. Ostler gave evidence estimating the extent or volume of mineralization within the claims, the potential gross value of the ore per ton, and costs of exploration and drilling. He prepared a report which the judge summarized as follows:

[125] On October 26, 1995, Mr. Ostler produced a report titled "Report of the Cost of Recent Work and the Value of Assets and Mineral Reserves on the Amber Property." In that report, he reproduced his estimates of the gross value of the mineral reserve in White Eagle and West Ridge from his April 1995 report and estimated the total cost of exploration and development in 1995 dollars from 1987 to 1995 as \$661,605. As well, he estimated the "in place value" of plant and equipment related to the White Eagle workings at \$154,756. The total value estimate of the properties was \$7,787,091. Mr. Ostler also noted the value of the recommended drilling program was \$650,000.

[15] In December 1995 Mr. Ostler produced a supplementary report:

[130] Mr. Ostler testified that he was then retained by the plaintiff to produce a report that divided the cost of recent work and the value of assets in mineral resources between the areas of the Amber claims. He did so in a report dated December 21, 1995, which supplemented his October 26, 1995 report by dividing the assets, resources and costs identified in the earlier report between the part of the Amber property retained by the plaintiff and that part lost to the protected area. In that report, however, he treated all of Amber 1 and 2 as falling within the protected area. He attributed total costs, resources and assets of \$7,787,091 to the whole property, and \$312,329 to the unexpropriated portion (Amber 3 and 4), leaving a total value of \$7,474,762 which he attributed to Amber 1 and 2.

[16] Dr. Weir-Jones gave opinion evidence as to the valuation of the expropriated properties. He referred to the Canadian Institute of Mining Valuation Standards (CIMVAL) which was issued in final form in 2003. He testified that Mr. Ostler's tonnage estimates were conservative. The learned trial judge summarized Dr. Weir-Jones' evidence:

[152] Dr. Weir-Jones' first method was to value the properties on the assumption that "a mining operation would yield a net profit of 10% of the metal value." His second method was to estimate the mining, processing and operating costs in order to arrive at a gross profit figure.

[153] He described the first valuation method as "preliminary and very conservative ... based on the assumption that a mining operator will yield a 10% annual dividend after all costs are deducted." He noted that "this figure is typically used as a preliminary means of valuing a property when no drill data is available to estimate the extent, continuity, grade and approximate mining/processing costs." He went on to explain that it will yield reasonably accurate values for large disseminated ore bodies but it tends to underestimate the value of small high grade deposits like those found at the Amber claims. Using that methodology, but using Mr. Ostler's grade and content numbers, Dr. Weir-Jones came to a figure of \$783,094 as the metal value at 10% of the market commodity price.

...

[155] In his evidence, he testified he did not attempt to calculate mineralization or inferred grade at other locations but "concentrated on" the White Eagle and West Ridge areas. Based on his estimates, he calculated the net value of the supplemental material in the Amber claims at \$391,000, and thus on his first method he arrived at a value of \$1,174,000 for the entire property "using a blended net value of the metal probably contained in the Amber claims equal to 7.5% of the prevailing commodity prices in [Quarter Two] 1995."

[156] With respect to his second evaluation method, Dr. Weir-Jones reiterated that he considered Mr. Ostler's estimate of 13,600 tons of high-

grade at White Eagle and West Ridge as “highly improbable” because of the likelihood that the mineralization intercepted by the West Ridge tunnel carried on and that other veins and enrichment zones will be present in the vicinity of the locations worked by Gallo.

[157] Based on “generations of experience” and “historical precedence at mines around the world,” he imputed 24,000 tons of ore at White Eagle and 3,200 at West Ridge. He accepted Mr. Ostler’s reported asset values (Ostler and Spearing 1987/88) and he concluded that the total value of the ore would be \$14.9 million, or \$550 per tonne. He went on to assume a small scale low environmental impact mining operation yielding 50 tons a day on two shifts, rendering a gross daily revenue of \$27,500. As to costs, he estimated mining related costs of \$2,000 a day for 40 man hours a day; \$1,000 a day for supervision, blasting and surveying, and \$500 per day camp costs; for mineral processing, he included \$2,500 a day for production of concentrate using a small crusher and high efficiency separator; \$500 per day was attributed to fuel and transportation costs; he included a contingency of \$3,500 a day for capital expenditures, including “engineering, geology, etc.,” and smelter charges and losses based on 30% of the contained metal value of \$9,000 per day, for a total of \$19,000 per day total daily operating costs. He calculated a daily gross profit of \$8,500 per day for 540 days, a 3-year production cycle based on a 6 month production season. He therefore identified the total gross profit as \$4.6 million over the mining season.

...

[159] In his report, Dr. Weir-Jones expressed his opinion that the value of the Amber claims were made up of three components: the value of the exploratory work carried out between 1987 and 1995 said to be \$600,000; the value of the underground workings at the White Eagle property, which could be rehabilitated to provide underground access, at \$150,000; and, the profits which would accrue to the owners if the metal was extracted and sold as high-grade concentrate between a minimum of \$1.174 million and \$4.6 million before taxes and depreciation.

[160] In the result, Dr. Weir-Jones expressed his opinion that “the fair and reasonable compensation for the expropriation of the Amber claims would lie in the range between a minimum of \$1,984,000 and a maximum of \$5,410,000.” He expressed the view that the residual portions of the property after expropriation had little or no value because the expropriated ground “provides the only means of access.”

...

[164] In cross-examination, he acknowledged that Mr. Ostler had doubled the tonnage in blocks A, B and C at the White Eagle workings based on the existence of a second vein which he inferred from the 1928 Minister of Mines report, and that the second vein was intersected by a raise driven up from the first vein. He agreed that there were no assay results from that second vein. He also agreed that he, in turn, doubled the tonnage estimated by Mr. Ostler. He denied that it was a subjective judgment, attributing it instead to “statistical probability,” but he did not cite any text or show any analysis in his report or working papers in arriving at that conclusion. He agreed with the suggestion that he “did it in his head.”

[17] Dr. Weir-Jones was cross-examined fully on his opinion and its foundations.

[18] The defendant's expert, Ellen F. Hodos, is a professional engineer registered in Nevada, and a professional geologist registered in Alaska, California and Oregon. With respect to her evidence, the trial judge said:

[194] She regarded the highest and best use of the Amber claims to be exploration activity. She considered the three traditional approaches to valuation under CIMVAL and the Canadian Uniform Standards of Professional Appraisal Practice. Those traditional approaches were the income, cost and market approaches. Ms. Hodos concluded that there was no basis to employ the income approach "as no mineral resources or reserves had been delineated on the subject claims." She utilized the cost approach, following both the "appraised value" method and the "multiple of exploration expenditure" method. She also utilized the market approach, following an investigation of "mineral property transactions in southwestern British Columbia from 1992 to mid-1995, including "the prior sale of the subject property."

[195] Using those approaches and methods, Ms. Hodos came to the conclusion that the expropriation of a portion of the Amber claim group damaged the value of the claim group as a whole. Under the *Expropriation Act* definition, she valued the fair market value of Amber 1 – 4 before expropriation at \$60,000. Utilizing the CIMVAL definition, she valued the fair market value at \$70,000. After the expropriation, she valued the fair market value of the four claims under both definitions at \$30,000 - \$40,000 and the fair market value of Ambers 1 and 2 only at \$10,000 or less.

[19] Ms. Hodos referred to a paper written by William S. Roscoe that provided guidelines for valuations based on retained portions of past expenditures.

[20] The judge continued his summary of her evidence as follows:

[197] It was Ms. Hodos' view that the Amber property fell into the category of "inactive property with no resources and negligible or very little exploration potential," thus attracting a retained value of zero to 10% of past exploration expenditures. She reasoned that "the claims contain no resources under CIM guidelines and a few ...low- priority drilling targets to extend the vein – that is, an attempt to try to demonstrate resources of vein material down-dip as projected by Ambergate might be undertaken by someone willing to invest in a high-risk venture." She selected the high end of 10% for that category and calculated the documented past exploration expenditures from 1987 to 1994 as \$192,264. She thus attributed the value of the past exploration as \$19,264 less 2% for the vendor's retained royalty, leaving a final value of \$18,879 rounded up to \$19,000.

[198] Ms. Hodos then went on to consider the prospective expenditures. She did not accept the validity of Mr. Ostler's 1995 proposed drilling program

at a cost of \$650,000 as it “was not warranted by the previously indicated drill targets on the property.” She did, however, accept that the drilling and trenching program he proposed in 1993 for 1994 at a budget of \$360,200 could be added to that \$192,640 for a total of \$552,840. She then used the 10% factor to reduce that value to \$55,284, less the 2% royalty, resulting in \$54,178 rounded up to \$54,200.

...

[200] In her testimony, Ms. Hodos acknowledged that she committed an error by conflating the “meaningful past exploration expenditures” with “warranted future costs” when she applied the “guidelines for retained expenditures for marginal and inactive properties” to both categories of expenditures, when the guidelines were meant to apply to establish “what proportion of past expenditures to retain as value”. (emphasis added).

[201] In other words, Ms. Hodos agreed that she should not have used only 10% of the warranted future costs as a measure of the property value, but should have added all of those prospective costs to the appropriate proportion of the past expenditures. Using that approach and accepting Ms. Hodos’ judgments about warranted future costs on past explorations, the appraised value method would produce a valuation of the claims in the neighbourhood of \$380,000.

...

[215] In her report, Ms. Hodos viewed the Amber Claims’ prior sale for \$60,000 as the most reliable fair market value indicator. She found support for that conclusion in the result of the appraised value method at \$54,000. In her testimony, after accounting for the errors she made in calculating the appraised value method result, she increased the fair market value under the *Expropriation Act* definition from \$60,000 to \$65,000, and under the CIMVAL definition from \$70,000 to \$90,000. She used the five comparators as a measure of the accuracy of her estimates, which produced a range of values between \$1,000 and \$375,000 but found the Cottonbelt transaction to be the most reliable, giving a value range of between \$1,000 to less than \$96,320, which bracketed both her valuations of \$65,000 and \$90,000 under the *Expropriation Act* and CIMVAL definitions respectively.

...

[217] Ms. Hodos did offer a valuation of the 4 claims after encumbrance by the park, concluding that they would have a value of \$30,000 - \$40,000 to reflect the loss of the exploration conducted on the eastern-most portions of Amber 1 and 2. She also concluded that Amber 1 and 2, as encumbered by the park, would have a value of \$10,000 or less given the limitations posed by the loss of Amber 3 and 4 and the creation of the park.

[Emphasis in original.]

[21] Ms. Hodos was also cross-examined extensively.

[22] Dr. Michael Samis gave a critique of Dr. Weir-Jones’ report, methodology and results.

IV. The Reasons for Judgment

A. Value to Owner

[23] The trial judge approached the issue of compensation for the taking on the basis that the test was the value to the owner of the property taken. I do not understand either party to challenge the correctness of this approach.

[24] The judge held that the highest and best use of the claims was as an exploration property. He was not persuaded that a valuation based on the income approach was justified.

[25] The judge held that Mr. Ostler's estimates of tonnages and grades (of ore) were speculative and he was not prepared to rely on those estimates as a proper basis for valuation. The judge also found Dr. Weir-Jones' evidence to be unreliable, and his conclusion of a value in excess of \$5 million to be "unreasonable".

[26] The judge also found the evidence of Ms. Hodos to be of "limited utility".

[27] In the end, the judge gave some weight to the "Retained Portion of Past Expenditures" approach and used the guidelines in Dr. Roscoe's report. He said:

[256] I also conclude that Ms. Hodos' application of the appraised value approach, particularly as she characterized the Amber properties pursuant to Dr. Roscoe's guidelines for the purposes of determining the retained portion of past expenditures, was unduly conservative. In my view, given the past mining activity on the property, the demonstrated presence of mineralization, and the work done on the property between 1987 and 1995 demonstrating some potential for further exploration, the Amber property is more accurately characterized in Dr. Roscoe's guidelines as falling in a category requiring a retention of between 50% - 75%. I would place it at a level justifying a retention of 60% of the past expenditures.

[257] As to what those past expenditures consist of, I note that in his paper, Dr. Roscoe observed that "[u]sually little of the expenditures more than 5 years or so prior to the effective valuation date are retained" and only those "which are considered reasonable and productive are retained as value." Those provisos could exclude much of Ambergate/Kenrich's costs and costs associated with Lakeview and arguably West Ridge, as well as the value of the historical workings.

[258] In my view, the figure identified by Ms. Hodos of \$192,640 for past expenditures seems not unreasonable, although it extends back 8 years and presumably incorporated some work not productive in the sense of

warranting further exploration. I would therefore attribute the sum of \$190,000 as a round figure to represent past expenditures meeting Dr. Roscoe's criteria for retention, and thus the retained portion of the past expenditures would be 60% of \$190,000 or \$114,000.

[28] He concluded his reasons on valuation of the claims thus:

[259] Insofar as the prospective expenditures are concerned, I find that the budget of \$360,200 for the drilling and trenching program proposed by Mr. Ostler in 1993 for 1994 most closely approximates warranted future costs justified by the evidence of the nature and extent of potential mineralization of the property. I do not consider the \$650,000 proposed by Mr. Ostler in his 1995 report to be an acceptable estimate in all the circumstances, particularly given the ambiguity regarding the potential of the West Ridge workings, one of the proposed sites for the drilling program. As well, as Ms. Hodos noted in her report, the more extensive drilling program which Mr. Ostler recommended in his 1995 report is not given any "detailed support." I thus conclude, on the appraised value approach, which I find significantly more reliable than the income approach used by Dr. Weir-Jones (for which I find no support beyond optimistic speculation), that an appropriate valuation of the Amber claims at the time of expropriation would be \$474,200.

[260] I do not entirely discount the market approach and in particular the prior sale of the Amber claims in arriving at a valuation for purposes of determining compensation. I would not, however, give that approach the same weight as Ms. Hodos did in her valuation, nor would I give that approach the same weight as the appraised value approach for the reasons I have set forth above. I conclude, considering both approaches, that the appropriate value to attribute to the Amber claims on a value to owner basis is \$300,000.

[Emphasis added.]

B. Disturbance Damages

[29] The judge's analysis of the various claims presented under this head commences at para. 261 of the reasons. His conclusions are expressed as follows:

[271] I would not give effect to the plaintiff's claim of compensation for disturbance damages of the "costs thrown away pre-1994" of \$254,463, as they were to some extent used to compute the value of the property and were, in any event, not costs incurred by the plaintiff. Similarly, the claims for costs thrown away in 1994 and 1995 of \$396,609 were again in part used to calibrate the value of the property and were not a loss or cost consequent upon the expropriation. The claim for abandoned improvements relating to the historical workings are not a loss separate from the intrinsic value of the property represented by the value I have attributed to it. In any event, I conclude that any value in the historical workings will be off-set by the costs necessary to remediate them.

[272] I find that the sum of \$3,633 representing the exploration costs expended in the one and a half months before expropriation and reflected in the 1996 year-end financial statements represents costs thrown away, in the sense that they were not costs considered as part of the process of the valuation of the property. I am not satisfied that the overhead costs of \$113,837 or the cost of looking for a viable replacement property through investigation and exploration are compensable as disturbance damages. The Amber claims were not a going concern except as an exploration property. The evidence is that few exploration properties become producing mines and hence it is in the nature of exploration companies such as the plaintiff to be leaving one property in search of or in favour of another. The fact that the plaintiff did not pursue further exploration on Amber 3 and 4 and the unexpropriated portions of Amber 1 and 2 underscores the point that interests in exploration properties are transitory and subject to a broad range of fluctuating conditions.

[273] I accept that the expropriation in the present case was a dominant factor in the plaintiff's decision not to pursue the remnants of Amber 1 and 2 and Amber 3 and 4, but I also conclude that the effect of the partial expropriation on the plaintiff's decision not to pursue the remaining claims is illustrative of the ephemeral quality of exploration properties generally and the Amber claims in particular. I thus conclude that it is likely that the replacement cost would have confronted the plaintiff company even without the expropriation, and whether the plaintiff expended further exploration costs.

[274] I accept the submissions of the defendant in relation to the asserted loss of \$150,000 in financing that it was not a loss as such as it merely involved an exchange of assets, and I also accept that the subsequent financing in the same amount did proceed. It would therefore be inappropriate to treat that sum as requiring compensation.

[275] I do accept, however, that because of the expropriation, the plaintiff was deprived of the opportunity to exploit the exploration potential of the Amber property and to either build up or maintain its reputation and goodwill, or to make the transition to another property in an orderly and strategic way. While it is difficult to quantify the loss thus caused, I am satisfied that the loss in share value amounting to \$329,780 following the expropriation is a rough measure of the loss of or cost to the plaintiff company caused by the expropriation, and I would award it compensation of \$300,000 as an amount reflecting loss of reputation or goodwill attributable to the expropriation.

V. Issues

A. Issues on Appeal

[30] The defendant contends that the learned trial judge erred in awarding compensation equal to the value of all four of the Amber Mineral Claims when in fact only a portion of two of the claims was taken and the remainder had residual value.

[31] The defendant also contends that the learned trial judge erred in awarding compensation for disturbance damage equal to the temporary loss in share value of the respondent.

B. Issues on Cross-Appeal

[32] The plaintiff says the trial judge erred in admitting the report and evidence of Ms. Hodos because she was not qualified in British Columbia as a geologist or engineer.

[33] The plaintiff also says the trial judge erred in relying on Ms. Hodos' report, if it was admissible.

[34] The plaintiff contends the trial judge erred in failing to make an adequate award for disturbance and consequential damages, and in failing to award special costs.

VI. Analysis

A. The Admissibility of Ms. Hodos' Evidence

[35] It appears to me that this issue should be considered first, because if Ms. Hodos' evidence is not admissible the judge's award for the value of the claims may be ill founded.

[36] On 29 January 2009, the judge gave full reasons for admitting Ms. Hodos' report over the objection of counsel for the plaintiff.

[37] Many objections were raised as to the admissibility of Ms. Hodos' report and the same grounds are advanced on this appeal. The plaintiff contends the judge erred in admitting Ms. Hodos' report because she was not authorized to practice geosciences in British Columbia and because:

- (a) Ms. Hodos was provided portions of a privileged report prepared for Adroit. It is not possible to know how much of her opinion was based on illegitimate considerations and the entire opinion should have been rejected.

- (b) The majority of Ms. Hodos experience is with placer mines or mid to large mining projects. She was not an expert in the type of valuation process required here.
- (c) A significant amount of the work done with respect to the report was done by her husband. This runs into the concerns addressed in *Emil Anderson Const. Co. v. B.C. Rail Co.* about reports with multiple authors.
- (d) A significant portion of her report is founded on hearsay evidence, not proved at trial. To the extent that Ms. Hodos based her opinion on such evidence, there is no foundation for it and it should not have been relied upon. This includes all of the evidence regarding the alleged comparables which were the foundation for Ms. Hodos' market valuation other than some evidence in the records of the company regarding the prior sale.
- (e) Ms. Hodos was shown to have erred in significant respects in her opinion.
- (f) Ms. Hodos' unreasonable attempts to discredit the Amber Claims and Mr. Ostler, her unreasonable valuations, even in the face of her admitted error on the appraised value method, her continued insistence on her "extraordinary assumption" in the face of overwhelming evidence contra, all point to bias.

[38] I see no merit in any of these objections. The trial judge applied the correct criteria for the admissibility of Ms. Hodos' report, and as is evident from his extensive reasons on this issue, did not err in applying those criteria to her report or evidence.

[39] Moreover, the judge placed limited weight on the opinions as to value or the other opinions provided by Ms. Hodos in her report and testimony.

[40] In my opinion, the trial judge did not err in admitting the report of Ms. Hodos.

B. Did the Judge Err in Awarding Compensation for the Value of All Four Claims?

[41] The defendant contends the judge erred in awarding compensation based on the value of all four claims, when only a portion of two of the claims were encompassed within the park's boundary. The defendant says that although the plaintiff was entitled to compensation for the reduced value of the remainder of Amber #1 and #2, and of Amber #3 and #4, caused by the taking of portions of Amber #1 and #2, the plaintiff failed to prove that the remaining claims or partial

claims were injuriously affected, and that the trial judge failed to find any injurious affection.

[42] Whether the value of the claims or partial claims not taken was reduced by the taking of parts of Amber #1 and #2 turns on the question of access. There was evidence to support the conclusion that the untaken claims or partial claims were rendered valueless because access to them had been cut off by creation of the park. Mr. Ostler gave evidence to that effect. Dr. Weir-Jones gave evidence to the same effect. In the words of the trial judge:

[160] ... He expressed the view that the residual portions of the property after expropriation had little or no value because the expropriated ground “provides the only means of access.”

[43] The trial judge concluded that because of the expropriation, the plaintiff was deprived of the opportunity to exploit the exploration potential of the Amber property. I understand that to be a finding of fact that the untaken claims or partial claims were injuriously affected to the full extent of their value, because the only viable means of access from the northeast through the Sunshine Claims had been cut off by the taking of the eastern parts of Amber #1 and #2. There was evidence to support that conclusion. Construction of a road on either side of Cascade Creek was precluded by its cost. In my respectful view, the trial judge did not err in awarding compensation on the basis that all four Amber Claims had been rendered valueless to the plaintiff by the partial taking of Amber #1 and #2.

[44] I would not give effect to this ground of appeal.

C. Did the Judge Err in Awarding Compensation of \$300,000 for the Loss of All Four Claims?

[45] The Province concedes the overall evaluation of the four claims taken together. However, the plaintiff, by its cross-appeal, asserts that the trial judge erred in his valuation, and that a proper assessment for the taking and injurious affection would be \$4.6 million. The plaintiff’s submission on this issue is premised on the evidence of Mr. Ostler and Dr. Weir-Jones.

[46] The value of \$4.6 million comes from Dr. Weir-Jones' evidence based on the "Income Approach". As an alternative, the plaintiff asserts a value of \$1.46 million based on Dr. Weir-Jones' evidence concerning the "Appraised Value Method".

[47] I am not able to accept these submissions. The plaintiff is effectively asking this Court to re-weigh the evidence, and to retry the issues of fact. We are not able to do so. The trial judge rejected Mr. Ostler's evidence concerning estimates of tonnage and grade as unreliable and speculative. Those estimates were the foundation for Mr. Weir-Jones' opinion as to value based on the income approach.

[48] In addition, the judge rejected Dr. Weir-Jones' opinion as to the value based on the income approach. He said that the income approach used by Dr. Weir-Jones had no support beyond "optimistic speculation".

[49] The plaintiff's alternative claim of \$1.46 million is based on the "Appraised Value Method". This sum is derived by adding:

The value of exploratory work from 1987 to 1995 (\$660,000); the value of underground workings (\$150,000); and the cost of the "Warranted Work Program" (\$650,000) - Total - \$1.46 million.

[50] In reaching his conclusion on value, the judge placed the most weight on the appraised value approach. He stated at para. 259:

[259] Insofar as the prospective expenditures are concerned, I find that the budget of \$360,200 for the drilling and trenching program proposed by Mr. Ostler in 1993 for 1994 most closely approximates warranted future costs justified by the evidence of the nature and extent of potential mineralization of the property. I do not consider the \$650,000 proposed by Mr. Ostler in his 1995 report to be an acceptable estimate in all the circumstances, particularly given the ambiguity regarding the potential of the West Ridge workings, one of the proposed sites for the drilling program. As well, as Ms. Hodos noted in her report, the more extensive drilling program which Mr. Ostler recommended in his 1995 report is not given any "detailed support." I thus conclude, on the appraised value approach, which I find significantly more reliable than the income approach used by Dr. Weir-Jones (for which I find no support beyond optimistic speculation), that an appropriate valuation of the Amber claims at the time of expropriation would be \$474,200.

[51] The judge, however, did not entirely dismiss the market approach, saying that it was of "limited utility". He said at para. 260:

[260] I do not entirely discount the market approach and in particular the prior sale of the Amber claims in arriving at a valuation for purposes of determining compensation. I would not, however, give that approach the same weight as Ms. Hodos did in her valuation, nor would I give that approach the same weight as the appraised value approach for the reasons I have set forth above....

[52] Ultimately, he considered both approaches in reaching his final valuation. He said:

[260] ... I conclude, considering both approaches, that the appropriate value to attribute to the Amber claims on a value to owner basis is \$300,000.

[53] I see no basis for interfering with the judge's conclusions as to the weight to be given to each expert's opinions or as to his conclusions on value.

D. Disturbance Damages

[54] The judge's award for disturbance damages was \$303,633, including \$300,000 for loss of share value representing loss of reputation and goodwill, and \$3,633 for past exploration costs. The defendant says the \$300,000 award was an error and amounts to double compensation for the value of the claims taken or injuriously affected. The plaintiff says the disturbance damages were significantly undervalued, and should have been compensated with an award of \$3,167,958.

[55] I am unable to determine the exact foundation for the plaintiff's claim. At paras. 261-264 of the reasons, the judge sets out the amounts claimed by the plaintiff as disturbance damages. They are:

1. Pre-1994/95 explorations costs	\$ 660,000
2. Partial 1996 overhead costs	\$ 16,262
3. 1996 exploration costs	\$ 3,633
4. Prior historical workings	\$ 150,000
5. Remainder of 1996 overhead	\$ 113,837

6. Search for a new property	\$1,827,495
7. 1995 loss of financing	\$ 150,000
8. Loss of share value in 1995	\$ 329,780
Total:	\$3,251,007

[56] That total is \$83,049 more than the amount claimed by the plaintiff at para. 172(b) of its factum on the cross-appeal.

[57] I am not able to reconcile this breakdown with the claims set out by the plaintiff in the factum on the cross-appeal at para. 163. Those amounts appear to total \$2,990,953.

[58] Whatever the correct total may be, the trial judge allowed only the item number 3 above, \$3,633 for the 1996 exploration costs, and part of item 8, loss of share value, in the sum of \$300,000 for a total of \$303,633.

[59] The defendant concedes only the amount of \$3,633. It says the award for loss of share value amounts to double counting as to the value of the taken or injuriously affected property, and that there is no evidence to support the allegation that loss of share value reflects loss of goodwill consequent on the taking.

[60] On the cross-appeal, the plaintiff says the judge erred in excluding the other claimed items from the award for disturbance damages, and by arbitrarily reducing the loss of share value from \$329,780 to \$300,000.

[61] The learned trial judge set out the law as to the definition of disturbance damages at paras. 268-269. Neither party disputes the test he applied.

[62] The learned trial judge's analysis of these various claims is set out in paras. 271-275 of the reasons. In my view, in rejecting all of the items claimed (except the 1996 exploration costs of \$3,633 and the loss of share value of \$329,280) the judge

did not err in his application of the legal test to the nature of the losses for which compensation was sought.

[63] The defendant concedes the amount of \$3,633 as properly recoverable.

[64] The only issue remaining, therefore, is whether the judge erred in making an award for loss of reputation or goodwill, and in basing that award on the loss of share value of \$.08 per share from the first half to the second half of 1995.

[65] As a matter of law, loss of goodwill is compensable disturbance damage. However, to be compensable it must be something other than “the opportunity to exploit the exploration potential of the Amber property” because that loss of opportunity is included in the value of the property to the owner that is compensated for under the first head of damage.

[66] There does not appear to be any evidence as to the value of the commercial goodwill of the plaintiff prior to the taking. One may infer that there was some value to the goodwill of the company, but I can see no evidence on which such an inference might be based. Further, while it may be said that the company’s share value is, in part, a reflection of the company’s goodwill, it does not seem to me that the entire drop in share price could be attributed to loss of goodwill, but would more accurately reflect the investors’ view that the company was worth less after it had lost the Amber assets to expropriation. That loss has already been compensated.

[67] The learned trial judge recognized the difficulty in quantifying the value of loss of reputation or goodwill, but accepted the loss of share value as “a rough measure of the loss or cost to the plaintiff company caused by the expropriation”. I am unable to see anything in the evidence that would support this conclusion. The judge did not cite any authority for valuing goodwill on the basis of the total of lost share value.

[68] I am thus of the opinion that the award of disturbance damages, save for \$3,633, should be set aside and I so order.

E. Costs and Interest

[69] The judge awarded interest from the date of taking to the present at the banker's prime rate to the government, to be calculated as compound interest. The defendant does not dispute that part of the order.

[70] The plaintiff claims special costs, but such a claim was not advanced at trial, and there is nothing in the record that would support such an order. Costs at trial should be ordinary party and party costs.

F. Conclusion

[71] I would allow the appeal in part and dismiss the cross-appeal. The respondent Province is entitled to the costs of both the appeal and cross-appeal.

“The Honourable Chief Justice Finch”

I AGREE:

“The Honourable Madam Justice Levine”

I AGREE:

“The Honourable Mr. Justice Groberman”

TAB 4

CITATION: Bradford Travel and Cruises Ltd. v. Viveiros, 2019 ONSC 4587
NEWMARKET COURT FILE NO.: CV-17-130384-SR
DATE: 20190812

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
Bradford Travel and Cruises Ltd.)	
	)	Alex Van Kralingen, for the Plaintiff
Plaintiff)	
)	
– and –)	
)	
Cassandra Viveiros and Mary Marques	)	Weston Powell, for the Defendant
)	
Defendants)	
)	
	)	Heard: June 7, 2019

2019 ONSC 4587 (CanLII)

REASONS FOR DECISION

DE SA J.:

Overview

- [1] This is a motion brought by the Defendant, Cassandra Viveiros, for an Order dismissing the Plaintiff’s action for defamation pursuant to section 137.1(1) and (3) of the *Courts of Justice Act*, RSO 1990, c C.43 (“CJA”).
- [2] The Defendant takes the position that the public interest in protecting expression clearly outweighs any potential merit to the Plaintiff’s claim. The Defendant also argues that the Plaintiff has not suffered harm that would warrant curtailing the Defendant’s expression. The Plaintiff argues that section 137.1 of the CJA requires that action be dismissed.
- [3] Having reviewed the record before me, I am satisfied that the proceeding has sufficient merit, and that the expression’s likely or actual harm is serious enough that public interest lies with allowing the matter to proceed to trial. Accordingly, the motion is dismissed.
- [4] The reasons for my decision are outlined below.

Summary of Facts

Background

- [5] The Plaintiff, Bradford Travel and Cruises Ltd. (“Bradford Travel”), is a small travel agency, which operates an office out of the Walmart in Bradford, Ontario. The Walmart opens early in the morning; the Bradford Travel location opens at 10:30 a.m.
- [6] Bradford Travel provides travel agency services to its clients, including but not limited to luxury vacations, large family/group vacations and large tour requirements that do not easily lend themselves to booking on the internet. As such, Bradford Travel’s business is usually connected to its personal relationships with its customers.
- [7] Melissa Marques was a long-time employee of Bradford Travel, based out of the Bradford location.
- [8] In 2016, Ms. Marques announced that she would be resigning from her position at Bradford Travel in December 2016 to start her own restaurant business with her partner. In November 2016, Ms. Marques asked to extend her last day to the end of January 2017. Bradford Travel agreed, and an overlap period with new staff was organized.
- [9] In January 2017, Melissa Marques asked for her resignation date to be extended to the end of February 2017. Bradford Travel’s management again reluctantly agreed.
- [10] On February 21, 2017, Ms. Brown, the owner of Bradford Travel, received a note from Melissa Marques, stating that “I gave you my notice for the end of February but I will need to stay until 2nd or 3rd week of March.”
- [11] Bradford Travel did not ultimately agree to this additional period of notice. Accordingly, February 28, 2017 was Melissa Marques’ last day at Bradford Travel.

The Confrontation at Bradford Travel

- [12] On February 28, 2017, Melissa Marques showed up at Bradford Travel for her last day. Upon showing up to work, Melissa Marques complained about the fact that she was not given a further extension of her resignation date and claimed that she was being treated unfairly. Ms. Brown stayed firm that it would be Melissa Marques’ last day. This initial conversation was not in any way heated.
- [13] Ms. Marques stormed off into the Walmart for some time and brought back a box to collect her belongings. When she returned to the store, Ms. Marques started to audio record her interactions with Ms. Brown. Shortly after starting the recording, Ms. Marques threw something and Ms. Brown told her to leave the store.
- [14] The entire audio recording involving Ms. Brown is less than four minutes long. The interactions between the two women is less than that. The recording evidently captures

Ms. Brown's frustrations with Melissa Marques in a moment where she felt Ms. Marques was being unreasonable.

The Postings

[15] On March 1, 2017, the Defendant, Ms. Viveiros, made a series of postings and replies to other postings on the "Welcome to Bradford, Ontario" Facebook group (the "Facebook Group") which, on their face, purport to communicate alleged facts and opinions which would objectively lessen the reputation of Bradford Travel to the community it serves. In essence, the postings provide:

- 1) That Ms. Viveiros personally witnessed some form of dispute between Melissa Marques and Ms. Brown, which constituted "workplace harassment";
- 2) That Bradford Travel does not care about its customers, and in fact only sees them as "dollar signs" – Ms. Viveiros clarified on discovery that she meant a company which doesn't "treat people with dignity when you go inside";
- 3) That Melissa Marques got treated like no employee ever should be treated and was "kicked to the curb".
- 4) That given the way Bradford Travel treats its employees and customers, people in Bradford should take their travel business to a competing brokerage, Verona Travel.

The Plaintiff's Position

[16] The Plaintiff takes the position that the Facebook posts at issue involve allegations of conduct that is illegal and immoral and would lessen the reputation of any business. Bradford Travel launched this action with evidence that there have been both tangible losses, as well as loss of its reputation in the local community that its Bradford location serves.

[17] While Ms. Viveiros claims that she was present at the Walmart on February 28, 2017 and saw the interaction between Ms. Marquez and Ms. Brown, at her discovery, Ms. Viveiros had no independent recollection of the event. When pressed, she did not have the timing right given when she said she went to the Bradford Walmart location.

[18] The Plaintiff takes the position that there are a number of issues which a trier of fact would need to assess, all of which go to the quality of the defences raised:

- 1) Whether Ms. Viveiros was actually present at the Walmart in question on February 28, 2017 and if so, what she actually saw;
- 2) Whether the interaction between the principal of Bradford and Melissa Marques, constituted a breach of Bradford Travel's obligations pursuant to various employment law statutes and associated common law obligations to employees;

- 3) What were Ms. Viveiros' motives in making the allegations in the Facebook posts, given that both her evidence on discovery and the posts themselves showed that:
- i. She was laudatory of Melissa Marques;
 - ii. Ms. Viveiros may have had historical animus towards Bradford Travel;
 - iii. Ms. Viveiros refused to produce the emails between her and Melissa Marques – after the litigation commenced – which attached the recording;
 - iv. The initial posts suggests that Ms. Viveiros knew about the recording at the outset and had communicated with Melissa Marques or her mother prior to the postings;
 - v. Ms. Viveiros was expressly encouraging existing and potential customers of Bradford Travel not to frequent the business.

[19] Given the limited judicial pre-screening afforded via section 137.1 of the CJA, Bradford Travel argues that it should have the right to try its claims.

Analysis

ANTI-SLAPP PROVISIONS

General

- [20] Section 137.1(1) of the CJA was created to “encourage individuals to express themselves on matters of public interest” and to “discourage the use of litigation by means of unduly limiting expression on matters of public interest” – or “Strategic Litigation Attacking Public Participation [SLAPP Suits].
- [21] The statute defines “expression” as “any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity”.
- [22] That statute also provides that a judge shall, on motion, dismiss any libel proceeding where the judge is satisfied “arises from an expression [...] that relates to a matter of public interest”.
- [23] A moving party relying on CJA section 137.1 must establish that a “proceeding arises from an expression made by the moving party”, one which “relates to a matter of public interest”.
- [24] CJA section 137.1(4) conversely, establishes that respondents to a section 137.1 motion can defeat such a motion if they convince the motion judge that their proceeding has merit, that the moving party has no valid defence available, and that the expression's

likely or actual harm to the respondent is serious enough that public interest lies with allowing their litigation.

- [25] If a judge dismisses a proceeding based on CJA section 137.1, the moving party is entitled to costs on the motion and the proceeding on a full indemnity basis, but if a proceeding is not dismissed, the responding party is not entitled to costs on the motion unless the judge determines that such an award is appropriate in the circumstances.

1) **Does the Expression relate to a matter of Public Interest?**

- [26] The determination of whether an expression relates to a matter of public interest must be made objectively, having regard to the context in which the expression was made and the entirety of the relevant communication.

- [27] The concept of “public interest” as it is used in CJA section 137.1(3) is a broad one that does not take into account the merits or manner of the expression, nor the motive of the author: See *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 (CanLII).

- [28] The 2010 Report of the Anti-SLAPP Advisory Panel to the Attorney General (the “Panel”) observed, at para. 18 of its Report:

[T]he purpose of the statute is to expand the democratic benefits of broad participation in public affairs and to reduce the risk that such participation will be unduly hampered by fear of legal action. It would seek to accomplish these purposes by encouraging the responsible exercise of free expression by members of the public on matters of public interest and by discouraging litigation and related legal conduct that interferes unduly with such expression.

[Emphasis added]

- [29] The concept of “public interest” contemplates conversations that go beyond mere personal disputes or discussions, and considers the conversation from the perspective of the public at large. Would there be an interest from any member or segment of the community in the conversation?

- [30] In *London Artists, Ltd. v. Littler*, [1969] 2 All E.R. 193 (C.A.), albeit in the context of the fair comment defence, Lord Denning, M.R., described public interest in the following way:

Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment. [p. 198]

- [31] Comments or conversations relating to corporations or businesses will more obviously have a public dimension to them. Members of the public or at least segments of the community will have an interest in knowing something about the companies that offer them services. This is true not only from the perspective of the “quality” of the services offered, but also from the perspective of whether or not a member of the public would want to contribute funds to the business/corporation.
- [32] In this respect, a company’s business practices, the conduct of its management, and even the company’s activities in the community will often have significance to the community.
- [33] Accordingly, I am satisfied that the Plaintiff has met its onus of demonstrating that the conversations address an issue of public interest.

2) **Should the Action be Permitted to Proceed?**

- [34] If the defendant (moving party) clears CJA section 137.1(3), the inquiry moves on to section 137.1(4). That section reads:

A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceedings.

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

- [35] Under section 137.1(4)(b), the plaintiff (responding party) has the persuasive burden. In other words, the plaintiff must convince the motion judge that their proceeding has merit, and that the expression’s likely or actual harm to the Respondent is serious enough that public interest lies with allowing the matter to proceed.
- [36] The Anti-SLAPP Advisory Panel to the Attorney General recognized that other interests that could conflict with freedom of expression also deserved vindication through the legal process, stating, at paras. 36-37:

The fact that a legal action may have an adverse effect on the ability of persons to participate in discussion on matters of public interest should not be sufficient to prevent the plaintiff’s action from proceeding. *The protection and promotion of such*

expression should not be a cover for expression that wrongfully harms reputational, business or personal interests of others.

Conversely, the fact that a plaintiff's claim may have only technical validity should not be sufficient to allow the action to proceed. *If an action against expression on a matter of public interest is based on a technically valid cause of action but seeks a remedy for only insignificant harm to reputation, business or personal interests, the action's negative impact on freedom of expression may be clearly disproportionate to any valid purpose the litigation might serve.*

- [37] There is a public interest in open discourse as evident from the Anti-SLAPP provisions themselves. However, the public also has an interest in preventing defamation and libel. As explained in *Grant v. Torstar Corp.*, [2009] 3 SCR 640, 2009 SCC 61 (CanLII) at para. 58:

Canadian law recognizes that the right to free expression does not confer a licence to ruin reputations. In assessing the constitutionality of the *Criminal Code's* defamatory libel provisions, for example, the Court has affirmed that “[t]he protection of an individual’s reputation from wilful and false attack recognizes both the innate dignity of the individual and the integral link between reputation and the fruitful participation of an individual in Canadian society”: *R. v. Lucas*, 1998 CanLII 815 (SCC), [1998] 1 S.C.R. 439, at para. 48, *per* Cory J.

- [38] The purpose of CJA section 137.1(4)(a) is not to determine whether or not the claim will succeed. Rather, it is to assess whether or not there is a meaningful action in place, or whether the claimant has merely commenced the action to frustrate legitimate expressions contemplated under the threshold inquiry. As explained in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 (CanLII) at paras. 73-75:

Section 137.1 does not provide an alternate means by which the merits of a claim can be tried, and it is not a form of summary judgment intended to allow defendants to obtain a quick and favourable resolution of the merits of allegations involving expressions on matters of public interest. *Instead, the provision aims to remove from the litigation stream at an early stage those cases, which under the criteria set out in the section, should not proceed to trial for a determination on the merits.*

Judicial screening of claims at a pretrial stage occurs in both criminal and civil litigation. *The purpose of the screening process varies, as do the screening criteria. Judges engaged in pretrial screening generally do not make, however, findings of fact in relation to the issues on which the litigation turns, credibility*

determinations, or any ultimate assessment of the merits of a claim or a defence.

- [39] The Plaintiff must also satisfy the motion judge that the harm caused to it by the Defendant's expression is "sufficiently serious" that the public interest engaged in allowing the plaintiff to proceed with the claim outweighs the public interest in protecting the defendant's freedom of expression.
- [40] In this case, there is no doubt that the harm caused by the expression was serious. I accept the statements made by Afroz Brown in her affidavit that the Facebook posts have had a serious impact on the Plaintiff's business operations.
- [41] I also accept that there is *potential* merit to the proceeding. I have heard the recording. Nothing on the recording would constitute yelling. Nothing in the recording would appear to constitute unfair or cruel treatment, or workplace harassment, particularly given the *context* of their earlier conversation.
- [42] I am also satisfied that the Facebook postings go well beyond factual statements. They are largely opinions and commentary on the business practices of the Plaintiff.
- [43] The record indicates that there was a relationship between Melissa Marques and both of the Defendants. On the limited record before me, there is clearly support for the claim that the negative commentary and remarks were actuated by malice and specifically directed at damaging the company.
- [44] When considered as a whole, I am satisfied that the proceeding has sufficient merit, and that the expression's likely or actual harm is serious enough that public interest lies with allowing the matter to proceed.

Disposition

- [45] Accordingly, the motion under CJA section 137.1 is dismissed.
- [46] In the circumstances, costs of the motion are ordered in the cause.

Justice C.F. de Sa

Released: August 12, 2019

TAB 5

Attribution

Original court site URL: <http://www.caselaw.nsw.gov.au/decision/54a63b133004de94513daf20>
Content retrieved: February 05, 2017
Download/print date: May 06, 2021

Supreme Court

New South Wales

Medium Neutral Citation: Dank v Whittaker (No 1) [2013] NSWSC 1062

Hearing dates: 6 August 2013

Decision date: 07 August 2013

Before: McCallum J

Decision: In proceedings 2013/157114, pleadings as against the second defendant, Dr Larkins, struck out with leave to replead.

In proceedings 2013/184586, pleadings as against the third defendant, Professor Ho, struck out with leave to replead.

Catchwords: DEFAMATION - publication - expert opinions attributed to defendant doctors quoted in newspaper articles - where no allegation of control over or assent to final versions of articles - test for joint liability as a publisher of the whole matter complained of - whether particulars given by plaintiff capable of sustaining plea of publication

Cases Cited: Craftsman Homes Australia Pty Ltd v Nine Network Australia Pty Ltd [2002] NSWSC 555, Palace v Fairfax Media Publications [2010] NSWSC 415, Seary v Molomby (unreported, Supreme Court of New South Wales, 23 August 1999) Speight v Gosney (1891) 60 LJQB 231, Thiess v TCN Channel Nine Pty Ltd (No 5) [1994] 1 Qd R 156, Webb v Bloch [1928] HCA 50; (1928) 41 CLR 331

Texts Cited: Gatley on Libel and Slander

Category: Interlocutory applications

Parties:

2013/157114:
Stephen Dank (plaintiff)
Paul Whittaker (first defendant)
Dr Peter Larkins
(second defendant)
Dr Tricia Kavanagh (third defendant)
Darren Kane (fourth defendant)
Rebecca Wilson (fifth defendant)
James Hooper (sixth defendant)
Josh Massoud (seventh defendant)

2013/184586:
Stephen Dank (plaintiff)
Paul Whittaker (first defendant)
Yoni Bashan (second defendant)
Professor Kenneth Ho (third defendant)

Representation:

Counsel:

2013/157114:
R Rasmussen (plaintiff)
T Blackburn SC with L Brown (first, fifth, sixth & seventh
defendants)
M Richardson (second defendant)
PT George, solicitor (third defendant)
No appearance for fourth defendant

2013/184586:
R Rasmussen (plaintiff)
T Blackburn SC with L Brown (first & second defendants)
ATS Dawson (third defendant)
Solicitors:
2013/157114
Cambridge Law (plaintiff)
Ashurst Australia (first, fifth, sixth & seventh defendants)
Norton Rose Fulbright (second defendant)
Kennedys (third defendant)
Wotton & Kearney (fourth defendant)

2013/184586:
Cambridge Law (plaintiff)
Ashurst Australia (first & second defendants)
Minter Ellison (third defendant)

File Number(s):

2013/157114 2013/184586

Publication restriction:

None

Judgment

1. **HER HONOUR:** Dr Stephen Dank has instituted a number of proceedings for defamation arising out of the publication of a series of newspaper articles concerning the suspected administration of performance-enhancing substances to footballers at the Cronulla Sharks Football Club. The articles state that the substances were administered during a time when Dr Dank was retained by the Club as a "sports scientist". Dr Dank is not a medical doctor but evidently holds a PhD in biochemistry.
2. In each of the proceedings, various objections have been taken by the defendants to the form of the pleadings. Some of the objections in different proceedings raised common issues which were able conveniently to be heard together. This judgment determines applications in two of the proceedings to have the pleading as against each applicant struck out on the basis that no reasonable cause of action is disclosed. Specifically, it is alleged in each case that the particulars provided by the plaintiff are incapable of sustaining the plea that the matter complained of was published by the relevant defendant.

Proceedings 114

3. Owing to the large number of separate proceedings commenced by Dr Dank, it is convenient to refer to each proceeding by the last three numerals of the relevant file number. The first application before the Court is made by the second defendant in proceedings 114, Dr Peter Larkins. Dr Larkins is a medical doctor who is quoted in the articles. The other defendants in proceedings 114 are the editor of the newspaper and the journalists under whose by-lines the articles were published; the author of a leaked report which is the focus of the articles and a solicitor apparently associated with the investigation which resulted in the production of the leaked report.
4. Proceedings 114 arise out of a series of articles published in *The Daily Telegraph* on 26 April 2013. The articles appeared in two different sections of the newspaper (at pages 1 to 3 and pages 134 to 136) but are sued on as a single defamatory publication. No objection is taken to that course.
5. Broadly speaking, the subject of the articles is the content of the leaked report, described in the articles as "explosive". The report warned the Club of an apparent causal link between the administration of peptides to its footballers and the death of one footballer, Mr Jon Mannah. The report is quoted in the articles as stating that Mr Mannah had previously been diagnosed with Hodgkin's lymphoma, a form of cancer, while under contract as a player with the club. After a period of treatment the cancer evidently went into remission and Mr Mannah was deemed fit to return to train and play in the 2011 football season. During that time, he was injected with two particular peptides over a period of several months. Mr Mannah's cancer subsequently returned. He died earlier this year.
6. The report is quoted in the articles as having included the following statements:

45 A brief review of the available published medical literature suggests an identified causal link between the use of substances such as CJC-1295 and GHRP-6 and the acceleration of the condition of disease Hodgkins lymphoma.

46 Without knowing anything further about Mannah's exact medical history and without seeking expert opinion from an appropriately qualified oncologist it is difficult to take this issue further.

47 However the issue of Mannah has the potential to be as serious as matters could get.

48 The club should be prepared for the potential for sections of the media making the same causal connection between the program administered and the illness suffered by Mannah.

7. The articles stated that the peptides referred to in the report were administered "after sports scientist Stephen Dank was recruited to Cronulla by ex Sharks head trainer Trent Elkin at the beginning of the 2011 season." The articles stated that it was not known whether the drugs were part of Dr Dank's program.
8. As apprehended by the author of the report (in the passage set out above), the media swarmed in on the issue of a potential connection between the administration of the two peptides and the death of Mr Mannah. The articles explored the issue referred to in the report of the need to seek expert opinion from an appropriately qualified doctor and, in that context, quoted a number of statements attributed to Dr Larkins. At paragraph 71 of the matter complained of, the following words are attributed to him against the description of his being a "leading Australian sports doctor":

I would have thought if I had any player or any patient that had any history of any cancer process the last thing I would even contemplate giving them is anything that increased cell growth. That would be an incontestable thing to do. If I had a woman with breast cancer who was in remission-phase, you would never contemplate giving her any medical treatment that had the potential to reactivate or stimulate cell multiplication.

9. The last three pages of the matter complained of, which probably appeared at the back of the newspaper in the Sports section, explored that issue in greater detail. Under the heading "Supplement Link to Mannah's Relapse", the articles reported Dr Larkins' horror at the possibility that Mr Mannah was given "growth accelerants" during the remission of his disease. However, the comments attributed to Dr Larkins by no means make up the whole of the matter complained of. There is a great deal of input from other sources as well as substantial contribution by the journalists themselves.
10. The statement of claim pleads the element of publication as against all defendants in simple terms, as follows:

In "The Daily Telegraph" of 26 April 2013 the defendants published or caused to be published of and concerning the plaintiff certain defamatory material a copy of which is annexed hereto and marked 'A'.

- ii. In response to an objection by those representing Dr Larkins that he could only be liable for what he himself published (in accordance with the principles considered in *Speight v Gosney* (1891) 60 LJQB 231) and a request for particulars to support the contention that Dr Larkins published the whole article, the plaintiff said:

Your client became a co-publisher of the article complained of when he made the statements to journalists about how horrified he was over the administration of supplements to Mr Mannah which were linked to his death. Dr Larkins knew that what he said would be republished in the newspaper and his statements were the rock on which the defamatory imputations were based. Dr Larkins made his statements at a time when media allegations that our client administered substances to football players were at their peak. Mr Dank's name was incorporated in headlines in the print media and he was featured in the electronic media almost daily. This was

particularly so at the end of April 2013. It is noted that Dr Larkins made no complaint about the article until he received the statement of claim.

It is well settled that all persons who procure or participate in the publication of a libel therefore are jointly and severally liable for the whole damage suffered by the plaintiff. Your attention is drawn to what Isaacs J said in *Webb v Bloch* (1928 41 CLR 331): "All who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication are to be considered as principals in the art of publication ... Thus if one suggests illegal matter in order that another may write or print it, and that a third may publish it, all are equally amendable for the act of publication when it has been so effected". (*Webb v Bloch* (ibid) per Isaacs J at 364).

...It's not that Dr Larkins said every word of the article complained of, but that he published or materially contributed to the publication of the eight defamatory imputations.

12. The imputations relied upon by the plaintiff in respect of the articles include imputations that the plaintiff is a murderer and that he murdered Jon Mannah.

Proceedings 586

13. Following paragraph cited by:

Dank v Cronulla Sutherland District Rugby League Football Club Ltd (28 August 2014)
(Ward JA at [1]; Emmett JA at [149]; Gleeson JA at [158])

61. Contrasting the position between the pleading in its initial form and the pleading in *Dank v Whittaker (No 1)*, her Honour had commented in her August reasons (at [13]) that:

Indeed the position is *a fortiori* in the present case, where the only fact, matter or circumstance that has been identified in support of the allegation that those defendants are liable as original publishers of the news broadcast is that "the sixth defendant [Mr Irvine] is depicted on the program complained of".

The second application presently before the Court is made by Professor Kenneth Ho, the third defendant in proceedings 586. Professor Ho is sued over a single article published in *The Daily Telegraph* on 4 June 2013. The article again focuses on the potential link between Mr Mannah's death and the administration of peptides to him during his period of remission from the disease. The article further reports that information has been handed to the New South Wales Police to assess whether any criminal acts were involved in his death. The article states:

It is understood detectives are assessing the information and any 'potential criminal action' over Mannah's death from cancer in January.

14. The article further states:

Medical experts have stated that peptides such as those given to Mr Mannah just two years after he was diagnosed with Hodgkin's lymphoma and while he was in remission could potentially be harmful and accelerate the condition.

15. There is then a quote attributed to Professor Ho, as follows:

If someone unknowingly had an established cancer and is given such a peptide, what is the risk of propagating cancer growth? Based on the property of growth hormones there is a risk that cancer growth can be propagated.

16. Separately the article reports that Professor Ho, when asked whether a patient was placing themselves at "considerable risk" taking these peptides if they previously suffered from cancer, said, "Correct".

17. The imputations relied upon by the plaintiff in respect of that article extend not only to imputations that the plaintiff is a murderer and murdered Jon Mannah but also to imputations concerning his facing potential criminal action by the New South Wales Police Force.

18. As with the claim against Dr Larkins, the pleading of the element of publication against Professor Ho is spare. The statement of claim asserts, at paragraph 2:

In "The Daily Telegraph" of 4 June 2013 the defendants published or caused to be published of and concerning the plaintiff certain defamatory material a copy of which is annexed hereto and marked 'A'.

19. A request for particulars of the claim was responded to by the plaintiff in the following terms:

The third defendant conducted to the publication in the sense anticipated by *Webb v Bloch*, Professor Ho was interviewed by a journalist of the Daily Telegraph in April and provided specific information about the administration of peptides to persons who have cancer and the risk that they are put at. The interview was given at a time when the April 2013 articles about the link to Jon Mannah's death and the administration of peptides at Cronulla apparently by the plaintiff was broken by that same paper. When the Professor gave that interview he impliedly authorised The Daily Telegraph to use the information that he provided for whatever purpose they deemed appropriate, which included its use in the matter complained of in quotes. He authorised the paper to use his name, status and title as a leading Endocrinologist of a major Brisbane Hospital. He could have provided the information anonymously or not authorised any attribution to him. The information attributed to the Professor at [12], [13] and [14] is integral to the article. It reinforces the likelihood of guilt of the plaintiff over the death of Jon Mannah. It quotes a well respected Medical Expert expressing the view that cancer growth can be propagated by peptides and that this places a patient who is administered with peptides at considerable risk. Jon Mannah was apparently given peptides whilst he was in remission from cancer and subsequently died of that disease.

Joint liability as a publisher

20. It was submitted Mr Richardson, who appears for Dr Larkins, that the pleading as fleshed out by the particulars set out above is incapable of sustaining the plea of publication against Dr Larkins. Mr Richardson sought an order that the pleading be struck out as against Dr Larkins but accepted that he could not oppose a grant of leave to re-plead.

21. Mr Richardson noted that the plaintiff expressly does not put the case as one of republication. Dr Larkins is sued as an original publisher of the whole of the matter complained of, that is, not only his own comments but also the words of the journalists and other contributors to the articles (including the reproduced parts of the confidential report of Dr Kavanagh's investigation). Mr Rasmussen, who appears for the plaintiff, confirmed that the plaintiff does not wish to restrict his cause of action to the words communicated by Dr Larkins to the journalist as reported in the articles. He acknowledged that the plaintiff eschews any kind of plea of the nature considered in *S peight v Gosney* (1891) 60 LJQB 231.

22. Following paragraph cited by:

Bolton v Stoltenberg (15 October 2018) (Payne J)

178. Liability as a principal for publication depends on participation in the original publication, which can consist of writing the matter complained of or consenting to its content prior to publication: *Habib v Radio 2UE Sydney* [2009] NSWCA 231 at [121]. Where a person contributes to the matter complained of but has no control over the final publishing process, they will ordinarily not be liable unless they have assented to the final form of publication: *Dank v Whittaker (No 1)* [2013] NSWSC 1062 at [22] and [26].

Deferos v Google Inc (04 April 2017) (John Dixon J)

32. In *Dank v Whittaker (No 1)*, [23] McCallum J accepted as correct the statement that: [24].

[I]n order to establish that a person is jointly liable as an original publisher of allegedly defamatory matter, it is necessary to establish either control or assent.

via

[24] *Ibid*, [22].

Dank v Cronulla Sutherland District Rugby League Football Club Ltd (28 August 2014) (Ward JA at [1]; Emmett JA at [149]; Gleeson JA at [158])

130. In *Dank v Whittaker (No 1)*, her Honour had considered an application for pleadings to be struck out as against an individual who was sued as an original publisher of the whole of the matter there complained of. Her Honour accepted (at [22]), as a correct statement of principle, the submission that, in order to establish that a person is jointly liable as an original publisher of allegedly defamatory matter, it is necessary to establish *either control or assent*. Her Honour said:

The notion of control is comprehended within the role of a person such as the proprietor of a newspaper, an editor who determines what is published and, ordinarily, the author of the defamatory matter (although it is well recognised that a journalist, whilst responsible for the

words written by him or her, is not necessarily liable for headlines or images added during the editorial process). Absent participation in a publication at that level of control, a person who merely contributes part of what is published will not be jointly liable as an original publisher of the whole unless he or she assents to its final form,

Mr Richardson's submissions were supported by a careful review of the authorities dealing with the issue of joint liability as a publisher. He submitted that those authorities hold that, in order to establish that a person is jointly liable as an original publisher of allegedly defamatory matter, it is necessary to establish either control or assent. Having reviewed the authorities relied upon, I accept that to be a correct statement of principle. The notion of control is comprehended within the role of a person such as the proprietor of a newspaper, an editor who determines what is published and, ordinarily, the author of the defamatory matter (although it is well recognised that a journalist, whilst responsible for the words written by him or her, is not necessarily liable for headlines or images added during the editorial process). Absent participation in a publication at that level of control, a person who merely contributes part of what is published will not be jointly liable as an original publisher of the whole unless he or she assents to its final form.

23. The starting point in considering the relevant principles is the well-known statement in *Webb v Bloch* [1928] HCA 50; (1928) 41 CLR 331 relied upon by the plaintiff in the correspondence set out above (at 364, 3 per Isaacs J, emphasis in original):

In *Parke v Prescott*, Giffard QC quotes from the second edition of Starkie: "All who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as *principals in the act of publication*: thus if one suggest illegal matter in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication when it has been so effected."

24. As has previously been observed, however, that statement needs to be approached with an understanding of the context in which it was made. Mr Richardson relied on the following passage from the decision of the Full Court of the Supreme Court of Queensland in *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156 at 194 to 195, where, after referring to a statement of the principles of publication from *Gatley on Libel and Slander* and the statement from *Webb v Bloch* set out above, the Court said:

So much must be accepted. It is necessary, however, to use care in applying general statements of this kind. Those who made them were directing attention to identifiable defamatory statements, to the publication of which in the completed form the defendant in question was held to have given his authority or approval or to the final form of which he had contributed. *Webb v Bloch* was an instance of that kind. The defamatory circular in that action was drafted by the solicitor Norman on instructions from the defendant Bloch. Bloch received the draft on 10 February 1926 although none of the other defendants saw it then. On 16 February 1926 Bloch instructed Norman to issue the circulars and his action in doing so was confirmed on 22 February by the Victorian committee, of which all the defendants were members. Starke J. (41 C.L.R. 331, 340) regarded this act of confirmation as rendering all the defendants responsible in law for the issue of the circular. His Honour considered Norman not as the author of the circular "but rather as the amanuensis of the defendants" (41 C.L.R. 331, 342). On appeal, Knox C.J. agreed with Starke J. in thinking that all defendants were responsible in law for

the publication of the circular (*ibid.*, at 347). Gavan Duffy J. would have dismissed the appeal from the judgment given by Starke J. in favour of the defendants (*ibid.*, at 375). Only Isaacs J. found it necessary to examine the authorities in order to discover what may have been a wider basis of liability.

What is said in *Webb v. Bloch* and *Gatley* would perhaps suffice to make Woodham liable with TCN 9 if he had seen the script or viewed the programmes before publication; but the evidence is that he did not do so. The decision in *Webb v. Bloch* is concerned with a case that is in some ways the direct converse of this. There the question was whether the defendants were principals of the solicitor Norman, who was the author and publisher of the defamatory circulars. No one suggests that Woodham was the principal of TCN 9 as author and publisher of the television programmes. He is not shown to have exercised control over its final form. At most he played a subsidiary and intermediate, if important, part in the creation of the product that in its finished state ultimately went to air. It is true that Woodham himself, or the visual image of Woodham, appeared in one or more of the programmes (principally the first ACA programme) broadcast by TCN 9, and that he was visible and audible to viewers as saying words that may have formed part of "the matter supporting the imputations or any of them". However, as we have seen, and despite the form of question 1, what the jury were asked to do was not to say whether Woodham published some, but whether he published all, of the matter supporting the defamatory imputations. Unless he was a co-publisher of all, the jury were, having regard to the way in which that question was left to them, entitled and indeed bound to find that he was not a co-publisher "with" TCN 9. As to that, the evidence is that there were some matters published about which Woodham knew little or nothing.

25. Mr Richardson also relied upon statements to like effect in my decision in *Palace v Fairfax Media Publications* [2010] NSWSC 415 at [24] to [25] and the judgment of Levine J in *Craftsman Homes Australia Pty Ltd v Nine Network Australia Pty Ltd* [2002] NSWSC 555 at [7]. He also relied upon the decision in *Seary v Molomby* (unreported, Supreme Court of New South Wales, 23 August 1999) where Sully J accepted the proposition that either some form of control over the editorial process or assent to the final form of the publication was essential to establish joint liability for a publication: at [20] to [25].

26. Following paragraph cited by:

Cronau v Vavakis (No 3) (10 December 2018) (McCallum J)

As submitted by Mr Potter, in circumstances where there is no suggestion that the defendant, Mr Vavakis, had any editorial control in respect of the publication of that material in *The Daily Mail*, there may be a real issue as to whether he is liable for publication of the whole of the article on the strength of principles considered by me in *Dank v Whittaker (No 1)* [2013] NSWSC 1062 at [26]; applied in *Dank v Cronulla-Sutherland District Rugby League Football Club (No 3)* [2013] NSWSC 1850 at [17]-[22]; upheld by the Court of Appeal in *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288 at [137].

Rush v Nationwide News Pty Ltd (No 2) (20 April 2018) (Wigney J)

124. Third, "where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form": *Dank v Whittaker (No 1)* [2013] NSWSC 1062 at [26]. In *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288, at [129]-[137], Ward

JA (with whom Emmett and Gleeson JJA agreed) appeared to approve that proposition, albeit as a particular application of the test in *Webb v Bloch* .

Noble v Phillips (No 2) (06 February 2018) (McCallum J)

43. The circumstances in which a person who has given a journalist quotes for attribution may be held jointly liable for the publication of an article featuring those quotes were considered by me in *Dank v Whitaker (No 1)* [2013] NSWSC 1062 at [22] and [26] . That decision was upheld by the Court of Appeal in *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288 at [137], [142] and [144] . Those decisions establish that, while each case turns on its own facts, in order to establish that the source is liable for the publication of the whole article, it is ordinarily necessary to establish that he or she assented to the publication or exercised some form of control over it.

Johnston v Holland (08 August 2017) (Derham AsJ)

112. In the course of considering the strike out application, her Honour considered the decision in *Webb v Bloch* . She noted that the statements from *Dank* need to be approached with an understanding of the context in which they were made, and reviewed the case and the comments of the Full Court of the Supreme Court of Queensland in *Thiess* and other authorities, and concluded:

In my view, the authorities relied upon by Mr Richardson establish that, where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form. [152]

via

[152] *Dank* [26] .

Dank v Rothfield (30 June 2015) (McColl JA, Simpson JA, Sackville AJA)

14. In *Dank v Whittaker (No 1)*, McCallum J formulated the relevant principle as follows: [6]

“the authorities ... establish that, where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form.”

via

[6] [2013] NSWSC 1062 at [26] .

Dank v Cronulla-Sutherland District Rugby League Football Club Ltd (No 3) (06 December 2013) (McCallum J)

17. The second matter complained of in paragraph 5 of the amended Statement of Claim and the pleading of the same matter as published on the Internet on

paragraph 7 of the amended Statement of Claim also raises issues which echo those determined in my earlier judgment. The defendants complained that the pleadings sought to attribute to them liability as an original publisher of the whole of a television broadcast (together with the proprietors and producers of the broadcast). A similar point had been determined by me during the same week in another action commenced by Dr Dank: *Dank v Whittaker (No 1)* [2013] NSWSC 1062. In that case, I held, at [26] :

In my view, the authorities relied upon by Mr Richardson establish that, where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form.

Toben v Mathieson; Toben v Nationwide News Pty Ltd (18 October 2013) (McCallum J)

4. Whilst the two sets of proceedings are travelling together, the present application concerns only the proceedings in which Senator Milne is a defendant (proceedings 200128 of 2013). In those proceedings, Senator Milne filed a notice of motion on 22 August 2013 moving the court for an order that the proceedings as against her be stayed or the statement of claim struck out. At that stage, the action against Senator Milne was based on the contention that she was jointly liable as a publisher of the whole of the article. The basis for the application to have the statement of claim struck out was the principle stated in my decision in *Dank v Whittaker (No 1)* [2013] NSWSC 1062. In that case I held that, where a person contributes to an article but is not alleged to have had any control over the publishing process, that person is not liable as a publisher of the whole of the article unless he or she has assented in some way to its final form (at [26]).

In my view, the authorities relied upon by Mr Richardson establish that, where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form.

27. Mr Rasmussen took issue with that principle. He submitted that the authorities support a broader view. However, when pressed to cite authority for any broader proposition, Mr Rasmussen relied only on the relevant extracts from Gatley. In saying that he relied "only" on that material, I mean no disrespect to the authors of that well-respected text but only to point to the fact that a law text does not stand as authority (in the relevant sense) for any legal principle. In any event, a close review of the passages of the text relied upon by Mr Rasmussen reveals little more than a discussion of some of the authorities relied upon by Mr Richardson. As already stated, upon careful analysis those authorities support the principle contended for by Mr Richardson, in my view. Mr Rasmussen made no attempt to go to any of the authorities cited in Gatley to establish any different proposition.
28. Separately, Mr Rasmussen submitted that Mr Richardson's contention is not a strike-out point but rather a matter for evidence. He relied as authority for that proposition on the following statement in *Thiess* at page 194 :

The question to be decided is whether the evidence was such as to require the jury, acting reasonably, to find that Woodham was a co-publisher with TCN Nine of the same matter and so make him liable at law for the consequences of doing so.

29. To the extent that that passage was sought to be relied upon as authority for the proposition that it is not necessary to plead material facts to establish a basis for alleging that a person is liable as a joint publisher, the submission was misconceived. The remarks in *Thiess* reflect nothing more than the fact that the present application is brought at a different stage of the proceedings than the issue under consideration in *Thiess*, which was after a jury trial. That said, the defendants acknowledge that they must satisfy the *General Steele* test in the present application.
30. Mr Rasmussen complained that the plaintiff cannot provide further particulars of material facts to support the publication allegation against the two doctors, since the plaintiff can know no more than what is reported in the matters complained of. If that is a difficulty, it is one which must fall at the feet of the plaintiff, not the doctors. That is presumably the reason it is uncommon to see a plea of this kind, attempting to fix a person who has merely contributed part of the information reported in an article with liability for the whole of the finished piece uncontrolled by him or her.

31. Following paragraph cited by:

Dank v Cronulla Sutherland District Rugby League Football Club Ltd (28 August 2014)
(Ward JA at [1]; Emmett JA at [149]; Gleeson JA at [158])

133. In *Dank v Whittaker (No 1)*, her Honour considered at [31] that the particulars set out in the pleadings in that case were incapable of sustaining the allegation that the defendant "had control of the final version of the matters complained of or assented to them" and that, insofar as the particulars were relevant to the plea, they said no more than that the defendant had made statements which were likely to be republished. The amended pleading in this case suffers from the same problem.

In my view the particulars set out above are incapable of sustaining the allegation that Dr Larkins had control of the final version of the matters complained of or assented to them. Insofar as the particulars are relevant to the plea, they say no more than that he made statements which were likely to be republished. In light of Mr Richardson's very fair concession, I propose to grant leave to the plaintiff to re-plead but I would wish to make a number of observations in that context. I will return to that issue.

32. Turning to proceedings 586, Mr Dawson, who appeared for Professor Ho, submitted that in the case of that article the particulars are so plainly incapable of establishing a case of liability against Professor Ho as a publisher of the whole of the matter complained of that there should be no grant of leave to re-plead and that the proceedings should be dismissed as against him.

33. Following paragraph cited by:

97. The defendant submits that the plaintiff should not be allowed to plead paragraph 18A of the PFASOC. The substantive allegation, read with the particulars, is incapable of establishing that the defendant is a publisher of the Email, and the particulars are incapable of sustaining an allegation of control over or assent to the publication or any degree of awareness or control of the relevant words that were published. It supports that submission by reference to the following principles and propositions:

- (a) liability as an original publisher is premised on establishing either control over the publishing process or some form of assent or approval given to the final form of the relevant publication; [128].
- (b) without particulars capable of establishing some measure of control or assent, a claim that a person is an original publisher of material (of which they were not the author) will be liable to be struck out; [129].
- (c) in the law of defamation, to determine responsibility for a publication, it is necessary to focus on what the person did, or failed to do, in the chain of communication; [130].
- (d) to be a publisher of an allegedly defamatory article, it is essential that the person has a degree of awareness or at least an assumption of general responsibility; [131] and
- (e) there must be knowing involvement in the process of publication of the relevant words. It is not enough that the person merely plays a passive instrumental role in the process. [132].

via

[129] Dank [33]; *Palace Films Pty Ltd v Fairfax Media Publications Pty Ltd* [2010] NSWSC 415 [3]-[37].

I accept that the particulars are plainly incapable of sustaining an allegation of either control or assent. However, I am loathe to dismiss the proceedings without a grant of leave to re-plead, since the plaintiff may choose to take the course of recasting the claim by reference only to the words attributed to Professor Ho. It is not appropriate for me to comment whether or not there would be any merit in such a plea, but I do not think this is a case in which it is appropriate to dismiss the claim altogether without affording that opportunity.

34. Following paragraph cited by:

Ghosh v Ninemsn Pty Ltd (No 2) (17 August 2013) (Gibson DCJ)

14. Publication by electronic means, whether by internet, email and/or social media, will inevitably lead to the bringing of claims for defamation against multiple defendants, in jurisdictions all over the world, where the audience for some of those publications may be no more than a handful of persons. The question is the degree to which the court allows parties to add further complexity to what is already a difficult area of the law or rely upon case management principles such as the "just, cheap and quick" directive in s 56 *Civil Procedure Act 2005 (NSW)*. In *Dank v Whittaker (No 1)* [2013] NSWSC 1062 at [34] McCallum J, faced with proceedings her Honour described as a "juggernaut", commented:

"A number of observations can be made about these proceedings and I would expect them to be reported to the plaintiff personally. It is, of course, a matter for him how he wishes to conduct his defamation actions (hopefully on the strength of sensible and complete legal advice). It may be observed, however, that the full collection of proceedings commenced by Dr Dank has launched something of a juggernaut. There are multiple proceedings, multiple defendants, multiple legal teams and a vast number of imputations relied upon in all. The objections that are now taken by the defendants in the present application and other applications I have heard this week will afford the plaintiff an opportunity not only to recast his claims in response to my rulings but also to reassess the ambit of the fight he wishes to take on. I would urge the plaintiff and those representing him to give careful consideration to the way in which the claims are framed with a view to bringing before the court a manageable dispute calculated to raise the real issues required to be determined for the purpose of vindicating Dr Dank's reputation."

I wish only to return to the question of re-pleading. A number of observations can be made about these proceedings and I would expect them to be reported to the plaintiff personally. It is, of course, a matter for him how he wishes to conduct his defamation actions (hopefully on the strength of sensible and complete legal advice). It may be observed, however, that the full collection of proceedings commenced by Dr Dank has launched something of a juggernaut. There are multiple proceedings, multiple defendants, multiple legal teams and a vast number of imputations relied upon in all. The objections that are now taken by the defendants in the present application and other applications I have heard this week will afford the plaintiff an opportunity not only to recast his claims in response to my rulings but also to reassess the ambit of the fight he wishes to take on. I would urge the plaintiff and those representing him to give careful consideration to the way in which the claims are framed with a view to bringing before the court a manageable dispute calculated to raise the real issues required to be determined for the purpose of vindicating Dr Dank's reputation.

35. In proceedings 114, the order is that the pleading as against Dr Larkins be struck out with leave to re-plead.
36. In proceedings 586, the order is that the proceedings as against Professor Ho be struck out with leave to re-plead.

RICHARDSON: I seek the costs of the argument.

HER HONOUR: Yes. Can you be heard against costs, Mr Rasmussen?

RASMUSSEN: No, your Honour.

HER HONOUR: In each case I order the plaintiff to pay the costs of the applicant in the two matters I have just determined.

Decision last updated: 08 August 2013

Cited by:

[Holten v Fehsenfeld \(Ruling\)](#) [2021] VCC 404 (15 April 2021) (Her Honour Judge Clayton)

Cases Cited: *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62; *Takemoto v Moody's Investors Service Pty Ltd* [2014] FCA 1081; *Trkulja v Google LLC* (2018) 263 CLR 149; *Dank v Whittaker (No 1)* [2013] NSWSC 1062; *Webb v Bloch* (1928) 41 CLR 331; *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156; *Parkes v Prescott* (1869) LR 4 Ex 169; *Rowson & Anor v Alpass* (2017) 53 VR 196; *John Fairfax Publications Pty Ltd v Rivkin* (2003) 201 ALR 77; *Australian Broadcasting Corporation v Obeid* [2006] NSWCA 231

[Holten v Fehsenfeld \(Ruling\)](#) [2021] VCC 404 (15 April 2021) (Her Honour Judge Clayton)

29 The plaintiff relies on decisions in *Trkulja v Google LLC*, [3] *Dank v Whittaker (No 1)*, [4] *Webb v Bloch* [5] and *Thiess v TCN Channel Nine Pty Ltd (No 5)* [6] for the proposition that publication ought to be construed broadly. Encouraging and assisting in the publication of the false statements is sufficient for the defendant to be found liable for their publication.

[Holten v Fehsenfeld \(Ruling\)](#) [2021] VCC 404 (15 April 2021) (Her Honour Judge Clayton)

29 The plaintiff relies on decisions in *Trkulja v Google LLC*, [3] *Dank v Whittaker (No 1)*, [4] *Webb v Bloch* [5] and *Thiess v TCN Channel Nine Pty Ltd (No 5)* [6] for the proposition that publication ought to be construed broadly. Encouraging and assisting in the publication of the false statements is sufficient for the defendant to be found liable for their publication.

via

[4] [2013] NSWSC 1062

[Noble v Phillips \(No 3\)](#) [2019] NSWSC 110 (25 February 2019) (McCallum J)

Dank v Whittaker (No 1) [2013] NSWSC 1062

[Noble v Phillips \(No 3\)](#) [2019] NSWSC 110 (25 February 2019) (McCallum J)

47. In *Dank v Whittaker (No 1)* [2013] NSWSC 1062, after considering *Webb v Bloch* and the decision of the Full Court of the Supreme Court of Queensland in *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 QdR 156 and the other decisions referred to in the judgment at [25], I said at [26]:

“In my view, the authorities relied upon by Mr Richardson establish that, where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form.”

Noble v Phillips (No 3) [2019] NSWSC 110 (25 February 2019) (McCallum J)

49. Mr Dank sought leave to appeal against the two judgments in the *Cronulla-Sutherland* proceedings. In a lengthy judgment published following a concurrent hearing of the application for leave to appeal and the appeal, the Court refused leave: *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288. The Court said at [137] :

“The difficulty with these proposed grounds of appeal is that they are predicated on her Honour having applied some new form of control test, whereas, properly understood, what her Honour was doing was applying the test in *Webb v Bloch* and *Thiess* ; namely that, for there to be liability as a publisher of defamatory material, the defendant must in some way knowingly ‘conduce’ and be responsible for the publication complained of. Her Honour was going no further than saying that mere contribution to an article by someone with no control over the publishing process will not *ordinarily* establish liability as a publisher ‘unless he or she has assented to its final form’. Her Honour’s comments in *Dank v Whittaker (No 1)* , which were incorporated by reference into her Honour’s judgment, made reference not merely to control but also to assent to the publication.”

Cronau v Vavakis (No 3) [2018] NSWSC 1973 (10 December 2018) (McCallum J)
Dank v Whittaker (No 1) [2013] NSWSC 1062 .

Cronau v Vavakis (No 3) [2018] NSWSC 1973 (10 December 2018) (McCallum J)

As submitted by Mr Potter, in circumstances where there is no suggestion that the defendant, Mr Vavakis, had any editorial control in respect of the publication of that material in *The Daily Mail*, there may be a real issue as to whether he is liable for publication of the whole of the article on the strength of principles considered by me in *Dank v Whittaker (No 1)* [2013] NSWSC 1062 at [26] ; applied in *Dank v Cronulla-Sutherland District Rugby League Football Club (No 3)* [2013] NSWSC 1850 at [17]-[22] ; upheld by the Court of Appeal in *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288 at [137] .

Bolton v Stoltenberg [2018] NSWSC 1518 (15 October 2018) (Payne J)
Dank v Whittaker (No 1) [2013] NSWSC 1062 .

Bolton v Stoltenberg [2018] NSWSC 1518 (15 October 2018) (Payne J)

178. Liability as a principal for publication depends on participation in the original publication, which can consist of writing the matter complained of or consenting to its content prior to publication: *Habib v Radio 2UE Sydney* [2009] NSWCA 231 at [121] . Where a person contributes to the matter complained of but has no control over the final publishing process, they will ordinarily not be liable unless they have assented to the final form of publication: *Dank v Whittaker (No 1)* [2013] NSWSC 1062 at [22] and [26] .

Rush v Nationwide News Pty Ltd (No 2) [2018] FCA 550 (20 April 2018) (Wigney J)

124. Third, “where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form”: *Dank v Whittaker (No 1)* [2013] NSWSC 1062 at [26] . In *Dank v*

Cronulla Sutherland District Rugby League Football Club Ltd [2014] NSWCA 288, at [129]-[137], Ward JA (with whom Emmett and Gleeson JJA agreed) appeared to approve that proposition, albeit as a particular application of the test in *Webb v Bloch*.

Noble v Phillips (No 2) [2018] NSWSC 25 (06 February 2018) (McCallum J)
Dank v Whitaker (No 1) [2013] NSWSC 1062

Noble v Phillips (No 2) [2018] NSWSC 25 (06 February 2018) (McCallum J)

43. The circumstances in which a person who has given a journalist quotes for attribution may be held jointly liable for the publication of an article featuring those quotes were considered by me in *Dank v Whitaker (No 1)* [2013] NSWSC 1062 at [22] and [26]. That decision was upheld by the Court of Appeal in *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288 at [137], [142] and [144]. Those decisions establish that, while each case turns on its own facts, in order to establish that the source is liable for the publication of the whole article, it is ordinarily necessary to establish that he or she assented to the publication or exercised some form of control over it.

Johnston v Holland [2017] VSC 448 (08 August 2017) (Derham AsJ)

110. The decision in *Dank* concerned two of a number of proceedings commenced by Dr Dank arising out of the publication of a series of newspaper articles concerning the suspected administration of performance-enhancing substances to footballers at the Cronulla Sharks Football Club. The judgment concerns the striking out of pleadings of publication against medical practitioners who were quoted in the articles. The proceedings were commenced against the editor of the newspaper, the journalist under whose by-line the article appeared, the medial doctor who was quoted and others. It was alleged 'in globo' that all the defendants published, or caused to be published, of and concerning the plaintiff, the defamatory material. Particulars later given allege the doctor quoted in the article became a co-publisher when he made the statements to journalists knowing he would be republished. *Webb v Bloch* was relied upon, on the basis that as a participant in the defamatory publication, he is responsible for the whole of the damage suffered, because:

All who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication are to be considered as principals in the art of publication ...[151]

Johnston v Holland [2017] VSC 448 (08 August 2017) (Derham AsJ)

112. In the course of considering the strike out application, her Honour considered the decision in *Webb v Bloch*. She noted that the statements from *Dank* need to be approached with an understanding of the context in which they were made, and reviewed the case and the comments of the Full Court of the Supreme Court of Queensland in *Thiess* and other authorities, and concluded:

In my view, the authorities relied upon by Mr Richardson establish that, where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form. [152]

Johnston v Holland [2017] VSC 448 (08 August 2017) (Derham AsJ)

96. If the limitation period is extended, Murray opposes the plaintiff's application to file and serve the PFASOC. Murray submits that the form of the proposed pleading in relation to the Tweets is embarrassing and should not be allowed.^[123] He submits:

(a) first, that it is internally inconsistent. On the one hand, it alleges that Murray encouraged disaffected former staff to send him emails about the plaintiff which 'he or [Ms Holland] would republish in part as tweets using the Twitter account'.^[124] On the other hand, it alleges that Ms Holland wrote and uploaded the Tweets sued upon.^[125] These allegations are internally inconsistent and render the pleading embarrassing; ^[126] and

(b) second, it does not plead the necessary matters to establish liability on the part of Murray as a publisher of the Tweets. The authorities make clear that for a person to be liable as an original publisher, it is necessary for a plaintiff to establish either control by that person over the publishing process or assent by that person to the final form of the publication.^[127] The proposed form of pleading is incapable of establishing these matters in relation to Murray.

via

^[127] *Dank v Whittaker (No 1)* [2013] NSWSC 1062 [20]-[33] (McCallum J) ('*Dank*') (leave to appeal refused: *Dank v Cronulla Sutherland District Rugby League Football Club Ltd* [2014] NSWCA 288 at ^[144] (Ward JA; Emmett and Gleeson JJA agreeing [156], [158]) addressing the principles identified by Isaacs J in *Webb v Bloch* (1928) 41 CLR 331, 363-365.

Johnston v Holland [2017] VSC 448 (08 August 2017) (Derham AsJ)

97. The defendant submits that the plaintiff should not be allowed to plead paragraph 18A of the PFASOC. The substantive allegation, read with the particulars, is incapable of establishing that the defendant is a publisher of the Email, and the particulars are incapable of sustaining an allegation of control over or assent to the publication or any degree of awareness or control of the relevant words that were published. It supports that submission by reference to the following principles and propositions:

(a) liability as an original publisher is premised on establishing either control over the publishing process or some form of assent or approval given to the final form of the relevant publication; ^[128]

(b) without particulars capable of establishing some measure of control or assent, a claim that a person is an original publisher of material (of which they were not the author) will be liable to be struck out; ^[129]

(c) in the law of defamation, to determine responsibility for a publication, it is necessary to focus on what the person did, or failed to do, in the chain of communication; ^[130]

(d) to be a publisher of an allegedly defamatory article, it is essential that the person has a degree of awareness or at least an assumption of general responsibility; ^[131] and

(e) there must be knowing involvement in the process of publication of the relevant words. It is not enough that the person merely plays a passive instrumental role in the process. ^[132]

via

[128] *Dank* [22]-[26].

Johnston v Holland [2017] VSC 448 (08 August 2017) (Derham AsJ)

97. The defendant submits that the plaintiff should not be allowed to plead paragraph 18A of the PFASOC. The substantive allegation, read with the particulars, is incapable of establishing that the defendant is a publisher of the Email, and the particulars are incapable of sustaining an allegation of control over or assent to the publication or any degree of awareness or control of the relevant words that were published. It supports that submission by reference to the following principles and propositions:

- (a) liability as an original publisher is premised on establishing either control over the publishing process or some form of assent or approval given to the final form of the relevant publication; [128].
- (b) without particulars capable of establishing some measure of control or assent, a claim that a person is an original publisher of material (of which they were not the author) will be liable to be struck out; [129].
- (c) in the law of defamation, to determine responsibility for a publication, it is necessary to focus on what the person did, or failed to do, in the chain of communication; [130].
- (d) to be a publisher of an allegedly defamatory article, it is essential that the person has a degree of awareness or at least an assumption of general responsibility; [131] and
- (e) there must be knowing involvement in the process of publication of the relevant words. It is not enough that the person merely plays a passive instrumental role in the process. [132].

via

[129] *Dank* [33]; *Palace Films Pty Ltd v Fairfax Media Publications Pty Ltd* [2010] NSWSC 415 [3]-[37].

Johnston v Holland [2017] VSC 448 (08 August 2017) (Derham AsJ)

109. The plaintiff contended that the decision of McCallum J in *Dank v Whitaker (No.1)* [150] should be distinguished on the basis that the statement of the law in that case needs to be seen in the light of the facts in the case, which were entirely different.

via

[150] *Dank*.

Johnston v Holland [2017] VSC 448 (08 August 2017) (Derham AsJ)

112. In the course of considering the strike out application, her Honour considered the decision in *Webb v Bloch*. She noted that the statements from *Dank* need to be approached with an understanding of the context in which they were made, and reviewed the case and the comments of the Full Court of the Supreme Court of Queensland in *Thiess* and other authorities, and concluded:

In my view, the authorities relied upon by Mr Richardson establish that, where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form. [152]

via

[152] *Dank* [26].

Deferos v Google Inc [2017] VSC 158 (04 April 2017) (John Dixon J)

32. In *Dank v Whittaker (No 1)*, [23] McCallum J accepted as correct the statement that: [24].

[I]n order to establish that a person is jointly liable as an original publisher of allegedly defamatory matter, it is necessary to establish either control or assent.

Deferos v Google Inc [2017] VSC 158 (04 April 2017) (John Dixon J)

32. In *Dank v Whittaker (No 1)*, [23] McCallum J accepted as correct the statement that: [24].

[I]n order to establish that a person is jointly liable as an original publisher of allegedly defamatory matter, it is necessary to establish either control or assent.

via

[23] [2013] NSWSC 1062.

Deferos v Google Inc [2017] VSC 158 (04 April 2017) (John Dixon J)

32. In *Dank v Whittaker (No 1)*, [23] McCallum J accepted as correct the statement that: [24].

[I]n order to establish that a person is jointly liable as an original publisher of allegedly defamatory matter, it is necessary to establish either control or assent.

via

[24] *Ibid*, [22].

Dawson v Harbour Radio Pty Ltd [2017] NSWSC 124 (10 February 2017) (McCallum J)

Dank v Whittaker (No 1) [2013] NSWSC 1062.

HER HONOUR: These are proceedings for defamation commenced by Ms Karen Dawson against Harbour Radio Pty Limited arising out of the broadcast of a segment on the Ray Hadley show. The proceedings came before the court for the first listing last Friday. On that occasion there was an argument brought forward by the third defendant, who was interviewed by Mr Hadley in the relevant segment of the broadcast, contending that the proceedings as against her should be dismissed on the grounds that she could not be held to be liable as a publisher of the whole of the matter complained of, based on the principles considered by me in *Dank v Whittaker (No 1)* [2013] NSWSC 1062 and later decisions.

17. I do not think it is fair to characterise the contention of republication in the present case as a bare guess. The particulars provided in the letter to which I have referred provide ample basis to sustain the inference contended for and I think it would be wrong to strike that averment from the pleading at this point of the proceedings. I do not think the position is governed by the position I took in *Bleyer v Google Inc* or *Dank v Whittaker (No 1)*.

10. Mr Dawson also referred to my judgment in *Dank v Whittaker (No 1)* [2013] NSWSC 1062. That was a case in which two of the defendants sought to have the proceedings as against them dismissed. They had been sued as joint publishers of a newspaper article on the basis of the principles stated by the High Court in *Webb v Bloch* [1928] HCA 50; 41 CLR 331 in circumstances where their alleged involvement in the article was confined to the fact that certain quotes within the article had been attributed to them. The plaintiff submitted that the issue of those defendants' liability as joint publishers of the whole article was a matter for evidence at the trial and not a strike-out point, citing *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156 at 194. In considering that submission, I said, "to the extent that that passage was sought to be relied upon as authority for the proposition that it is not necessary to plead material facts to establish a basis for alleging that a person is liable as a joint publisher, the submission was misconceived", implicitly rejecting the proposition that the pleading could stand in the form in which it was against the prospect of further information being obtained by interlocutory processes (at [29] to [30]).

13. The Strike Out Judgment was not the first time that the primary Judge, in proceedings commenced by Dr Dank, had considered whether a defendant who contributed to a publication, but was not responsible for the entire publication, could be regarded as an original publisher of the whole matter complained of. In an earlier decision in different proceedings, *Dank v Whittaker (No 1)*, [4] McCallum J struck out pleadings to this effect. Her Honour did so on the ground that the pleadings did not establish that the defendants were original publishers of defamatory material within the principles stated by the High Court in *Webb v Bloch* [5].

[Dank v Rothfield](#) [2015] NSWCA 193 (30 June 2015) (McColl JA, Simpson JA, Sackville AJA)

13. The Strike Out Judgment was not the first time that the primary Judge, in proceedings commenced by Dr Dank, had considered whether a defendant who contributed to a publication, but was not responsible for the entire publication, could be regarded as an original publisher of the whole matter complained of. In an earlier decision in different proceedings, [Dank v Whittaker \(No 1\)](#), [4] McCallum J struck out pleadings to this effect. Her Honour did so on the ground that the pleadings did not establish that the defendants were original publishers of defamatory material within the principles stated by the High Court in [Webb v Bloch](#) [5].

via

[4] [2013] NSWSC 1062 .

[Dank v Rothfield](#) [2015] NSWCA 193 (30 June 2015) (McColl JA, Simpson JA, Sackville AJA)

14. In [Dank v Whittaker \(No 1\)](#), McCallum J formulated the relevant principle as follows: [6].

“the authorities ... establish that, where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form.”

via

[6] [2013] NSWSC 1062 at [26] .

[Dank v Nine Network Australia Pty Limited](#) [2014] NSWSC 1938 (11 December 2014) (McCallum J)
[Dank v Whittaker \(No 1\)](#) [2013] NSWSC 1062 .

[Dank v Nine Network Australia Pty Limited](#) [2014] NSWSC 1938 (11 December 2014) (McCallum J)

8. The central proposition on the strength of which Mr Dank's pleading against Mr Rothfield was struck out in my earlier judgment in [Dank v Cronulla Sutherland District Rugby League Football Club \(No 3\)](#) [2013] NSWSC 1850 derived from the determination of the first round of this kind of argument in my judgment in [Dank v Whittaker \(No 1\)](#) [2013] NSWSC 1062 . That decision was concerned with Mr Dank's attempt to make liable, as publishers of the whole of a defamatory publication, two experts to whom were attributed various quotes in the newspaper article, Dr Larkins and Dr Ho.

[Dank v Cronulla Sutherland District Rugby League Football Club Ltd](#) [2014] NSWCA 288 (28 August 2014) (Ward JA at [1]; Emmett JA at [149]; Gleeson JA at [158])
[Dank v Whittaker \(No 1\)](#) [2013] NSWSC 1062 .

[Dank v Cronulla Sutherland District Rugby League Football Club Ltd](#) [2014] NSWCA 288 (28 August 2014) (Ward JA at [1]; Emmett JA at [149]; Gleeson JA at [158])

60. As to the second matter complained of (at [5] of the amended statement of claim) and the pleading of the same matter as published on the internet (at [7]), her Honour said that those raised issues which echoed those determined in her August 2013 judgment as to the attribution of liability as an original publisher for the whole of the television broadcast. In that judgment, her Honour had concluded that the plea of publication of the second and

third matters complained of by the Irvine respondents could not be sustained for the reasons expressed in her earlier judgment in other proceedings brought by Dr Dank (*Dank v Whittaker (No 1)* [2013] NSWSC 1062) .

Dank v Cronulla Sutherland District Rugby League Football Club Ltd [2014] NSWCA 288 (28 August 2014) (Ward JA at [1]; Emmett JA at [149]; Gleeson JA at [158])

61. Contrasting the position between the pleading in its initial form and the pleading in *Dank v Whittaker (No 1)* , her Honour had commented in her August reasons (at [13]) that:

Indeed the position is *a fortiori* in the present case, where the only fact, matter or circumstance that has been identified in support of the allegation that those defendants are liable as original publishers of the news broadcast is that "the sixth defendant [Mr Irvine] is depicted on the program complained of".

Dank v Cronulla Sutherland District Rugby League Football Club Ltd [2014] NSWCA 288 (28 August 2014) (Ward JA at [1]; Emmett JA at [149]; Gleeson JA at [158])

63. In the December judgment, her Honour made reference (at [20]) to *Webb v Bloch* and *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156. Her Honour rejected the submission by Mr Evatt as to the import of the test in *Thiess* for pleading purposes and concluded (at [22]) that what was absent in the present case was a cause of action pleaded with sufficient facts, matters and circumstances to establish a basis for a case to go to a jury; her Honour there noting that *Thiess* was concerned with the question as to what had been the task for the jury but that was premised on there being a case to go to the jury. Her Honour said at [22] :

I adhere to my view in the earlier judgments [there clearly referring to the August reasons and her Honour's judgment in *Dank v Whittaker (No 1)* and some of the cases referred to therein] that, *absent any particulars of the kind there referred to*, the pleading is liable to be struck out. In other words, it is not open to a plaintiff in a defamation action to sue every person to whom quotes are attributed in a television broadcast in the hope that, by the end of the interlocutory processes, it will have been established that each such person played a sufficient role in the production of the broadcast to attract liability in the way in which Mr Woodham was alleged to have attracted liability in *Thiess* . [my emphasis]

Dank v Cronulla Sutherland District Rugby League Football Club Ltd [2014] NSWCA 288 (28 August 2014) (Ward JA at [1]; Emmett JA at [149]; Gleeson JA at [158])

70. Her Honour said (at [31]):

Consistently with my decision in *Dank v Whittaker (No 1)* there being no particulars as to any basis on which Mr Rothfield should be held liable as an original publisher of the whole of the broadcast, and absent his being a journalist employed by the Nine Network, I would have struck out that allegation against him with leave to replead a case of the kind referred to in *Dank v Whittaker (No 1)* .

Dank v Cronulla Sutherland District Rugby League Football Club Ltd [2014] NSWCA 288 (28 August 2014) (Ward JA at [1]; Emmett JA at [149]; Gleeson JA at [158])

70. Her Honour said (at [31]):

Consistently with my decision in *Dank v Whittaker (No 1)* there being no particulars as to any basis on which Mr Rothfield should be held liable as an original publisher of the whole of the broadcast, and absent his being a journalist employed by the Nine Network, I would have struck out that allegation against him with leave to replead a case of the kind referred to in *Dank v Whittaker (No 1)* .

Dank v Cronulla Sutherland District Rugby League Football Club Ltd [2014] NSWCA 288 (28 August 2014) (Ward JA at [1]; Emmett JA at [149]; Gleeson JA at [158])

129. The basis on which her Honour considered that the amended pleading did not properly plead a cause of action against any of the respondents to the effect that they were original publishers of the television programme was that there was no pleading of facts, matters and circumstances sufficient to establish, if proven, that each either had control over the broadcast or had assented to its final form. I draw this from her Honour's reference at [17] to what she had earlier said at [26] in *Dank v Whittaker (No 1)* and to the discussion by her Honour from [18]-[23].

Dank v Cronulla Sutherland District Rugby League Football Club Ltd [2014] NSWCA 288 (28 August 2014) (Ward JA at [1]; Emmett JA at [149]; Gleeson JA at [158])

130. In *Dank v Whittaker (No 1)*, her Honour had considered an application for pleadings to be struck out as against an individual who was sued as an original publisher of the whole of the matter there complained of. Her Honour accepted (at [22]), as a correct statement of principle, the submission that, in order to establish that a person is jointly liable as an original publisher of allegedly defamatory matter, it is necessary to establish *either control or assent*. Her Honour said:

The notion of control is comprehended within the role of a person such as the proprietor of a newspaper, an editor who determines what is published and, ordinarily, the author of the defamatory matter (although it is well recognised that a journalist, whilst responsible for the words written by him or her, is not necessarily liable for headlines or images added during the editorial process). Absent participation in a publication at that level of control, a person who merely contributes part of what is published will not be jointly liable as an original publisher of the whole unless he or she assents to its final form.

Dank v Cronulla Sutherland District Rugby League Football Club Ltd [2014] NSWCA 288 (28 August 2014) (Ward JA at [1]; Emmett JA at [149]; Gleeson JA at [158])

133. In *Dank v Whittaker (No 1)*, her Honour considered at [31] that the particulars set out in the pleadings in that case were incapable of sustaining the allegation that the defendant "had control of the final version of the matters complained of or assented to them" and that, insofar as the particulars were relevant to the plea, they said no more than that the defendant had made statements which were likely to be republished. The amended pleading in this case suffers from the same problem.

Dank v Cronulla Sutherland District Rugby League Football Club Ltd [2014] NSWCA 288 (28 August 2014) (Ward JA at [1]; Emmett JA at [149]; Gleeson JA at [158])

137. The difficulty with these proposed grounds of appeal is that they are predicated on her Honour having applied some new form of control test, whereas, properly understood, what her Honour was doing was applying the test in *Webb v Bloch* and *Thiess*; namely that, for there to be liability as a publisher of defamatory material, the defendant must in some way knowingly "conduce" and be responsible for the publication complained of. Her Honour was going no further than saying that mere contribution to an article by someone with no control over the publishing process will not *ordinarily* establish liability as a publisher "unless he or she has assented to its final form". Her Honour's comments in *Dank v Whittaker (No 1)*, which were incorporated by reference into her Honour's judgment, made reference not merely to control but also to assent to the publication.

Toben v Mathieson (No 2) [2014] NSWSC 575 (13 May 2014) (McCallum J)
Dank v Whittaker (No 1) [2013] NSWSC 1062

Toben v Mathieson (No 2) [2014] NSWSC 575 (13 May 2014) (McCallum J)

8. As noted on behalf of Senator Milne, costs will have been incurred in the present case in respect of three issues which required the attention of the lawyers. First, the amendment was initially prompted by an objection to the manner in which Dr Toben had originally pleaded

the element of publication against Senator Milne. The original statement of claim sought to hold her liable for the whole of the content of the newspaper article in question, notwithstanding the fact that she is not the journalist or the proprietor of the newspaper but is a person to whom certain quotes are attributed within the body of the article. Senator Milne moved to have the pleading struck out on that basis, relying on my decision in *Dank v Whittaker (No 1)* [2013] NSWSC 1062. Dr Toben capitulated to that objection. One of the purposes of the proposed amendment was to re-plead the element of publication.

Zeccola v Fairfax Media Publications Pty Ltd (No 2) [2014] NSWSC 421 (07 April 2014) (McCallum J)
Dank v Whittaker (No 1) [2013] NSWSC 1062.

Zeccola v Fairfax Media Publications Pty Ltd (No 2) [2014] NSWSC 421 (07 April 2014) (McCallum J)

4. As to the form of the reply referred to by Mr Rasmussen, Mr Dawson informs me that there would also be a measure of delay if that issue were to hold up the mediation. The plaintiff relies on the alleged malice of the second defendant, Mr Rosen. As noted by Mr Dawson, there is in the law of defamation no doctrine of transferred malice, although I apprehend there may be room for debate about the precise content and application of that principle. In any event, the difficulty is that there is an issue the second defendant would wish to raise as to the continuation of the claim against him in light of the principles stated in my judgment in *Dank v Whittaker (No 1)* [2013] NSWSC 1062.

Linnell v Channel Seven Sydney Pty Ltd [2013] NSWSC 1062 (03 February 2014) (Beech-Jones J)
Dank v Whittaker (No 1) [2013] NSWSC 1062.

Linnell v Channel Seven Sydney Pty Ltd [2013] NSWSC 1062 (03 February 2014) (Beech-Jones J)

26. Counsel for the plaintiff, Mr Rasmussen, submitted that, even if the Court ordered that those parts of the Amended Statement of Claim be struck out, his client should be granted liberty to replead its case against the third to sixth defendants. It seems that the reformulation of the case against those defendants occurred partly out of a concern raised by the decision of McCallum J in *Dank v Whittaker (No 1)* [2013] NSWSC 1062 which was said to raise a doubt as to whether a person who is interviewed for a programme assumes responsibility for its broadcast or publication.

Linnell v Channel Seven Sydney Pty Ltd [2013] NSWSC 1062 (03 February 2014) (Beech-Jones J)

27. Mr Rasmussen submitted that, if these paragraphs are struck out, his client should be allowed the opportunity to reformulate its case so as to make the third to sixth defendants responsible for the 30 November 2013 broadcast and, if necessary, to challenge the correctness of *Dank*.

Linnell v Channel Seven Sydney Pty Ltd [2013] NSWSC 1062 (03 February 2014) (Beech-Jones J)

29. I think the best course is not to shut Mr Rasmussen out of making an argument in respect of *Dank*. However, I think this should be done by the service of a proposed further Amended Statement of Claim that not only reformulates the pleading and particulars in light of those paragraphs that have been struck out, but also identifies how it is said that the third to sixth defendants bear responsibility for the broadcast on 30 November 2012.

Linnell v Channel Seven Sydney Pty Ltd [2013] NSWSC 1062 (03 February 2014) (Beech-Jones J)

If the plaintiffs wish to re-agitate some aspect of *Dank* then the forum in which they could do so is at the time of seeking leave to file any such proposed Amended Statement of Claim.

Dank v Cronulla-Sutherland District Rugby League Football Club Ltd (No 3) [2013] NSWSC 1850 (06 December 2013) (McCallum J)

Dank v Cronulla-Sutherland District Rugby League Football Club Ltd (No 3) [2013] NSWSC 1850 (06 December 2013) (McCallum J)

17. The second matter complained of in paragraph 5 of the amended Statement of Claim and the pleading of the same matter as published on the Internet on paragraph 7 of the amended Statement of Claim also raises issues which echo those determined in my earlier judgment. The defendants complained that the pleadings sought to attribute to them liability as an original publisher of the whole of a television broadcast (together with the proprietors and producers of the broadcast). A similar point had been determined by me during the same week in another action commenced by Dr Dank: *Dank v Whittaker (No 1)* [2013] NSWSC 1062. In that case, I held, at [26] :

In my view, the authorities relied upon by Mr Richardson establish that, where a person merely contributes material to an article but has no control over the publishing process, liability as a publisher will not ordinarily be established unless he or she has assented to its final form.

Dank v Cronulla-Sutherland District Rugby League Football Club Ltd (No 3) [2013] NSWSC 1850 (06 December 2013) (McCallum J)

18. In *Dank v Whittaker (No 1)*, I acceded to a submission that there was no articulated basis for making such a plea. In my first judgment in *Dank v Cronulla-Sutherland District Rugby League Football Club Ltd*, it was acknowledged that the pleading of the second matter complained of was governed by the same ruling (see [13] of the judgment). In the Amended Statement of Claim, the only response the plaintiff has made to that determination is to seek to attribute only half of the broadcast, or a portion of it, to the first and sixth defendants.

Dank v Cronulla-Sutherland District Rugby League Football Club Ltd (No 3) [2013] NSWSC 1850 (06 December 2013) (McCallum J)

19. I think it is fair to say that, in seeking to defend the pleading in that form, Mr Evatt sought to revisit my decision in *Dank v Whittaker (No 1)*. It was an interlocutory judgment and there is not necessarily any vice in doing so.

Dank v Cronulla-Sutherland District Rugby League Football Club Ltd (No 3) [2013] NSWSC 1850 (06 December 2013) (McCallum J)

31. Consistently with my decision in *Dank v Whittaker (No 1)*, there being no particulars as to any basis on which Mr Rothfield should be held liable as an original publisher of the whole of the broadcast, and absent his being a journalist employed by the Nine Network, I would have struck out that allegation against him with leave to replead a case of the kind referred to in *Dank v Whittaker (No 1)*.

Dank v Cronulla-Sutherland District Rugby League Football Club Ltd (No 3) [2013] NSWSC 1850 (06 December 2013) (McCallum J)

31. Consistently with my decision in *Dank v Whittaker (No 1)*, there being no particulars as to any basis on which Mr Rothfield should be held liable as an original publisher of the whole of the broadcast, and absent his being a journalist employed by the Nine Network, I would have struck out that allegation against him with leave to replead a case of the kind referred to in *Dank v Whittaker (No 1)*.

Dank v Whittaker (No 3) [2013] NSWSC 1822 (06 December 2013) (McCallum J)

Dank v Whittaker (No 1) [2013] NSWSC 1062

Dank v Whittaker (No 3) [2013] NSWSC 1822 (06 December 2013) (McCallum J)

2. The second defendant in the proceedings is Dr Peter Larkins, who is quoted in a number of the articles. On 7 August 2013, I determined an application by Dr Larkins to have the pleadings as against him struck out: *Dank v Whittaker (No 1)* [2013] NSWSC 1062. At the time of that application Dr Larkins did not oppose the plaintiffs having leave to replead his claim against Dr Larkins (noted at [20] of the judgment).

YZ v Amazon [2013] NSWSC 1522 (18 October 2013) (McCallum J)

Dank v Whittaker (No 1) [2013] NSWSC 1062.

YZ v Amazon [2013] NSWSC 1522 (18 October 2013) (McCallum J)

24. A second difficulty with the pleading of the element of publication arises from the fact that the plaintiff seeks to hold persons other than the author of the book jointly liable as publishers. The pleading does not adequately articulate a basis for doing so. That difficulty is most acute in respect of the fifth defendant (the author's spouse) and the sixth defendant (a parent of the child). The relevant principles are considered in my decision in *Dank v Whittaker (No 1)* [2013] NSWSC 1062. The present pleading does adequately any state facts, matters or circumstances such as to bring the individual defendants other than the fourth defendant within those principles.

Toben v Mathieson; Toben v Nationwide News Pty Ltd [2013] NSWSC 1530 (18 October 2013) (McCallum J)

Dank v Whittaker (No 1) [2013] NSWSC 1062.

Toben v Mathieson; Toben v Nationwide News Pty Ltd [2013] NSWSC 1530 (18 October 2013) (McCallum J)

4. Whilst the two sets of proceedings are travelling together, the present application concerns only the proceedings in which Senator Milne is a defendant (proceedings 200128 of 2013). In those proceedings, Senator Milne filed a notice of motion on 22 August 2013 moving the court for an order that the proceedings as against her be stayed or the statement of claim struck out. At that stage, the action against Senator Milne was based on the contention that she was jointly liable as a publisher of the whole of the article. The basis for the application to have the statement of claim struck out was the principle stated in my decision in *Dank v Whittaker (No 1)* [2013] NSWSC 1062. In that case I held that, where a person contributes to an article but is not alleged to have had any control over the publishing process, that person is not liable as a publisher of the whole of the article unless he or she has assented in some way to its final form (at [26]).

Glanville v TCN Channel Nine Pty Ltd [2013] NSWSC 1143 (20 August 2013) (McCallum J)

Dank v Whittaker (No 1) [2013] NSWSC 1062.

Glanville v TCN Channel Nine Pty Ltd [2013] NSWSC 1143 (20 August 2013) (McCallum J)

8. The claim on that basis is problematic. I recently had occasion to consider the relevant principles in *Dank v Whittaker (No 1)* [2013] NSWSC 1062 at [22] to [26]. In that case, after considering a careful analysis of the relevant authorities provided by Mr Richardson of counsel (who appears as junior counsel for the media defendants in the present case), I accepted the proposition that liability as an original publisher is premised on the establishment of either control over the publishing process or some form of assent or approval given to the final form of the relevant publication.

Ghosh v Ninemsn Pty Ltd (No 2) [2013] NSWDC 145 (17 August 2013) (Gibson DCJ)

Dank v Whittaker (No 1) [2013] NSWSC 1062.

Ghosh v Ninemsn Pty Ltd (No 2) [2013] NSWDC 145 (17 August 2013) (Gibson DCJ)

14. Publication by electronic means, whether by internet, email and/or social media, will inevitably lead to the bringing of claims for defamation against multiple defendants, in jurisdictions all over the world, where the audience for some of those publications may be no more than a handful of persons. The question is the degree to which the court allows parties to add further complexity to what is already a difficult area of the law or rely upon case management principles such as the "just, cheap and quick" directive in s 56 *Civil Procedure Act 2005 (NSW)*. In *Dank v Whittaker (No 1)* [2013] NSWSC 1062 at [34] McCallum J, faced with proceedings her Honour described as a "juggernaut", commented:

"A number of observations can be made about these proceedings and I would expect them to be reported to the plaintiff personally. It is, of course, a matter for him how he wishes to conduct his defamation actions (hopefully on the strength of sensible and complete legal advice). It may be observed, however, that the full collection of proceedings commenced by Dr Dank has launched something of a juggernaut. There are multiple proceedings, multiple defendants, multiple legal teams and a vast number of imputations relied upon in all. The objections that are now taken by the defendants in the present application and other applications I have heard this week will afford the plaintiff an opportunity not only to recast his claims in response to my rulings but also to reassess the ambit of the fight he wishes to take on. I would urge the plaintiff and those representing him to give careful consideration to the way in which the claims are framed with a view to bringing before the court a manageable dispute calculated to raise the real issues required to be determined for the purpose of vindicating Dr Dank's reputation."

Dank v Carroll; Dank v Nationwide News Pty Limited [2013] NSWSC 1122 (16 August 2013) (McCallum J)
Dank v Whittaker (No 1) [2013] NSWSC 1062

Dank v Carroll; Dank v Nationwide News Pty Limited [2013] NSWSC 1122 (16 August 2013) (McCallum J)

1. **HER HONOUR:** Dr Stephen Dank has instituted multiple proceedings for defamation arising out of widespread reports in the media suggesting that he administered performance-enhancing drugs to footballers at Cronulla-Sutherland District Rugby League Football Club. Objections to the form of the pleadings have been taken in a number of matters: see *Dank v Whittaker (No 1)* [2013] NSWSC 1062; *Dank v Cronulla-Sutherland District Rugby League Football Club* [2013] NSWSC 1101 and *Dank v Whittaker (No 2)* [2013] NSWSC 1064.

Dank v Whittaker (No 2) [2013] NSWSC 1064 (09 August 2013) (McCallum J)
Dank v Whittaker (No 1) [2013] NSWSC 1062

Dank v Whittaker (No 2) [2013] NSWSC 1064 (09 August 2013) (McCallum J)

5. More detail of the content of the articles is set out in my judgment in *Dank v Whittaker (No 1)* [2013] NSWSC 1062.

Dank v Cronulla-Sutherland District Rugby League Football Club [2013] NSWSC 1101 (08 August 2013) (McCallum J)
Dank v Whittaker (No 1) [2013] NSWSC 1062

Dank v Cronulla-Sutherland District Rugby League Football Club [2013] NSWSC 1101 (08 August 2013) (McCallum J)

12. In other defamation proceedings commenced by Mr Dank, I have this week heard applications by defendants in a similar position, that is, defendants sued as original publishers of the whole of an article where those defendants had only contributed a small part of the material reproduced in the article and were not proprietors, editors or journalists of the relevant newspaper. I held that the pleadings against those defendants should be struck out: *Dank v Whittaker (No 1)* [2013] NSWSC 1062.

TAB 6

Fraleigh v. RBC Dominion Securities Inc. et al.

[Indexed as: Fraleigh v. RBC Dominion Securities Inc.]

99 O.R. (3d) 290

Ontario Superior Court of Justice,
Newbould J.
October 8, 2009

Torts -- Intentional interference with economic relations -- Plaintiff bringing action against brokerage firm and employee of firm claiming that he was damaged by firm's provision of information about him to Ontario Securities Commission and employee's testimony on her examination in connection with OSC's motion to freeze his accounts -- Employee's testimony and firm's provision of information to OSC protected by absolute privilege -- Defendants' motion for summary judgment dismissing action granted.

Torts -- Malicious falsehood -- Plaintiff bringing action against brokerage firm and employee of firm claiming that he was damaged by firm's provision of information about him to Ontario Securities Commission and employee's testimony on her examination in connection with OSC's motion to freeze his accounts -- Employee's testimony and firm's provision of information to OSC protected by absolute privilege -- Defendants' motion for summary judgment dismissing action granted.

The Ontario Securities Commission was conducting an investigation into the activities of the plaintiff and R, and issued directions freezing their accounts. The OSC sent letters to the defendant DS Inc. and other brokerage firms asking to be informed of the accounts of the plaintiff and R. D, an employee

of DS Inc., noted that the plaintiff was denying that he knew R. She informed her supervisor that she recalled the plaintiff telephoning R on two occasions. DS Inc. instructed its external legal counsel to notify OSC staff of that information. As a result, OSC staff delivered a notice of examination to examine D as a witness in its motion to continue the freeze of the plaintiff's accounts. D was examined under oath. The plaintiff brought an action against DS Inc. and D for damages for injurious falsehood and interference with economic relations. The defendants brought a motion for summary judgment dismissing the action.

Held, the motion should be granted.

An absolute privilege attaches to communications which take place during, incidental to, or in furtherance of judicial or quasi-judicial proceedings. Absolute privilege applies to causes of action other than defamation, and applied to the causes of action pleaded by the plaintiff. D's evidence given under oath during her examination was protected by absolute privilege. DS Inc.'s communications to the OSC were not covered by the same privilege attaching to the evidence given by D. However, the communications were protected by absolute privilege as they were statements made to a quasi-judicial body. The claims for malicious falsehood was based squarely on the evidence given by D, and the claim for interference with economic relations was based squarely upon the communications between DS Inc. and D with the OSC. As those communications were covered by absolute privilege, neither claim could succeed.

Cases referred to

Hung v. Gardiner, [2003] B.C.J. No. 1048, 2003 BCCA 257, 227 D.L.R. (4th) 282, 184 B.C.A.C. 4, 13 B.C.L.R. (4th) 298, 1 Admin. L.R. (4th) 152, 32 C.P.C. (5th) 1, 122 A.C.W.S. (3d) 185; Web Offset Publications Ltd. v. Vickery (1999), 43 O.R. (3d) 802, [1999] O.J. No. 2760, 123 O.A.C. 235, 89 A.C.W.S. (3d) 1315 (C.A.), affg (1998), 40 O.R. (3d) 526, [1998] O.J. No. 6478 (Gen. Div.), consd [page291]

Other cases referred to

1061590 Ontario Ltd. v. Ontario Jockey Club (1995), 21 O.R. (3d) 547, [1995] O.J. No. 132, 77 O.A.C. 196, 16 C.E.L.R. (N.S.) 1, 43 R.P.R. (2d) 161, 52 A.C.W.S. (3d) 1377 (C.A.); 3173763 Canada Inc. v. Armcorp. 4-8 Ltd., [1997] O.J. No. 3631, 43 O.T.C. 358, 50 C.B.R. (3d) 23, 73 A.C.W.S. (3d) 849 (Gen. Div.); Dawson v. Rexcraft Storage and Warehouse Inc., [1998] O.J. No. 3240, 164 D.L.R. (4th) 257, 111 O.A.C. 201, 26 C.P.C. (4th) 1, 20 R.P.R. (3d) 207, 81 A.C.W.S. (3d) 783 (C.A.); French v. Law Society of Upper Canada (1975), 9 O.R. (2d) 473, [1975] O.J. No. 2422, 61 D.L.R. (3d) 28 (C.A.); Gala Homes Inc. v. Flisar (2000), 48 O.R. (3d) 470, [2000] O.J. No. 1694, [2000] O.T.C. 334, 2 C.L.R. (3d) 261, 97 A.C.W.S. (3d) 229 (S.C.J.); Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, [1999] S.C.J. No. 60, 178 D.L.R. (4th) 1, 247 N.R. 97, 126 O.A.C. 1, 49 B.L.R. (2d) 68, 15 C.C.L.I. (3d) 1, 39 C.P.C. (4th) 100, [2000] I.L.R. I-3 741, 91 A.C.W.S. (3d) 796; Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545, [1991] O.J. No. 1478, 83 D.L.R. (4th) 734, 50 O.A.C. 176, 1 C.P.C. (3d) 248, 28 A.C.W.S. (3d) 974 (C.A.); Lineal Group Inc. v. Atlantis Canadian Distributors Inc. (1998), 42 O.R. (3d) 157, [1998] O.J. No. 4499, 83 A.C.W.S. (3d) 702 (C.A.); Nicholas v. Anderson, [1998] O.J. No. 3923, 5 C.B.R. (4th) 256, 82 A.C.W.S. (3d) 851 (C.A.), affg [1996] O.J. No. 1068, 40 C.B.R. (3d) 32, 62 A.C.W.S. (3d) 229 (Gen. Div.); Reynolds v. Kingston (City) Police Services Board, [2006] O.J. No. 2039, 267 D.L.R. (4th) 409, 212 O.A.C. 299, 39 C.C.L.T. (3d) 257, 148 A.C.W.S. (3d) 399 (C.A.); Romano v. D'Onofrio (2005), 77 O.R. (3d) 583, [2005] O.J. No. 4969, 262 D.L.R. (4th) 181, 143 A.C.W.S. (3d) 1141 (C.A.); Samuel Manu-Tech Inc. v. Redipac Recycling Corp., [1999] O.J. No. 3242, 124 O.A.C. 125, 38 C.P.C. (4th) 297, 90 A.C.W.S. (3d) 721 (C.A.); Spasic Estate v. Imperial Tobacco Ltd (2000), 49 O.R. (3d) 699, [2000] O.J. No. 2690, 188 D.L.R. (4th) 577, 135 O.A.C. 126, 2 C.C.L.T. (3d) 43, 47 C.P.C. (4th) 12, 98 A.C.W.S. (3d) 558 (C.A.); Sussman v. Eales, [1986] O.J. No. 317, 25 C.P.C. (2d) 7 (C.A.), revg [1985] O.J. No. 412, 33 C.C.L.T. 156, 1 C.P.C. (2d) 14, 31 A.C.W.S. (2d) 114 (H.C.J.)

Statutes referred to

Securities Act, R.S.O. 1990, c. S.5, ss. 11, 13, 126, (5), 127,

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules
20.04(2), (4), 39

Authorities referred to

Brown, Raymond D., *The Law of Defamation in Canada*, 2nd ed.,
vol. 2, looseleaf (Toronto: Carswell, 1999)

Fleming, John G., *The Law of Torts*, 9th ed. (Sydney: LBC
Information Services, 1998)

MOTION by the defendants for summary judgment dismissing the
action.

Alistair M. Crawley, for plaintiff.

Linda L. Fuerst, for defendants.

Endorsement of NEWBOULD J.: --

Overview and Background Facts

[1] This is a motion by the defendants for summary judgment
dismissing the claim of Mr. Fraleigh. [page292]

[2] Mr. Fraleigh claims that he has been damaged as a result
of alleged false information provided by RBC Dominion
Securities Inc. ("DS") to the Ontario Securities Commission
("OSC") and false evidence given under oath by the defendant
Pamela De Abreu in legal proceedings brought by the OSC to
freeze an account of Mr. Fraleigh's at BMO Nesbitt Burns Inc.
("BMO"), and the subsequent publication of her testimony by
the media. He claims that the actions of the defendants
constituted a malicious falsehood and an intentional
interference with his economic relationships.

[3] The background to this action is that in March 2001, DS
became aware of unusual trading in offshore accounts at DS in
the Bahamas. DS notified the OSC of their concerns. On April 4,
2001, DS made a public announcement that it had commenced an
internal investigation into suspicious trading in offshore
accounts. At that time, DS was not yet aware of the person who

operated the DS account in the Bahamas, but DS was concerned that the trading implicated Mr. Andrew Rankin, who worked at DS in Toronto. DS later learned that the DS account in the Bahamas was an account of Mr. Daniel Duic.

[4] Coincidentally, on April 4, 2001, BMO notified the OSC of unusual trading activity in a BMO account of Mr. Fraleigh in the Bahamas. The OSC issued directions freezing the Bahamian account at RBC and Mr. Fraleigh's account at BMO and took proceedings in the Superior Court of Ontario to continue those freezing orders. Protective orders were obtained temporarily sealing the court files.

[5] Shortly thereafter, on April 27, 2001, the OSC sent letters to brokerage firms in Toronto, including DS, requesting to be informed of accounts of parties named in the letter whose trading was being reviewed by the OSC. Included in the persons named were Mr. Rankin and Mr. Fraleigh. Shortly after that, notwithstanding the protective orders, the media began publishing articles about the OSC's investigation into Mr. Rankin's activities, including possible links between Mr. Fraleigh and Mr. Rankin and referred to the freeze of Mr. Fraleigh's account at BMO.

[6] Ms. De Abreu, who had been Mr. Rankin's personal assistant at DS, read the media reports and saw that Mr. Fraleigh was quoted as saying he did not know Mr. Rankin. At that stage, Mr. Rankin had been suspended by DS. Ms. De Abreu went to her supervisor and said that she recalled Mr. Fraleigh telephoning Mr. Rankin on two occasions. As a result, DS instructed its external legal counsel to notify OSC staff that [page293] DS had information from Ms. De Abreu that suggested that Mr. Fraleigh and Mr. Rankin knew each other.

[7] Upon being advised of that information, the OSC staff delivered a notice of examination to examine Ms. De Abreu as a witness in the motion to continue the freeze of the BMO accounts of Mr. Fraleigh, and Ms. De Abreu attended on the following day, April 15, 2001, and was examined under oath by counsel for the OSC and cross-examined by counsel for Mr. Fraleigh. She testified as to the two telephone calls she

recalled having been made by Mr. Fraleigh to Mr. Rankin while she was acting as the assistant to Mr. Rankin.

[8] On May 17, 2001, the OSC motion to continue the freeze of the BMO accounts of Mr. Fraleigh was argued before Farley J. The transcript of the examination of Ms. De Abreu was filed in court. Farley J. dismissed the motion. On the following day, newspaper articles reported on the motion and included references to Ms. De Abreu's evidence regarding the telephone calls from Mr. Fraleigh to Mr. Rankin.

[9] Mr. Fraleigh's claim against DS is that the publication of Ms. De Abreu's evidence by the media damaged him with respect to his business and banking relationships. The OSC closed its investigation with respect to his trading without any proceedings being taken against him.

[10] The OSC charged Mr. Rankin with insider trading and providing insider tips to Mr. Duic, who was the holder of the DS account in the Bahamas that had been investigated. Mr. Duic settled with the OSC and charges were not brought against him.

[11] Mr. Fraleigh's claim is that the reporting of Ms. De Abreu's information by DS to the OSC and her evidence given under oath was false. He also claims that DS knew or should have known that Ms. De Abreu's information was false and that their motivation to pass on the information of Ms. De Abreu about Mr. Fraleigh was to prevent an investigation into other senior officers of RBC and DS who were known to Mr. Fraleigh and who were concerned, so it is alleged, that their reputations might be harmed if their names were mentioned.

[12] The motion for summary judgment is brought by the defendants on the basis that the statement of DS to the OSC and the evidence of Ms. De Abreu are protected by absolute privilege and that there is no evidence that the alleged harm caused to Mr. Fraleigh was other than a result of the publication by the media of the statements made by Ms. De Abreu on a privileged occasion. The defendants also assert that as the statements which form the basis of Mr. Fraleigh's claim are absolutely privileged, the motivation by DS or Ms. De Abreu in

making the privilege [page294] statements is irrelevant and that in any event there is no credible evidence of any malice or intent to injure Mr. Fraleigh.

[13] In my view, the defendants have established that there is no genuine issue for trial and the motion for summary judgment dismissing Mr. Fraleigh's claim should be granted.
Test for Summary Judgment

[14] On a motion for summary judgment a defendant may, after delivering a statement of defence, move for summary judgment dismissing the plaintiff's claim. Where the court is satisfied, after consideration of the evidence advanced on the motion by all parties, that there is no genuine issue for trial, the court shall grant summary judgment accordingly: see rule 20.04(2) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

[15] The proper test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial. Once the moving party has made this showing, the respondent must then establish his claim as being one with a real chance of success. A self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence: see *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, [1999] S.C.J. No. 60.

[16] On a motion for summary judgment, the court must take a "good hard look" at the merits of the action and determine whether, on the material before it, there is a genuine issue in respect of a material fact requiring resolution by a judge. If there is evidence capable of supporting the plaintiff's claim, summary judgment is precluded: see *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547, [1995] O.J. No. 132 (C.A.) and *Dawson v. Rexcraft Storage and Warehouse Inc.*, [1998] O.J. No. 3240, 164 D.L.R. (4th) 257 (C.A.).

[17] The court's function is not to resolve an issue of fact, but rather to decide whether a genuine issue of fact exists. Only an issue of fact relating to a fundamental or material

issue that has legal probative force will preclude summary judgment being granted: see *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545, [1991] O.J. No. 1478 (C.A.).

[18] Mr. Crawley on behalf of Mr. Fraleigh contends that to the extent a case involves the resolution of unsettled questions of law requiring a factual context, a motion for summary judgment is not a proper forum to resolve the issue, and he relies on *Reynolds v. Kingston (City) Police Services Board*, [2006] O.J. No. 2039, 212 O.A.C. 299 (C.A.) and *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 49 O.R. (3d) 699, [2000] O.J. No. 2690 (C.A.). [page295] Those cases were pleadings motions without any evidentiary record available to the court. In a motion for summary judgment, the record contains evidence as to the facts, with each side being required to put their best foot forward, and questions of law can be resolved. I realize that our Court of Appeal has held that it is not appropriate to decide a summary judgment motion where a legal issue is unsettled and a factual record is required that is not before the court on the motion: see *Romano v. D'Onofrio* (2005), 77 O.R. (3d) 583, [2005] O.J. No. 4969 (C.A.). However, rule 20.04(4) provides that on a motion for summary judgment where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly. In any event, in this case the facts regarding the communications to the OSC and of Ms. De Abreu's evidence are not in dispute and the legal principles applicable to the immunity issue governing those facts are well settled.

Analysis of Privilege Issues

(a) Evidence under oath by Ms. De Abreu

[19] The OSC issued its direction to BMO to freeze the accounts relating to Mr. Fraleigh on April 9, 2001 under s. 126 of the Securities Act, R.S.O. 1990, c. S.5. Section 126(5) of that Act provides that within seven days after the direction, the OSC is to apply to the Superior Court of Justice to continue the direction. The OSC served its notice of motion to continue the freeze of Mr. Fraleigh's accounts at BMO on April 12, 2001. On May 14, 2001, the OSC delivered a notice of examination on Ms. De Abreu pursuant to Rule 39 of the Rules of

Civil Procedure in connection with its motion to continue the freezing of Mr. Fraleigh's accounts at BMO. On the following day, Ms. De Abreu was examined under oath by counsel for the OSC and cross-examined by Mr. Crawly on behalf of Mr. Fraleigh. It was during this examination that Ms. De Abreu gave her evidence regarding her recollection of Mr. Fraleigh telephoning Mr. Rankin on two occasions.

[20] In my view, it is quite clear that this evidence given under oath by Ms. De Abreu attracts an absolute privilege at law.

[21] An absolute privilege or immunity attaches to communications which take place during, incidental to, and in the process and furtherance of judicial or quasi-judicial proceedings. The immunity is not designed for the benefit of the participants but for the efficacy of the judicial proceeding. It reflects a balance between the right of a person to protect his or her reputation [page296] and the public interest in the full disclosure of facts essential to ensure the unfettered administration of justice: see Raymond D. Brown, *The Law of Defamation in Canada*, 2nd ed., vol. 2, looseleaf (Toronto: Carswell, 1999) at pp. 12-43 to 12-47 and 12-58 to 12-63 and the authorities therein referred to.

[22] The evidence of a witness in any proceedings before any court or judicial tribunal recognized by law is absolutely privileged regardless of whether it is malicious or knowingly false: see *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.*, [1999] O.J. No. 3242, 38 C.P.C. (4th) 297 (C.A.), at paras. 19 and 20; and *Reynolds v. Kingston (City) Police Services Board*, *supra*, at para. 14. There is conflicting evidence as to whether Ms. De Abreu lied in her testimony. Mr. Fraleigh says he did not know Mr. Rankin and never telephoned him. On a motion for summary judgment, I am not in any position to weigh the evidence on the point and make any decision as to what evidence I prefer. However, even on the assumption that Ms. De Abreu did lie, which would be evidence of malice, that would not affect the absolute privilege which the law affords her evidence.

[23] The absolute privilege applies to causes of action other than defamation and it is clear that it applies to the causes of action pleaded by Mr. Fraleigh of injurious falsehood and unlawful interference with his economic relations. In *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.*, supra, Feldman J.A. for the court stated that the immunity provided by absolute privilege extends to any action, however framed, and is not limited to actions for defamation. In that case, a claim for intentional interference with economic relations was struck on the basis of absolute immunity relating to the judicial proceedings. The same result occurred in *Web Offset Publications Ltd v. Vickery* (1998), 40 O.R. (3d) 526, [1998] O.J. No. 6478 (Gen. Div.), affd (1999), 43 O.R. (3d) 802, [1999] O.J. No. 2760 (C.A.). This result makes good sense. The policy reasons for providing absolute privilege to a witness to protect the efficacy of a judicial proceeding are equally at play in an action for injurious falsehood or intentional interference with economic relations arising from evidence given in a legal proceeding as they would be in an action for defamation. In this case, the essential allegation supporting the causes of action that is pleaded is the knowingly making of a false statement.

(b) DS communication to the OSC

[24] Mr. David Lang, the chief compliance officer for the Capital Markets Division of DS, was told on or about May 4, 2001 of the information given by Ms. De Abreu to her supervisor [page297] that she recognized Mr. Fraleigh's name in a newspaper article and that she recalled Mr. Fraleigh telephoning Mr. Rankin. Mr. Lang then interviewed Ms. De Abreu, who confirmed to him the information that he had been given. Mr. Lang's affidavit, on which he was not cross-examined, then stated:

27. In good faith and consistent with my understanding of the OSC's expectations of a registrant, RBC DS instructed its legal counsel, Stikeman Elliot, to notify OSC staff that RBC DS had received information about Mr. Fraleigh from Ms. De Abreu that suggested that Fraleigh and Rankin knew each other. I am advised by Sean Dunphy of Stikeman Elliot and verily believe that he and John Stransman, then a partner of Stikeman Elliot who is now deceased, subsequently relayed

that information to OSC staff. At the time, the OSC motion to continue the BMO freeze direction was pending.

[25] Counsel for the OSC on the cross-examination of Yvonne Lo, an OSC staff member, stated his belief that the information from DS was provided to the OSC on May 10 or 11. Mr. Lang stated in his affidavit that the timing of the disclosure to the OSC was in the hands of Stikeman Elliot.

[26] This communication from DS through Stikeman Elliot to the OSC regarding Ms. De Abreu's information was never publicized in any way. It is claimed by Mr. Fraleigh, however, that this notification was made by DS knowing that Ms. De Abreu's recollection was false and, as it led to the OSC examining Ms. De Abreu under oath, the communication is a constituent element of the torts of injurious falsehood and intentional interference with Mr. Fraleigh economic relations alleged against DS and Ms. De Abreu.

[27] DS contends that the statement by it to the OSC is privileged on two grounds. The first is that the statement was made after the OSC had commenced its legal proceedings and was made in connection with those proceedings. Thus, it is said that the statement is covered by the same privilege attaching to the evidence given by Ms. De Abreu in those proceedings. The second is that the statement was made to a quasi-judicial body in circumstances in which the statement is absolutely privileged. I will deal with each of these.

[28] DS relies on principles enunciated in *Web Offset Publications Ltd v. Vickery*, supra. In that case, a lawyer who had commenced an action in New York State sent the pleadings in that action to Ontario solicitors who attached them to an affidavit used in an Ontario action. Although the New York solicitor did not swear the affidavit in the Ontario action or give any viva voce evidence, it was held that the absolute privilege which protects a witness applied as the privilege extends to statements made by a witness to a solicitor taking his proof or when [page298] interviewing him with the object of possibly calling him as a witness, and extends to documents produced by the person at such interview.

[29] In my view, DS is not protected under this privilege. The information provided by DS to the OSC was not given to a solicitor for the OSC who was seeking evidence to be potentially used in the proceedings which it had commenced. Rather, Mr. Lang felt duty-bound to provide the information on behalf of DS to its regulator, the OSC. While the letter from the OSC to DS and other brokerages in Toronto on April 27, 2001 requested confirmation whether DS had any accounts in the name of persons listed, including Mr. Rankin and Mr. Fraleigh, it did not ask for other information and I do not think it can be considered to be a request from a solicitor seeking proof with the possibility of calling someone as a witness in a legal proceeding.

[30] The alternative argument of DS is that the statement made by it to the OSC was a statement made to a quasi-judicial body and thus protected by an absolute privilege. There can be little doubt that the OSC is a quasi-judicial body. It is empowered to make investigations for the due administration of Ontario securities laws under ss. 11 and 13 of the Securities Act and under s. 127 of that Act to make orders in the public interest, including preventing a person trading in securities. It was contended on behalf of Mr. Fraleigh that the information was provided by DS to the OSC staff who themselves could not be considered a quasi-judicial body. I do not agree with that contention. The OSC staff are employed by the OSC. The fact that the person at the OSC who was advised of the DS information were staff undertaking an investigation does not mean that the information was not provided to the OSC, which is a quasi-judicial body. Moreover, it has been held that the investigatory functions of the Law Society are quasi-judicial acts: see *French v. Law Society of Upper Canada* (1975), 9 O.R. (2d) 473, [1975] O.J. No. 2422 (C.A.), at p. 477 O.R.; see, also, *Sussman v. Eales*, [1985] O.J. No. 412, 1 C.P.C. (2nd) 14 (H.C.J.), affd on this point [1986] O.J. No. 317, 25 C.P.C. (2d) 7 (C.A.). The same would apply to the OSC.

[31] There are cases in which a complaint made to a quasi-judicial body has been held to be protected by an absolute privilege, regardless of whether proceedings are taken by the

quasi-judicial body against the person against whom the complaint has been made: see *Sussman v. Eales*, supra. In *Gala Homes Inc. v. Flisar* (2000), 48 O.R. (3d) 470, [2000] O.J. No. 1694 (S.C.J.), Nordheimer J. held that complaints by home buyers to the Ontario New Home Warranty Plan attracted an absolute privilege. He held that there was a strong public policy argument that [page299] the quasi-judicial attributes of a tribunal extended to the initial complaint-registering and information-gathering functions.

[32] In this case, DS was not making an initial complaint to the OSC regarding Mr. Fraleigh in the sense of asking the OSC to conduct an investigation. The OSC had already started an investigation into Mr. Fraleigh's trading. DS was passing on information that it felt bound to provide to its regulator which DS knew was investigating the trading of Mr. Fraleigh. In my view, however, the fact that DS was not an initial complainant regarding Mr. Fraleigh does not mean that the statement of information provided by DS to the OSC regarding Mr. Fraleigh was not privileged.

[33] In *Hung v. Gardiner*, [2003] B.C.J. No. 1048, 227 D.L.R. (4th) 282 (C.A.), it was held that the sending of information to quasi-judicial bodies was covered by absolute privilege. In that case, the plaintiff was a solicitor and a member of the Certified General Accountants Association. Actions taken by the plaintiff while employed by a firm of chartered accountants resulted in an investigation and reprimand of her supervisor by the professional conduct committee of the Institute of Chartered Accountants. The professional conduct committee then forwarded to the Certified General Accountants Association and the Law Society of British Columbia their report which contained information regarding the plaintiffs conduct. Neither the Certified General Accountants Association nor the Law Society of British Columbia took any disciplinary action against the plaintiff.

[34] In sending their report to the Law Society and to the Certified General Accountants Association, the senders of the report were not making a complaint in the sense that they were asking that some action be taken against the plaintiff, but

rather were passing on their concerns. This is in substance no different from what occurred when DS passed on its information regarding communications between Mr. Fraleigh and Mr. Rankin. DS knew from the fact of the freeze order made by the OSC against Mr. Fraleigh's accounts at BMO, and from the letter of April 27, 2001 sent by the OSC to DS and other brokers in Toronto, that the OSC was seeking information about accounts controlled by both Mr. Fraleigh and Mr. Rankin. The information in the hands of DS that there was evidence of communication between Mr. Fraleigh and Mr. Rankin was something that would elicit in the mind of DS a concern that the OSC should be informed of the information. In *Hung v. Gardiner*, Levine J.A. stated [at paras. 31 and 37]:

There are important public policy reasons for this finding. Absolute privilege allows a member of the public to raise a concern about the conduct of a [page300] professional person, without fear of reprisal. In this way, the immunity afforded by absolute privilege protects both professionals and the public.

.

The appellant's action against the respondents cannot be maintained. All of the respondents are entitled to claim absolute privilege and are immune from liability for their actions in sending information to the Law Society and the CGA Association concerning the appellant's professional conduct.

[35] For DS not to have advised the OSC of its information regarding Ms. De Abreu would clearly have been contrary to the public interest. Mr. Lang, who at one time had worked in the Enforcement Branch of the OSC, knew that it was expected of DS as a registrant in a highly regulated industry to provide information to the OSC regarding an OSC investigation. It was for the OSC to decide what use to make of the information, not DS. The public policy reasons articulated in *Hung v. Gardiner* encouraging members of the public to come forward to regulatory bodies applies equally to DS.

Claim for Injurious Falsehood

[36] The tort of injurious falsehood is similar to the tort

of defamation but protects a different interest. Defamation protects a person's personal reputation while injurious falsehood protects an interest in one's property, products or business. In order to recover for injurious falsehood, there must be a false statement made with malice and malice must be proven. Injurious falsehood consist in the publication of false and malicious statements concerning the plaintiff or his property calculated and intended to induce others not to deal with him: see John G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at pp. 778-79.

[37] In this case, Mr. Fraleigh pleads that it was the false statements made by Ms. De Abreu reported in the media that disparaged him and that the wide reporting of those statements resulted in damage to Mr. Fraleigh's business and banking relationships. It is pleaded that DS is vicariously reliable for the actions of its employee and that both DS and Ms. De Abreu knew that her statements were false and knew that these false statements would eventually be widely reported in the media and intended that to occur.

[38] Thus, the claim for injurious falsehood is squarely based on the evidence given by Ms. De Abreu. That evidence carries absolute privilege and therefore the claim for injurious falsehood as pleaded cannot succeed. [page301]
Interference with Economic Relations

[39] The tort of interference with economic or contractual relations requires a plaintiff to prove (i) an intention to injure the plaintiff, (ii) interference by illegal means with the plaintiff's method of gaining his or her living or business and (iii) economic loss caused thereby: see *Lineal Group Inc. v. Atlantis Canadian Distributors Inc.* (1998), 42 O.R. (3d) 157, [1998] O.J. No. 4499 (C.A.).

[40] In this case, Mr. Fraleigh pleads that DS proffered Ms. De Abreu as a witness to the OSC knowing that her statements were false and that these false statements made by her, either informally or under oath pursuant to a summons, would result in significant injury to Mr. Fraleigh's business and banking relationships. It is pleaded that the interference with Mr.

Fraleigh's economic relations was unlawful because DS and Ms. De Abreu knowingly made false statements to the OSC.

[41] Thus, the claim for interference with Mr. Fraleigh's economic relations is based squarely upon the communications between DS and Ms. De Abreu with the OSC, communications which were covered by an absolute privilege. Therefore, the claim for intentional interference with economic relations as pleaded cannot succeed.

Causation

[42] Mr. Fraleigh pleads in his statement of claim:

Mr. Fraleigh states that, but for the false statements of Ms. De Abreu, who was aided and abetted by DS, Mr. Fraleigh would not have suffered the harm and damages described below.

[43] In light of the fact that the statements of Ms. De Abreu are covered by an absolute immunity, there is no basis on the claim pleaded to contend that Mr. Fraleigh was harmed by anything other than actions that are privileged. Thus, on that ground the action as pleaded cannot succeed.

[44] It is not, therefore, strictly necessary to review the evidence of causation. However, in spite of the allegation of Mr. Fraleigh in his statement of claim that it was the publication of the false statements of Ms. De Abreu that caused him damage, his own evidence filed in 2001 belies that assertion. It is clear from his affidavit evidence at that time that he concluded before any statement was made by DS to the OSC that his reputation had been irreparably damaged.

[45] Mr. Fraleigh's affidavit was sworn May 11, 2001 and used to oppose the motion by the OSC to continue the freezing order that it had made regarding his Bahamian accounts at BMO. In [page302] his affidavit, he referred to the letter of April 27, 2001 sent by the OSC to brokerages throughout Toronto, including DS, which listed his name as well as others, including Mr. Rankin. He swore that the OSC's actions in freezing his account in conjunction with its high profile

investigation caused irreparable damage to his reputation. He referred to reports in the media starting on May 2, 2001 and referred to articles on May 3, 4 and 5, 2001 in the National Post and Globe and Mail which he said had a devastating effect on him personally and his family and said that, as a result, he had to resign as an officer and director of a company in which he was involved and in which apparently he was undertaking some financing transaction. Some of the articles in the newspaper at that time referred to his arrest in 1989 for stealing \$50,000 in Canada Savings Bonds from his former employer, his conviction for theft and a pardon received in 1998.

[46] All of this publicity that Mr. Fraleigh swore had irreparably damaged his reputation took place before DS advised the OSC on May 10 or 11, 2001 that it had information from Ms. De Abreu and before Ms. De Abreu gave her evidence under oath on May 15, 2001. On Mr. Fraleigh's own sworn evidence, his reputation by that time had been irreparably damaged.

[47] The best that would open to Mr. Fraleigh would be to assert in some manner that while his reputation had already been irreparably damaged, matters became worse after Ms. De Abreu's evidence was reported in the media.

Alleged Malice and Intention to Injure

[48] Mr. Fraleigh's theory is that DS put Ms. De Abreu up to making a false statement in order to shield senior officers of DS and RBC known to Mr. Fraleigh from being investigated and thus preventing them from having their reputations harmed by being connected to him. This theory was contained in his affidavit as a statement of belief. His statements of belief contained in his affidavit are not admissible evidence. A self-serving affidavit is not sufficient to create a triable issue in the absence of detailed facts and supporting evidence: see *Guarantee Co. of North America v. Gordon Capital Corp.*, supra. See, also, *Nicholas v. Anderson*, [1996] O.J. No. 1068, 40 C.B.R. (3d) 32, (Gen. Div.), affd [1998] O.J. No. 3923, 5 C.B.R. (4th) 256 (C.A.), for authority that a court ought not to give effect to hearsay evidence in affidavits or if the affidavit does not disclose a source of the information and the belief in its truth. That is the case with Mr. Fraleigh's

statements in his affidavit.

[49] Mr. Crawley in argument referred to bits and pieces of evidence, such as a delay in DS notifying the OSC of Ms. De Abreu's [page303] information. He asserted that DS only provided Ms. De Abreu's information when it realized that the OSC's theory regarding Mr. Fraleigh was incorrect and that it provided Ms. De Abreu's information, knowing it was false, in order to cause the OSC to keep investigating Mr. Fraleigh. He acknowledged that there was no evidence that DS was trying to influence the OSC's investigation, but said it could be inferred. This ignores Mr. Lang's uncontradicted evidence that the timing of the release of the information to DS was in the hands of their external counsel, Stikeman Elliot, and he was not sure why they waited although it may have been because they were interviewing others. It also ignores Mr. Lang's evidence that he knew that the OSC was conducting their own investigation of Mr. Fraleigh, that DS did not know what information the OSC had about Mr. Fraleigh and his trading and he knew from his experience at the OSC that the OSC did not permit market participants to quarterback an OSC investigation and would scrutinize and test any information it received before deciding whether to rely on it.

[50] Mr. Crawley also asserted that the OSC's first theory was that Mr. Fraleigh's trading in his BMO account was similar to the trading in Mr. Duic's account at RBC and that by May 9, 2001, the OSC's theory against Mr. Fraleigh had changed to be an allegation of a correlation between Mr. Fraleigh's trading and M & A transactions in which RBC was an advisor. He asserted the change was due to activities of DS, but again acknowledged that there was no evidence to support that.

[51] Mr. Crawley asserted that RBC had a positive duty to inform the OSC what was wrong with the OSC's theory regarding Mr. Fraleigh and that it failed to do so. Mr. Fraleigh has not pleaded any such suggested duty on the part of DS, a regulated dealer, to advise its regulator as to what the OSC should or should not be doing in any investigation, nor did Mr. Crawley provide any legal authority for that proposition.

[52] Even if it could be said that there is an evidentiary issue as to whether DS was motivated in putting forward Ms. De Abreu to the OSC in trying to protect the reputation of other senior officers of DS and RBC, that would not provide any triable issue as the acts pleaded and relied upon as the acts giving rise to the torts of injurious falsehood and interference with economic relations are covered by absolute privilege and motive is irrelevant.

[53] Mr. Fraleigh submits that all of the answers to undertakings have not been answered and that therefore the motion should not succeed until he has had a chance to obtain all of the internal documents from various persons at DS. If that evidence [page304] were relevant, Mr. Crawley might have a point. However, it goes to the motive of DS and therefore is not relevant. Moreover, the discoveries were completed in 2005 and undertakings given at that time. No motion by Mr. Fraleigh has been brought to have the undertakings answered. In 2008 when the statement of claim was amended, the claims were narrowed and not all of the undertakings were relevant. The motion for summary judgment was served in March of this year. While there was apparently a hiatus between the parties from mid-June to the first week of August, for reasons which I am told are not relevant, the fact remains that before then and after a motion for the undertakings to be complied with could have been brought if it was thought that any potential evidence might be helpful. It has been held that failure to move to have answers compelled is no basis for refusing a motion for summary judgment: see 3173763 Canada Inc. v. Armcorp. 4-8 Ltd., [1997] O.J. No. 3631, 50 C.B.R. (3d) 23 (Gen. Div.).

Conclusion

[54] In my view, for the reasons given, there is no genuine issue for trial and the motion for summary judgment dismissing this action is granted. DS and Ms. De Abreu are entitled to their costs of the action. If the parties are unable to agree on the costs, submissions may be made in writing within ten days on behalf of DS and Ms. De Abreu and reply submissions within a further ten days.

Motion granted.

TAB 7

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Hung v. Gardiner,***
2003 BCCA 257

Date: 20030506
Docket: CA030057

Between:

Christine Hung

Appellant
(Plaintiff)

And

Brian C. Gardiner, Donald Willoughby, Bryant McAfee, Jim P. Mills, Barbara Carle-Thiesson, Judy Garner, D. Ted MacCormac, Mark McGorman, Sunny Mathieson, W. Wayne McIlroy, The Institute of Chartered Accountants of British Columbia

Respondents
(Defendants)

Before: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Hall
The Honourable Madam Justice Levine

C. Hung Appearing In-Person

D.B. Wende Counsel for the Respondents

Place and Date of Hearing: Vancouver, British Columbia
March 5, 2003

Place and Date of Judgment: Vancouver, British Columbia
May 6, 2003

Written Reasons by:

The Honourable Madam Justice Levine

Concurred in by:

The Honourable Madam Justice Ryan
The Honourable Mr. Justice Hall

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] At issue in this appeal is whether a person who provides information to a professional disciplinary body about the conduct of one of its members is liable in an action brought by that member. The clear answer is that the communication of the information is subject to absolute privilege, which provides a defence to all claims.

[2] The appellant, Christine Hung, is a member of the Law Society of British Columbia and the Certified General Accountants Association of British Columbia (the "CGA Association"). Actions taken by her while she was employed by a firm of chartered accountants resulted in an investigation and reprimand of her supervisor by the Professional Conduct Inquiry Committee (the "PCEC") of the respondent, the Institute of Chartered Accountants of British Columbia (the "ICABC"). The members of the PCEC (the respondents, Donald Willoughby, Bryant McAfee, Jim P. Mills, Barbara Carle-Thiesson, Judy Garner, D. Ted MacCormac, Mark McGorman and Sunny Mathieson) decided that the Law Society and the CGA Association should be informed of the appellant's conduct. The respondent, Brian Gardiner, the Director of Ethics for the ICABC, forwarded to those professional bodies the report of

the investigator, the respondent, Wayne McIlroy. Both professional bodies declined to investigate further or to take any disciplinary action against the appellant.

[3] The appellant brought an action for damages for defamation, malicious prosecution, negligence, breach of confidentiality under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, breach of the *Accountants (Chartered) Act*, and bylaws, misfeasance in public office, breach of the *Privacy Act*, R.S.B.C. 1996, c. 373, invasion of privacy and conspiracy.

[4] Mr. Justice Joyce, after a summary trial under Rule 18A of the Supreme Court Rules, dismissed all of the appellant's claims, finding that they were barred by the absolute privilege that surrounded the act of providing the report to the professional bodies. (His reasons for judgment may be found at [2002] B.C.J. No. 1918 (QL); 2002 BCSC 1234.) As I agree with that conclusion, I do not find it necessary to review his consideration of the other defences raised, or the appellant's grounds of appeal on those matters.

[5] In a preliminary objection to the Rule 18A proceeding, the appellant argued that a summary trial would be unjust because, among other reasons, it would deprive her of a jury trial. The trial judge ruled ([2002] B.C.J. No. 1293 (QL);

2002 BCSC 781) that this was a factor to consider, but provided there was sufficient evidence to find the necessary facts, it would not be unjust to decide the matter under Rule 18A. On the appeal, the appellant argues that Rule 39(27) of the Supreme Court Rules barred the court from proceeding under Rule 18A in her defamation action. In my opinion, the appellant is wrong.

Absolute Privilege

[6] The trial judge began his discussion of the application of the defence of absolute privilege by quoting the decision of Smith J. in *Sussman v. Eales* (1985), 33 C.C.L.T. 156 at 157 (Ont.H.C.J.), appeal allowed in part (1986), 25 C.P.C. (2nd) 7 (Ont. C.A.). In my view, the principles enunciated in that case apply here, and are worth repeating. Smith J. said at pp. 157-8:

The issue is whether the defendants enjoy immunity. The general rule is clear. No action will lie for defamatory statements contained in a document properly used in the course of any proceedings before a court of justice or tribunal recognized by law. The rule is well enough settled. The need for citing jurisprudential support has virtually disappeared. However, the following passage in Fleming, Law of Torts 4th ed. (1971) p. 489, always bears repetition:

“Freedom of speech without fear of consequences is considered indispensable for the proper and effective administration of justice ... The

privilege is incident to the proceedings of all courts of justice and, though analogically applied to other tribunals exercising equivalent functions, has not been extended to those wielding administrative rather than judicial powers ... Though it is perhaps not easy to justify the inclusion of military courts of inquiry, as distinct from courts martial, no one would cavil at the extension of the privilege to ... disciplinary proceedings by the Law Society ... The privilege is not confined to statements made in court, but extends to all preparatory steps taken with a view to judicial proceedings."

[Emphasis added.]

[7] Smith J. explained the rationale for the immunity (at pp. 159-60):

The principle is the same. It is a question of balancing two interests. The public interest should outweigh that of the individual for at least two reasons. Firstly the immunity will only be conferred upon a citizen complaining in a confidential way to a body created by statute. A communication of that kind can hardly be said to be a publication of the kind that is apt to harm one's reputation in the community to a degree sufficient to attract an award of compensation.

Secondly, the right to engage in professional activities must be the subject of rules governing them. These rules cannot be enforced without a corresponding right in the members of the public to complain uninhibited and without fear of being found wrong and as a result being subject to actions in defamation. Surely it is a small price for a professional person to pay.

[8] The Court of Appeal agreed that the doctrine of immunity applied to statements made to a disciplinary body:

In our view, the doctrine of immunity by reason of absolute privilege with respect to statements made in the course of proceedings before a statutory body, exercising disciplinary powers over a member with respect to unprofessional conduct, applies to statements made in a letter of complaint addressed to the Registrar of the Royal College of Dental Surgeons. It is a document incidental to the initiation of quasi-judicial proceedings, and it matters not that the Complaints Committee has investigatory powers which may or may not lead to a direction that the matter be referred to the Discipline Committee. A complainant in the respondent Eales' position should not be deterred by the fear of proceedings and "the vexation of defending actions". (*Lincoln v. Daniels*, [1961] 3 All E.R. 740 at 748.)

[9] In *Sussman*, the issue was whether the body to which the complaint was sent was quasi-judicial or whether it was merely administrative in nature.

[10] That is not an issue on this appeal. The trial judge found, and the appellant does not dispute that both the Law Society and the CGA Association are quasi-judicial bodies, empowered by statute, and each having a duty, to investigate complaints and hold disciplinary proceedings. The trial judge concluded that the act of sending the report to the Law Society and the CGA Association was the necessary first step in quasi-judicial proceedings, and was sufficiently proximate

to potential disciplinary proceedings to be protected by absolute privilege.

[11] The appellant claims that the trial judge erred in finding that the respondents enjoyed absolute privilege where neither the Law Society nor the CGA Association commenced disciplinary proceedings against her. She argues that absolute privilege extends to a complaint submitted to a quasi-judicial body only if proceedings ensue.

[12] In *Sussman*, Smith J. dealt with a similar argument (at p. 159):

The plaintiff-respondent concedes that the Discipline Committee is a quasi-judicial body. He seeks however to draw a neat distinction between the Complaints Committee and the Discipline Committee. His contention is that the first one is purely investigative and is not protected. I cannot view the discipline machinery in that way. The complaint is a necessary first step in one entire process. The legislature could not have intended to break the machinery or the mechanism unit into discrete parts.

In *French v. L.S.U.C.* (1975), 9 O.R. (2d) 473, a decision of the Ontario Court of Appeal, it was said at p. 477:

"The investigative function of the Law Society and the preparation and swearing of the complaints against the appellant solicitor were discretionary and quasi-judicial acts pursuant to a statutory duty and called for the exercise of discretion and judgment on the part of the officials concerned."

[Emphasis added.]

[13] In support of her argument that neither the Law Society nor the CGA Association exercised any quasi-judicial functions when they decided not to proceed with disciplinary action, the appellant relies on *Lincoln v. Daniels*, [1962] 1 Q.B. 237 (C.A.); *Rajkhowa v. Watson et al.* (1998), 167 N.S.R. (2d) 108 (S.C.); and *O'Connor v. Waldron*, [1935] A.C. 76 (H.L.), rev'g [1932] S.C.R. 183.

[14] In *Lincoln*, the Court of Appeal held that absolute privilege did not extend to a letter of complaint alleging professional misconduct by the plaintiff barrister, sent by the defendant to the secretary of the Bar Council. The Court awarded the plaintiff damages for libel.

[15] The key to the Court's decision was the relationship between the Bar Council and the Benchers of the Inns of Court. The Court found that the Bar Council and the Benchers of the Inns of Court were two distinct bodies. Only the Benchers of the Inns of Court - not the Bar Council - had disciplinary powers and functions over the members. The Bar Council, in contrast to the Benchers of the Inns of Court, was merely administrative in nature. Though the Bar Council sometimes received complaints from the public, this was only as a matter of practice. It did not claim any right to exercise the jurisdiction, powers or privileges of the Inns of Court, nor

did it seek to usurp that jurisdiction. Devlin L.J. explained (at p. 256) that the Bar Council:

. . . does not normally hear the complainant; it has no power to summon the barrister before it or to apply any sanction against him; it does not invariably ask him for his defence. In short, there is no trial process. If there emerges an issue of fact to be tried, the matter must be referred to the Bench of the barrister's Inn.

[16] Thus, the Court found that the Bar Council was an administrative body, not a quasi-judicial one. The Bar Council did not exercise any quasi-judicial functions or powers; it was not empowered to determine the legal rights or affect the status of its members; nor was it a professional body with disciplinary powers over its members. The Court therefore held that the defendant was not entitled to rely on the defence of absolute privilege because his complaint was not directed to the appropriate body.

[17] A similar issue arose in *Sussman*. The action in that case was brought by a dentist against the manager of a nursing home who made complaint to the College of Dental Surgeons and the local dental society. The Ontario Court of Appeal held that absolute privilege applied with respect to the letter sent to the College, which exercised quasi-judicial powers in disciplinary proceedings, but did not apply with respect to

the letter sent to the dental society, which had no such powers.

[18] *Lincoln* stands for the principle, applied in *Sussman*, that absolute privilege extends to a letter of complaint, provided it is written to the appropriate professional body. It matters not whether that body declines to commence proceedings against the professional person after receiving the complaint. The key determination with respect to absolute privilege is whether the body complained to exercises quasi-judicial powers over the individual complained of.

[19] *Lincoln* is of no assistance to the appellant because, in this case, the respondents sent the report, in a confidential manner, to the two professional bodies that exercise quasi-judicial disciplinary powers over her. In fact, *Lincoln* supports the respondents' claim to absolute privilege precisely because they sent the report to the appropriate professional bodies.

[20] The appellant cites the *Rajkhowa* case as being similar to the *Lincoln* case. As with *Lincoln*, however, it does not support her position and actually supports the respondents' defence of absolute privilege.

[21] In *Rajkhowa*, the defendant investigated and audited claims submitted by doctors under the Medical Services Insurance Plan. He gave information to the police concerning the plaintiff's billing practices, so that they could conduct a criminal investigation. No charges were laid and the investigation came to an end.

[22] Hood J., citing from *Sussman*, set out the test to determine whether the information was protected by absolute privilege (at para. 36):

The proper question to be asked in this case is that set out by Smith, J. in *Sussman*: "whether the body to which the complaint ... was sent is quasi-judicial or whether it is merely administrative in nature."

[23] Citing from *Boyachuk v. Dukes* (1982), 136 D.L.R. (3d) 28 (Alta.Q.B.), he applied the test as follows (at para. 46):

If the question is asked: Do the police exercise quasi-judicial or administrative functions? to ask the question is to answer it. The police investigate, they do not adjudicate. Or to paraphrase Adams, J. in *Boyachyk*: they do not have the duty and authority to determine guilt or innocence nor the disciplinary powers to enforce sanctions. The police are therefore in a position similar to that of the Bar Council in the Lincoln case: they do not exercise judicial or quasi-judicial functions.

[24] It is noteworthy that in *Boyachuk*, the court found that a complaint to the chief of police concerning the conduct of a police officer was subject to absolute privilege, because:

Unlike the commissioner in the *O'Connor* case and the bar council in the *Lincoln* case, the chief of police in the present case had not only the authority but the duty to determine the guilt or innocence of the plaintiff and the disciplinary powers to enforce sanctions.

[25] The appellant also relies on *O'Connor*, arguing that it settled the law on absolute privilege in Canada. The *O'Connor* case concerned words uttered by a commissioner appointed under the *Combines Investigation Act*, R.S.C. 1927, c. 26, alleging misconduct by the plaintiff, who was a barrister, during proceedings under the *Act*. In his defence, the commissioner claimed he uttered the words on an occasion of absolute privilege. In determining the issue, Lord Atkin, writing for the Privy Council, stated (at p. 81):

The question therefore in every case is whether the tribunal in question has similar attributes to a court of justice or acts in a manner similar to that in which courts act?

[26] He applied the test to the facts of the case as follows:

Has then a commissioner appointed under the *Combines Investigation Act* attributes similar to those of a court of justice; or does he act in a manner similar to that in which such courts act? In

their Lordships' opinion the answer must be in the negative.

[27] He explained (at p. 82):

It is only necessary to remember that the commissioner by the Act is empowered to enter premises and examine the books, papers and records of suspected persons to see how far his functions differ from those of a judge. His conclusion is expressed in a report; it determines no rights, nor the guilt or innocence of any one. It does not even initiate any proceedings, which have to be left to the ordinary criminal procedure.

[28] In the result, the Privy Council reversed the decision of the Supreme Court of Canada and adopted the dissenting reasons of Hodgins J.A., of the Appellate Division of the Supreme Court of Ontario ([1931] O.R. 608). In reaching the conclusion that absolute privilege did not apply, Hodgins J.A. (at pp. 614-5) cited the following passage from *Odgers on Libel and Slander*, 6th ed. (1929), at p. 195:

An absolute privilege also attaches to all proceedings of, and to all evidence given before, any tribunal which by law, though not expressly a Court, exercises judicial functions – that is to say has power to determine the legal rights and to effect (*sic*) the status of the parties who appear before it.

[29] On close reading, the authorities cited by the appellant are consistent with those relied on by the trial judge. He applied the proper test to determine whether the report was

sent on an occasion of absolute privilege. The test is whether the Law Society and the CGA Association, exercising their disciplinary powers, have attributes similar to a court of justice or act in a manner similar to that in which such courts act. There is no real question that they do.

[30] The Law Society and the CGA Association are quasi-judicial bodies and are not merely administrative in nature. They have the power to determine the legal rights and to affect the status of their members. Thus, a complaint made to them in a confidential way concerning a member's conduct is absolutely privileged.

[31] There are important public policy reasons for this finding. Absolute privilege allowspermits a member of the public to raise a concern about the conduct of a professional person, without fear of reprisal. In this way, the immunity afforded by absolute privilege protects both professionals and the public.

[32] The purpose of the immunity would be undermined if absolute privilege only applied where the complaint leads to proceedings, as contended by the appellant. Nor is the defence of absolute privilege affected by the fact that the Law Society and the CGA Association declined to pursue the matter further.

[33] Thus, the trial judge was correct in finding that the respondents sent the report to the Law Society and the CGA Association on an occasion of absolute privilege.

[34] The trial judge was also correct in concluding that the absolute privilege applies to all causes of action arising from that act. That is clear from the reasons for judgment of Seller L.J., concurred in by Willmer and Diplock LL.J., in **Marrinan v. Vibart**, [1962] 3 All E.R. 380 (C.A.) where, after citing the Court's decision in **Lincoln**, he said (at p. 383):

Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given. LORD ESHER M.R. has been well cited too; in *Royal Aquarium and Summer and Winter Garden Society v. Parkinson* [[1892] 1 Q.B. 431] he says [at p. 442]:

"It is true that, in respect of statements made in the course of proceedings before a court of justice, whether by judge or counsel, or witnesses, there is an absolute immunity from liability to an action. The ground of that rule is public policy. It is applicable to all kinds of courts of justice..."

[35] Seller L.J. quoted further from **Royal Aquarium**, as follows:

"...But it does not matter whether the action is framed as an action for defamation or as an action

analogous to an action for malicious prosecution or for deceit or, as in this instance, for combining or conspiring together for the purpose of injuring another: the rules of law is that no action lies against witnesses in respect of evidence prepared (*Watson v. McEwan, Watson v. Jones* [[1905] A.C. 480], given, adduced or procured by them in the course of legal proceedings. The law protects witnesses and others, not for their benefit, but for a higher interest, namely, the advancement of public justice."

[36] Diplock L.J. put the principle succinctly (at p. 385):

Counsel for the plaintiff has sought to persuade this court that that rule of public policy, for reasons which it is impossible to explain, applies only to actions for defamation and that, if one is sufficiently ingenious to discover some other way of bringing an action against a witness for evidence which he has given in a court, then public policy does not apply to that, although all of the evils of the action are precisely the same as it if were a direct action for defamation. It seems to me quite plain on the authorities - and on the English authorities as well as the Australian authority directly on point - that that argument is without foundation.

[37] The appellant's action against the respondents cannot be maintained. All of the respondents are entitled to claim absolute privilege and are immune from liability for their actions in sending information to the Law Society and the CGA Association concerning the appellant's professional conduct.

Rules 18A and Jury Trial

[38] Before concluding, I will comment on the issue of whether filing a jury notice under Rule 39(26) in a defamation case precludes a summary trial under Rule 18A.

[39] Rules 39(26) and (27) of the Supreme Court Rules apply to a party's election to have a trial with a jury. Under Rule 39(26), "a party may require that the trial of an action be heard by the court with a jury by (a) filing and delivering...a notice...". Rule 39(27) provides that a party to whom a notice under Rule 39(26) has been delivered may apply for an order that the trial be heard without a jury "[e]xcept in cases of defamation, false imprisonment and malicious prosecution...".

[40] The appellant argues that Rule 39(27) prevents a party to a defamation action in which a jury notice has been filed from applying for a summary trial pursuant to Rule 18A. She says that allowing her action to be dealt with by way of summary trial under Rule 18A deprives her of the right to a jury trial provided under Rule 39(27). The appellant argues that Rules 18A and 39(27) are in conflict and that Rule 39(27) ought to prevail.

[41] It appears that neither the Supreme Court nor this Court has directly addressed this issue. Unfortunately, it was not fully argued in this case, in either the factums or oral

submissions. While I have had the opportunity to research the issue since hearing the appeal, that is not a substitute for reasoned argument by counsel on both sides. Having said that, I will provide my opinion based on the brief submissions made and further consideration of other material I have found.

[42] The issue was addressed inferentially by this Court in ***Pentecost v. Kowal***, [1988] B.C.J. No. 130 (C.A.)(QL). The Insurance Corporation of British Columbia, a defendant in a personal injury action, brought an application for judgment under Rule 18A, which was dismissed by a chambers judge. Hutcheon J.A. (Esson J.A. concurring and Craig J.A. dissenting) held that where a party had filed a jury notice, nothing in Rule 18A gave a judge jurisdiction to find the facts. Hutcheon J.A. commented, after quoting Rule 39(19) (the predecessor to Rule 39(27)) that (at p. 7):

The proposition of I.C.B.C. must extend logically to this that even in cases of defamation, false imprisonment and malicious prosecution the party to whom the notice has been given may apply under Rule 18A for the Court to find the facts and to give judgment.

[43] Following the decision in ***Pentecost***, what is now Rule 18A(16) was added by B.C. Reg 95/89. Rule 18A(16) provides:

A party may apply to the court for judgment under this rule notwithstanding the fact that a party may

have filed a notice under Rule 39(26) requiring that the trial of the action be heard with a jury.

[44] McLachlin and Taylor, in *British Columbia Practice*, 2nd ed. looseleaf (Butterworths, 1991) stated the following:

The purpose of this subrule, introduced as an amendment to R18A in 1989, is to permit R18A applications to be heard in appropriate cases despite the filing of a jury notice. Presumably a bona fide election for trial by jury on reasonable grounds would be a factor supporting a dismissal of an application under R18A.

[45] Since then there have been a number of cases decided in the Supreme Court in which it has been reiterated that filing a jury notice under Rule 39(26) does not bar an application for summary trial under Rule 18A. See, for example, **Garcha v. Baas**, [1995] B.C.J. No. 2946 (S.C.), where Humphries J. agreed with the conclusion reached in McLachlin and Taylor; **Burke v. Neil**, [1996] B.C.J. No. 838 (S.C.), where Legatt J. summarized the relevant case law dealing with the effect of a jury notice, at paras. 21-5; and to the similar effect, **Otto v. Holburn**, [1997] B.C.J. No. 1763 (S.C.); **Bulic v. Insurance Corp. of British Columbia**, [1998] B.C.J. No. 65 (S.C.)(QL); **Einarson v. Richmond (City)**, [1998] B.C.J. No. 2103 (S.C.)(QL); **Caleta v. Honaizer**, [2001] B.C.J. No. 2712 (S.C.)(QL); **Bush v. Lundstrom**, [2001] B.C.J. No. 197 (S.C.)(QL).

[46] None of these cases, however, dealt with actions for defamation. The interaction between Rule 39(27) and Rule 18A was alluded to in *Mclean v. Southam Inc.*, [2002] B.C.J. No. 700; 2002 BCCA 229, (Saunders J.A. (in chambers)). She dismissed an application for leave to appeal the decision of a chambers judge that a defamation action was not suitable for determination under Rule 18A. She referred to Rule 39(27) in the following passage (at para. 11):

Very much at the heart of the reasons given by the learned judge was the suitability of the case for jury determination, given the nature of the issues, and the desirability of viva voce evidence. I have already referred to his statements as to the desirability of having the witnesses seen and heard. On the suitability of the case for jury determination, the judge noted that Rule 39(27) supports the view that the availability of trial by jury holds an extra value in cases of defamation...

[Emphasis added.]

[47] In concluding that the leave application should be dismissed, she said (at para. 14):

While Mr. Harbottle says that the interaction between Rule 39 and Rule 18A is an important issue weighing in favour of granting leave to appeal, in my view the discretionary nature of the decision, the emphasis given to the issues raised by the pleadings, the desirability of viva voce evidence on the issues in this case which very much engage issues of credibility and reputation, and the case specific language used by the chambers judge in his reasons for judgment, puts this case squarely with those in which leave has been refused.

[48] The Manitoba Court of Appeal dealt with the issue of whether a defamation action could be disposed of by way of summary judgment in *Weisenberger v. Johnson & Higgins*, [1998] M.J. No. 555 (C.A.)(QL), leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 70 (QL). The Court cited with approval the decision of the Master in *Hall v. Puchniak* (1997), 122 Man.R. (2d) 256 (Q.B.), [1997] M.J. No. 418 (Q.B.), aff'd [1998] M.J. No. 610 (Q.B.). I find these cases of some assistance.

[49] In both *Weisenberger* and *Hall*, the plaintiff's action was for defamation and wrongful termination and the defendants applied for summary judgment under Rule 20 of the *Court of Queen's Bench Rules*, Man. Reg. 553/88. The plaintiffs claimed that s. 64(1) of the *Court of Queen's Bench Act*, C.C.S.M., c. C280 mandated a trial by jury unless the parties waive it. Section 64(1) reads as follows:

64(1) An action for defamation, malicious arrest, malicious prosecution or false imprisonment shall be tried with a jury, unless the parties waive trial with a jury.

[50] In *Weisenberger*, Kroft J.A., Monnin J.A. concurring, (at para. 9) approved the reasoning of Master Goldberg in *Hall* (at p. 258):

S. 64(1) of *The Queen's Bench Act* prescribes the method of trial in defamation actions. It does not

mandate that each and every defamation action must proceed to trial. It does not preclude the proper disposition of defamation actions which can or should be disposed of without a trial. There is no conflict between Rule 20, which enables the court to dispose of actions by motion when there is no genuine issue for trial, and s. 64(1) of *The Queen's Bench Act*, which sets out who (judge or jury) shall try the action.

[51] In the result, the Court unanimously agreed (as stated by Huband J.A., who dissented in the result, (at para. 37)) that:

...an action based on defamation is subject to rules with respect to summary dispositions, and it is only those defamation actions which proceed to trial where the plaintiff has the right to a determination by jury.

[52] Rule 20 of the *Court of Queen's Bench Rules* is more similar to Rule 18 of the Supreme Court Rules, which provides for summary judgment in an action, than to Rule 18A, which provides for summary trial. In my opinion, however, the principles applied by the Manitoba Court of Appeal are nonetheless of assistance.

[53] In *Hall*, Master Goldberg pointed out that regulatory provisions are presumed to work together. In my opinion, Rule 18A and Rule 39(27) are easily interpreted in a complementary manner.

[54] If an application is made under Rule 18A, it is for the court to determine, pursuant to Rules 18A(8) and (11), whether the matter is appropriate for summary trial. It is only after that determination has been made that Rule 39(27) comes into play. If the court decides the matter is not appropriate for disposition under Rule 18A, then the matter goes to a full trial and Rule 39(27) applies. If, however, the court decides the matter is appropriate for disposition under Rule 18A, then Rule 39(27) has no application.

[55] As stated in the cases cited that have considered Rule 18A(16), the filing of a jury notice is an important factor to consider in assessing whether a matter is appropriate for summary trial, and, as suggested in *McLean*, may "hold an extra value in cases of defamation", but it is not determinative of the issue.

[56] Where the issues raise questions of law rather than fact, the appropriateness of a summary trial under Rule 18A is enhanced and the importance of a jury is reduced. The trial judge referred to this factor in his ruling that he would proceed with the Rule 18A application. He pointed out (at para. 28) that the defences relied on were "statutory and/or common law privileges", that is, questions of law, and there was no real dispute about the basic facts.

[57] In my opinion, filing a jury notice in a defamation action is not a bar to bringing an application for summary trial pursuant to Rule 18A. To hold otherwise would frustrate the purpose of Rule 18A(16), which was introduced to permit Rule 18A applications to be heard in appropriate cases, despite the filing of a jury notice.

[58] In this case, the trial judge gave careful consideration to the appellant's election for trial by jury, as well as her submissions on the issue of a potential conflict in the Rules. He determined that the matter was appropriate for disposition by summary trial only after weighing all the relevant factors.

[59] In **McLean**, Saunders J.A. reviewed the test to be applied in reviewing the determination by a trial judge of whether a case should proceed under Rule 18A (at para. 10):

While it is true that this Court has urged a robust application of Rule 18A, that urging is in the context of leaving to the trial court the determination of whether a particular case is suitable for determination on that summary basis. This Court does not lightly interfere with the exercise of discretion, and will only do so when satisfied that the discretion was not exercised judicially or was exercised on a wrong principle. I refer, for example, to **Silver Standard Resources Inc. v. Joint Stock Co. Geolog**, [1998] B.C.J. No. 2298 C.A., **Strata Plan LMS 2019 v. Green** [2001] B.C.J. No. 741; 2001 BCCA 286 and **Watson v. Imperial Financial Services Ltd.** (1992), 65 B.C.L.R. (2d) 281 (C.A.).

[Emphasis added.]

[60] In my opinion, the trial judge exercised his discretion judicially and made no error in principle in deciding this case under Rule 18A, despite the fact the appellant had filed a jury notice.

Conclusion

[61] I would dismiss the appeal.

The Honourable Madam Justice Levine

I AGREE:

The Honourable Madam Justice Ryan

I AGREE:

The Honourable Mr. Justice Hall

TAB 8

COURT OF APPEAL FOR ONTARIO

CITATION: Levant v. Day, 2019 ONCA 244

DATE: 20190328

DOCKET: C64586

Doherty, Pardu and Nordheimer JJ.A.

BETWEEN

Ezra Levant

Plaintiff (Respondent)

and

Robert P.J. Day

Defendant (Appellant)

Jeff G. Saikaley, for the appellant

A. Irvin Schein, for the respondent

Heard: February 12, 2019

On appeal from the order of Justice Carole J. Brown of the Superior Court of Justice, dated October 18, 2017, with reasons reported at 2017 ONSC 5956, 17 C.P.C. (8th) 183, and from the costs order dated October 31, 2018, with reasons reported at 2018 ONSC 6236.

Pardu J.A.:

[1] The defendant in this action for damages for defamation appeals from the decision of a motion judge refusing to dismiss the action pursuant to s. 137.1 of

the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the “Anti-SLAPP¹” provisions. He submits that the motion judge erred in coming to the following conclusions:

1. The appellant’s tweets did not relate to a matter of public interest.
2. The defence of fair comment was not available to the appellant and that the notice provisions of the *Libel and Slander Act*, R.S.O. 1990, c. L. 12, are inapplicable to Internet publications.
3. The public interest in allowing the proceeding to continue outweighed the public interest in protecting the appellant’s expression.

[2] In oral argument, the appellant submitted that the motion judge should have found that the impugned expression related to a matter of public interest and that in the absence of any harm to the respondent, the action should have been dismissed without an analysis of the merits of the claim and the availability of various defences. The appellant also seeks leave to appeal from the costs order made against him.

[3] For the reasons that follow, I dismiss the appeal but grant leave to appeal from the costs order and vary that order accordingly.

A. FACTS

[4] The appellant and the respondent are from opposite ends of the “Twitterverse.” The motion judge described the respondent as “the principle of an online media outlet, Rebel News, which is known as an online media site that

¹ SLAPP means Strategic Litigation Against Public Participation.

comments on political and social issues, espousing right-wing or right-leaning views”: *Levant v. Day*, 2017 ONSC 5956, 17 C.P.C. (8th) 183, at para. 6.

[5] The motion judge described the appellant as “a regular participant on social media for over a decade” who maintained a blog named “Canadian Cynic”: *Levant*, at para. 7. He expressed his views almost exclusively on Twitter. The appellant describes his views as liberal, progressive and left-wing.

[6] From early May to early June 2016 the appellant posted tweets highly critical of the respondent and of Rebel News relating to their campaign to raise money for the victims of the Fort McMurray forest fires.

[7] In those tweets the appellant alleged matters such as the following:

1. The respondent was engaged in a scam of “unadulterated sleaziness” so that he could improperly take advantage of other donors’ charitable tax receipts. By leading the fundraising campaign, the respondent was enriching himself at the expense of forest fire victims.
2. The respondent would use charitable donations intended for those victims to pay his personal legal expenses.
3. The respondent falsely promised that donors to his campaign would get tax receipts.
4. Fort McMurray residents would lose promised matching donations from the federal and provincial governments, which would have been available had donations been made directly to the Red Cross.
5. The payment of a 5% administration fee meant less money went to victims.

6. Even though the Red Cross confirmed on May 13 that they would provide a charitable tax receipt to donors using the Rebel News website, the appellant continued to assert that the respondent had treated the donors badly, and said he could not have invented a scheme as “sleazy or grandstanding or narcissistic as what Ezra came up with”.
7. On June 1, 2016 the appellant tweeted that he was advised by authoritative sources that the donations made as a result of the respondent’s campaign would not qualify for matching donations, and the donors would not get tax receipts.
8. On June 3 and 4, 2016, the appellant suggested that the respondent had a reputation as a “liar, con artist and scumbag”, with little reputation to damage, and that he had siphoned his money away from the Red Cross.
9. Finally, on June 4, the appellant suggested that the respondent was “fucking donors out of their tax receipts”, implied that he was a “sleazy opportunist, hack, con artist and grafter” and that he was raising money for himself.

B. STATUTORY SCHEME

[8] Sections 137.1(1) - (4) of the *Courts of Justice Act* provide as follows:

Dismissal of proceeding that limits debate

Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest;
and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

Definition, “expression”

(2) In this section,

“expression” means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

C. ANALYSIS

(1) Did the appellant's tweets relate to a matter of public interest?

[9] The motion judge held that the appellant had failed to satisfy his onus of showing that the expressions related to a matter of public interest: *Levant*, at paras. 24-25. She recognized that the Fort McMurray fires were matters of public interest, but found that the Day tweets were, “in pith and substance, direct personal attacks on Ezra Levant”: *Levant*, at para. 24. Citing *Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785, 410 D.L.R. (4th) 380, aff'd 2018 ONCA 690, 428 D.L.R. (4th) 568, the motion judge noted that “[w]here the pith and substance of the matter is a defamatory personal attack thinly veiled as a discussion on matters of public interest, the court has all the tools it requires to determine the true nature of the expression and rule accordingly”: *Levant*, at para. 23.

[10] The motion judge did not have the benefit of this court's decision in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, 142 O.R. (3d) 161, in which the concept of “public interest” was summarized at para. 65:

In summary, the concept of “public interest” as it is used in s. 137.1(3) is a broad one that does not take into account the merits or manner of the expression, nor the motive of the author. The determination of whether an expression relates to a matter of public interest must be made objectively, having regard to the context in which

the expression was made and the entirety of the relevant communication. An expression may relate to more than one matter. If one of those matters is a “matter of public interest”, the defendant will have met its onus under s. 137.1(3). [Emphasis added.]

[11] In focusing on the merits of the allegation of defamation, the manner of expression and the motives of the author, the motion judge committed an extricable error of law displacing the deference otherwise due to her conclusion. While the motion judge found that the appellant had launched a defamatory personal attack, his motive for the tweets is a matter distinct from the subject matter of the tweets.

[12] The appellant’s tweets, when taken as a whole and in context, are about the legitimacy of the respondent’s fundraising campaign, the benefits which should properly flow to victims of the Fort McMurray forest fires from charitable contributions and the treatment of donor contributions. These indisputably relate to a matter of public interest.

(2) Were there grounds to believe that the appellant had no valid defence in the proceedings?

[13] The respondent satisfied the motion judge that there were grounds to believe that the appellant had no valid defences. The appellant had advanced the defences of fair comment and failure to provide notice pursuant to s. 5(1) of the *Libel and Slander Act* (the “Act”). The motion judge characterized the impugned Twitter posts as statements of fact, not comment based on facts: *Levant*, at para.

38. She observed that the statements were repeated, even after the appellant knew the statements were untrue: *Levant*, at para. 40. She concluded that the statements were motivated by malice and that there were reasonable grounds to believe that no defence of fair comment was made out: *Levant*, at paras. 41-42. With respect to the notice defence, the motion judge was of the view that s. 5(1) of the Act did not apply to Twitter posts: *Levant*, at paras. 45-47. In particular, the motion judge found that s. 5(1) of the Act refers to libel in a newspaper and broadcast, and noted that the appellant failed to provide any evidence regarding the functioning of Twitter or provide policy reasons to justify extending the meaning of “broadcast” to include content disseminated via Twitter: *Levant*, at paras. 45-47. The motion judge also declined to take judicial notice of such facts: *Levant*, at para. 46.

[14] *Pointes* instructs that “[s]ection 137.1 does not provide an alternate means by which the merits of a claim can be tried, and it is not a form of summary judgment intended to allow defendants to obtain a quick and favourable resolution of the merits of allegations involving expressions on matters of public interest”: at para. 73. Rather, the motion judge must decide whether a conclusion that the defendant has no valid defence falls within “the range of conclusions reasonably available on the motion record”: *Pointes*, at para. 75. Here, a trier could reasonably conclude that some of the defamatory statements made amounted to factual assertions, were not recognisable as comment and could

reasonably conclude that the statements were made with malice. A trier might also reasonably conclude that s. 5(1) of the Act does not apply to the Twitter posts. Thus, the respondent has demonstrated that a conclusion that the appellant has no defence to the action is amongst the range of reasonable conclusions which might be reached by a trier and as such has met the test in s. 137.1 (4)(a)(ii), as explained in *Pointes*. Since the respondent has surmounted this hurdle, an analysis of the balancing test in s. 137.1(4)(b) is required.

(3) Is the harm suffered or likely to be suffered serious enough to outweigh the public interest in protecting the expression embodied in the tweets?

[15] The motion judge indicated that she was satisfied “that the interest in permitting the within proceeding to continue to trial outweighs the public interest in protecting the impugned expression contained in the Day [tweets]. In the circumstances of this case, there is no public interest in protecting said [tweets]”: *Levant*, at para. 54.

[16] Sometimes claims of defamation may exact too great a cost to the public interest in promoting and protecting freedom of expression in relation to matters of public interest: *Pointes*, at para. 86.

[17] As pointed out in the Anti-SLAPP Advisory Panel², *Report to the Attorney General* (Ontario: Ministry of the Attorney General, 2010), at para. 37:

If an action against expression on a matter of public interest is based on a technically valid cause of action but seeks a remedy for only insignificant harm to reputation, business or personal interests, the action's negative impact on freedom of expression may be clearly disproportionate to any valid purpose the litigation might serve.

[18] Here, the alleged defamatory statements accused the respondent of defrauding victims of the Fort McMurray forest fires. While the harm suffered or likely to be suffered may often be measured primarily by the monetary damages suffered or likely to be suffered, the "preservation of one's good reputation" has inherent value beyond the monetary value of the claim: *Pointes*, at para. 88. Here, we are told the appellant had around 11,000 followers on Twitter. There is no indication the statements were made to a private, or closed group. These were not statements made to a small group and quickly retracted. The statements attribute serious criminality to the respondent. On his discovery, the appellant accepted that donors were receiving tax receipts for their donations. He admitted that he had not made any inquiries of the government about matching donations. He also admitted that he had no information that the respondent received any personal benefit from the fundraising campaign.

² The Anti-SLAPP Advisory Panel was assembled in 2010 to advise the Attorney General of Ontario on the potential content of legislation against SLAPPs and to help develop a test for courts to quickly recognize a SLAPP suit.

[19] The appellant submits that the respondent is a “noisy troublemaker” who does not shy away from controversy, and has participated in other defamation cases, as both plaintiff and defendant. The appellant submits that the respondent’s platform, Rebel Media, has relentlessly attacked and denigrated individuals and groups. The appellant further submits that the respondent’s reputation is so bad that the impugned tweets cannot have caused him any damages, especially since others made similar comments. Even if the appellant’s characterization of the respondent’s reputation were correct, and I make no finding on that issue, this is different from a reputation tainted with criminal conduct depriving innocent victims of charitable donations.

[20] While there is an ephemeral quality to individual tweets, which may have some bearing on the damages ultimately awarded, here the appellant engaged in a sustained attack upon the respondent.

[21] I cannot say that any damages awarded would necessarily be nominal, or that the respondent has suffered only insignificant harm.

[22] On the other side of the balance, the quality of the expression and the motivation of the appellant are relevant to the measure of the public interest in protecting his expression: *Pointes*, at para. 94. This court in *Pointes*, at para. 94, held that “deliberate falsehoods, gratuitous personal attacks or vulgar and offensive language”, all part of the expression here, may reduce the public

interest in protecting that speech, compared to cases where the message is delivered “without the lies, vitriol, and obscenities.”

[23] This is not to say that resort to some vulgar language will necessarily deprive expression of value worth protecting. However here the tweets posted are imbued with hyperbole and vulgar vitriol, and admittedly false in many respects such that there is little value in protecting their expression.

[24] On balance, the respondent has established that the harm likely to be suffered, or which has been suffered, is sufficiently serious that the public interest in allowing the proceeding to continue outweighs the public interest in protecting the appellant’s expression.

D. LEAVE TO APPEAL COSTS

[25] The appellant also seeks leave to appeal from the costs order made against him, following dismissal of his motion to dismiss the respondent’s action, relying on s. 137.1 of the *Courts of Justice Act*.

[26] The motion judge awarded costs to the respondent, on a partial indemnity basis in the sum of \$19,731.64: \$13,666.22 was allocated for the anti-SLAPP motion, and \$6047.42 was allocated for the costs of a failed motion to adduce fresh evidence, brought after the main motion was heard but before the decision was delivered to the parties.

[27] The appellant submits that the motion judge erred in four respects:

1. The decision awarding costs was tainted by procedural unfairness. While the decision on costs was under reserve, the respondent's counsel made unsolicited submissions to the motion judge, without the appellant's consent.
2. The motion judge failed to give effect to s. 137.1(8) of the *Courts of Justice Act* which provides that "if a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances."
3. The respondent unilaterally, and without the appellant's consent adjourned the motion from June 20, 2017 to June 22, 2017. As a result, the appellant and his client incurred unnecessary travel costs from Ottawa to Toronto in the sum of \$1222.38 which should be set off against any cost award.
4. The motion judge did not award costs when she delivered her ruling on the fresh evidence motion. As a result, she had no authority to award costs of that motion when she decided the costs associated with the anti-SLAPP motion.

(1) Procedural unfairness

[28] I would grant leave to appeal from the costs order because of the procedural unfairness of counsel making further unsolicited submissions to the motion judge without the consent of the appellant, and without invitation from the court. While leave to appeal costs is rarely granted, in this case, this court should look at costs afresh because of the uncertainty as to the effect if any, those additional submissions had on the motion judge. Rule 1.09 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides:

When a proceeding is pending before the court, no party to the proceeding and no party's lawyer shall communicate about the proceeding with a judge, master

or case management master out of court, directly or indirectly, unless,

(a) all the parties consent, in advance, to the out-of-court communication; or

(b) the court directs otherwise.

(2) Section 137.1(8)

[29] Both parties point to the underlying merits of each of their positions before the motion judge, and her assessment of the merits as having an impact upon the issue of costs of the motion. The most significant factor here, however, is that the anti-SLAPP motion was brought after the action was set down for trial. As indicated in *Pointes* at para. 73, s. 137.1 establishes a “judicial screening or triage device designed to eliminate certain claims at an early stage of the litigation process.” Section 137.1 contains various provisions intended to expedite the hearing of these motions, including a prohibition against taking other steps until the motion is heard: *Pointes*, at para. 43. Given the serious cost consequences which can result from a successful anti-SLAPP motion, such as full indemnity costs as per s. 137.1(7), these motions should be brought early in the proceedings. Here, the delay in bringing the anti-SLAPP motion justified an award of costs in favour of the successful plaintiff, the respondent, despite s. 137.1(8).

(3) The adjournment of the motion

[30] The respondent does not deny that he adjourned a motion hearing date without the consent of the appellant, but says in his factum that “[p]arties and their counsel are responsible for ensuring that they are aware of procedural developments in a case, including on an administrative level.” The respondent submits that appellant’s counsel were made aware of the date change by email dated June 19, 2017, the date he says the hearing of the motion was scheduled to continue. The parties do not agree as to whether the motion was to be continued on June 19 or June 20, 2017. The record is not of much help establishing precisely what happened, nor exactly how the additional costs claimed were incurred. The motion judge did not address this issue.

[31] The parties do not agree as to whether the appellant actually incurred additional costs as a result of a unilateral adjournment by the respondent. The appellant’s costs outline filed June 20, 2017 claims \$1747.66 for the changed flights and the appellant claims an offset of costs amounting to \$1222.38. Given that the appellant certified that the costs were incurred, and having regard to the amounts and the distance travelled, I would credit the appellant for this unnecessary travel.

(4) Did the motion judge have authority to award costs on the fresh evidence motion?

[32] The motion for fresh evidence was inextricably linked to the motion judge's hearing of the anti-SLAPP motion. In these circumstances she did not err in awarding costs of that motion.

[33] Working from the motion judge's assessment of the quantum of partial indemnity costs, with which no one takes issue, I would vary the costs awarded below for the anti-SLAPP motion and the motion to adduce fresh evidence to the sum of \$18,000, inclusive of HST and disbursements, in favour of the respondent.

E. DISPOSITION

[34] I would accordingly dismiss the appeal with costs of the appeal to the respondent, in the agreed sum of \$25,000, inclusive of disbursements and HST. As per the above, costs awarded below are varied to \$18,000, inclusive of HST and disbursements, in favour of the respondent.

"G. Pardu J.A."

"I agree Doherty J.A."

"I agree I.V.B. Nordheimer J.A."

Released: March 28, 2019

TAB 9

CITATION: Mazhar v. Farooqi, 2020 ONSC 3490
COURT FILE NO.: CV-19-626256
DATE: 20200609

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CHOUDRY AJLAL MAZHAR, Plaintiff / Responding Party

AND:

SALWA FAROOQI, Defendant / Moving Party

BEFORE: Pinto J.

COUNSEL: *Nader R. Hasan and Carlo Di Carlo*, for the Moving Party Defendant

Choudry Ajlal Mazhar, self-represented, for the Responding Party Plaintiff

Date: March 12, 2020

REASONS FOR DECISION

Overview

[1] The defendant Salwa Farooqi brings an anti-SLAPP motion under section 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (“CJA”). This provision allows a court to dismiss, at an early stage, an action that it considers a Strategic Lawsuit Against Public Participation (“SLAPP”), where the expression at issue “relates to a matter of public interest”. A defendant is entitled to bring an anti-SLAPP motion without even filing a defence.

[2] Here, the plaintiff, self-represented, brought a defamation action after the defendant complained to the leadership of a community organization about the plaintiff’s alleged harassing behaviour. At the time, both parties were volunteers with the organization. The defendant submits that the action should be dismissed because her complaint relates to the treatment of young mentees in a community organization and, in turn, to the organization’s reputation, both matters of public interest. The defendant also submits that the plaintiff’s defamation action has no merit. Conversely, the plaintiff submits that his action should be allowed to proceed as it concerns a private dispute with no public interest component. He claims that he has suffered reputational harm that outweighs any public interest in protecting the defendant’s expression.

[3] For reasons that follow, I find that the anti-SLAPP test is satisfied and that the plaintiff’s action should be dismissed with costs and damages awarded to the defendant.

The Facts

[4] The plaintiff, Choudry Ajlal Mazhar, describes himself as a Pakistani Muslim who came to Canada in 2007 at the age of 18 to make a better life. He studied engineering at the University of Toronto and is employed as a consultant. He met the family of the defendant, Salwa Farooqi, in 2013, as they shared the same cultural and religious background.

[5] Farooqi is 6 years younger than Mazhar. In February 2015, when she was 20 and he was 26, she received a marriage proposal from Mazhar over Facebook Messenger. This was the first time that Farooqi learned of Mazhar's romantic interest as they had no previous romantic interaction or close friendship. Mazhar conceded that Farooqi barely even knew him at that point. Farooqi declined Mazhar's proposal indicating that they were at very different points in their life, and that she had long term plans to pursue her education. Indeed, in 2017, Farooqi entered medical school and, at the time of bringing the motion, was a third-year medical student.

[6] Mazhar maintains, to this day, that he had an oral engagement of marriage with Farooqi and her mother, which was broken-off in September 2017. In retrospect, he believes that Farooqi and her family took advantage of him. Farooqi categorically rejects any suggestion that she was engaged. She portrays Mazhar as pursuing her despite her clear verbal and written indications of disinterest in him.

[7] In December 2017, Farooqi's mother advised her that Mazhar still had romantic feelings for her. In January 2018, to clear the air, Farooqi emailed Mazhar and suggested that they meet in person. In a January 11, 2018 email, prior to their meeting, Mazhar wrote:

Your Mama informed me you don't want to get married for next 8 years and rather intend to centre on your career only, it was unspoken nevertheless understood yourself (*sic*) and/or your mama are interested in someone else instead. I completely valued your choice, at that time (after 5 long years of wait), I started feeling tired and exhausted, and decided to move forward.

[8] On January 16, 2018, the parties met for coffee and Farooqi told Mazhar that she would never be interested in marrying him and that she was already in a long-term relationship. In the course of their coffee meeting, the parties discussed Mazhar's interest in MAX (Muslim Awards for Excellence), an organization that encourages and recognizes the professional, educational, and charitable achievements of Canadian Muslims. Farooqi was already a member of MAX and agreed to Mazhar's request to introduce him to MAX's founder. Later the same day, Farooqi sent an email to MAX's founder recommending Mazhar as a potential mentor with the program.

[9] Over the course of 2018, Mazhar became involved with MAX as a volunteer and mentor. This brought him into contact with a number of the organization's university-aged female volunteers. He and Farooqi continued to have text and email communications ostensibly in respect of MAX, but Farooqi grew uncomfortable as the communications veered into personal matters. In June, Mazhar returned to the topic of marriage and suggested that he was still waiting for her. Farooqi advised Mazhar, in no uncertain terms, that she did not appreciate his comments, that she now had a partner, and that he should respect her boundaries. She also told Mazhar that

she was not interested in being involved in a business idea proposed by him. In October, she blocked Mazhar on WhatsApp, a messaging platform, and asked him not to communicate with her unless it was necessary.

[10] In December 2018, Farooqi became engaged to her long-term partner, another medical professional. On January 24, 2019, Farooqi received a disturbing email from Mazhar that claimed that Mazhar, Farooqi, and Farooqi's mother had all been infected with "black magic" following her fiancé's return from Bangladesh. Mazhar claimed that the "food [Farooqi] has been eating [these] past many months, has been intoxicated with *haram* ingredients from Bangladesh (black magic practitioners), putting [Farooqi] under severe influence of black magic, where [Farooqi] could not think of anything other than [her fiancé]." In the email, Mazhar stated that he had developed a severe hatred for Farooqi and her mother over the past few months, which he now traced to the influence of black magic.

[11] Farooqi felt threatened by Mazhar's "black magic" email. She became concerned for herself and others, including at MAX. On January 24, 2019, Farooqi contacted Dr. Saad Ahmed, the Chair of MAX Mentors, to discuss the situation and forwarded the "black magic" email to him. In an exchange of text messages, Dr. Ahmed advised Farooqi that there would need to be an organizational response from MAX. Farooqi responded that while she was not comfortable talking to MAX's board of directors, she wanted them to know what she was experiencing as a volunteer. Dr. Ahmed advised Farooqi that MAX would consult with human resources professionals about designing a legitimate process for investigating sexual harassment complaints. He also suggested that Farooqi should think about disclosing her identity.

[12] On January 25, 2019, Farooqi was to host a MAX event at a local law firm at which Mazhar was a volunteer. Dr. Ahmed contacted Mazhar and advised him not to attend the event due to a serious complaint of unprofessional conduct and harassment filed against him by an unspecified number of volunteers. Mazhar left at the start of the event. That evening Mazhar texted Farooqi's mother stating, "I'll be taking legal action against you and Salwa if my reputation is impacted by any means anywhere, also I'll not care and open all secrets from last 6 years with evidences in the court."

[13] On January 26, Dr. Ahmed emailed Mazhar stating that "the allegations are very serious and represent clear violations of our code of conduct (see attached)." Mazhar was directed not to participate in any volunteer activities while an investigation was underway.

[14] On January 28, Mazhar and Farooqi's mother spoke by telephone. Farooqi provided a recording of this telephone conversation which was in Urdu, along with a transcript based on her own translation of the recording into English. According to the transcript, Mazhar stated that: his first priority was to "zero" the complaint; if false accusations were made, the family would have to pay for the consequences; he had lawyers at his disposal whom he had already engaged; his legal bill would be \$15-\$20,000; the eventual bill would have to be paid by the losing party; he had been very involved with MAX; he had conversations with a number of female volunteers and based on their reaction, it seemed like he had done something wrong; he was waiting for MAX's next move and was preparing to respond.

[15] Mazhar claimed that Farooqi had provided partial and out of context excerpts of the call, and that, on the call, Farooqi's mother had offered him money to make the dispute go away.

[16] On February 18, Dr. Ahmed emailed Mazhar again, this time identifying Farooqi as the complainant. The email described Farooqi's complaint as one of "harassment - that you have messaged her despite frequent requests not to message you (*sic*), and indeed made clear by her blocking you, and this persistence represented a clear boundary violation." MAX had set up a Special Committee to conduct a confidential investigation. The email further advised that "we are not an employer nor a judicial body, and will investigate as far as we are concerned about someone's suitability to continue volunteering for our organization." The Special Committee planned on hearing from the parties separately.

[17] On February 25, Dr. Ahmed advised Farooqi of the Special Committee's investigation using the same language as sent to Mazhar. Subsequently, Farooqi sent the Board a number of materials supporting her complaint ("complaint package"). In a cover letter, Farooqi stated that "[T]he purpose of this now-formalized complaint is to safeguard myself and my fiancé, both active members of MAX Mentors, from this volunteer who has demonstrated unprofessional and unstable conduct."

[18] On February 26, Mazhar met with members of the Special Committee.

[19] On March 22, the Special Committee advised Mazhar that it had come to a decision and that "on review of the materials presented by both parties, we do not believe there is any reason to ask you not to volunteer for our organization." The Special Committee considered the matter closed.

[20] On April 16, a lawyer acting on Mazhar's behalf sent Farooqi a without prejudice letter threatening to commence a defamation action unless she agreed to certain terms. The lawyer's letter was copied to Farooqi's father, mother, brother, and to MAX. MAX's counsel replied to Mazhar's lawyer requesting that he "cease and desist from bringing [MAX] into what is purely a private party-to-party dispute."

[21] In June 2019, Farooqi married her partner.

[22] On July 29, 2019, MAX sent an email to Mazhar advising him that the MAX Mentors team was undergoing substantial restructuring and that MAX would be in touch if it needed further volunteering time.

[23] On August 27, 2019, Mazhar commenced a defamation action against Farooqi claiming general and special damages in the amount of \$75,000, and punitive, aggravated, and exemplary damages in the amount of \$25,000. Farooqi's counsel made a demand for particulars which was answered by Mazhar, but Farooqi did not file a statement of defence before bringing this anti-SLAPP motion.

Legal Test on an Anti-SLAPP Motion

[24] In *Di Franco v. Bueckert*, 2020 ONSC 1954, at paras. 11-13, Gomery J. provided a succinct description of the legal test under s.137.1 of the CJA:

[11] Argument on an anti-SLAPP motion proceeds in two stages.

[12] The defendant making the motion must first persuade the judge that the lawsuit “arises from an expression made by the person that relates to a matter of public interest”; s. 137.1(3). If the defendant cannot meet this threshold, then the motion must be dismissed.

[13] If the defendant meets this threshold, the analysis moves to the second stage. The onus shifts to the plaintiff, the responding party on the anti-SLAPP motion, to persuade the motion judge that there are grounds to conclude that:

- (i) the lawsuit has substantial merit;
- (ii) the defendant has no valid defence; and
- (iii) the harm likely to be or which has been suffered by the plaintiff as a result of the defendant's expression “is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression”; s. 137.1(4).

[14] All three parts of this test must be met for the plaintiff to be permitted to proceed with the lawsuit. If the plaintiff cannot meet the onus on the first two parts of this test (those that assess the basic plausibility of the claim and the defence), then there is no need for the court to balance the competing interests on the third part of the test. If the motion judge considers that the harm that has been or that is likely to be suffered by the plaintiff as a result of the defendant's impugned expression is trivial, or clearly outweighed by the public interest in protecting that expression, the judge does not need to spend time considering the potential merits of the claim or the validity of any defence asserted.

What is the impugned expression?

[25] I find it necessary to clarify the scope of the impugned expression as it is not clear from the claim. In describing the alleged defamatory expression, the claim (paras. 18 and 19) references the occasion on January 25, 2019 when Mazhar attended a MAX event hosted by Farooqi and, moments after arriving, learned of a “serious complaint of unprofessional conduct and harassment” that had been filed against him by “an unspecified number of volunteers at MAX”. According to the claim (para. 20), “The complaint alleged, among other things, that the Plaintiff harassed multiple volunteers at MAX, and that the Plaintiff's presence constituted a threat to multiple people.”

[26] The claim (para. 25) also references the February 18, 2019 email from MAX that disclosed that the complainant was Farooqi and described the details of the complaint. These details are again referenced at para. 26 of the claim:

26. The particulars of the defamatory statement are within the exclusive knowledge of the Defendant, but, in pith and substance, were referred to in the email from [Dr. Ahmed] as follows:

Complaint: Harassment - that you (the Plaintiff) have messaged Salwa Farooqi (the Defendant) despite frequent requests not to message, and indeed made clear by her blocking, and this persistence represented a clear boundary violation.

[27] In Mazhar's response to Farooqi's Demand for Particulars, he indicated that the identities of the alleged "unspecified number of volunteers", other than Farooqi, were never revealed to him. He also conceded that the author of the February 18, 2019 email, which was said to contain the defamatory statement, was Dr. Ahmed, not the defendant. However, he asserted that "the said quote is the product of the defamatory statements communicated to [Dr. Ahmed] by the Defendant, as she is the author of the said defamatory statements. Hence the aforementioned quote is [Dr. Ahmed's] materialized product of the communications made by the Defendant."

[28] At the hearing of the motion, defendant's counsel conceded, quite correctly in my view, that while the plaintiff had framed his defamation action around the complaint described in Dr. Ahmed's February 18, 2019 email, the actual scope of the alleged defamation was, in fact, more properly described as the complaint package that Farooqi provided to MAX in response to Dr. Ahmed's February 25, 2019 email.

[29] For the purposes of this motion, I find that the alleged defamatory material, or the impugned expression, is what Farooqi included in her complaint package sent to MAX, minus anything written by Mazhar himself. For clarity, the impugned expression consists of (a) Farooqi's cover letter; (b) Farooqi's text messages to Mazhar as revealed in the complaint package; and (c) Farooqi's comments to MAX about the text messages.

[30] I have reproduced herein Farooqi's cover letter and her comments in their entirety, but not the text messages the parties exchanged. I confirm that I reviewed the text messages and considered them, in context, to arrive at my decision on this motion.

[31] Farooqi's cover letter to MAX stated:

Salam,

I hope this email finds everyone well. Please find attached some supporting evidence regarding my complaint about a MAX Mentors volunteer and previous family friend. The reason for this complaint was fear for my safety and my Fiancé's safety, after receiving an alarming email from this volunteer on Thursday Jan 24 - a day before the Sustaining Sabr Event on January 25, 2019. My concern

was for my immediate safety as I was leading and hosting this event and knew that this volunteer was going to be present at it. I shared my fears and stress surrounding this situation with Saad Ahmed, who was forwarded this email.

Upon reflecting on this situation, I believe MAX Mentors would benefit from knowing the most relevant information that pertains to my position as an executive for MAX Mentors and this volunteer's interaction with me under my leadership.

I did, however, provide some information that dates back to the first unprofessional encounter I had with this volunteer (in order to provide context), who coincidentally is also an old and now estranged family friend.

I understand that MAX is not a judicial body and hold no such expectations from the organization. The purpose of this now-formalized complaint is to safeguard myself and my fiancé, both active members of MAX Mentors, from this volunteer who has demonstrated unprofessional and unstable conduct.

Thank you for taking the time to investigate my report.

Warmest Regards,

Salwa Farooqi

[32] Farooqi's comments about the text messages stated:

1. First facebook message from [Mazhar] who was not accepted as a friend on this platform, however, he demonstrated evidence of constantly checking my social media for updates and despite me respectfully asking to maintain professional boundaries and explicitly telling him that I was not interested in his proposal, he continued to pester me through social media to which I subsequently blocked him.
2. After joining MAX Mentors, [Mazhar] constantly overstepped his boundaries - even though I explicitly communicated to him to contact me via email if he had MAX related queries. I had him blocked on all social media platforms and whatsapp. In November, he messaged via text and made incoherent statements after finding out about [fiancé's] and I's (*sic*) upcoming engagement (evidenced below).
3. Again, I blocked him from being able to text or call me after this unsettling text message encounter. In December, at our general meeting, he asked me to privately step aside to speak to him. I did not feel safe or comfortable being around him and asked him to speak to me in the main lobby with everyone around, he apologized for his behaviour over text, and again, I felt an immediate threat for my safety, I told him I did not feel comfortable speaking with him any

further and quickly exited the conversation to quickly join my friends who were waiting for me across the hallway.

4. On Jan 24 he sent a very disturbing and unsettling email from his work email regarding my fiancé, who was out of province for his CaRMS interviews for medical residency. I was very fearful of encountering him at the Jan 25, 2019 event I was leading and hosting, and I was extremely fearful for my safety as [Mazhar] was showing evidence of delusional thought disorder and [an] underlying psychiatric condition. I consulted [Dr. Ahmed] who took immediate action to control the situation.

Does the impugned expression relate to a matter of public interest?

[33] The first step of the s.137.1 test is to determine whether Farooqi's expression relates to a matter of public interest.

[34] In *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, 142 O.R. (3d) 161, at paras. 62-65, the Court of Appeal for Ontario provided guidance as to the meaning of “public interest”:

[62] An expression can relate to a matter of public interest without engaging the interest of the entire community, or even a substantial part of the community. It is enough that some segment of the community would have a genuine interest in the subject matter of the expression: *Grant v. Torstar Corp.*, at paras. 102 and 105.

[63] Public interest does not turn on the size of the audience. Especially in today's world, communications on private matters can find very large audiences quickly. On the other hand, statements between two people can relate to matters that have a strong public interest component.

[64] Finally, since the promotion of the open exchange of information and opinions on matters of public interest is one of the overarching purposes animating s. 137.1, the characterization of the expression as a matter of public interest will usually be made by reference to the circumstances as they existed when the expression was made.

[65] In summary, the concept of “public interest” as it is used in s. 137.1(3) is a *broad one* that does not take into account the merits or manner of the expression, nor the motive of the author. The determination of whether an expression relates to a matter of public interest must be made objectively, having regard to the context in which the expression was made and the entirety of the relevant communication. An expression may relate to more than one matter. If one of those matters is a “matter of public interest”, the defendant will have met its onus under s. 137.1(3). [emphasis added]

[35] The Court of Appeal's decision in *Platnick v. Bent*, 2018 ONCA 687 also provides guidance as to the meaning of public interest. Bent, a lawyer in private practice, sent an email to a confidential listserv of plaintiff-oriented members of the Ontario Trial Lawyers Association expressing concern that Platnick, a medical doctor, had misrepresented other doctors' findings in his reports. Although Bent's immediate interest was her client's case, the trial judge held, and the appeal court affirmed, that the public interest in Bent's email related to the proper administration of justice in Ontario, particularly the honesty and integrity of the arbitration process.

[36] Here, the moving party argues that “Farooqi's statements were made to the leadership of an organization whose objectives include encouraging the professional, educational and charitable achievements of Muslims in Canada”, specifically about its mentorship program. Mazhar was a volunteer and mentor in that program who, by his own admission, came into contact with other mentees, including other university-aged women. Mazhar conceded, in cross examination, that the MAX community would want to be assured that volunteers were treated well and would be concerned if volunteers said they felt unsafe.

[37] Mazhar responds that Farooqi's dispute with him is a purely private affair with no public interest component. He points out that whereas Farooqi's original objective in complaining to MAX was “to be left alone” by him, her revised position in court was that she had complained for the greater good. Mazhar also points to MAX's response to his lawyer's demand letter. In the letter, MAX's counsel states that “our organization has nothing to do with the [Mazhar v. Farooqi] matter”, that it is a “toxic personal matter”, and a “purely private party-to-party dispute.”

[38] Guided by the broad meaning of public interest, I find that the impugned expression here relates to a matter of public interest, namely, the character and integrity of mentors in a volunteer organization. It is enough that some segment of the MAX community would have a genuine and legitimate interest in knowing about the character and integrity of mentors in their organization.

[39] I am also mindful that an expression may relate to more than one matter but that if one of those matters is a “matter of public interest”, the defendant will have met its onus. Here, Farooqi's comments, as contained in her complaint package to MAX, and viewed in context, relate to both her private and personal interest in protecting herself, her fiancé and her family, and her broader responsibility to caution and protect other volunteers, particularly young female mentees, in the MAX community. In her cover letter, Farooqi stated “I believe MAX Mentors would benefit from knowing the most relevant information that pertains to my position as an executive for MAX Mentors and this volunteer's interaction with me under my leadership”. This suggests that Farooqi was mindful of her wider responsibility to the MAX organization and community to ensure that her concerns about Mazhar, a mentor with the organization, were more widely known.

[40] I also find it significant that MAX was concerned about Mazhar potentially violating its Code of Conduct and that its investigation was about “someone's suitability to continue volunteering for our organization.” I agree that the question of “volunteer suitability” particularly in a mentorship context is what underpins the public interest aspect of the impugned expression,

and what differentiates it from other harassment complaints. Issues of consent and safe interactions between members of a volunteer community concern the welfare of that community and can amount to matters of public interest under anti-SLAPP legislation: *Lyncaster v. Metro Vancouver Kink Society*, 2019 BCSC 2207, at para. 27.

[41] I find, therefore, that Farooqi has satisfied her onus of demonstrating that her expression relates to a matter of public interest under s. 137.1(3).

[42] The onus now shifts to the plaintiff Mazhar with respect to the rest of the anti-SLAPP test.

Are there grounds to conclude that Mazhar's lawsuit has substantial merit?

[43] In *Pointes*, the Court of Appeal provided guidance as to how a motions judge should approach this question:

The motion judge must first satisfy himself or herself that there are reasonable grounds to believe that the claim has “substantial merit”: at para. 79.

The use of the word “substantial” to modify “merit” in s.137.1(4)(a)(i) signals that the plaintiff must do more than simply show that its claim has some chance of success: at para. 80.

A claim has “substantial merit” for the purposes of s.137.1 if, upon examination, the claim is shown to be legally tenable and supported by evidence, which could lead a reasonable trier to conclude that the claim has a real chance of success: at para. 80.

[44] To have a legally tenable cause of action, a plaintiff in any defamation case must lead evidence to establish the following elements of the tort: (1) that the words complained of referred to the plaintiff; (2) that the words were communicated to at least one other person; and (3) that the words complained of were defamatory in the sense of tending to lower the plaintiff's reputation in the eyes of a reasonable person: *Amorosi v. Barker*, 2019 ONSC 4717, at para. 21, citing *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, at paras. 61-62; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 164.

[45] It is not in dispute that Farooqi's impugned words referred to the plaintiff Mazhar, and that the words were communicated to at least one other person, namely the members of the Special Committee of MAX. The contested issue is whether the words complained of are defamatory.

[46] Farooqi argues that:

- (a) the general rule is that defamatory words about which the plaintiff complains must be set out fully and precisely in the statement of claim;

- (b) plaintiffs are also required to set out the alleged defamatory meaning of the impugned words; and
- (c) in order to succeed, a plaintiff must prove that words complained of bore the meanings set out in her pleading.

[47] Farooqi urges a strict application of the rules of pleadings with respect to defamation actions that would likely result in my finding that the claim does not have sufficient merit. However, I find that this approach is not consistent with the more flexible approach required by the Court of Appeal: *Catalyst Capital Group Inc. v. Veritas Investment Research Corporation*, 2017 ONCA 85, 136 O.R. (3d) 23, at paras. 21-25.

[48] In this case, the statement of claim is far from precise as to what words are alleged to be defamatory. On the one hand, paragraph 26 of the claim states:

26. The particulars of the defamatory statement are within the exclusive knowledge of the Defendant, but, in pith and substance, were referred to in the email from [Dr. Ahmed] as follows:

Complaint: Harassment - that you (the Plaintiff) have messaged Salwa Farooqi (the Defendant) despite frequent requests not to message, and indeed made clear by her blocking, and this persistence represented a clear boundary violation.

[49] On the other hand, in other parts of the claim, the self-represented plaintiff also references whatever words Farooqi used that resulted in MAX's investigation of Farooqi's complaint. These words go beyond the words contained in Dr. Ahmed's February 18, 2019 email and, as discussed above, include the words Farooqi used in her complaint package.

[50] A statement is defamatory if it tends to harm the reputation of another so as to lower him or her in the estimation of the community or to deter third parties from associating or dealing with him or her: P. Milmo and W. Rogers, eds., *Gatley on Libel and Slander*, 11th ed. (London: Sweet & Maxwell, 2008), at p. 39, quoting the American Law Institute in the Second Restatement.

[51] I find that a number of the words Farooqi wrote in her complaint package could be considered to be defamatory:

"The reason for this complaint was fear for my safety and my Fiancé's safety."

"My concern was for my immediate safety"

"first unprofessional encounter"

"safeguard myself and my fiancé... from this volunteer who has demonstrated unprofessional and unstable conduct."

“he continued to pester me”

“constantly overstepped his boundaries”

“he messaged via text and made incoherent statements”

“I did not feel safe or comfortable being around him and asked him to speak to me in the main lobby with everyone around, he apologized for his behaviour over text, and again, I felt an immediate threat for my safety”

“he sent a very disturbing and unsettling email”

“I was very fearful encountering him”

“I was extremely fearful for my safety as [Mazhar] was showing evidence of delusional thought disorder and an underlying psychiatric condition.”

[52] Paragraph 39 of the claim is the plaintiff's pleading regarding the purported meaning of the defendant's defamatory comments:

39. The defamatory allegations are, in their literal meaning, completely false. Notwithstanding, the allegations against the Plaintiff, in their extended meaning, were intended to be understood, and were understood to mean, as follows:

- (a) The Plaintiff is a predator;
- (b) The Plaintiff harassed Defendant and has consistently harassed her;
- (c) The Plaintiff is a misogynist;
- (d) The Plaintiff has a propensity or potential to be violent;
- (e) The Plaintiff emotionally abused the Defendant;
- (f) The Plaintiff cannot be trusted;
- (g) The Plaintiff is morally corrupt;
- (h) The Plaintiff is cruel to women.

[53] Farooqi submits that the plaintiff is confined to the meanings relied upon in his pleadings; and since the words complained of as defamatory cannot and do not bear those meanings, the plaintiff's action should fail: *Lawson v. Baines*, 2011 BCSC 326, 34 B.C.L.R. (5th) 363, at para. 35.

[54] I find that Farooqi's words in her complaint package cannot be interpreted to mean most of what is listed in paragraph 39 of the claim. However, Farooqi's words can bear the meaning

that the plaintiff harassed or consistently harassed her or, that he has the potential to be violent. I find that this meaning flows from Farooqi's repeated references to her feelings of fear and lack of safety, and her reference to Mazhar's alleged instability. Certainly, in a community of young professionals, particularly one bound by common religious and cultural ties, I can see how allegations of "feeling unsafe" and "being pestered" are tantamount to an allegation of harassment. Such an allegation made by a young female volunteer against an older male volunteer could lower the latter's reputation. I therefore disagree with the defendant who argues that, because it was MAX and not Farooqi who used the word "harassment", Farooqi cannot be held liable.

[55] Noting that the question of substantial merit should not be conflated with the question of valid defences, I find that there are reasonable grounds to believe that the substantial merit requirements of the plaintiff's claim are satisfied.

Are there grounds to conclude that the defendant has no valid defence?

[56] The onus is on the plaintiff to convince me that, looking at the motion record through the reasonableness lens, a trier could conclude that none of the defences advanced would succeed. If that assessment is among those reasonably available on the record, the plaintiff has met his onus: *Pointes*, at para. 84.

[57] Here, the defendant claims three defences: (a) justification or truth; (b) qualified privilege; and (c) fair comment.

(a) Justification

[58] To establish a defence of justification or truth, the defendant must prove the substantial truth of the "sting", or main thrust, of the libel complained of: *Cusson v. Quan*, 2007 ONCA 771, 87 O.R. (3d) 241, at para. 35, rev'd on other grounds 2009 SCC 62, 3 S.C.R. 712.

[59] The main thrust of Farooqi's expression was that Mazhar had continued to contact her seeking a personal relationship despite her repeatedly asking him not to do so and blocking him on WhatsApp. Her concern became acute after receiving Mazhar's January 24, 2019 email which claimed that her fiancé had infected her and her mother with black magic after he returned from Bangladesh. In the same email, Mazhar also said that he had developed a hatred of them.

[60] I have little difficulty in finding that Farooqi's comments are substantially true.

[61] The context goes back to 2015 when, out of the blue, Mazhar sent Farooqi a marriage proposal over Facebook Messenger. She firmly but politely rejected him. Mazhar maintains to this day that the parties had an "oral" engagement until it was called off in September 2017, but he could not provide a date when the engagement supposedly occurred.

[62] In January 2018, Mazhar acknowledged in an email "[Y]our Mama informed me you don't want to get married for next 8 years and rather intend to centre on your career only... [and] you and/or your mama are interested in someone else instead". Farooqi confirmed her disinterest

again a few days later in their coffee meeting. Yet, in June of 2018, Mazhar again brought up the topic of marriage and that he was waiting for Farooqi. She texted him back: “I never told you I wanted to marry you ever”; “I told you I have a partner”; and “I would appreciate it if you respect my boundaries.” In October, she blocked him on WhatsApp and advised him not to communicate with her unless it was necessary. And then she received Mazhar's “black magic” email in January 2019 which prompted her to complain to MAX.

[63] Mazhar claims that his communications with Farooqi have been taken out of context. But upon reviewing the record, I do not see what further context could detract from Farooqi's essential point that Mazhar pursued her romantically even though she had made it absolutely clear that she was not interested in him, that she had a partner, was engaged, and had blocked his messages. Mazhar claims that the sending of his “black magic” email was justified because he expressed “genuinely held religious, cultural, and spiritual concerns deriving from his Pakistani and Muslim identity.” This may have been his motivation, but it does not change the fact that he once again contacted Farooqi about a personal matter after she repeatedly asked him to stop doing so.

[64] The plaintiff has not met his burden of demonstrating that a trier could conclude that the defence of justification would not succeed.

(b) Fair Comment

[65] A defendant claiming fair comment must satisfy the following test:

- (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 recognizable as comment;
- (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?; and
- (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice.

Walsh Energy Inc. v. Better Business Bureau of Ottawa-Hull Incorporated, 2018 ONCA 383, at para. 21.

[66] I find that, to the extent that Farooqi's expression was a comment, her defence of fair comment is satisfied. I have already found that the comment was on a matter of public interest and that Farooqi was commenting on the facts of her interaction with Mazhar. With respect to the third element, the Supreme Court has directed that whether a statement is a comment is a “relatively easy” onus to discharge, and that comment is to be “generously interpreted”: *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, 2 SCR 420, at paras. 26 and 30.

[67] Here, Farooqi was advising MAX about her reaction to receiving the disturbing “black magic” email from Mazhar and putting it into context regarding a “volunteer who has demonstrated unprofessional and unstable conduct.” Based on the record, I find that a person could honestly express the same opinion as Farooqi on the facts.

[68] The evidence does not establish malice on Farooqi's part despite the plaintiff's claim that malice was Farooqi's dominant motive in sending her complaint to MAX. Farooqi wrote a carefully worded cover letter to her complaint, enclosed the relevant text messages, and provided her comments, all of which emphasize her concern for her safety and that of others. In light of having just received Mazhar's “black magic” email that stated he had developed a hatred for her, I find Farooqi's response measured and not made in malice.

(c) *Qualified Privilege*

[69] An apt summary of the defence of qualified privilege was provided in *Weisleder v. OSSTF*, 2019 ONSC 5830, at paras. 8-12, per Ferguson J.:

[8] The defence of qualified privilege is described in *Brown on Defamation*, as follows:

There are certain occasions on which a person is entitled to publish untrue statements about another, where he or she will not be liable even though the publication is defamatory. One such occasion is called a conditional or qualified privilege. No action can be maintained against a defendant unless it is shown that he or she published the statement with actual or express malice. An occasion is privileged if a statement is fairly made by a person in the discharge of some public or private duty, or for the purpose of pursuing or protecting some private interest, provided it is made to a person who has some corresponding interest in receiving it. The duty may be either legal, social or moral. The test is whether persons of ordinary intelligence and moral principle, or the great majority of right-minded persons, would have considered it a duty to communicate the information to those to whom it was published.

[9] Qualified privilege attaches to the occasion upon which the communication is made, and not to the communication itself. A privileged occasion is an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it.

[10] Qualified privilege applies to communications made by a member or executive member of a trade union to other members of that union concerning the union's affairs and the activities or actions of executive members.

[11] The legal effect of the defence of qualified privilege is to rebut the inference that the published defamatory words were spoken with malice. Where the occasion is shown to be privileged, the bona fides of the defendant is presumed and the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff. The privilege is not absolute, however, and may be defeated if the dominant motive for publishing is actual or express malice. Qualified privilege may also be defeated if the limits of the duty or interest have been exceeded. If the information communicated was not reasonably appropriate to the legitimate purposes of the occasion, the qualified privilege will be defeated.

[12] The defence of qualified privilege reflects a balancing of competing interests: the interest the maker of the statement seeks to serve and the interest in reputation that the defamed party seeks to protect.

[70] The key element to the defence is that there is the reciprocity between the publisher and the recipient of the impugned statement: *RTC Engineering Consultants Ltd. v. Ontario* (2002), 58 O.R. (3d) 726 (C.A.), at para. 16.

[71] I find that the defence of qualified privilege fully applies to the facts of this case. Farooqi contacted Dr. Ahmed in the wake of receiving Mazhar's "black magic" email, and the day before she was to host a MAX event at which Mazhar was to volunteer. Dr. Ahmed was the one who suggested that there would need to be an organizational response and that she should think about coming forward and disclosing her identity as a complainant. MAX began a confidential investigation process through a Special Committee which requested to meet with the parties separately. Farooqi sent her complaint package to MAX referencing her "position as an executive for MAX Mentors and this volunteer's interaction with [her] under [her] leadership." I find that these factors speak clearly to the reciprocal nature of Farooqi's complaint, and her social and moral duty to furnish information to MAX given Mazhar's mentor status.

[72] Farooqi was careful not to characterize her complaint as one of sexual harassment, and I hasten to add that my ruling should not be seen as making any finding in that regard. However, relevant to the discussion of qualified privilege, I note that MAX may have also had a legal obligation to investigate Farooqi's complaint of harassment under human rights law: *Coates v. Communications, Energy & Paperworkers Union, Local 324*, 2009 HRTO 1631, at paras. 67-69. Although the parties were not employees of MAX, volunteer organizations may be considered a "social area" under the Ontario *Human Rights Code: PR v. Toronto (City)*, 2020 HRTO 124, at para. 21, citing *Rocha v. Pardons and Waivers of Canada*, 2012 HRTO 2234, at para. 23.

[73] Since I also find that Farooqi was acting in good faith when she submitted her complaint to MAX, all the elements of a qualified privilege defence are satisfied.

[74] As Farooqi has the defences of justification, fair comment, and qualified privilege available, the plaintiff has not satisfied me that the defendant has no valid defence in the proceeding.

[75] I could end my analysis here and dismiss the action as all three elements of s.137.1(4) must be satisfied by the plaintiff, whereas the plaintiff has already not satisfied the “no valid defences” element. However, I will continue my analysis with respect to the final element of the anti-SLAPP test.

Does the harm suffered by Mazhar outweigh the public interest in protecting Farooqi’s expression?

[76] In *Bullard v. Rogers Media Inc.*, 2020 ONSC 3084, McKelvey J. set out the relevant principles from *Pointes* with respect to the final element of the anti-SLAPP test:

[13] The court in the *Pointes* decision recognizes that the real heart of the anti-SLAPP legislation is found in subsection (4)(b) which considers the public interest in protecting the expression as compared to the degree of harm that has been suffered by the responding party.

[14] At para. 88 of the *Pointes* decision, the Court of Appeal states,

The harm suffered or likely to be suffered by the plaintiff as a consequence of the defendant’s expression will be measured primarily by the monetary damages suffered or likely to be suffered by the plaintiff as a consequence of the impugned expression. However, harm to the plaintiff can refer to non-monetary harm as well. The preservation of one’s good reputation or one’s personal privacy have inherent value beyond the monetary value of a claim. Both are tied to an individual’s liberty and security interests and can, in the appropriate circumstances, be taken into account in assessing the harm caused to the plaintiff by the defendant’s expression.

[15] At para. 90 of the *Pointes* decision, the court notes that a plaintiff must provide a basis upon which a motion judge can make some assessment to the harm done or likely done to it by the impugned expression. The court notes that “this will almost inevitably include material providing some quantification of the monetary damages”. The court accepts, however, that a plaintiff is not expected to present a fully developed damages brief. At para. 92, the court notes that equally important to the quantification of the damages, a plaintiff must provide material which can establish the causal link between the defendant’s expression and the damages claimed.

[77] Mazhar sued Farooqi for \$100,000 in damages. He argues that he has suffered reputational damage and that his lawsuit does not bear the classic indicia of a SLAPP suit identified in *Platnick*, at para. 99. He has no history of using litigation to silence his critics; he claims he has less, not more, financial resources than the plaintiff, who is supported by her family and her physician husband; and, he has no punitive purpose in bringing this case since he was already vindicated by the outcome of MAX’s investigation. With respect to his damages, he

asks the court to consider the reputational impact that Farooqi's complaint has on him in the context of him living without a family in Canada since 2007. He states that he sought mental health counselling after being suspended from MAX.

[78] Farooqi responds that the evidence, particularly from Mazhar's cross-examination, undermines many of his claims. Mazhar acknowledged that most of the MAX volunteers did not even know about Farooqi's complaint, and that he is still in more than 100 chat groups with MAX members. The confidential nature of MAX's investigation conducted by a Special Committee insulated him from reputational harm. Farooqi's complaint was not upheld, and he was free to continue to volunteer with MAX. He has been gainfully employed with the same employer for the last two years. With respect to his mental health counselling, he attended on three occasions but two of the attendances were before he learned about Farooqi's complaint. Finally, he did not provide evidence with respect to any special damages. In contrast, Farooqi's complaint had a strong public interest component in respect of protecting volunteers in the organization.

[79] At the hearing of the motion, I provided the plaintiff with several opportunities to draw a link between Farooqi's complaint and his alleged ostracism from MAX. I found his evidence to be speculative. For instance, he claimed that a July 29, 2019 email from MAX claiming that its mentorship program was undergoing substantial restructuring was not accurate, as the website still showed MAX looking for volunteers. However, this was not supported in the record.

[80] The plaintiff also pointed out that in 2018 he was tasked with building an entire project for MAX, but in 2019, after the complaint, his involvement was discontinued. But here he failed to account that within a volunteer organization there can be a number of reasons why certain volunteers are reorganized and why certain projects are discontinued. Mazhar failed to make a nexus between the defendant's impugned expression and the termination of his relationship with MAX. Mazhar simply blamed Farooqi's complaint on what transpired at MAX after the investigation.

[81] Moreover, on the evidence, I find that Mazhar's own conduct may have contributed to a chill in relations with MAX. I note, for instance, the aggressive and "over the top" tone of his lawyer's demand letter to Farooqi dated April 16, 2019, copied to MAX. The letter stated "[t]he complaint suggested, among other things, that [Mazhar] abused you sexually, physically and emotionally." Of course, Farooqi's complaint said no such thing. The letter also demanded, *inter alia*, that Farooqi "step away from MAX in all capacities for [the] next five years", and that Farooqi's entire family apologize to Mazhar. This letter generated a terse response from MAX's lawyer requesting that Mazhar refrain from involving MAX in his dispute with Farooqi.

[82] Ultimately, when weighing the public interest in protecting Farooqi's expression versus the harm done to Mazhar's reputation, there is no contest. Mazhar has not met his burden and as such fails on this component of the test.

[83] In summary:

- a) I am satisfied that the claim arises from an expression that relates to a matter of public interest;
- b) while there are grounds to believe that the proceeding has substantial merit;
- c) there are also ground to believe that the defendant has valid defences; and
- d) the harm to the plaintiff is not sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.
- e) Accordingly, the action is dismissed.

Costs

[84] The defendant provided a Bill of Costs requesting \$75,212.28 in full indemnity costs pursuant to s. 137.1(7) of the *CJA*, the costs provision of the anti-SLAPP legislation.

[85] “Full indemnity” means recovery of what would reasonably have been contemplated as the amount a lawyer would actually charge the client. When a Court orders full indemnity costs, it means that the party is entitled to recover all that it has expended in the action: *DEI Films Ltd. v. Tiwari*, 2018 ONSC 4818, at para. 14.

[86] The Law Commission of Ontario in its report, *Defamation Law in the Internet Age: Final Report* (Toronto: Law Commission of Ontario, 2020), at p. 52, described the costs provisions of the anti-SLAPP legislation as follows:

The legislation uses cost provisions to encourage defendants to make use of the new procedure. Where a defendant is successful in having a proceeding dismissed, there is a statutory presumption that she will be awarded her costs of the motion and the proceeding on a full indemnity basis. However, where a plaintiff is successful in defending her action, the presumption is the opposite – she will not be awarded costs on the motion. Both presumptions are subject to the judge’s discretion.

[87] In *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128, at para. 42, the Court of Appeal also provided guidance regarding the obligations of a motion judge to determine costs under this section.

[42] We do, however, agree with the appellant that there remains an obligation on a motion judge, when determining the quantum of costs under s. 137.1(7), to undertake the same type of analysis that is required when fixing costs in any other context. Just because the award is on a full indemnity basis does not mean that the successful party is entitled to whatever costs were incurred. The quantum must still be fair and reasonable for what was involved in the particular proceeding: *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26. The award must also be

proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding: see r. 1.04(1.1), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[88] I find the defendant's Bill of Costs of \$75,212.28 to be fair and reasonable for what was involved in the proceeding. For example, Farooqi provided a 147-page motion record consisting of her affidavit (11 pages) and exhibits, whereas Mazhar provided an 846-page responding motion record consisting of his affidavit (104 pages) and exhibits. I also note that the cross-examination of the plaintiff was conducted by the less senior of the defendant's counsel in a professional and efficient manner.

[89] I also consider the defendant's costs request to be fair in light of other anti-SLAPP cases including:

- *McQueen v. Reid*, 2018 ONSC 1662, at para. 45, where costs of \$80,000 were awarded in a defamation case between two individuals. The defendant had requested \$100,000 in full-indemnity costs.
- *Joshi v. Allstate Insurance Company of Canada*, 2019 ONSC 5934, at para. 24, where costs of \$95,173.26 were awarded where the successful defendant had requested \$126,449.16.
- *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 6350, at para. 11; affirmed on appeal, *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128, at para. 41, where costs of \$122,286.94 were awarded. However, \$30,000 of those costs were awarded on three earlier motions, therefore, the comparable anti-SLAPP costs award is \$92,286.94.
- *United Soils Management Ltd. v. Barclay*, 2018 ONSC 1372, at para. 144, affirmed on appeal, *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128, at para. 41, where costs of \$126,438.55 were awarded.

Section 137.1(9) Damages

[90] Section 137.1(9) of the *CJA* provides that if, in dismissing a proceeding under that section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate.

[91] Farooqi requested \$50,000 in such damages acknowledging that, if awarded, such an amount would set a high-water mark for s. 137.1(9) damages. In the *United Soils Management* cases, the motions judges awarded \$20,000 in damages to Barclay and \$7,500 to Mohammed.

[92] In affirming the damages awards in *United Soils Management*, the Court of Appeal set out the following principles at paras. 35-38:

- a) if the court is satisfied on the record before it that an action has been brought in bad faith or for an improper motive, such as punishing, silencing or intimidating the defendant rather than any legitimate pursuit of a legal remedy, an additional remedy should be available for this improper conduct;
- b) medical evidence is not necessary to support a claim for s.137.1(9) damages. While medical evidence might be of assistance in determining the proper quantum of damages to be awarded, in certain cases, it may be presumed that damages will arise from the use of a SLAPP lawsuit;
- c) whether an award of damages is warranted should also take into account the presumption that costs will be awarded on a full-indemnity basis; and
- d) the thrust of such damages is to provide compensation for the harm done directly to the defendant arising from the impact of the instituted proceeding. It is not a proxy for punitive damages.

[93] The defendant justified her damages request on a combination of the impact of the lawsuit on her, and the plaintiff's "deplorable behaviour" throughout the litigation. Farooqi pointed out that Mazhar:

- a) repeatedly berated her in her cross-examination for not swearing on the Holy Quran, despite her already having been affirmed and the fact that he himself had been affirmed;
- b) threatened to sue Farooqi's mother if Farooqi advanced her complaint at MAX;
- c) threatened to sue her fiancé; and
- d) included embarrassing but irrelevant documents about Farooqi and her fiancé in his motion materials.

[94] Farooqi also pointed to a particularly disturbing threat made by Mazhar about going after Farooqi's professional reputation if his defamation claim was dismissed:

But if this claim is quashed that gives me a legal license to file a complaint against Ms. Farooqi and she cannot pick on me because I am just going to pick up on this claim that was rejected. I can go to University of Toronto, I can go to medical boards, I can go to hospitals, I can go to medical councils of Canada, I can go to College of Physicians...College of Family Physicians of Canada, and I can go anywhere else. (Transcript of cross-examination of plaintiff, p. 256)

I agree with the defendant that the self-represented plaintiff's behaviour during the litigation was egregious. Still, the focus of s. 137.1(9) is determining whether the action has been brought in bad faith or for an improper motive, such as to punish, silence or intimidate the defendant, rather than any legitimate pursuit of a legal remedy.

[95] I find that s. 137.1(9) damages are warranted here. Mazhar commenced this action despite MAX's harassment investigation process being confidential and concluding that he could still continue as a volunteer. The matter could have ended there. Mazhar's decision to commence a defamation claim despite the conclusion of MAX's investigation process evinces the bad faith or improper purpose with which this action was brought.

[96] I find that Mazhar commenced his defamation claim to punish Farooqi for complaining to MAX about him, and to intimidate her in case she planned on going further. Translating this into the language of harassment complaints, his civil lawsuit represents a reprisal.

[97] Farooqi did not provide medical evidence of the impact of Mazhar's conduct. However, I find that Mazhar sued her in the early years of her medical career, shortly after she had just got married, and a few months after her father passed away due to sudden heart failure. I find that in these circumstances the lawsuit caused Farooqi unnecessary stress that negatively affected her life.

[98] I find that the plaintiff's conduct and its impact on the defendant merits a compensatory award of \$10,000 in s. 137.1(9) damages. This is less than the \$20,000 awarded in *United Soils v. Barclay*, 2018 ONSC 1372, but there the plaintiff corporation brought a number of interlocutory motions that were seen by the motion judge as unduly aggressive and unjustifiable.

[99] I find that something more than full indemnification of the defendant's costs is warranted in the circumstances of this case.

Conclusion

[100] As the defendant has been successful in the anti-SLAPP motion, the plaintiff's action is dismissed. The defendant is awarded costs in the amount of \$75,212.28 and damages in the amount of \$10,000, all to be paid by the plaintiff within 30 days of the release of my decision.

Pinto J.

Date: June 9, 2020

TAB 10

COURT OF APPEAL FOR ONTARIO

CITATION: Nanda v. McEwan, 2020 ONCA 431

DATE: 20200702

DOCKET: C67816

Strathy C.J.O., Tulloch and Coroza JJ.A.

BETWEEN

Irwin Nanda

Plaintiff (Respondent)

and

Derrick McEwan, Avelino Carvalho, Angela Mason
and Satish Sharma

Defendants (Appellants)

Kevin J. Scullion, for the appellants

Ivanna Iwasykiw, for the respondent

Heard: In writing

Appeal from the order of Justice Leonard Ricchetti of the Superior Court of Justice, dated January 7, 2019, with reasons reported at 2019 ONSC 3357.

Strathy C.J.O.:

A. INTRODUCTION

[1] This is an appeal from an order made under s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (“CJA”), dismissing an “anti-SLAPP” motion brought by the appellants.¹ The action is for defamation, based on statements made by the appellants in the midst of the respondent’s unsuccessful campaign for election as president of the Toronto Local of the Canadian Union of Postal Workers (“CUPW”).

[2] The motion judge dismissed the appellants’ motion to dismiss the action, holding that they had not established that the statements at issue related to a “matter of public interest”, as required by s. 137.1(3). Although it was not necessary to consider whether the respondent’s claim met the requirements of s. 137.1(4), the motion judge undertook the public interest balancing assessment in s. 137.1(4)(b) and found that the public interest did not weigh in favour of the protection of the statements. He therefore dismissed the appellants’ motion.

[3] For the reasons that follow, I would dismiss the appeal. I reach this result through a different course of reasoning than the motion judge. In my respectful view, the motion judge erred in his analysis under s. 137.1(3). The proper application of that section, as explained in *1704604 Ontario Ltd. v. Pointes*

¹ “SLAPP” means Strategic Litigation Against Public Participation.

Protection Association, 2018 ONCA 685, 142 O.R. (3d) 161², leads to a conclusion that the expressions relate to a matter of public interest.

[4] However, conducting the additional analysis required by s. 137.1(4), I come to the same result as the motion judge: having regard to the merits of the proceeding and the harm likely to have been suffered by the respondent, the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expressions at issue.

B. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

[5] The appellants are members of the Toronto Local of CUPW. The respondent had been involved in a leadership capacity in the Toronto Local of CUPW from 1990 to 2011, then as a member of the executive of the Ontario Federation of Labour from 2011 to 2016. In 2016, he resumed involvement in CUPW activities and ran in the 2017 election for President of the Toronto Local. The appellants opposed his candidacy.

[6] The respondent alleged that during the election campaign, the appellants made defamatory statements about him in two invitation-only “WhatsApp” chat groups and in posters or flyers that were distributed to members of the local during the election. The first WhatsApp group had 183 members and the second

² leave to appeal granted and appeal heard and reserved November 12, 2019, [2018] S.C.C.A. No. 467.

had 100, with some overlap in membership. The statements included allegations that the respondent:

- was a racist, a bigot, a sexist, a bully and a thief;
- was corrupt;
- had “rigged” a union election;
- had stolen from membership and had abused his position of trust;
- had used union funds to buy votes; and
- had engaged in a criminal conspiracy.

[7] The respondent commenced an action in the Small Claims Court, a branch of the Superior Court of Justice. The appellants’ statement of defence did not dispute that the statements were made but argued that they were not defamatory and raised several defences, including justification, absolute and/or qualified privilege, fair comment, and public interest communication.

[8] The appellants moved before a deputy judge of the Small Claims Court to dismiss the action on three grounds: first, that the proceeding was properly the subject of arbitration under the union constitution; second, that the respondent had failed to give notice under the *Libel and Slander Act*, R.S.O. 1990, c L.12; and third, that the action improperly limited public debate under s. 137.1 of the *CJA*. The deputy judge stayed the action as a result of the respondent’s failure to

give notice of his claim. He did not consider it necessary to deal with the anti-SLAPP motion.

[9] The respondent appealed that order to a single judge of the Divisional Court. The appellants cross-appealed on the arbitration and anti-SLAPP issues. The Divisional Court judge allowed the appeal, concluding that there was no evidence before the deputy judge to permit a conclusion that the WhatsApp statements constituted a “broadcast” under the *Libel and Slander Act*. He dismissed the cross-appeal with respect to the arbitration issue.

[10] The appellants indicated that they wished to pursue the anti-SLAPP motion. Rather than remitting the motion to the deputy judge, the Divisional Court judge (hereinafter the “motion judge”) agreed to deal with the matter himself. The parties agreed that he could address the matter through written submissions.

[11] The motion judge dismissed the anti-SLAPP motion. He concluded that the impugned expressions were not related to a matter of public interest, and even if they were, the public interest did not weigh in favour of protecting such expressions.

[12] Subsequent to the motion judge’s decision, this court held in *Bruyey v. Canada (Veteran Affairs)*, 2019 ONCA 599, 147 O.R. (3d) 84, that a deputy judge of the Small Claims Court has no jurisdiction to make an order under s. 137.1, as that jurisdiction rests with a “judge”, meaning a Superior Court judge.

[13] The appellants filed a motion for leave to appeal to this court. The panel that heard the motion directed that leave is not required as an appeal lies to this court under s. 6(1)(d) of the *CJA*, which provides for an appeal as of right from an order under s. 137.1.

C. THE MOTION JUDGE'S REASONS

[14] The motion judge found that the appellants did not meet the threshold test under s. 137.1(3) of establishing that the expressions at issue related to the public interest. The purpose and context of the statements at issue were “to make disparaging, inflammatory and allegedly defamatory comments about the Plaintiff to other local union members to get those other members not to vote for the Plaintiff.” Although some 200 members of the local saw the WhatsApp messages, they were not members of the general public or a segment of it. Therefore, neither the public nor a segment of the public had an interest in the expression.

[15] The motion judge found that the election of a local union official is not a matter of public interest. He reasoned that local union elections are private matters, unlike the election of public officials, such as municipal councillors. Elections that take place in private institutions, such as churches, private companies, community and charitable organizations, and law firms, are not of public interest, as they “involve highly local, limited and private interests.”

[16] The motion judge suggested that the public interest may arise by virtue of: (a) the appointment/election of persons in public positions; and also (b) the appointment/election of those that engage in public interest issues, such as environment, planning, and the arts. However, he appears to have found neither category to be at play.

[17] As his conclusion on the threshold test was dispositive of the motion, the motion judge did not consider the merits of the proceeding or the defences available under s. 137.1(4)(a). He did, however, comment on the public interest balancing under s. 137.1(4)(b). He found that the statements at issue were not worthy of protection because they did not encourage debate on public matters. They were “vulgar and vitriolic statements meant to denigrate and defame the character of the Plaintiff to sway other voters not to vote for the Plaintiff”, referring to *Levant v. Day*, 2019 ONCA 244, 145 O.R. (3d) 442, at paras. 22-23, leave to appeal refused, [2019] S.C.C.A. No. 194.

D. ISSUES

[18] The appellants’ grounds of appeal can be summarized as follows:

- 1) the motion judge erred in determining that the expression did not relate to the public interest under s. 137.1(3);
- 2) the motion judge erred in opining on public interest balancing under s. 137.1(4)(b), as his determination under s. 137.1(3) was dispositive; and

- 3) the motion judge erred in improperly determining the minimum threshold for protected political speech in his s. 137.1(4)(b) analysis, holding that political “attack ads” are never protected forms of speech.

E. THE PARTIES’ SUBMISSIONS

(1) Appellants

[19] First, the appellants submit that the motion judge erred in finding that unions are “private” institutions and that the election of a local union President is a private matter and not a matter of public interest. He improperly focused on a small number of members of the local (approximately 200) and should have considered whether the union has the ability to affect public policy through government lobbying and advocacy on behalf of workers. They submit that the government/non-government distinction conflicts with binding authority of this court: *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128, 53 C.C.L.T. (4th) 1, leave to appeal refused, [2019] S.C.C.A. No. 153.

[20] Second, the appellants submit that once the motion judge found that the expressions did not relate to a matter of public interest under s. 137.1(3), he should have refrained from characterizing the expressions or determining whether they were deserving of protection under s. 137.1(4)(b). In proceeding to do so, he improperly interfered with the trial judge’s jurisdiction and impaired the appellants’ ability to raise defences on the merits.

[21] Third, the appellants submit that the motion judge improperly determined the minimum threshold of protection for political speech, in essence holding that all political “attack ads” are not protected forms of speech.

(2) Respondent

[22] First, the respondent submits that the motion judge correctly determined that the purpose of an organization should be examined to determine whether its elections are matters of public importance. The motion judge did not treat the number of members as a determinative factor; he was simply noting that the number of interested parties was limited to the members of the collective bargaining unit.

[23] Second, the respondent submits that the additional comments on public interest balancing under s. 137.1(4)(b) were merely *obiter dicta* and would not restrict the ability of the trial judge to decide the matter on the evidence.

[24] Third, because the comments under s. 137.1(4)(b) were *obiter dicta*, they do not represent a determination of the minimum threshold for protected political speech. In the alternative, the respondent submits that the motion judge properly determined that bald attacks are not protected under the public interest balancing test.

F. ANALYSIS

(1) Section 137.1 of the *CJA* – The “Anti-SLAPP” Provision

(a) Purpose

[25] Section 137.1 of the *CJA* is designed to prevent the legal process from being used as a weapon to limit debate on matters of public interest. Section 137.1(1) explains that its purpose is:

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

[26] In *Pointes*, the seminal case on the interpretation of s. 137.1, Doherty J.A. provided the following summary of the operation of the legislation, at para. 7:

s. 137.1 allows a defendant to move any time after a claim is commenced for an order dismissing the claim. The defendant must demonstrate that the litigation arises out of the defendant’s expression on a matter relating to the public interest. If the defendant meets that onus, the onus shifts to the plaintiff to demonstrate that its lawsuit clears the merits-based hurdle in s. 137.1(4)(a) and the public interest hurdle in s. 137.1(4)(b).

(b) Section 137.1(3): The Threshold Requirement

[27] Section 137.1(3) sets out what was described in *Pointes* as a “threshold requirement”:

On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

[28] This provision requires the moving party to establish, on a balance of probabilities, that the expression “relates to a matter of public interest.” This term is to be given a broad reading and does not require that the expression actually further the public interest. It covers language that is intemperate, false, or even contrary to the public interest: *Pointes*, at para. 55.

(c) Section 137.1(4): The Merits-Based and Public Interest Hurdles

[29] If the defendant establishes that the expression relates to a matter of public interest, s. 137.1(4) comes into play and the onus shifts to the plaintiff. It provides:

A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[30] First, to satisfy s. 137.1(4)(a), the “merits-based hurdle”, the plaintiff must establish, on a balance of probabilities, that the proceeding has substantial merit and that the defendant has no valid defence.

[31] Second, to surmount s. 137.1(4)(b), the “public interest hurdle”, the plaintiff must show that the harm suffered by the plaintiff as a result of the defendant's expression “is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.”

[32] I will discuss the application of s. 137.1 in more detail below.

(2) Standard of Review

[33] The standard of review for determinations under ss. 137.1(3) and 137.1(4) is deference, absent legal error or palpable and overriding factual error: see *Pointes*, at paras. 66, 97.

(3) Analysis

(a) Section 137.1(3): The Threshold Requirement

[34] The motion judge correctly identified *Pointes* as the dispositive authority. In my respectful view, however, he mischaracterized the context of the expressions

at issue, defined the segment of the community too narrowly, and drew an unwarranted distinction between expressions made in the context of “private” and “public” organizations.

[35] *Pointes* and subsequent decisions of this court have referred to *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 for guidance in the analysis of the “public interest” requirement. The following considerations may be relevant:

- the context of the expression, having regard to the communication as a whole: *Pointes*, at para. 60;
- expressions that relate to private matters do not become matters relating to the public interest merely because the public is curious about them: *Pointes*, at para. 61;
- “[a]n expression can relate to a matter of public interest without engaging the interest of the entire community, or even a substantial part of the community. It is enough that some segment of the community would have a genuine interest in the subject matter of the expression”: *Pointes*, at para. 62;
- public interest does not turn on the size of the audience: *Pointes*, at para. 63; and
- the concept of “public interest” is a broad one that does not take into account the merits or manner of expression, nor the motive of the author. It

covers language that is intemperate, false, and even contrary to the public interest: *Pointes*, at paras. 55, 65.

[36] In *Pointes*, at para. 54, Doherty J.A. suggested that the public interest can be determined by asking: “what is the expression about, or what does it pertain to?”

[37] In identifying the purpose and context of the expressions as making “disparaging, inflammatory and allegedly defamatory comments about the Plaintiff to other local union members to get those other members not to vote for the Plaintiff”, the motion judge focused on the manner of expression and the motives of the appellants. This runs contrary to the observations of Doherty J.A. in *Pointes*, at para. 65, that the analysis does not consider the motives of the author or the merits of the expression. The motion judge made the error that this court identified in *Levant*, at para. 11.

[38] The motion judge also defined the group interested in the expressions too narrowly. Specifically, he said that “[t]he expression may be of interest to the approximately 200 members of the local union, but NOT the public generally or a segment of the public.” First, as Doherty J.A. noted in *Pointes*, at para. 63, the public interest does not turn on the size of the audience. Second, the public interest extended well beyond those who were direct recipients of the texts and

the posters. It would have included other members of CUPW, as well as the public sector more generally.

[39] Finally, even if one were to accept that a local of a major Canadian public union is a “private” organization, the distinction between expressions made in the context of “private” and “public” organizations is not found in *Pointes*.

[40] Had the motion judge properly addressed the question, “what is the expression about?”, he would have responded that it was about allegations of corruption and misconduct by a candidate for the office of President of the Toronto Local of the Canadian Union of Postal Workers.

[41] In my view, expressions concerning racism, sexism, corruption, abuse of union funds, and misconduct by a candidate for President of the Toronto Local of a Canadian public sector union relate to a matter of public interest. In the words of McLachlin C.J.C. in *Torstar*, at para. 102, “[i]t is enough that some segment of the community would have a genuine interest in receiving information on the subject”: see also *Torstar*, at para. 105. Members of the Toronto Local, beyond the recipients of the posters and WhatsApp messages, would clearly have a genuine interest in the expressions in the context of an election campaign. But the scope of public interest would extend even further, to the broader community served by members of CUPW and the public sector.

[42] It is of note that two of the decisions released contemporaneously with *Pointes* deal with expressions made in the context of elections. In *Armstrong v. Corus Entertainment Inc.*, 2018 ONCA 689, 143 O.R. (3d) 54, the plaintiff and one of the defendants, Nancy McSloy, were candidates for a position as city councillor in the municipal election in London, Ontario. During the campaign, Ms. McSloy made comments in a press release and on a talk radio broadcast, the gist of which were that Mr. Armstrong had used threats, intimidation, illegal acts, and bullying to get what he wanted from others. On the motion under s. 137.1, the motion judge held that the defendants had satisfied him that the subject matter of the claims related to “a matter of public interest” under s. 137.1(3). Doherty J.A. observed, “[t]hat finding is not in dispute on the appeal. Nor should it be. Statements about a candidate’s fitness for office made in the course of an ongoing election campaign undoubtedly qualify as expression relating to a matter of public interest.”

[43] In *Able Translations Ltd. v. Express International Translations Inc.*, 2018 ONCA 690, 428 D.L.R. (4th) 568, the expressions at issue were made in the course of a federal election campaign and related to the suitability of a candidate to sit as a member of Parliament, given his prior senior management position with the plaintiff corporation. In affirming the motion judge’s conclusion that the communications related to a matter of public interest, Doherty J.A. observed, at para. 19, “[n]o one disputes that communications directed at a person’s suitability

to hold elected office, particularly when made in the middle of an election campaign, are communications relating to a matter of public interest.”

[44] Subsequently, in *Labourers’ International Union of North America, Local 183 v. Castellano*, 2020 ONCA 71, 444 D.L.R. (4th) 183, this court affirmed a motion judge’s decision to dismiss an anti-SLAPP motion and to grant summary judgment in favour of the plaintiff for defamation. The defendant, a former member of the plaintiff local, had made internet posts in which he described the union as, among other things, “terrible”, “corrupt”, “despicable”, “evil”, “no good degenerate scum”, a “vicious pit of snakes” and as having a “bad reputation for corrupt and deceitful behaviour.” He described the union’s counsel and other members and officers in similar terms.

[45] Referring to *Pointes*, the motion judge in *Castellano* noted that the fact that the defendant’s posts contained derogatory, malicious, and false statements did not preclude a finding that the expressions related to a matter of public interest. Looking at the broader context of the expressions, other statements made by the defendant were concerned with the quality of representation he felt he was being provided by the union. The motion judge found this was a matter of public interest, at para. 40:

While the posts may be understood as the public airing of very personal grievances, they may also be construed as addressing the Union’s governance and the suitability of some of the plaintiffs to act as union

representatives... I accept Mr. Castellano's submission that this characterization of the expression has significance for members of Local 183 as well as the community at large. This is sufficient to ground a finding that Mr. Castellano has met his onus under s. 137.1(3).

[46] The motion judge went on to dismiss Mr. Castellano's anti-SLAPP motion, finding that the public interest in the expressions was low and that the harm suffered by the plaintiffs outweighed the public interest in protecting the defendant's expression. This court dismissed an appeal from that portion of the judgment.

[47] In summary, the motion judge erred in this case by focusing on the nature of the expressions and failing to consider their context, in defining the group interested in the expressions too narrowly, and in treating the "private" context as determinative. In my view, allegations of racism, sexism, corruption, and misconduct in the context of the election of the President of a major local of an important public sector union is a matter of public interest. The appellants' motion passed the public interest threshold. This requires this court to conduct the additional analysis under s. 137.1(4).

(b) Section 137.1(4)(a): The Merits-Based Hurdle

[48] In *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60³, one of the companion cases to *Pointes*, Doherty J.A. summarized the requirements of s. 137.1(4)(a), at para. 43:

s. 137.1(4)(a) puts the onus on the plaintiff (responding party) to establish on the balance of probabilities that there are reasonable grounds to believe both that the plaintiff's claim has substantial merit and that the defendant (moving party) has no valid defence. Broadly speaking, the section provides a mechanism whereby claims that have little apparent merit and that potentially undermine freedom of expression can be screened out of the litigation process at an early stage.

[49] Applying that analysis, the question raised by s. 137.1(4)(a) becomes:

Could a reasonable trier conclude that [Mr. Nanda] had a real chance of establishing that he was libelled and could a reasonable trier conclude that [the defendants] had no valid defence to the allegation?

[50] In the court below, the appellants made no submission on the merits of the respondent's defamation claim, but they submitted that they were entitled to the defences of justification, fair comment, absolute and/or qualified privilege, and public interest communication. In this court, their submissions on s. 137.1(4) are primarily that the motion judge erred in making *obiter* statements that could bind a trial judge.

³ leave to appeal granted and appeal heard and reserved November 12, 2019, [2018] S.C.C.A. No. 466.

[51] Only one of the appellants, Mr. Sharma, filed an affidavit on the motion. It contains nothing to support any defence to the most serious defamatory statements. It states that the respondent was “regarded by some members as a polarizing figure in the CUPW Toronto Local, with members holding the opinion that he was acting in an obstructive, intimidating manner, skirting the Rules of Order and proposing motions which could have angered the membership.” It attaches a photograph of a meeting of the Toronto Local, purporting to show that the respondent divided the membership on ethnic lines. It refers to another website containing allegations of corruption against the respondent. Nowhere do the appellants’ materials demonstrate defences to the defamatory statements concerning corruption, rigging elections, abuse of trust, and conspiracy.

[52] In my view, the respondent’s claim survives the merits-based hurdle. The defamation claim is supported by the evidence adduced by the respondent and the appellants’ pleading, and the evidence does not reveal a defence to the respondent’s serious complaints. A conclusion such as this does not “bind” the trial judge, who will consider the merits and defences on a full record.

(c) Section 137.1(4)(b): The Public Interest Hurdle

[53] I turn to the second hurdle. Section 137.1(4)(b), set out above, calls for the balancing of the public interest in permitting a proceeding to continue against the public interest in the protection of expression on matters of public interest.

[54] At this stage, the plaintiff has a burden to establish evidence of harm, which may be in the form of damage to monetary, reputational, and/or privacy interests: *Pointes*, at paras. 87-88. The plaintiff must demonstrate that there was a causal connection between the defendant's expression and the harm suffered: *Pointes*, at paras. 90-92. The motion judge must also assess the public interest in protecting the actual expression that is the subject of the lawsuit.

[55] In *Platnick*, at para. 98, Doherty J.A. suggested that, while acknowledging that s. 137.1 does not apply only to litigation that meets the criteria of a SLAPP, it may be appropriate to begin the s. 137.1(4)(b) analysis by asking, "[d]oes this claim have the hallmarks of a classic SLAPP?" These may include such matters as: a history of the plaintiff using litigation or the threat of litigation to silence critics; a financial or power imbalance that strongly favours the plaintiff; a punitive or retributory purpose animating the plaintiff bringing the claim; and minimal or nominal damages suffered by the plaintiff: *Platnick*, at para. 99.

[56] This is hardly a classic SLAPP. None of the indicia identified by Doherty J.A. are present. While the respondent seeks damages of only \$25,000, he has adduced some evidence of an income loss related to the loss of the election for the office of President, and the damages claimed are realistic.

[57] I agree with the motion judge's conclusion on this issue. Having regard to the expressions at issue, the merits of the respondent's case, and giving due

regard to the public interest in public debate and expression in the context of a union election, the public interest in permitting the action to proceed must prevail.

(d) The Motion Judge’s Decision was Fact Specific

[58] I reject the appellants’ submission that the motion judge erred by “determining the minimum protection threshold for protected political speech” and by holding that “attack ads” are not protected speech. The appellants focus on the motion judge’s observations, at paras. 46 and 47, where he observed, in relation to the statements at issue:

These types of Statements do not encourage debate on public matters but are allegedly defamatory statements made for the sole purpose of attacking and maligning the character of an individual without a meaningful connection with the alleged public interest or to encourage debate on matters of public interest.

Put another way, the statements by the Defendants in this case, appear to be vulgar and vitriolic statements meant to denigrate and defame the character of the Plaintiff to sway other voters not to vote for the Plaintiff. These statements were not intended to provide information or the exchange of opinion, assert facts into the public debate (even if it were a matter of public interest) or to engage in a discussion of a person’s qualifications for office. A key example is the statement that the Plaintiff engaged in criminal conduct.

[59] Shortly after making these statements, the motion judge quoted from this court’s decision in *Levant*, at paras. 22-32, citing to *Pointes*, at para. 94, that “deliberate falsehoods, gratuitous personal attacks or vulgar and offensive

language” may reduce the public interest in protecting that speech, compared to cases where the message is delivered “without the lies, vitriol, and obscenities.”

[60] As the appellants note, the motion judge’s observations on this aspect of the issue were *obiter*. In my view, they are nothing more than an application of the particular facts of this case to the relevant legal test. Specifically, the motion judge was applying the guidance in *Pointes* that, in conducting the balancing exercise under s. 137.1(4)(b), the quality of the expressions and the motivation of the speaker are relevant to the measure of public interest in protecting the expression.

G. DISPOSITION

[61] For the foregoing reasons, I would dismiss the appeal. There were no submissions as to costs. If no agreement is reached, the parties shall submit written submissions. The appellants shall deliver their submissions to the Registrar of the court within 30 days from the release of these reasons and the respondent shall have 15 days to respond. The submissions are limited to 10 pages, exclusive of costs outlines.

Released: “GRS” JUL 02 2020

“George R. Strathy C.J.O.”
“I agree. M. Tulloch J.A.”
“I agree. S. Coroza J.A.”

TAB 11

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nazerali v. Mitchell*,
2015 BCSC 2560

Date: 20150619
Docket: S116979
Registry: Vancouver

Between:

Altaf Nazerali

Plaintiff

And:

**Mark Mitchell, Patrick Byrne, Deep Capture LLC,
High Plains Investments LLC, Godaddy.com, Inc.,
Nozone, Inc. dba Steadfast Networks,
Google Inc. and Google Canada Corporation**

Defendants

- and -

Between:

Docket: S137262
Registry: Vancouver

Altaf Nazerali

Plaintiff

And

Judd Bagley, Evren Karpak and Overstock.com, Inc.

Defendants

Corrected Judgment: The cover of the Judgment was corrected on March 10, 2016.

Before: The Honourable Mr. Justice Affleck

Oral Ruling on Dismissal Application

Counsel for the Plaintiff:

D.W. Burnett Q.C.
H. Maconachie

Counsel for the Defendants Mark Mitchell,
Patrick Byrne, Deep Capture LLC, High
Plains Investments LLC. and Judd Bagley:

R.D. McConchie
R.A. McConchie

Counsel for Overstock.com:

S.R. Schachter, QC

Place and Dates of Trial:

Vancouver, B.C.
April 13-17, 20-21, 23-24, 2015
June 15-19, 2015

Place and Date of Judgment:

Vancouver, B.C.
June 19, 2015

[1] **THE COURT:** This defamation trial involves two actions which are being tried at the same time. The plaintiff has closed his case after 11 1/2 days of trial, and the defendant, Overstock.com, Inc., applies to dismiss action number S137262, relying on Rule 12-5(4) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, arguing the plaintiff has led no evidence to support his claim against Overstock. These are my reasons for judgment on that application. If they are transcribed I reserve the right to edit them.

[2] In the action in which the application is made, which I will refer to as "the Overstock action," like the other action, number S116979, which I will refer to as the "Deep Capture action," the plaintiff seeks injunctive relief and damages alleging defamatory publications on a website located at www.deepcapture.com, which is owned by Deep Capture LLC, which is one of the defendants in the Deep Capture action.

[3] The plaintiff's case in both actions has been put forward through numerous documents by the plaintiff himself, who testified over ten days, through four other witnesses who testified *viva voce* and through extensive read-ins of questions and answers from the examination for discovery transcripts of Judd Bagley, a defendant in the Overstock action, and from the examination for discovery transcripts of Mark Mitchell and Patrick Byrne, who are defendants in the Deep Capture action.

[4] During the examinations for discovery a number of documents were marked as exhibits and became exhibits on the trial through the discovery read-in process.

[5] Mr. Byrne has been examined for discovery in his personal capacity, not as a representative of any of the corporate defendants in the Deep Capture action.

[6] The effect of the provisions of Rule 12-5(46) is that evidence read-in from Mr. Bagley in the Overstock action and from Mr. Byrne and Mr. Mitchell read in from the Deep Capture action as well as the documents which became evidence on the trial through the examination for discovery process are inadmissible against Overstock.

[7] The plaintiff accepts that that is the usual rule, but in an alternative submission in response to Overstock's application for a non-suit submits this court has a discretion to alter the strictures of that rule. I will return to that question later in these reasons.

[8] I am advised the plaintiff did not examine for discovery a representative of Overstock in that capacity. The allegations in the Overstock action are that on the Deep Capture website the plaintiff has been repeatedly defamed in a series of what are called "chapters" with the title "The Miscreants' Global Bust-Out."

[9] Overstock is alleged to be vicariously liable for the defamation and libel as a publisher. In particular it is alleged in para. 15 of the notice of civil claim in the Overstock action that Patrick Byrne is the publisher of the Deep Capture website and carries out that role within and in conjunction with his activities as chief executive officer of Overstock and therefore Overstock is a publisher and vicariously liable for the alleged misconduct of Deep Capture LLC.

[10] In para. 5 of the notice of civil claim in the Overstock action the defendant Bagley is alleged to be an employee or contractor with Overstock and that at relevant times in the course of his duties with Overstock and as a publisher, as the plaintiff alleges, of all expression contained in the Deep Capture website.

[11] Para. 16 of the notice of civil claim in the Overstock action alleges Mr. Bagley carried out his role as publisher of the Deep Capture website within or in conjunction with his role as an employee of Overstock, and thus Overstock is vicariously liable for the alleged misconduct of Deep Capture LLC.

[12] Para. 17 in the notice of civil claim in the Overstock action alleges the resources of Overstock have been used in the publication of the Deep Capture website, which is alleged to be a further basis for the liability of Overstock for the conduct of Deep Capture.

[13] Overstock acknowledges that the plaintiff has proven certain publications by the defendant Deep Capture and acknowledges the plaintiff has proven the

defendant Patrick Byrne in the Deep Capture action is the owner of Deep Capture LLC. but submits the plaintiff's case against it lacks any evidence that could lead to liability for Overstock as alleged in the Overstock action.

[14] Overstock submits that neither the plaintiff himself nor any of his witnesses who gave *viva voce* evidence testified to facts or introduced documents which support the allegations of Overstock's liability. If that submission is correct Overstock submits the action against it must now be dismissed.

[15] The question to be decided on the present application is whether there is any evidence offered in the plaintiff's case on which a properly instructed jury or a judge performing the fact-finding role of a jury could reasonably base a finding of liability against Overstock.

[16] In *Maughan v. UBC*, 2008 BCSC 14, Mr. Justice Cullen as he then was, reviewed the authorities governing a no-evidence motion and wrote the following at para. 21 of his reasons:

[21] I conclude therefore that in considering the no evidence motion in this case, I am obliged in the case of elements of the torts being advanced which are supported by direct evidence, not to weigh the evidence, but only to consider whether it meets a threshold of reasonableness such that a properly instructed jury could make the requisite finding. In the case of elements supported solely by circumstantial evidence, on the other hand, I am obliged to engage in a limited weighing of the evidence to ensure that it is reasonably capable of bridging the inferential gap between the evidence proffered and the element to be proved.

[17] In *Maughan v. University of British Columbia*, 2009 BCCA 447, the conclusion of Mr. Justice Cullen was upheld. In reasons recently handed down by the Court of Appeal in *Brule v. Rutledge*, 2015 BCCA 25, the Court reiterated its approval of the analysis in *Maughan* and emphasized that the role of a trial judge is not to weigh the evidence but to determine as a matter of law whether there is any evidence that can support the claim.

[18] A no-evidence motion is to be approached with caution in a trial with multiple defendants because of the prejudice the remaining defendants may suffer through

the loss of the ability to apportion fault. In *Craigdarloch Holdings Ltd. v. Syscon Justice Systems Canada Ltd.*, 2010 BCSC 46, Mr. Justice Hinkson, as he then was, considered the authorities when an application is made for a non-suit in a trial involving multiple defendants. At para. 27 of the reasons the following is found:

[27] Additional case law sheds some light on the issue of whether or not one defendant can be successful in seeking a non-suit where there are multiple defendants. In *Diamond Willow Ranch Ltd. v. Oliver*, [1987] B.C.J. No. 2973 [*Diamond Willow*], Davies J. concluded the following:

I considered firstly the question of whether one defendant can succeed on non-suit when there is more than one defendant in an action. In *Ayer Mountain Estates Ltd. v. McElhanney Surveying and Engineering* (1978), 7 B.C.L.R. 310, my brother Legg held that in an action with more than one defendant, non-suit should only be granted if it can be granted to all defendants. His reasoning was that it would be unfair to release a defendant even though no case could be made against it for to do so may prevent another defendant claiming degrees of fault amongst the defendants pursuant to the *Negligence Act*. I should say that from my review of the authorities which included the dissent of Craig, J.A. in *Funk v. Clapp*, [1986] B.C.J. No. 122 (February 1986, B.C.C.A.), I have concluded that non-suit may be granted to one defendant at the close of the plaintiff's case but only where,

1. There is no possibility of liability against the defendant, and;
2. No possibility of a claim for apportionment of fault under the *Negligence Act* by the remaining defendant or defendants.

[19] At para. 28 Mr. Justice Hinkson observed that *Diamond Willow* was subsequently applied in *Knight's Mineral Exploration & Company Ltd. Partnership v. Corcoran & Co. Partnership*, [1994] B.C.J. No. 92, where Mr. Justice Cohen commented at para. 30:

30 In light of the above evidence, there is no basis upon which I can find that the plaintiff has met the onus on it to prove its allegations of reliance upon Mr. Krueckl. While, the general rule is that where there are multiple defendants a non-suit should not be granted in favour of one of them, I think Mr. Krueckl's application falls within the exception to the general rule set out in *Diamond Willow Ranch Ltd. v. The Municipality of the Village of Oliver et al.*, [1987] B.C.J. No. 2973 (December 18, 1987), Vancouver C961931 (B.C.S.C.). The plaintiff has failed to establish the key element of its claim against Mr. Krueckl, and I can see no prejudice to the other defendants in granting his application. Therefore, fairness dictates that Mr. Krueckl's application be allowed.

[20] The plaintiff before me submits this is an instance where the multiple-defendants rule ought to apply to defeat the non-suit application. The plaintiff also refers to *Semenoff Estate v. Bridgeman*, 2013 BCSC 1022, in which a third party moved for a non-suit. Para. 58 of those reasons reads:

[58] There is case law that prevents a party from invoking a non suit where there are several defendants and the results of that non suit would not effectively dispose of all issues between defendants: see *Ayer Mountain Estates Ltd. v. McElhanney Surveying & Engineering Ltd.* (1978), 7 B.C.L.R. 310, *Hunt v. MacLeod Construction Co.*, [1958] S.C.R. 737, *Craigdarloch Holdings Ltd. v. Syscon Justice Systems Canada Ltd.*, 2010 BCSC 46, *Smith v. Matsqui* (1986), 4 B.C.L.R. (2d) 342. In *Oh. v. Usher*, 2009 BCSC 1888.

[21] The plaintiff also refers to *Westbank Indian Band v. Tomat* (1992), 63 BCLR (2d) 273 (C.A.), where the Court of Appeal ordered a new trial in a defamation action. The plaintiff submits that the Court observed that damage awards in defamation cases involving multiple plaintiffs must take into account the conduct and degree of involvement of each plaintiff.

[22] That in my view is not controversial but does not create an impediment for a judge to decide a non-suit application of the type brought by the defendant Overstock involving several defendants. If one defendant succeeds in having the action dismissed against it that does not prevent me on this trial, if liability is found against remaining defendants from assessing damages against those defendants who are found liable according to the degree of their participation in the tortious conduct.

[23] The plaintiff also draws my attention to the *Libel and Slander Act*, R.S.B.C. 1996, c. 263, which at s. 16 reads under the heading "Verdict, damages and costs in consolidated actions":

(1) In a consolidated action under section 15, the court or jury must assess the whole amount of the damages, if any, in one sum, but a separate verdict must be taken for or against each defendant, in the same way as if the actions consolidated had been tried separately.

(2) If the court or jury finds a verdict against the defendant or defendants in more than one of the actions consolidated, they must proceed to apportion the amount of damages that they have found between and against the defendants.

(3) If the court awards costs to the plaintiff, the court must make an order it thinks just for the apportionment of costs between and against the defendants.

[24] I am not persuaded those sections stand in the way of the application of Overstock. I will note that the two actions before me were consolidated by an order dated June 24, 2014, but no steps had been taken by the parties prior to the trial to put the consolidation order into effect by, for example, preparing a single set of pleadings in a single trial record.

[25] The trial proceeded on the basis the actions would be tried together and during the course of the trial the parties consented to an order de-consolidating the actions. Irrespective of whether ss. 15 and 16 of the *Libel and Slander Act* are intended to apply only to a true consolidated trial or to multiple actions tried at the same time, in my view, if a defendant in a defamation action with multiple defendants succeeds in a non-suit application, that would not necessarily prevent the Court from applying the provisions of s. 16 of the *Libel and Slander Act* if liability is found unless the defendants seek contribution from each other.

[26] I am informed that the defendants before me do not intend to make cross claims, and no such claims are pleaded. As I understand the plaintiff's position, he also submits the remaining defendants in the Overstock action may be motivated to overstate the role of Overstock if the present application succeeds, thus distorting the assessment of damages to the disadvantage of the plaintiff.

[27] The removal of Overstock from the action may affect the dynamics of damage assessment in ways that are unpredictable. I agree those matters are possibilities, but it is for the judge or jury, if there is one in such circumstances, to determine on the evidence the degree of fault of each of the remaining defendants. If there is no case against Overstock made out by the plaintiff and no defendant intends to cast blame on Overstock, as I am told is the case, I do not detect any prejudice to the plaintiff in this trial if the so-called multiple defendants rule is not applied to prevent Overstock succeeding on its application.

[28] As mentioned above Overstock submits that in the case put forward by the plaintiff the evidence is incapable of establishing Overstock's vicarious liability. Overstock relies on *Fallowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, in which Mr. Justice Cromwell for the Court held at para. 142:

[142] The question of whether vicarious liability should be imposed is approached in three steps. First, the court determines whether the issue is unambiguously determined by the precedents. If not, a further two-part analysis is used to determine if vicarious liability should be imposed in light of its broader policy rationales: *Bazley v. Curry*, [1999] 2 S.C.R. 534, at para. 15; *John Doe v. Bennett*, 2004 SCC 17, [2004] 1 S.C.R. 436, at para. 20. The plaintiff must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close and that the wrongful act is sufficiently connected to the conduct authorized by the party against whom liability is sought: *Bennett*, at para. 20. The object of the analysis is to determine whether imposition of vicarious liability in a particular case will serve the goals of doing so: imposing liability for risks which the enterprise creates or to which it contributes, encouraging reduction of risk and providing fair and effective compensation: *Bennett*, at para. 20.

[29] In *Bazley v. Curry*, [1999] 2 S.C.R. 534, referred to in the *Fallowka* case, Madam Justice McLachlin, as she then was, speaking for the Court at paras. 37 and 41(2) wrote:

37 Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.

41 Reviewing the jurisprudence, and considering the policy issues involved, I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles:

...

(2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection

between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.

[30] Overstock submits that the law of vicarious liability in this context is articulated in *Brown on Defamation*, loose-leaf edition (Carswell, 1994) at 18-176 and is clear. It reads:

If there is nothing to show that a servant is doing anything relating to his or her employment or acting within the scope of employment a master is not vicariously liable for the servant's defamatory statement. On the other hand liability on the part of the master may be imposed where he expressly directs the servant to publish the defamatory statement or the servant is acting in the course of his employment and within the scope of his authority or the principal has subsequently adopted and ratified the acts of the servant.

[31] And at page 7-26 and 7-27 these words are found:

Nor is it sufficient merely to show that the defendant contributed the background information for the article that was written or that his office was used to compose a piece written by someone else or that his employees were used to deliver it to a newspaper for publication. To be responsible a person must knowingly be involved in the process of publishing the relevant words. The defendant must be conscious of the fact that he or she is publishing a defamation. There must be some affirmative act on the part of the defendant which demonstrates that he or she directed or participated in the publication. It is not enough that a person merely plays a passive instrumental role in the process.

[32] Overstock submits there is no evidence admissible against the defendants Byrne, Bagley and Karpak, the last was never served, that any of them published the alleged defamatory words while in the course of or within the scope of their employment with Overstock or that Overstock contributed to the risk of the publication of the defamatory words on a website it did not own.

[33] The plaintiff relies on the *Bazley* case, which the plaintiff submits has broadened the scope of the factors for a court to consider when there is an allegation of vicarious liability, and the plaintiff submits that that consideration should lead to caution in addressing the present non-suit application.

[34] I agree the Supreme Court of Canada in *Bazley* articulated a more principled and nuanced approach that has been applied in some of the older cases, and I have taken that into account when considering these reasons.

[35] If I conclude Overstock's application is correct and that there is no admissible evidence against it, the plaintiff proposes two alternatives. The first is to relax the constraints of Rule 12-5(46), which makes the examination for discovery evidence admissible only against the adverse party who is examined. The second proposed alternative is to allow the plaintiff to reopen the trial to permit him to employ the adverse witness rule to cross-examine some or all of the individual defendants to obtain the evidence against Overstock which now may be lacking because of the constraints of Rule 12-5(46).

[36] The plaintiff's position as I understand it is there can be no surprise for Overstock about the evidence that the plaintiff wants to put before the court. It is found, in the examination for discovery read-ins of Messrs. Bagley, Mitchell and Byrne, and the documents they each identify.

[37] There are at least two problems I foresee may arise if Rule 12-5(46) is relaxed. One arises from the fact that none of the examinations were conducted or defended on the basis that the witnesses were testifying for Overstock. I have no means of knowing whether counsel acting for Overstock would have approached the defence of the examination for discovery differently if a person, perhaps Mr. Byrne or someone else, had been examined as a representative of Overstock, whose evidence would be binding on Overstock. I do not know if someone other than Mr. Byrne had been put forward as Overstock's representative to be examined, if that person would have been more knowledgeable about some matters in which he or she was examined. I expect the answer is probably not, but I cannot be certain.

The prejudice to Overstock in now finding itself bound by a large number of answers given on discovery in a somewhat different context cannot now be determined.

[38] The second concern I have with relaxing Rule 12-5(46) is the implications for the trial so far if that should happen. If counsel for Overstock had known that the evidence given on the discovery of Messrs. Bagley, Mitchell and Byrne was the evidence of Overstock, would he have avoided cross-examining the plaintiff's witnesses as he has so far done on this trial?

[39] That consideration applies with even greater force if the trial is reopened to permit the plaintiff to cross-examine the witnesses who are examined for discovery. It cannot be known in advance with precision what their evidence would be if that was permitted. Perhaps counsel for Overstock would then seek to recall the plaintiff. We would thus risk abandoning an orderly trial.

[40] In my view, if the examination for discovery evidence that has been read in is entirely excluded from consideration in the case before Overstock, the non-suit application must succeed.

[41] Overstock submits that even if Rule 12-5(46) was relaxed to permit that evidence to be received against Overstock, there would still be no evidence on which a jury could reasonably find liability. I do not agree. Exhibit 25 is a binder containing 22 exhibits marked on the examinations for discovery of Mr. Byrne, Mr. Mitchell and Mr. Bagley. Exhibit 1 from the discovery of Mr. Byrne is found at the first tab of Exhibit 25 on the trial. It is an e-mail from Patrick Byrne sent from the e-mail address pbyrne@overstock.com to Mark Mitchell. The subject line reads through page 70, and attached to the e-mail is a 233-page document entitled "The Miscreants' Ball and the Global Bust-Out Investigating the Financial Underworld of Destructive Financial Crime, Chapter 1, Was the United States Attacked by Financial Terrorists?"

[42] The document appears to be an edited version of at least some of the published defamatory words of which the plaintiff complains. At page 32, for example, there are these words:

Nazerali dabbled in arms dealing, delivering weapons to war zones in Africa and to the mujahedeen in Afghanistan, but his primary line of business in the early 1980s was his Mafia brokerage, First Commerce Securities, which soon became an important component of the BCCI syndicate.

[43] There are other portions of the text of the attachment to the e-mail which are very similar and perhaps identical to the alleged defamatory publications. In my opinion if that e-mail and its attachment was put before a jury it could reasonably conclude there was evidence to support the plaintiff's case against Overstock.

[44] I make no comment on the weight to attach to that evidence. At this stage of the trial I find only that it is evidence that could go to a jury. However, it is not evidence against Overstock because of the constraints of Rule 12-5(46).

[45] Nevertheless, a trial is a search for the truth. The object of the rules is to determine cases on their merits. In this instance to apply Rule 12-5(46) rigorously in my opinion would thwart the search for truth and may lead to an outcome which has little to do with the merits of the plaintiff's case. As I have said the evidence found at tab 1 of Exhibit 25 is obviously no surprise to Overstock.

[46] Can Rule 12-5(46) be relaxed? The plaintiff brings *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303, to my attention. At paras. 47 and 48 Madam Justice Dickson made the following observations:

[47] The *viva voce* testimony of Dato Chee, Deborah Chang and Michael Tham and the Documents are plainly admissible evidence against all of the defendants. As a general rule, however, admissions made in the course of examinations for discovery are admissible against only the party who made them: *Bower v. Cominco* (1998), 53 B.C.L.R. (3d) 322 (S.C.). Accordingly, the discovery evidence read-in by the plaintiffs would typically be admissible against only the individual defendant involved.

[48] An exception to the general rule may arise where the admitting party has a common or identical interest with other defendants. In particular, where parties have a community of joint interest in the conduct of their business affairs and associated litigation to the extent one may fairly be characterised as representing the others that party's admissions on discovery

may be used as evidence against the others: *Tri-Con Concrete Finishing Co. v. Caravaggio*, [2002] O.J. No. 2771 (Q.L.) (Ont. Sup.Ct.). Such circumstances are unusual, however, and, in the absence of express agreement, should only be found where the independent evidence of commonality is abundantly clear.

[47] I accept that in the present instance there is a common interest among the defendants that provides for the exception to the general rule which would exclude the discovery evidence. Nevertheless, I am not prepared to receive all of the evidence read in by the plaintiff as evidence against Overstock. I have already commented on the difficulties that may impose if it occurred.

[48] I am, however, prepared to admit the document at tab 1 of Exhibit 25, and it will become evidence at large. Having received that document, there is evidence which as I have already commented could go to a jury on the question of Overstock's liability. The non-suit application is dismissed on that basis.

“Affleck J.”

TAB 12

CITATION: Paramount v. Johnston, 2018 ONSC 3711
COURT FILE NO.: CV-17-580326
DATE: 20180620

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
PARAMOUNT FINE FOODS and	)	<i>Jonathan C. Lisus and Fahad Siddiqui, for</i>
MOHAMAD FAKIH	)	the Plaintiffs/Responding Parties
)	
Plaintiffs/Responding Parties)	
)	
– and –)	
)	
KEVIN J. JOHNSTON, RANENDRA	)	<i>Lorne Honickman, for the Defendant/</i>
BANERJEE, and FREEDOMREPORT.CA	)	Moving Party, Ranendra Banerjee
)	
Defendants/Moving Parties)	
)	
)	
)	
	)	HEARD: May 10, 2018

JUSTICE S. NAKATSURU

[1] This case is about a defamation lawsuit brought by the owners of a Middle Eastern restaurant against two men who made hateful comments about the restaurant in particular and Muslims in general.

[2] This is a case about freedom of expression. But it is also about the limits to that constitutionally protected right. Expressions of hatred and bigotry towards racial, ethnic, religious, or other identifiable groups have no value in the public discourse of our nation.

[3] It is alleged that the defendants, Mr. Banerjee and Mr. Johnston attended the Mississauga location of Paramount, a restaurant owned by Paramount Fine Foods and Mohamad Fakih, a Canadian-Muslim businessman, on July 20, 2017. A fundraiser had been organized for Prime Minister Justin Trudeau at the restaurant that day. A protest of the fundraiser had been organized, with members of the protest expressing displeasure about the government’s settlement of Omar Khadr’s lawsuit. It is alleged that both Mr. Banerjee and Mr. Johnston made comments on video that defamed the plaintiffs, Paramount Fine Foods and Mr. Fakih.

[4] Mr. Banerjee brings a motion to dismiss this defamation action against him before trial. The motion is brought under a law designed to protect people engaged in expressions on matters of public interest from lawsuits aimed at stifling their right to freedom of expression. He also argues that the action should be dismissed because it is frivolous, vexatious, and an abuse of process.

[5] For the reasons below, I find that Mr. Banerjee's motion cannot succeed. The defamation action should not be dismissed.

A. OVERVIEW OF THE FACTS

1. The Parties

[6] Mr. Fakh grew up amidst the sectarian violence of the Lebanese civil war. His own mother was a victim of a bombing in Beirut. In the winter of 1998, while travelling to Toronto to visit a friend, Mr. Fakh found Canada to be a respite from the violence of Lebanon. He therefore immigrated and purchased a small restaurant near Dixie Road and Eglinton Avenue in Mississauga. This became the first Paramount Fine Foods restaurant. Since then, the Paramount Fine Foods chain has enjoyed success and has expanded to almost 50 establishments in Canada and worldwide including corporate retail locations, franchises, butcher shops and a food plant.

[7] Mr. Fakh is a Muslim-Canadian. Mr. Fakh has been active in charity work and is committed to cross-cultural understanding and the promotion of respect for diversity. He is active in the assistance of refugees and involved with interfaith engagements. His business has recruited refugees including recent Syrian refugees. Mr. Fakh has published articles denouncing racism including anti-Semitism and hate directed towards vulnerable religious, racial and sexual minorities. Mr. Fakh counts this charitable work and activism as a part of his and Paramount Fine Food's brand and success.

[8] Mr. Banerjee has a university education. He is a web developer and has written on issues in technology and business. He owns a website www.RiseCanada.com and is a director of an organization called Canadian Hindu Advocacy. He owns and administers a number of social media accounts including Twitter, You Tube, and Facebook. Mr. Banerjee generates, publishes, and broadcasts content on the digital media.

[9] Mr. Johnston is a digital journalist and the owner of Freedomreport.ca which has a website of the same name. He also has numerous You Tube channels, Twitter channels, and other social media accounts and websites.

[10] It is alleged by the plaintiffs that both Mr. Banerjee and Mr. Johnston use their social media outlets to spew hateful invective against Muslims. On July 24, 2017, Mr. Johnston was charged with two counts of willful promotion of hatred against Muslims contrary to s. 319(2) of the *Criminal Code*.

2. The eight videos taken on July 20, 2017, at Paramount Fine Foods Restaurant

[11] On July 20, 2017, Mr. Banerjee and Mr. Johnston were at the Paramount Fine Foods restaurant in Mississauga. Eight video clips that were taken that day were widely distributed on the internet including Freedomreport.ca and YouTube. Mr. Banerjee testified that he learned that the Jewish Defence League was organizing a protest that day in front of Paramount restaurant with respect to a settlement payment made to Mr. Khadr. Prime Minister Trudeau was attending a fundraising dinner at the restaurant. Mr. Banerjee testified that this was the reason he went there. He testified that he did not know Mr. Fakih and had never been to a Paramount restaurant. He testified that sole purpose he went there was to protest the Khadr settlement.

[12] Generally speaking, the eight videos at the center of this lawsuit has Mr. Johnston with a microphone in hand making comments to the camera, talking to other people, and videoing what was taking place that day outside the Paramount restaurant, mainly from across the street. The videos portray themselves to be a broadcast of Freedomreport.ca with prominent logos of that defendant displayed. The following is a short summary of the various videos taken:

- **Video #1, published July 23, 2017:** Mr. Johnston is speaking directly to the camera. He also is directing the camera operator. He is at the Paramount Fine Foods location in Mississauga. He is standing at the intersection close to the restaurant. Mr. Johnston points to the restaurant and identifies the Paramount restaurant as being owned by Muslims. An image of the Paramount restaurant with a moon and star superimposed on it appears, along with text reading “Islamic Restaurant Paramount Fine Foods” and the restaurant’s address and phone number. Mr. Johnston states he has deep concerns about the restaurant and finds it suspicious that it is in the middle of an industrial area. He advises his audience to look up Paramount Foods and says they will understand it is little more than a front. Mr. Johnston says they will be following up on the story. Mr. Banerjee is not in this video clip.
- **Video #2, published July 23, 2017: (The alleged defamatory expressions attributed to Mr. Banerjee are contained in this video)** This video clip takes place immediately after the first. At the beginning, Mr. Banerjee and Mr. Johnston are present in close proximity to each other. There is almost no one else outside of the restaurant, which is nearby. Mr. Banerjee has a megaphone slung over his shoulder. Together Mr. Banerjee and Mr. Johnston walk towards the restaurant with the camera operator following them. They speak to someone who appears to work at the restaurant. There is text on the video clip, reading “Justin Trudeau Speaking at Muslim Only Meeting in Mississauga, Ontario, on July 20, 2017 – Part 2”. They approach a person passing by and strike up a conversation with the man and to each other:

Mr. Johnston (to the pedestrian): “I just told the guy I’m hungry, I don’t think I’m allowed in because I’m white”.

Mr. Banerjee: “No. You gotta be a jihadist”.

Mr. Johnston: “Yes.”

Mr. Banerjee: “You have to.”

[Mr. Johnston points to a nearby car apparently belonging to CBC and then turns back towards the Restaurant.]

Mr. Johnston: (To people standing in front of the restaurant) Hey guys? Is it possible to get inside and just say hello? No? Okay. We’ll find out...

Mr. Banerjee: (Pointing to the restaurant) “No listen. You need credentials. You have to have raped your wife at least a few times to be allowed in there.”

Mr. Johnston: “Someone else’s wife. Not your wife.”

Thereafter, a large Paramount sign and logo appears with the added sound of an Arabic incantation (apparently a reference to a call for prayer used by those who adhere to the Islamic faith).

- **Video #3, published July 23, 2017:** Mr. Johnston is speaking to the camera. He describes the activities of people standing at the restaurant’s entrance. He speaks to someone who drives up to the restaurant, then attempts to speak to a woman who is entering the restaurant. Mr. Banerjee is not visible. At the end of the video, the sound of an Arabic incantation re-appears over video of the restaurant’s façade.
- **Video #4, published July 23, 2017:** Mr. Johnston is speaking to the camera. Mr. Banerjee is walking down the street in the distance and is speaking to someone. Mr. Johnston comments that “‘Jihadi Justin Trudeau’ will be showing up soon”. He says that “we’ll talk about the amount of money Muslims always seem to have in Canada”, pointing to the restaurant as an example. He points to a car parked outside the restaurant that Paramount appears to be raffling. He says, “you can win this car...so everyone knows you’ve had Saudi Arabian money buy a car for you”. Mr. Johnston states that Justin Trudeau, who is “not a good guy”, will be coming later, and that Paramount Fine Foods wants to raise more money for Omar Khadr and “terrorist ilk just like him.”
- **Video #5, published July 26, 2017:** Mr. Banerjee and Mr. Johnston walk together. Mr. Johnston starts to speak with a CBC producer and a cameraman who has set up outside. Mr. Johnston queries why a restaurant is here unless it is up to something nefarious. There are now more demonstrators visible on camera. Mr. Johnston questions why CBC is there when they are told CBC is doing a documentary on Muslim children. He questions that. At one point when the CBC cameraman tells Mr. Johnston he is being aggressive, Mr. Johnston denies it. Mr. Johnston then appears in front of the protest, talking to the camera. He says,

“What does the CBC need to do with a protest about Jihadi Justin Trudeau? It’s because the CBC is gonna take all this and spin it into some kind of problem that doesn’t exist. And they’re gonna lie and show some Muslim kids crying in the background, then show this crowd over here, to make it seem like Muslims are the victims. But remember, Canada is the victim of Islam. Always remember that”.

Mr. Johnston then speaks to the CBC journalist again, while Mr. Banerjee stands beside him. He continues to question why the CBC is there, and suggests that they will use the footage to create a “left-wing diatribe”, suggesting that Muslim children are victims of Islamophobia. “Islam is the issue”, Mr. Johnston says, but Justin Trudeau is even worse.

- **Video #6, published July 31, 2017:** Mr. Johnston is across the street from the restaurant with other people of the protest. He along with others are calling a young man over to join them on their side. Mr. Banerjee is heard saying to the young man that he is on the wrong side, that he knows what it is all about, and not to play dumb. The young man comes over and states he was just walking by. Mr. Johnston talks with him. The young man debates with Mr. Johnston about Mr. Khadr’s settlement and disagrees with the small crowd’s sentiments. Mr. Johnston disagrees with the young man. Mr. Banerjee is in and out of view, listening in.
- **Video #7, published on August 1, 2017:** Mr. Johnston is interviewed on camera by a City TV journalist with respect to why he was there. Mr. Johnston talks about Omar Khadr and the settlement. Mr. Banerjee is in the distant background with his megaphone speaking with others.
- **Video #8, published on August 1, 2017:** The entire video is of the president of the Jewish Defence League, Meir Weinstein, who is speaking to the small group present outside the restaurant, about his concerns surrounding the government’s decision to settle the lawsuit with Omar Khadr. Mr. Johnston is not present, nor is he heard from. Mr. Banerjee is in the background from time to time, speaking with others, or listening in.

3. Past activities of Mr. Banerjee and his association with Mr. Johnston

[13] Mr. Banerjee admits that he has known Mr. Johnston for a period of time and that he is aware his website Freedomreport.ca. However, he denies ever being involved with Freedomreport.ca.

[14] There is a video of Mr. Banerjee dated September 11, 2015. Mr. Banerjee is outside the Eaton Centre. He is shouting to people passing by. He shouts amongst other things that Muhammad was a pedophile; that Muhammad was a dirty, filthy, pedophile; that Islam should be banned and is evil.

[15] There is a video dated February 29, 2016 of Mr. Banerjee, again at the corner of Yonge Street and Dundas Street near the Eaton Centre, holding sign supporting Donald Trump’s

candidacy. Mr. Banerjee is shouting out to people passing by to join Trump. He says Islam is evil and wicked, that Muslims should be banned from all civilized countries worldwide, that there should be a special registry for Muslims, and that Muhammad was a child molester.

[16] Another video published on January 18, 2018, has Mr. Banerjee at some point in 2016 using a megaphone speaking to a small assembled crowd. In that crowd is Mr. Johnston, who stands next to Mr. Banerjee. Mr. Banerjee is speaking for RiseCanada.com. He states that he is against Islamic prayer in school. He shouts out that Islam is a rape culture; that Muslims systematically rapes children; that every rape in India is done by Muslims, and that Muhammad was a great deceiver.

[17] On March 27, 2017, Mr. Banerjee publishes a video from an event organized for the then candidate for the leadership of a federal party, Ms. Kellie Leitch. Mr. Banerjee is speaking at a podium in what appears to be a modest conference room with chairs set up. This is before Ms. Leitch arrives. Mr. Johnston is seated in the room. Mr. Banerjee speaks about fighting Islam. After Ms. Leitch arrives and leaves, Mr. Banerjee records a video of Mr. Johnston. There is money being counted. Mr. Banerjee asks how much money Mr. Johnston raised from the Hindu community to help stop a building of a mosque. Mr. Banerjee states “Ok! 245 bucks, you’re half way there Kevin!” Mr. Johnston replies that he will get the paperwork together for Friday. Mr. Banerjee states “Do we do it or what!” and “Let’s stop that mosque; let’s stop that mosque.”

[18] The Twitter accounts that Mr. Banerjee administers also have comments such as banning Muslims; Islam is a rape culture because their prophet was a child rapist; a dead Muslim is no great loss but a net gain for humanity; Muslims are rotten from the time they are born. Regarding a widely disseminated image of a young Syrian boy who had washed up on a beach while fleeing the war-torn country, Mr. Banerjee’s Twitter account released the following tweet: “The sharks would’ve loved to eat him. A nice morsel for them...We should never allow any Muslim to enter. Ban all Islamic immigration.” Mr. Banerjee testified that he may or may not have written those tweets.

B. SECTION 137.1 OF THE COURTS OF JUSTICE ACT

[19] The material subsections of s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 state:

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

- (a) to encourage individuals to express themselves on matters of public interest;
- (b) to promote broad participation in debates on matters of public interest;
- (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

(2) In this section,

“expression” means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party’s expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 2015, c. 23, s. 3.

[20] Section 137.1 was enacted to prevent the misuse of the judicial system or other agencies of justice at the hands of litigants who resorted to lawsuits for strategic purposes: Ministry of the Attorney General, *Anti-Slapp Advisory Panel Report to the Attorney General* (Ontario: Ministry of the Attorney General, 2010). In *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 4450, 7 C.P.C. (8th) 58, at para. 2, Lederer J. described such lawsuits, often referred to as Strategic Litigation Against Public Participation (SLAPP) in the following way:

Parties, often corporations and other well-resourced members of our society, when confronted with negative comment or publication implicating matters of public interest of concern to them, commenced a law suit for libel. The purpose of the litigation was not to realize on a claim for damages. It was to suggest a potential vulnerability to the individual making the impugned observation or causing its publication. The goal was to illicit [*sic*] a quick retraction and apology and have the party remove herself, himself or itself from taking part in any further public debate of the issue at hand.

[21] Thus, s. 137.1 is referred to as an anti-SLAPP provision. As I understand it, although a number of cases dealing with this provision have been argued before the Ontario Court of Appeal, no appellate direction has yet been forthcoming on its interpretation. However, this provision has been considered on a number of occasions at the trial level: see, for example, *United Soils Management Ltd.*

C. ANALYSIS UNDER S. 137.1 OF THE CJA

[22] Mr. Banerjee submits that he has no connection to the approximately 36 minutes of video taken at the protest posted on Mr. Johnston's website, Freedomreport.ca. Of those eight videos, Mr. Banerjee speaks directly to Mr. Johnston on camera for about 7.5 seconds. He submits those statements are not defamatory. Mr. Banerjee submits that the comments were not about Mr. Fakih and/or Paramount Fine Foods.

[23] Further, Mr. Banerjee submits that the plaintiffs wrongly attempt to make him jointly liable for the entire eight videos published which contain alleged defamatory statements by Mr. Johnston. Mr. Banerjee is not a publisher, producer, or editor of any of the impugned videos.

[24] Mr. Banerjee argues the plaintiff's lawsuit should be dismissed under s. 137.1. He submits that Mr. Banerjee's expression relates to a matter of public interest in that when one examines the entire context, his expression related to the federal government's awarding of the \$10.5 million to Mr. Khadr to settle his lawsuit. This is an important matter of public interest. Further, Mr. Fakih and Paramount Fine Foods have not shown that there are grounds to believe the claim has substantial merit, there is no valid defence, nor that the harm suffered by them is sufficiently serious that it outweighs the public interest in protecting expression.

[25] Paramount Fine Foods and Mr. Fakih responds that even aside from the broader allegations that Mr. Banerjee and Mr. Johnston acted in concert by publishing all eight videos, Mr. Banerjee's own statements made to Mr. Johnston were defamatory. The comments he made clearly refer to the Paramount restaurant and its Muslim owner. They bear no relationship to Mr. Khadr or the government's settlement. Mr. Banerjee is an experienced and prolific speaker of hateful language, often promulgating it through the medium of social media. This expression is not protected under s. 137.1(3). Alternatively, the plaintiffs submit they have amply met their burden under s. 137.1(4).

1. The expression made by Mr. Banerjee does not relate to a matter of public interest

[26] On this motion, the onus is initially on Mr. Banerjee to establish that the impugned expression is related to a matter of public interest.

[27] As previously noted, Mr. Banerjee submits that his brief 7.5 second statement to Mr. Johnston must be assessed in a broader contextual framework. This includes the fact that he was attending a protest in front of Paramount restaurant with other protestors to protest the federal government's settlement with Mr. Khadr. When the expression is looked at as a whole, he submits that this statement is one regarding a matter of public interest.

[28] Mr. Fakhri and Paramount Fine Foods submit that his statement is tantamount to hate speech. It is based upon racist tropes associated with Muslims that portray them as terrorists and rapists. There is no public interest in these types of statements. Thus, it is argued that Mr. Banerjee's motion should be dismissed at this initial stage of the test.

[29] Before addressing the merits of the submissions, I would like to make this initial observation. This law, like many other laws, attempts to strike a balance. Animating this statutory provision are competing important values. Equally applicable to s. 137.1 are the following comments made by Binnie J. in *WIC Radio v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 2, on the development of the defence of fair comment in the law of defamation:

[T]he worth and dignity of each individual, including reputation, is an important value underlying the *Charter* and is to be weighed in the balance with freedom of expression, including freedom of the media. The Court's task is not to prefer one over the other by ordering a "hierarchy" of rights...but to attempt a reconciliation. An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest. [Citation omitted.]

[30] The legislature did not define "public interest" as it is used in s. 137.1. Both parties have referred to *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, as the authority that can provide substance to its definition. A number of cases have also adopted that definition in order to elucidate the term in the context of its use in s. 137.1: *United Soils Management Ltd.; Able Translations Ltd. v. Express International Translations Inc.*, 2016 ONSC 6785, 410 D.L.R. (4th) 380; *Rizvee v. Newman*, 2017 ONSC 4024; *Fortress Real Developments v. Rabidoux*, 2017 ONSC 167, 6 C.P.C. (8th) 373; *Hudspeth v. Whatcott*, 2017 ONSC 1708, 98 C.P.C. (7th) 40; *McCarthy-Oppedisano v. Muter*, 2018 ONSC 2136.

[31] I too agree that *Grant* provides invaluable assistance in this regard. I must note though that that case may not be the last word on this issue. *Grant* modified the common law of defamation to provide a defence of responsible communication on matters of public interest. Section 137.1 is not limited to defamation. The definition of "expression" in s. 137.1 is very broad and would include a communication that is made privately, involves just conduct, or is one-sided advocacy. In addition, the test formulated in *Grant* regarding "matters of public interest" was one aspect of a two-part test for a defence which also included "responsible" communication, once the plaintiff had shown the impugned statements were defamatory. By contrast, section 137.1 involves a statutory scheme whereby the onus is initially placed on the moving party in subsection (3) and then reversed on the responding party in subsection (4). The constituent components of the test in s. 137.1 are also obviously very different.

[32] All that being said, the legislator did not choose this wording in a legal vacuum. The principles underlying why expressions involving matters of public interest should be encouraged

are essentially the same whether one is speaking of s. 137.1 or the defamation concepts of responsible communication or fair comment.

[33] In my view, from *Grant* and the authorities applying it in the context of s. 137.1, some principles can be distilled:

- The judge functions as a gatekeeper in making the determination as to what is in the public interest by ensuring only worthy material falls within the protection of the section;
- In making this determination, the focus is on the substance of the expression and not the “occasion” or the circumstances in which it is communicated;
- The whole of the expression should be considered and not just the isolated portions that are impugned. The question is whether the subject matter of the expression as a whole is one of public interest. Care must be taken in determining the subject matter accurately. An overly narrow or an overly broad characterization of the subject matter may lead to an skewed analysis;
- Whether the expression is related to a matter of public interest is an objective assessment. The subjective intention or motive of the communicator is not material;
- To be of public interest, some segment of the public must have a genuine stake in knowing about the expression. This is a normative determination. It is not simply a question of whether a subject matter would or would not interest some members of the public. It is broad in terms of matters that it can legitimately encompass ranging from politics, science, arts, environment, religion, and morality. There is no static list of topics that fall within it. It is said that to be of public interest, the subject matter “must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached”: Brown, Raymond, *The Law of Defamation in Canada*, (Toronto: Carswell).

[34] Before analyzing Mr. Banerjee’s specific expression, I wish to first refer to *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11, [2013] 1 S.C.R. 467. This is because a crucial issue in this motion is whether or not Mr. Banerjee’s expression amounts to hate speech. Thus, it is useful to consider what the Supreme Court of Canada has defined such speech to be. Of course, I fully appreciate that this case was decided in the context of a specific piece of human rights legislation. But I see no reason why I should not use such well-tailored garments to clothe the body of s. 137.1.

[35] In *Whatcott* it was held that two anti-gay flyers constituted publications that contravened s. 14 of *The Saskatchewan Human Rights Code* because they exposed persons to hatred and ridicule on the basis of their sexual orientation, and concluded that s. 14 of the *Code* was a reasonable restriction on Mr. Whatcott's rights to freedom of religion and expression guaranteed

by s. 2(a) and (b) of the *Canadian Charter of Rights and Freedoms*. In the course of deciding this issue, Rothstein J. considered the definition of hate speech. He held that in the human rights setting, where a reasonable person, aware of the context and circumstances, would view an expression as likely to expose a person(s) to detestation and vilification on a prohibited ground of discrimination, this would amount to prohibited hate speech. He expanded upon this in the following way at para. 41:

In my view, "detestation" and "vilification" aptly describe the harmful effect that the *Code* seeks to eliminate. Representations that expose a target group to detestation tend to inspire enmity and extreme ill-will against them, which goes beyond mere disdain or dislike. Representations vilifying a person or group will seek to abuse, denigrate or delegitimize them, to render them lawless, dangerous, unworthy or unacceptable in the eyes of the audience. Expression exposing vulnerable groups to detestation and vilification goes far beyond merely discrediting, humiliating or offending the victims.

[36] Rothstein J. then reviewed some authorities that summarized the "hallmarks of hate": blaming members of the group for the current problems in society alleging they are a powerful menace, carrying out secret conspiracies, or plotting to destroy civilization; labelling them as criminals, parasitic, or pure evil; equating targeted group with groups traditionally reviled in society such as child abusers or deviant criminals; dehumanizing the targeted group by describing them as animals, lesser creatures, or the like.

[37] In *Hudspeth*, Perell J. dealt with a cross-motion brought by the same Mr. Whatcott under s. 137.1 to dismiss an action brought against him for distributing anti-gay pamphlets at the Toronto Pride Parade. Perell J. dismissed that motion, finding that Mr. Whatcott did not prove that his pamphlets were an expression that related to a matter of public interest. Mr. Banerjee attempts to distinguish this case by pointing to the fact that the pamphlets in question had already been determined by the Supreme Court of Canada to be hate speech, unlike the impugned expression in the case at bar. This attempt to so distinguish the authority is unpersuasive. More significant is that Perell J. concluded that this type of speech could not in principle be considered a matter of public interest within the meaning of s. 137.1. He stated at para. 183:

[H]ate speech is by its nature not in the public interest and hate speech interferes with public discourse and debate. The anti-SLAPP provisions of the *Courts of Justice Act*, do not create a "safe space" for defamation because the subject matter is one of public interest and hateful or malicious attempts to inflict harm under the guise of free debate of matters of public interest are not protected from suit by the legislation. [Citations omitted.]

[38] It is not necessary for me to conclude that the comments at issue in this case is in fact hate speech as defined in the *Criminal Code* or a piece of human rights legislation. It is Mr. Banerjee's onus to establish that his expression, when looked at as a whole, relates to a matter of public interest. Even when viewed in context, I find that Mr. Banerjee's remarks shares all the

essential hallmarks and attributes of an expression that is not worthy of protection under the anti-SLAPP provision.

[39] First of all, I agree that it is important to deal with the whole of the expression and not just isolated bits of it. Both this factor and the careful assessment of the expression itself, requires me to take into account the context in which it took place. Mr. Banerjee argues that when this is done, it is plain that his comments were related to a matter of public interest. He submits this is so because he is at a protest making his views about the Khadr settlement known. It is contended that when one looks at the whole of the eight videos, this is clear. He submits that his own comments form but a fraction of the over half hour of video and when assessed in its proper context, he has met his onus.

[40] To assess this argument, I have scrutinized all the videos closely. In the first series of videos, Mr. Banerjee and Mr. Johnston are there mainly alone with the camera operator. It appears that they are there early to the gathering when others are not present. Also, in the first series of videos, the focus is almost exclusively on the plaintiffs. Indeed, I find that Paramount is their target. Prime Minister Trudeau, Omar Khadr, or the settlement are seldom mentioned. Mr. Banerjee is there with Mr. Johnston and a cameraman. It is a reasonable inference that they are together and in association. Clearly they are within earshot of each other in video #2. Just prior to Mr. Banerjee's impugned expression, Mr. Johnson queries why a restaurant would be in the middle of an industrial plaza unless "the restaurant was up to something nefarious". A reasonable interpretation of that comment is a suggestion of some illegal conspiracy occurring in the restaurant. Mr. Johnson then states to a pedestrian that he does not believe he is allowed in because he is white. That comment suggests that only non-white persons are permitted into Paramount restaurant and their practices are discriminatory. It is at this point Mr. Banerjee says "No. You gotta be a Jihadist." Mr. Banerjee says it quite forcefully and seriously to Mr. Johnson who stands next to him. Equally forcefully and seriously said was Mr. Banerjee's comments about how you need credentials, those being that you had to have raped your wife a few times before being allowed in. Although, Mr. Banerjee submits that during this exchange there was laughter, it was only Mr. Johnston who chuckled while looking at his phone when he said "someone else's wife. Not your wife." Mr. Banerjee does not laugh. He just walks out of camera range.

[41] Following these initial videos, there is a video that, for some reason only known to Mr. Johnston, also seems to target the *bona fides* of the CBC. It is only the later videos that deal more with the Khadr settlement. Videos #6 to 8 are the ones that clearly have the Khadr settlement as the focal point, when Mr. Johnston debates the bystander, gives an interview to City Television, and records a speech given by Mr. Weinstein.

[42] While all 8 videos form the context in which Mr. Banerjee expressed his alleged defamatory comments, there is a difference in that context between the videos themselves. At the beginning, in my opinion, the plaintiffs are the clear targets of the expressions of both Mr. Banerjee and Mr. Johnston. What is being communicated in these videos is that the plaintiffs and those who go into the restaurant are not up to any good because they are Muslims. They are

impugned as terrorists, criminals, discriminators, and as being involved in some form of a secret conspiracy.

[43] In my view, the fact that later videos incorporate matters that are more manifestly political and therefore in the public interest, does not alter the fundamental nature of the communications in the earlier videos. They may be a backdrop to those comments, but they do not change their essential character.

[44] I agree that at first glance, the broad definition of “expression” as defined in s. 137.1(2) would seem to support Mr. Banerjee’s position. “Expression” includes both verbal and non-verbal communication. Thus, an argument could be constructed that it was Mr. Banerjee’s overall presence and participation in the protest against the payment of money to Mr. Khadr that needs to be assessed. However, in my view, this would ignore the wording of s. 137.1(3) which states it is “*the proceeding (that) arises from an expression*” which must relate to a matter of public interest. The proceeding in this case arises from the alleged defamatory statements made by Mr. Banerjee. It is not Mr. Banerjee’s participation in the protest that gives rise to this defamation proceeding. Rather, it is the statements that he made about Paramount Fine Foods and Mr. Fakhri. Thus, the onus is on Mr. Banerjee to connect this expression that has brought him before the courts to a matter of public interest.

[45] Merely uttering something in a forum or at an event where matters of public interest are being discussed does not make the expression a matter of public interest within the meaning of s. 137.1. For instance, a serious threat to kill a politician uttered by an audience member at a political debate between candidates is not an expression related to a matter of public interest. In my view, it was reasoning along these lines that led Justice Healey in *McCarthy-Oppedisano* to conclude that someone who embeds defamatory comments within political, economic, or social commentary cannot claim immunity on the basis that this expression related to a matter of public interest. When it comes to hate speech, this is particularly important. Often such expression is disguised or colored in an attempt to avoid censure, prohibition, or prosecution. A person may communicate hate in forums or contexts where legitimate debate is taking place. For the purposes of the proper application of the anti-SLAPP provisions, the true nature of the expression, and not just the setting in which it takes place, must be carefully scrutinized before it is permitted to pass the first hurdle of the test.

[46] Even if there is a dual character to the expression uttered by Mr. Banerjee, this does not alter my thinking. In other words, where the expression can reasonably be interpreted as both hate communication and a communication on a matter of public interest, s. 137.1 does not extend its protection. This is so because hate communication raises no subject matter that is related to the public interest, regardless of its other features. Indeed, the public interest lies in its suppression. My thinking on this has support in the following comments made by Justice Dickson in *R. v. Keegstra*, [1990] 3 S.C.R. 697:

The suppression of hate propaganda undeniably muzzles the participation of a few individuals in the democratic process, and hence detracts somewhat from

free expression values, but the degree of this limitation is not substantial. I am aware that the use of strong language in political and social debate – indeed, perhaps even language intended to promote hatred – is an unavoidable part of the democratic process. Moreover, I recognize that hate propaganda is expression of a type which would generally be categorized as “political”, thus putatively placing it at the very heart of the principle extolling freedom of expression as vital to the democratic process. Nonetheless, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee.

[47] In this case, I need not go that far. The expression uttered by Mr. Banerjee is focused against the plaintiffs. Viewed contextually and as a whole, it is unrelated to Mr. Khadr or the government’s settlement with him. The 7.5 seconds long video of his statements forms the dominant part of the case against him. This is not a case where there was a long diatribe being communicated by Mr. Banerjee of which only a portion is said to be defamatory. When Mr. Banerjee argues that the entire 8 videos are the whole of his expression, I cannot agree. This in my view is simply the setting or the occasion in which he uttered his very brief expression. The substance of the expression I must consider cannot reasonably include the other published videos where Mr. Banerjee has little if any presence, except being seen or heard from time to time as a member of a small group of protesters.

[48] While the protest itself in front of Paramount restaurant can be viewed as something dealing with a matter of public interest, the comments made by Mr. Banerjee are not. As *Grant* suggests, it is the substance of the expression that must be examined, not the “occasion” on which they are made.

[49] Let me turn to the objective assessment of the expression from which this proceeding then arises. In this case, Mr. Banerjee’s comments go beyond offensive or hurtful expression. They involve hallmarks of hate. He refers to the patrons as “jihadists”. While the term can have different meanings, looked at in context and objectively, the statement signifies that only Muslim insurgents or terrorists were allowed into Paramount restaurant. In this day and age, such an imputation can only inspire extreme ill-will and disdain. He further states that you would have to “rape your wife a few times” to be allowed in. These representations “abuse, denigrate or delegitimize” those who attend Paramount restaurant and its owners. The expression renders them as “lawless, dangerous, unworthy or unacceptable in the eyes of the audience.”

[50] It may be contended that my assessment of whether Mr. Banerjee’s expression relates to a matter of public interest is a normative one. I do not disagree. To a certain extent, that is unavoidable. But I find that it is an assessment that can be properly defined by the law. It is one

required by s. 137.1. I would also like to add that it is one that I am able to come to without reliance upon the evidence regarding Mr. Banerjee's past expressions and activities.

[51] Bluntly put, if I were to allow Mr. Banerjee to justify his comment as an expression related to a matter of public interest, I would be undermining and trivializing the laudable objectives of this anti-SLAPP provision.

2. It is not necessary to determine whether the plaintiffs have proven s. 137.1(4)

[52] The plaintiffs bear the onus on proving whether there are grounds to believe the proceeding has substantial merit, the defendant has no valid defence, and the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. Given my conclusion that the defendant has not discharged his onus with regards to s. 137.1(3), it is not necessary for me to consider this. That said, it is obvious given my conclusion above that any analysis under this subsection would have favoured the plaintiffs.

[53] If it was necessary to analyze whether the plaintiffs have established the requirements of s. 137.1(4), I would have had resort to the evidence of the videos and digital messaging involving Mr. Banerjee on other and unrelated occasions. This evidence is relevant to Mr. Banerjee's motivation in making the remarks that are the subject-matter of this motion. It is also relevant to his credibility when he has said that he was either joking, being satirical, or making a political point about Mr. Khadr's settlement. This evidence is also relevant to the issue of whether on the day in question, Mr. Banerjee was acting in concert with Mr. Johnston.

[54] Let me say this about Mr. Banerjee's affidavit where he avers that when he made the impugned comments, he was referring to the fact that Mr. Khadr was a convicted terrorist. It is his position that his comments meant to convey the message that the only people the officials would allow to come into the restaurant to speak to them would be people who acted like terrorists. He also averred that his alleged comments bore no relation or connection to Paramount Fine Foods or Mr. Fakhri. Another part of his defence is that he did not participate in, encourage, or condone Mr. Johnston's publication of the webcasts. In short, his defence is that he was just an innocent participant in a political protest. He submitted that these were valid defences and that the plaintiffs have no meritorious case against him.

[55] I do not find these averments credible.

[56] Mr. Banerjee was cross-examined on his affidavit. Although I fully appreciate that I have only the transcript of that cross-examination and did not hear *viva voce* evidence, much of what he said was not plausible. For instance, Mr. Banerjee testified that when he made these anti-Muslim comments in the past, he was only referring to Islamic extremism or radical Islam. This explanation is not worthy of belief. They are only designed to extricate himself from the consequences of his past expression. When I assess them, it is clear and obvious that he was not making such a distinction at the time he made those statements as he now claims in justification. There are other examples. Mr. Banerjee further testified that when he said Muhammad was a

pedophile and child molester he meant that people who commit those crimes use the name Muhammad. When he said ban Muhammad, Mr. Banerjee testified under cross that he meant ban the radical ideology that is promoted by people who use the name Muhammad. With respect, these explanations are nonsensical. In addition, I found him evasive when he claimed that his memory failed him when shown tweets on an account for which he was an administrator. Finally, Mr. Banerjee was inconsistent in his explanations of why he uttered the impugned expressions to Mr. Johnston on camera. In an email sent to Mr. Johnston dated August 4, 2017, where he distanced himself from the webcasts, Mr. Banerjee stated they were just personal humorous comments made to Mr. Johnston. In an email to Mr. Lisus, counsel for the plaintiffs, on the same date, he again stated they were humorous comments to Mr. Johnston. Mr. Banerjee composed these emails carefully after getting the Libel Notice and consulting counsel. There is no reference to Mr. Khadr, the government settlement, or his purported explanation on the motion that since Mr. Khadr was a convicted terrorist, he was merely proffering an opinion that only people who would be allowed in that day to speak to government officials were those who acted like terrorists. I find these explanations inconsistent. Mr. Banerjee's credibility on this point suffers.

[57] I do not need to explain why these findings about Mr. Banerjee's credibility would have worked to his detriment were it necessary for me to have considered s. 137.1(4). The explanation is self-evident.

D. ANALYSIS UNDER RULE 21.01(3)(d)

[58] In the alternative, Mr. Banerjee argues that this action should be dismissed under rule 21.01(3)(d). While he makes many of the same points previously argued above, the core of his submission here is that the plaintiffs have brought this lawsuit for an improper purpose and it is an abuse of process. It is submitted that Mr. Banerjee was brought into the lawsuit and is being sued as a co-producer and a co-publisher with his co-defendants to punish him or to teach him a lesson for his past improper conduct and not for his 7.5 second remarks in front of the restaurant.

[59] Rule 21.01(3)(d) allows for the staying or dismissal of an action when the cause of action is clearly one on its face that no reasonable person could treat as a *bona fide* one. Where an action cannot succeed, is clearly without merit, or if the action can lead to no possible good or where no reasonable person could expect relief, it is frivolous, vexatious, or an abuse of process: *Currie v. Halton Regional Police Services Board* (2003), 179 O.A.C. 67 (C.A.) at paras. 14-18. In determining this, the whole history of the matter is considered and not just the question of whether there is a good cause of action.

[60] That said, the starting point is whether the pleadings set out an actionable cause. The plaintiffs are suing Mr. Banerjee for defamation. One generally accepted definition for defamation is from *Salmond on the Law of Torts*, 17th ed. (London: Sweet & Maxwell, 1977), at pp. 139-40, which is based on the test proposed by Lord Atkin in *Sim v. Stretch* (1936), 52 T.L.R. 669 (H.L.), at p. 671, and which was approved by the British Columbia Court of Appeal in *Vander Zalm v. Times Publishers* (1980), 109 D.L.R. (3d) 531 at p. 535:

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 in the estimation of right-thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem.

[61] This test is often construed as setting a low threshold for establishing *prima facie* defamation: *Gatley on Libel and Slander*, 10th ed. (London: Thomson/Sweet & Maxwell, 2004). Even a defamation action that appears unlikely to succeed or lacks proportionality will not meet the test for dismissal under rule 21.01(3)(d): *Temilini v. Ontario Provincial Police Commissioner* (1990), 73 O.R. (2d) 664 (C.A.); *Sussman v. Ottawa Sun* (1997), 22 O.T.C. 75, (Ont. C.J., Gen. Div.).

[62] A reasonable person would understand that Mr. Banerjee's statements were directed against the restaurant owned by the plaintiffs. The remarks made by Mr. Banerjee are facially defamatory and would tend to lower Paramount Fine Foods and Mr. Fakhri's reputation in the eyes of a reasonable person.

[63] Mr. Banerjee submits that there is no evidence and no material facts pleaded as to Mr. Banerjee's role in publishing the videos on the internet. It is submitted that only his co-defendants are responsible for this. I agree with the plaintiffs that it is not necessary to prove Mr. Banerjee's publication of the defamatory remarks in this way. Mr. Banerjee has published these statements by knowingly communicating his statements in video #2 to Mr. Johnston and the camera person that was brought along: *Crookes v. Wikimedia Foundation Inc.*, 2011 SCC 47, [2011] 3 S.C.R. 269, at para. 1. The statement of claim captures this allegation of publication. In addition, when the matter is looked at as a whole, it is alleged in the claim and it could be reasonably proven that Mr. Banerjee and Mr. Johnston were joint tortfeasors and participated in the publication of the defamatory expression in furtherance of a common design: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 176. Put simply, while Mr. Johnston may have put the videos up on his website, Mr. Banerjee knew Mr. Johnston would do this and chose to make his statements to the camera while it was recording. Indeed, given their past knowledge of and association with each other, it could reasonably be proven that they both attended in front of the restaurant that day to further a common design to injure the plaintiffs' reputation.

[64] Mr. Banerjee submits the cross-examination on his affidavit was almost exclusively about his previous comments and speeches where he espoused anti-Islamic rhetoric, and not about the videos that are the subject-matter of the lawsuit. He points to this as evidence of the improper motives of the plaintiffs. I do not see it in that way. As already stated, this evidence is relevant to the motion and the lawsuit. They are pleaded as material facts. A tactical consideration by counsel to focus on these issues on the cross-examination does not advance Mr. Banerjee's argument that the lawsuit is being advanced for an improper purpose.

[65] In addition, Mr. Banerjee points to some comments made by Mr. Fakhri about his frustration with the actions of the defendants in sowing discord in the community. That evidence falls significantly short in demonstrating the plaintiffs have brought this lawsuit to harass, oppress, or abuse Mr. Banerjee for his past conduct. An indication that Mr. Fakhri may be motivated by altruistic as well as purely self-interested financial concerns, far from demonstrating an abuse of process, only re-affirms the role of the courts as the forum to which litigants can turn to for settling private law disputes – including ones with broader societal ramifications.

[66] There is no merit to Mr. Banerjee’s motion for dismissal under rule 21.01(3)(d).

[67] Let me leave my decision by referring to Binnie J.’s observation at para. 4 of *WIC Radio* that we live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones. I acknowledge that. But we also live in a country where alleged hateful and defamatory expressions can appropriately be litigated in the judicial system.

[68] If the issues of costs cannot be resolved between the parties, I will entertain written submissions, each one limited to two pages excluding any attachments (any Bill of Costs, Costs Outline, and authorities). Paramount Fine Foods and Mr. Fakhri shall file within 20 days of the release of these reasons. Mr. Banerjee shall file within 10 days thereafter. There will be no reply submissions without leave of the court.

JUSTICE S. NAKATSURU

Released: June 20, 2018

CITATION: Paramount v. Johnston, 2018 ONSC 3711
COURT FILE NO.: CV-17-580326
DATE: 20180620

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

PARAMOUNT FINE FOODS and MOHAMAD
FAKIH

Plaintiffs/Responding Parties

– and –

KEVIN J. JOHNSTON, RANENDRA BANERJEE, and
FREEDOMREPORT.CA

Defendants/Moving Parties

REASONS FOR JUDGMENT

NAKATSURU J.

Released: June 20, 2018

TAB 13

National Post, Matthew Fraser and Andrew McIntosh *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Canada, Attorney General of New Brunswick, Attorney General of Alberta, Bell GlobeMedia Inc., Canadian Broadcasting Corporation, British Columbia Civil Liberties Association, Canadian Civil Liberties Association, and Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, Canadian Journalists for Free Expression, Canadian Association of Journalists, Professional Writers Association of Canada, RTNDA Canada/Association of Electronic Journalists, Magazines Canada, Canadian Publishers' Council, Book and Periodical Council, Writers' Union of Canada and PEN Canada ("Media Coalition") *Interveners*

INDEXED AS: R. v. NATIONAL POST

2010 SCC 16

File No.: 32601.

2009: May 22; 2010: May 7.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of expression — Journalist and confidential source — Document received by confidential source from anonymous sender given to journalist on condition of confidentiality — Document alleged to be forged — Search warrant and assistance order compelling production of document and envelope — Protection of confidential

National Post, Matthew Fraser et Andrew McIntosh *Appelants*

c.

Sa Majesté la Reine *Intimée*

et

Procureur général du Canada, procureur général du Nouveau-Brunswick, procureur général de l'Alberta, Bell GlobeMedia Inc., Société Radio-Canada, Association des libertés civiles de la Colombie-Britannique, Association canadienne des libertés civiles, et Association canadienne des journaux, Ad IDEM/Canadian Media Lawyers Association, Journalistes canadiens pour la liberté d'expression, Association canadienne des journalistes, Professional Writers Association of Canada, ACDIRT Canada/Association des journalistes électroniques, Magazines Canada, Canadian Publishers' Council, Book and Periodical Council, Writers' Union of Canada et PEN Canada (« Coalition des médias ») *Intervenants*

RÉPERTORIÉ : R. c. NATIONAL POST

2010 CSC 16

N° du greffe : 32601.

2009 : 22 mai; 2010 : 7 mai.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Liberté d'expression — Journaliste et source confidentielle — Document reçu par une source confidentielle d'un expéditeur anonyme et transmis au journaliste sous une condition de confidentialité — Document prétendu contrefait — Mandat de perquisition et ordonnance d'assistance exigeant la production du document et de

source — Whether guarantee of freedom of expression creates constitutionally entrenched immunity to protect journalists against compelled disclosure of confidential source — Canadian Charter of Rights and Freedoms, s. 2(b).

Constitutional law — Charter of Rights — Search and seizure — Journalist and confidential source — Document received by confidential source from anonymous sender given to journalist on condition of confidentiality — Document alleged to be forged — Search warrant and assistance order compelling production of document and envelope — Protection of confidential source — Whether search warrant and assistance order reasonable within meaning of s. 8 of Canadian Charter of Rights and Freedoms — Whether newspaper should have been given notice of warrant application to search its premises.

Evidence — Privilege — Journalist and confidential source — Document received by confidential source from anonymous sender given to journalist on condition of confidentiality — Document alleged to be forged — Search warrant and assistance order compelling production of document and envelope — Protection of confidential source — Whether guarantee of freedom of expression creates constitutionally entrenched immunity to protect journalists against compelled disclosure of confidential source — Whether confidential source protected by common law of privilege — If so, whether journalist-confidential source privilege constituted on case-by-case basis — What elements must be established and who bears burden of proof.

Criminal law — Search warrants — Search of newspaper office — Whether newspaper should be given notice of application for search warrant.

The *National Post* employed M as a journalist. M investigated whether C, then Prime Minister of Canada, was improperly involved with a loan from a federally funded bank to a hotel in C's riding which allegedly owed a debt to C's family investment company. X, a secret source, provided M with relevant information in exchange for a blanket, unconditional promise of confidentiality. In 2001, M received a sealed envelope in the mail that contained a document which appeared to be the bank's authorization of its loan to the hotel. If genuine, it could show that C had a conflict of interest in relation to the loan. M faxed copies of the document

l'enveloppe — Protection de la source confidentielle — La garantie de la liberté d'expression accorde-t-elle aux journalistes une immunité constitutionnelle contre la divulgation forcée de leur source confidentielle? — Charte canadienne des droits et libertés, art. 2b).

Droit constitutionnel — Charte des droits — Fouilles, perquisitions et saisies — Journaliste et source confidentielle — Document reçu par une source confidentielle d'un expéditeur anonyme et transmis au journaliste sous une condition de confidentialité — Document prétendu contrefait — Mandat de perquisition et ordonnance d'assistance exigeant la production du document et de l'enveloppe — Protection de la source confidentielle — Le mandat de perquisition et l'ordonnance d'assistance sont-ils abusifs au sens de l'art. 8 de la Charte canadienne des droits et libertés? — Le journal aurait-il dû être avisé de la demande de mandat de perquisition visant ses locaux?

Preuve — Privilège — Journaliste et source confidentielle — Document reçu par une source confidentielle d'un expéditeur anonyme et transmis au journaliste sous une condition de confidentialité — Document prétendu contrefait — Mandat de perquisition et ordonnance d'assistance exigeant la production du document et de l'enveloppe — Protection de la source confidentielle — La garantie de la liberté d'expression accorde-t-elle aux journalistes une immunité constitutionnelle contre la divulgation forcée de leur source confidentielle? — La source confidentielle est-elle protégée par les règles de common law régissant le privilège? — Dans l'affirmative, le privilège du secret des sources confidentielles des journalistes est-il reconnu au cas par cas? — Quels éléments doivent être établis et à qui en incombe le fardeau?

Droit criminel — Mandats de perquisition — Perquisition dans les bureaux d'un journal — Le journal aurait-il dû être avisé de la demande de mandat de perquisition visant ses locaux?

Le *National Post* employait M à titre de journaliste. M a mené une enquête visant à savoir si C, le premier ministre du Canada de l'époque, était impliqué dans un prêt consenti par une banque fédérale à un hôtel, situé dans le comté de C, qui paraissait avoir une dette envers la société d'investissement de la famille de C. X, une source secrète, a transmis des renseignements pertinents à M en échange d'une promesse générale et inconditionnelle de confidentialité. En 2001, M a reçu par la poste une enveloppe scellée contenant un document qui semblait être la copie de l'autorisation par la banque du prêt à l'hôtel. Si le document était authentique, il

to the bank, to the Prime Minister's office, and to a lawyer for the Prime Minister. All three said that the document was a forgery. Shortly thereafter, X met M. X described receiving the document anonymously in the mail, discarding the original envelope, and passing the document on to M in the belief that it was genuine. M was satisfied that X was a reliable source who did not believe that the document was a forgery when he or she forwarded it to M. X feared that fingerprint or DNA analysis might reveal his or her identity and asked M to destroy the document and the envelope. M refused but told X that his undertaking of confidentiality would remain binding as long as he believed that X had not deliberately misled him.

The bank complained to the RCMP and an officer asked the appellants to produce the document and the envelope as physical evidence of the alleged crimes i.e. the forgery itself and the "uttering" (or putting into circulation) of the doctored bank records. They refused and M declined to identify his source.

The officer applied for a search warrant and an assistance order compelling M's editor to assist the police in locating the document and the envelope. He intended to submit them for forensic testing to determine if they carried fingerprints or other identifying markings (including DNA) which might assist in identifying the source of the document. Although the Crown informed the judge that the *National Post* had requested notification of the application, the hearing proceeded *ex parte* and a search warrant and an assistance order were issued.

The warrant and the order provided the appellants with one month before the RCMP could search the *National Post*'s premises and included other terms intended to accommodate the needs of the *National Post* as a media entity. The appellants applied to quash the warrant and assistance order. The reviewing judge held that there was sufficient information to conclude the document was a forgery but that there was only a remote and speculative possibility that disclosure of the document and the envelope would advance a criminal investigation. She set aside the search warrant and the assistance order. The Court of Appeal reversed that decision and reinstated the search warrant and the assistance order. In this Court, the appellants and supporting interveners argued that the warrant and the order should be quashed because they infringe s. 2(b) or s. 8 of the

pourrait démontrer que C se trouvait en conflit d'intérêts par rapport au prêt. M a transmis des copies du document par télécopieur à la banque, au Cabinet du premier ministre et à un avocat du premier ministre. Tous trois ont répondu que le document était contrefait. Peu après, X a rencontré M. X a dit avoir reçu le document par la poste d'une source anonyme, avoir jeté l'enveloppe originale et, le croyant authentique, l'avoir transmis à M. M était convaincu que X était une source fiable qui ne croyait pas le document contrefait au moment où il ou elle l'a transmis à M. X, craignant que des empreintes digitales ou une analyse génétique ne révèlent son identité, a demandé à M de détruire le document et l'enveloppe. M a refusé, mais a dit à X que son engagement de confidentialité demeurerait valide tant qu'il croirait que X ne l'avait pas induit en erreur délibérément.

La banque a porté plainte à la GRC, et un agent a demandé aux appelants de produire le document et l'enveloppe comme éléments de preuve matérielle des prétendues infractions, soit fabrication du faux lui-même et emploi (ou mise en circulation) de documents bancaires contrefaits. Ils ont refusé, et M n'a pas révélé l'identité de sa source.

L'agent a demandé un mandat de perquisition et une ordonnance d'assistance enjoignant au rédacteur en chef de M d'aider la police à trouver le document et l'enveloppe. Il avait l'intention de soumettre ces pièces à une analyse criminalistique afin de déterminer s'ils portaient des empreintes digitales ou d'autres marques distinctives (y compris de l'ADN) pouvant servir à identifier la source du document. Bien que le ministre public ait informé le juge que le *National Post* avait demandé d'être avisé de la demande, le juge a entendu la demande *ex parte* et a décerné un mandat de perquisition et une ordonnance d'assistance.

Le mandat et l'ordonnance prévoyaient un délai d'un mois avant la perquisition par la GRC dans les locaux du *National Post* et d'autres modalités visant à tenir compte des besoins du *National Post* comme organe de presse. Les appelants ont demandé l'annulation du mandat et de l'ordonnance d'assistance. La juge siégeant en révision a conclu qu'il y avait suffisamment de renseignements pour conclure qu'il s'agissait d'un document contrefait, mais il n'existait qu'une faible possibilité hypothétique que la divulgation du document et de l'enveloppe fasse progresser une enquête criminelle. Elle a annulé le mandat de perquisition et l'ordonnance d'assistance. La cour d'appel a infirmé sa décision et rétabli le mandat de perquisition et l'ordonnance d'assistance. Devant notre Cour, les appelants et les intervenants qui les appuient ont fait valoir que le mandat

Canadian Charter of Rights and Freedoms, or because the secret sources are protected by the common law of privilege.

Held (Abella J. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ.: It is well established that freedom of expression protects readers and listeners as well as writers and speakers. It is in the context of the public right to information about matters of public interest that the legal position of the confidential source or whistleblower must be located. The public has an interest in effective law enforcement. The public also has an interest in being informed about matters of public importance that may only see the light of day through the cooperation of sources who will not speak except on condition of confidentiality. The role of investigative journalism has expanded over the years to help fill what has been described as a democratic deficit in the transparency and accountability of our public institutions. There is a demonstrated need, as well, to shine the light of public scrutiny on the dark corners of some private institutions. The appellants and their expert witnesses make a convincing case that unless the media can offer anonymity in situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be badly compromised. Important stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment.

In appropriate circumstances, accordingly, the courts will respect a promise of confidentiality given to a secret source by a journalist or an editor. The public's interest in being informed about matters that might only be revealed by secret sources, however, is not absolute. It must be balanced against other important public interests, including the investigation of crime. In some situations, the public's interest in protecting a secret source from disclosure may be outweighed by other competing public interests and a promise of confidentiality will not in such cases justify the suppression of the evidence.

This case involves an attempt by person(s) unknown to dupe the appellants into publishing a document which, on its face, implicated a former Prime Minister

et l'ordonnance devraient être annulés au motif qu'ils portent atteinte à l'al. 2*b*) ou à l'art. 8 de la *Charte canadienne des droits et libertés* ou que les sources secrètes sont protégées par un privilège issu de la common law.

Arrêt (la juge Abella est dissidente) : Le pourvoi est rejeté.

La juge en chef McLachlin et les juges Binnie, Deschamps, Fish, Charron, Rothstein et Cromwell : Il est bien reconnu que la liberté d'expression protège tant les lecteurs et les auditeurs que les rédacteurs et les orateurs. C'est dans le contexte du droit du public d'être informé des affaires d'intérêt public que doit être envisagée la situation juridique de la source confidentielle ou du dénonciateur d'irrégularités. Le public a un intérêt à ce que lui soit communiquée l'information sur des sujets importants susceptibles de ne pas être mis au jour sans la collaboration de sources qui ne parleront que sous le couvert de la confidentialité. Le rôle du journalisme d'enquête s'est élargi au fil des ans pour combler ce qui a été décrit comme un déficit démocratique dans la transparence et l'obligation redditionnelle de nos institutions publiques. Il a aussi été démontré qu'il est nécessaire de mettre au jour, à la faveur d'un examen public, les facettes obscures de certaines institutions privées. Les appelants et leurs témoins experts présentent des arguments convaincants pour démontrer que, si les médias ne peuvent assurer l'anonymat dans des situations où les sources se tariraient autrement, la liberté d'expression dans les débats sur des questions d'intérêt public sera grandement compromise. Des faits importants ne seront jamais relatés, et la transparence et l'obligation redditionnelle de nos institutions publiques s'en trouveront amoindries au détriment de l'intérêt public.

Par conséquent, lorsque les circonstances le requièrent, les tribunaux respectent la promesse de confidentialité faite à une source secrète par un journaliste ou un directeur de la rédaction. L'intérêt du public à ce que lui soit communiquée l'information sur des sujets susceptibles de n'être mis au jour qu'avec la collaboration de sources secrètes n'est toutefois pas absolu. Il doit être mis en balance avec d'autres intérêts publics importants, comme la conduite d'enquêtes criminelles. Dans certaines situations, des intérêts publics opposés l'emporteront sur l'intérêt public à protéger la source secrète contre toute divulgation et, en pareil cas, une promesse de confidentialité ne justifiera pas la rétention de la preuve.

L'affaire porte sur une tentative, par une ou plusieurs personnes dont on ne connaît pas l'identité, de bernier les appelants pour les amener à publier un document

of Canada in a serious financial conflict of interest. The appellants were unable to confirm the document's authenticity and the police have reasonable grounds to believe that the document is a forgery. The document and envelope that came into M's possession constitute physical evidence reasonably linked to a serious crime. The police seek to subject this material to forensic analysis. A search to retrieve the physical instrumentality by which the offence was allegedly committed would likely satisfy the test in s. 487 of the *Criminal Code*, even if (as the reviewing judge predicted) forensic analysis of the document and the envelope do not shed light on the identity of the offender. The document and the envelope are not merely pieces of evidence tending to show that a crime has been committed. They constitute the *actus reus* or *corpus delicti* of the alleged offences.

Freedom to publish the news necessarily involves a freedom to gather the news, but each of the many important news gathering techniques, including reliance on secret sources, should not itself be regarded as entrenched in the Constitution. The protection attaching to freedom of expression is not limited to the "mainstream media", but is enjoyed by "everyone" (in the words of s. 2(b) of the *Charter*) who chooses to exercise his or her freedom of expression on matters of public interest. To throw a constitutional immunity around the interactions of such a heterogeneous and ill-defined group of writers and speakers and whichever "sources" they deem worthy of a promise of confidentiality and on whatever terms they may choose to offer it (or, as here, choose to amend it with the benefit of hindsight) would blow a giant hole in law enforcement and other constitutionally recognized values such as privacy. The law needs to provide solid protection against the compelled disclosure of secret sources in appropriate situations, but the history of journalism in this country shows that the purpose of s. 2(b) can be fulfilled without the necessity of implying a constitutional immunity. Accordingly, a judicial order to compel disclosure of a secret source in accordance with the principles of common law privilege would not in general violate s. 2(b).

Although the common law does not recognize a class privilege protecting journalists from compelled disclosure of secret sources, a journalist's claim for protection of secret sources can be assessed properly using the case-by-case model of privilege. The Wigmore criteria provide a workable structure within which to assess,

qui, à première vue, impliquait le premier ministre du Canada de l'époque dans un grave conflit d'intérêts financiers. Les appelants n'ont pas pu confirmer l'authenticité du document et la police a des motifs raisonnables de croire qu'il s'agit d'un faux. Le document et l'enveloppe qui se sont retrouvés en la possession de M constituent des éléments de preuve matérielle raisonnablement liés à un crime grave. La police veut soumettre ces éléments à une analyse criminalistique. Une perquisition visant à découvrir l'instrument matériel de la perpétration de l'infraction reprochée respecterait probablement le critère établi à l'art. 487 du *Code criminel*, même si — comme la juge siégeant en révision l'a prouvé — l'analyse criminalistique du document et de l'enveloppe ne révèle pas l'identité du contrevenant. Le document et l'enveloppe ne sont pas de simples éléments de preuve tendant à démontrer qu'un crime a été commis. Ils constituent l'*actus reus* même ou le *corpus delicti* des crimes reprochés.

La liberté de diffuser les informations emporte nécessairement la liberté de recueillir les informations, mais chacune des nombreuses techniques importantes de collecte d'information, dont le recours à des sources secrètes, ne doit pas être considérée en soi comme protégée par la Constitution. La protection accordée à la liberté d'expression ne se limite pas aux « médias traditionnels », mais elle est accordée à « chacun » (aux termes de l'al. 2b) de la *Charte*), soit à quiconque décide d'exercer sa liberté d'expression sur des questions d'intérêt public. Conférer une immunité constitutionnelle aux interactions entre un groupe de rédacteurs et d'orateurs aussi hétérogène et mal défini et toute « source » que ces derniers estiment digne d'une promesse de confidentialité, assortie des conditions qu'ils déterminent (ou, comme en l'espèce, modifient par la suite), aurait pour effet de miner considérablement l'application de la loi et d'autres valeurs constitutionnelles, comme le respect de la vie privée. Le droit doit offrir une solide protection contre la divulgation forcée de l'identité des sources secrètes dans les situations qui le requièrent, mais l'histoire du journalisme au pays démontre que l'objectif de l'al. 2b) peut être atteint sans qu'il soit nécessaire de reconnaître implicitement une immunité constitutionnelle. Par conséquent, une ordonnance judiciaire visant à forcer la divulgation d'une source secrète en conformité avec le privilège de common law ne va généralement pas à l'encontre de l'al. 2b).

Bien que la common law ne reconnaisse pas l'existence d'un privilège générique qui soustrairait les journalistes à l'obligation de divulguer leurs sources secrètes, la revendication par un journaliste d'une protection de ses sources secrètes peut être évaluée à bon droit selon le modèle du privilège fondé sur les circonstances de

in light of society's evolving values, the sometimes-competing interests of free expression and the administration of justice and other values that promote the public interest. This will provide the necessary flexibility and an opportunity for growth that is essential to the proper function of the common law.

The scope of the privilege will depend, as does its very existence, on a case-by-case analysis, and may be total or partial. It is capable, in a proper case, of being asserted against the issuance or execution of a search warrant. A promise of confidentiality will be respected if: the communication originates in a confidence that the identity of the informant will not be disclosed; the confidence is essential to the relationship in which the communication arises; the relationship is one which should be sedulously fostered in the public good; and the public interest in protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth. This approach properly reflects *Charter* values and balances the competing public interests in a context-specific manner.

The media party asking the court to uphold a promise of confidentiality must prove all four criteria and no burden of proof shifts to the Crown. This includes, under the fourth criterion, proving that the public interest in protecting a secret source outweighs the public interest in a criminal investigation. The weighing up under this criterion will also include the nature and seriousness of the offence under investigation, and the probative value of the evidence sought to be obtained measured against the public interest in respecting the journalist's promise of confidentiality. The underlying purpose of the investigation is relevant as well. Until the media have met all four criteria, no privilege arises and the evidence is presumptively compellable and admissible. Therefore, no journalist can give a secret source an absolute assurance of confidentiality.

In this case, the first three of the four criteria are met. The communication originated in confidence and neither the journalist-source relationship nor the communication would have occurred without confidentiality. This type of journalist-source relationship ought to be sedulously fostered given the importance of investigative journalism exploring potential conflicts of interest at the highest levels of government. The appellants,

chaque cas. Le test de Wigmore fournit un cadre pratique pour l'appréciation des intérêts, parfois opposés, à la liberté d'expression et à l'administration de la justice, ainsi que d'autres valeurs d'intérêt public, au gré des changements de la société. Il offre ainsi la souplesse nécessaire et une occasion propice à l'évolution, qui est indispensable au bon fonctionnement de la common law.

Le privilège peut être absolu ou partiel et sa portée dépend, comme son existence même, d'une analyse effectuée au cas par cas. Il peut, dans certains cas, être opposable à la délivrance ou à l'exécution d'un mandat de perquisition. Une promesse de confidentialité sera honorée si : la communication a été transmise confidentiellement avec l'assurance que l'identité de l'informateur ne serait pas divulguée; le caractère confidentiel est essentiel aux rapports dans le cadre desquels la communication est transmise; ces rapports devraient, dans l'intérêt public, être entretenus assidûment; et l'intérêt public à protéger l'identité de l'informateur contre la divulgation l'emporte sur l'intérêt public à la découverte de la vérité. Cette façon de procéder reflète bien les valeurs consacrées dans la *Charte* et met les intérêts publics opposés en balance en fonction du contexte.

Le média qui fait valoir une promesse de confidentialité devant le tribunal doit satisfaire aux quatre critères et il n'y a pas inversion du fardeau de la preuve, qui n'incombe en rien au ministère public. Cela vaut notamment à l'égard du quatrième critère qui exige la preuve que l'intérêt public à la protection de la source secrète l'emporte sur l'intérêt public à la conduite d'une enquête criminelle. La pondération requise par ce critère englobe aussi notamment, d'un côté, la nature et la gravité de l'infraction faisant l'objet de l'enquête et la valeur probante des éléments qu'on cherche à obtenir et, de l'autre côté, l'intérêt public à ce que la promesse de confidentialité faite par un journaliste soit respectée. Le but sous-jacent de l'enquête est aussi un facteur pertinent. Jusqu'à ce que le média ait satisfait aux quatre volets, aucun privilège ne s'applique; il y a présomption que la preuve est admissible et que le tribunal peut en ordonner la production. Par conséquent, aucun journaliste ne peut donner une garantie de confidentialité absolue à l'une de ses sources.

En l'espèce, les trois premiers des quatre critères sont remplis. La communication s'est faite sous le sceau du secret et il n'y aurait eu ni relation entre le journaliste et sa source ni communication sans garantie de confidentialité. Ce type de relation entre un journaliste et sa source devrait être entretenue assidûment, car il importe que les journalistes d'enquête puissent s'enquérir des conflits d'intérêts potentiels des décideurs au

however, have failed to establish the fourth criterion. The alleged offences are of sufficient seriousness to justify the decision of the police to investigate the criminal allegations. The physical evidence is essential to the police investigation and likely essential as well to any future prosecution. While it is appropriate under this criterion to assess the likely probative value of the evidence sought, the reviewing judge ought not to have pre-empted the forensic investigation by seemingly prejudging the outcome without first considering all the relevant factors in her assessment. DNA analysis is capable of producing results even under exceptionally unpromising circumstances. The police should not be prevented from pursuing well-established modes of forensic analysis of relevant physical evidence on the basis that in the end such analysis may prove to be unsuccessful.

The argument that there is a “fatal disconnect between the envelope, the document, the identity of X and the alleged forgery” hinges on the credibility of X’s story that he or she was not the perpetrator of the forgery, but an innocent recipient, who passed it on to M in good faith. However a denial of criminal involvement is not a sufficient ground to put an end to a serious criminal investigation, even where the intermediate (though not the ultimate) intended victim of the alleged crime happens to be a media organization. The police need not accept X’s anonymous, uncorroborated and self-exculpatory statements to a third party (M) as a reason to terminate their investigation of the physical evidence any more than they need accept the disclaimers of any other potential witness to a crime, especially when the witness may also be the perpetrator.

The media’s ss. 2(b) and 8 *Charter* interests are clearly implicated when the police seek to seize documents in their possession. Even where no privilege is found to exist, warrants and assistance orders against the media must take into account their “special position” and be reasonable in the “totality of circumstances”. It is not sufficient for the Crown merely to establish that the requirements set out in ss. 487.01 and 487.02 of the *Criminal Code* were met. In this case, the conditions governing the search ensured that the media organization would not be unduly impeded by a physical search in the publishing or dissemination of the news. The order contained the usual clause directing that any documents seized be sealed on request. The police had reasonable grounds to believe that criminal offences had been committed and that relevant information would be

plus haut niveau du gouvernement. Les appelants n’ont toutefois pas réussi en l’espèce à établir que le quatrième critère était rempli. Les infractions reprochées sont suffisamment graves pour justifier amplement la décision de la police d’enquêter sur les allégations criminelles. La preuve matérielle est essentielle à l’enquête de la police et probablement essentielle à toute poursuite à venir. Bien qu’il soit approprié, en appliquant ce critère, d’évaluer la valeur probante de la preuve recherchée, la juge siégeant en révision n’aurait pas dû anticiper l’enquête criminalistique en préjugant apparemment le résultat sans d’abord tenir compte de tous les facteurs pertinents dans son évaluation. L’analyse génétique peut produire des résultats même dans des circonstances très peu prometteuses. La police ne devrait pas être empêchée d’appliquer des méthodes d’analyse bien établies à des éléments de preuve matérielle pertinents simplement parce que l’analyse pourrait, au bout du compte, se révéler infructueuse.

L’argument selon lequel il n’existe « aucun lien entre l’enveloppe, le document, l’identité de X et le prétendu faux, et cette absence de lien est fatale » dépend de la crédibilité du récit de X, qui nie être l’auteur du faux et prétend plutôt avoir reçu le document en toute innocence et l’avoir transmis à M de bonne foi. Toutefois, la dénégalation de toute participation à une activité criminelle ne constitue pas une raison suffisante pour mettre un terme à une enquête sur une infraction grave, même si c’est un organe de presse qui est la cible intermédiaire (et non la cible ultime) du prétendu crime. La police n’est pas plus tenue de mettre fin à son enquête sur un élément de preuve matérielle sur la foi des déclarations anonymes, non corroborées et disculpatoires de X à un tiers (M) qu’elle n’est tenue d’ajouter foi aux dénégations de tout autre témoin potentiel, à plus forte raison quand ce dernier pourrait être aussi l’auteur du crime.

Les droits que l’al. 2b) et l’art. 8 de la *Charte* garantissent aux médias sont manifestement en jeu lorsque la police veut saisir des documents en leur possession. Même si l’on ne conclut pas à l’existence d’un privilège, les mandats de perquisition et les ordonnances d’assistance visant les médias doivent tenir compte de leur « situation très particulière » et être raisonnables compte tenu de « l’ensemble des circonstances ». Il ne suffit pas pour le ministère public d’établir que les exigences formelles énoncées aux art. 487.01 et 487.02 du *Code criminel* ont été respectées. En l’espèce, les conditions de la perquisition garantissaient au média qu’il ne serait pas indûment empêché par la perquisition de publier ou de diffuser les informations. L’ordonnance contenait la condition habituelle prévoyant la mise sous scellés sur demande de tout document saisi. Les policiers avaient

obtained. The search warrant was reasonable within the meaning of s. 8 of the *Charter*.

On the facts of this case, the *ex parte* nature of the issuing judge's order is not a ground for setting the warrant aside. There is no jurisdictional requirement to give notice to a media entity of an application for a warrant to search its premises. The media should have an opportunity to argue against a warrant at the earliest reasonable opportunity, but whether and when to provide prior notice remain matters of judicial discretion. Where, as here, a court proceeds *ex parte*, adequate terms must be inserted in the warrant to protect the special position of the media, and to permit the media ample time and opportunity to challenge the warrant.

In this case, the issuing judge was aware that the secret source issue lay at the heart of the controversy, and the appellants' position was fully protected by the terms of the warrant. They have not demonstrated any prejudice on that account. The assistance order also was reasonable. Given the concerted action between M and his editor, it was appropriate to enlist the editor's assistance in locating and producing the concealed documents.

Accordingly, the warrant and assistance order were properly issued and must be complied with even if the result is to disclose the identity of the secret source who, the police have reasonable cause to believe, uttered (and may indeed have created) a forged document.

Per LeBel J.: Claims of journalist-source privilege should be resolved on a case-by-case basis applying the Wigmore criteria, and there is agreement with the majority's weighing of the relevant rights and interests under the fourth criterion of the analysis.

There is agreement with Abella J. that when an application for a search warrant is made against a media organization, there is a presumptive requirement to give notice of the application to the affected organization. The media play a key role in disseminating information and triggering debate on public issues. The process of applying for search warrants should be sensitive to the need to prevent undue or overly intrusive interference in media operations and affected media organizations should be able to raise their concerns at the first

des motifs raisonnables de croire que des infractions criminelles avaient été commises et que des renseignements pertinents seraient obtenus. L'ordonnance de perquisition n'était pas abusive au sens de l'art. 8 de la *Charte*.

Le caractère *ex parte* de l'ordonnance ne justifie pas l'annulation du mandat au vu des faits de l'affaire. Il n'existe pas d'exigence juridictionnelle d'aviser un média d'une demande de mandat de perquisition visant ses locaux. Les médias devraient avoir la possibilité de faire valoir leurs arguments contre la délivrance d'un mandat à la première occasion raisonnable, mais l'absence ou l'existence et le moment d'un préavis relèvent du pouvoir discrétionnaire du juge. Lorsque, comme en l'espèce, un tribunal entend une demande *ex parte*, il doit assortir le mandat de conditions adéquates pour protéger la situation très particulière du média et lui donner amplement le temps et la possibilité de justifier l'annulation du mandat.

En l'espèce, le juge qui a décerné le mandat savait que la question des sources secrètes était au cœur de la controverse et la situation des appelants était entièrement protégée par les conditions du mandat. Ils n'ont démontré aucun préjudice à cet égard. L'ordonnance d'assistance était elle aussi raisonnable. Étant donné que M et le rédacteur en chef ont agi de concert, il était approprié de requérir l'assistance du rédacteur en chef pour la recherche et la production des documents cachés.

Par conséquent, le mandat et l'ordonnance d'assistance ont été délivrés régulièrement et doivent être respectés, même au risque que soit dévoilée l'identité de la source secrète dont la police a des motifs raisonnables de croire qu'elle a mis en circulation (et peut-être effectivement créé) un document contrefait.

Le juge LeBel : La revendication du privilège du secret des sources des journalistes doit être tranchée au cas par cas par l'application du test de Wigmore. Il y a accord avec les juges majoritaires sur la pondération des droits et des intérêts pertinents au quatrième critère de l'analyse.

Il y a accord avec la juge Abella selon laquelle une demande de mandat de perquisition contre une organisation médiatique devrait être présumée emporter l'obligation de donner un préavis au média visé. Les médias jouent un rôle essentiel en diffusant l'information et en suscitant des débats sur des questions d'intérêt public. La procédure de demande de mandats de perquisition doit donc tenir compte de la nécessité d'éviter les perturbations indues ou trop envahissantes des activités des médias et permettre à ces derniers d'exprimer leurs

opportunity. The requirement to give notice may be waived in urgent situations, in which case the issuing judge should craft conditions to limit interference with the media organization's operations. In this case, since the lack of notice did not make the search unreasonable and the issuing judge proceeded on the basis of established law, the search warrant should not be quashed.

Per Abella J. (dissenting): Journalist-source privilege should be assessed on a case-by-case basis. The balancing of the interests of the press against other societal interests, such as crime prevention, prosecution and investigation, should be done in accordance with the four Wigmore criteria, infused with *Charter* values. In this case, the search warrant and assistance order should be quashed. The criteria are met, including the fourth criterion, which requires the claimant to demonstrate that the injury that would inure to the relationship by the disclosure of the communications is greater than the benefit thereby gained for the correct disposal of the litigation. The harm caused by the disclosure of the identity of the confidential source in this case is far weightier on the scales than any benefit to the investigation of the crime.

The media's role in disseminating information is pivotal in its contribution to public debate, and the use of confidential sources can be an integral part of the responsible gathering of the news and the communication of matters of public interest. Several jurisdictions have already recognized the importance of confidential sources by granting, legislatively or judicially, some form of qualified privilege to journalists. The chilling effect that could result from the compelled exposure of confidential journalistic sources also cannot be ignored. In the case before us, X's confidentiality was crucial to M's ability to write on a subject of public interest. M had prior positive experiences with X where he had been able to confirm the authenticity of information provided by X via an intermediary. He also took steps to assure himself of X's credibility and integrity in connection with the latest document by asking for a confidential affidavit and telling X that his/her confidentiality would only be protected if M were satisfied that he was not being misled. Where a journalist has taken credible and reasonable steps to determine the authenticity and reliability of a source, one should respect his or her professional judgment and pause before trespassing on the confidentiality which is the source of the relationship. In this case, demonstrable and profound injury to the journalist/source relationship

préoccupations à la première occasion. L'obligation de donner un préavis peut être levée dans des situations urgentes, auquel cas le juge saisi de la demande devrait assortir le mandat de conditions limitant les perturbations dans les activités du média visé. En l'espèce, puisque l'absence de préavis n'a pas rendu la perquisition abusive, et que le juge a appuyé sa décision sur des règles de droit établies, le mandat de perquisition ne doit pas être annulé.

La juge Abella (dissidente) : Le privilège du secret des sources des journalistes devrait être examiné au cas par cas. Il faut sopeser les intérêts de la presse par rapport à d'autres intérêts sociétaux comme la prévention, les poursuites et les enquêtes en matière criminelle en fonction des quatre critères énoncés par Wigmore, de manière à refléter les valeurs consacrées par la *Charte*. En l'espèce, le mandat de perquisition et l'ordonnance d'assistance devraient être annulés. Les critères sont remplis, y compris le quatrième, où le demandeur doit démontrer que le préjudice que la divulgation des communications causerait aux rapports entre le journaliste et sa source est plus considérable que l'avantage à retirer d'une juste décision. Le préjudice causé par la divulgation de l'identité de la source confidentielle en l'espèce pèse beaucoup plus dans la balance que n'importe quel avantage dont pourrait bénéficier l'enquête criminelle.

En tant que diffuseurs de l'information, les médias jouent un rôle capital par leur contribution au débat public, et le recours à des sources confidentielles peut faire partie intégrante du journalisme responsable dans la collecte d'informations et la communication touchant les questions d'intérêt public. Dans plusieurs États, l'importance des sources confidentielles a été confirmée par des mesures législatives ou des décisions judiciaires reconnaissant une forme quelconque de privilège du secret des sources des journalistes. L'effet de dissuasion qui pourrait découler de la divulgation forcée des sources confidentielles des journalistes ne peut non plus être ignoré. Dans la présente affaire, l'anonymat de X était crucial pour les articles de M sur un sujet d'intérêt public. M avait eu des expériences antérieures positives avec X où il avait été en mesure de confirmer l'authenticité de renseignements fournis par X par le truchement d'un intermédiaire. Il a également pris des mesures pour s'assurer de la crédibilité de X et de son intégrité à l'égard du dernier document reçu en lui demandant de signer un affidavit confidentiel et en lui disant qu'il ne garderait son identité secrète que s'il était convaincu de ne pas avoir été induit en erreur. Lorsqu'un journaliste a pris des mesures raisonnables et crédibles pour vérifier l'authenticité et la fiabilité de sa source, il faut respecter son jugement professionnel et hésiter à compromettre

will result from disclosure of the documents and potentially of the identity of the source.

On the other side of the balancing exercise, the benefits of disclosure range from speculative to negligible. While it is undisputed that the investigation of crime is an important public objective, the evidence sought by the state is of only questionable assistance in this case. The police hoped to find DNA and fingerprint evidence on the envelope and the document which they thought might reveal the identity of the source of the alleged forgery. However, there is a fatal disconnect between the envelope, the document, the identity of X and the alleged forgery. X received the document anonymously and discarded the original envelope in which he/she received the document. Since X does not know the identity of the sender, learning X's identity will yield virtually no evidence that could assist in determining who was responsible for the alleged forgery. Moreover, the more documents are manipulated, the less likely the chances of obtaining fingerprints. Both the document and the envelope had been extensively handled. X is therefore in no position to provide any information of assistance to the investigation and is, in any event, under no legal obligation to speak to the police. The benefit to the forgery investigation of getting the documents is, therefore, at best marginal. The only remaining purpose for learning the confidential source's identity is to discover who created this public controversy. This by itself is not an acceptable basis for interfering with freedom of the press. Lastly, the remote possibility of resolving the debt forgery — a crime of moderate seriousness — is far from sufficiently significant to outweigh the public benefit in protecting a rigorously thorough and responsible press.

A search warrant of media premises is a particularly serious intrusion, and a decision should not be made about its propriety without submissions from the party most affected. The operating presumption should be that the media's unique institutional character entitles it to notice when a search warrant is sought against it unless there are urgent circumstances justifying an *ex parte* hearing. No such notice was given to the *National Post* and there was no such urgency. It therefore lost the opportunity to make timely submissions on the confidential nature of the source and the serious informational gaps in the Information to Obtain. Had the fuller record and their arguments been

la confidentialité à l'origine de la relation. En l'espèce, un préjudice démontrable et grave aux rapports entre le journaliste et sa source résultera de la divulgation des documents et, éventuellement, de l'identité de la source.

De l'autre côté de la balance, les avantages à retirer de la divulgation sont négligeables, voire hypothétiques. Bien qu'il soit incontesté que la conduite d'enquêtes criminelles constitue un objectif public important, les éléments de preuve que l'État cherche à obtenir ne sont que d'une utilité discutable en l'espèce. La police espérait relever sur l'enveloppe et sur le document des empreintes digitales et génétiques susceptibles de révéler l'identité de la source du prétendu faux. Toutefois, il n'y a aucun lien entre l'enveloppe, le document, l'identité de X et le prétendu faux, et cette absence de lien est fatale. X a reçu le document par la poste d'une source anonyme et a jeté l'enveloppe originale dans laquelle il/elle avait reçu le document. Comme X ne connaît pas l'identité de l'expéditeur du document, apprendre l'identité de X ne fournira pratiquement aucune preuve pouvant aider à déterminer qui était responsable du prétendu faux. En outre, plus les documents sont manipulés, moins on a de chances d'y relever des empreintes digitales. Le document et l'enveloppe avaient été tous les deux largement manipulés. Par conséquent, X n'est pas en mesure de fournir de renseignements utiles pour l'enquête et, de toute façon, X n'a pas l'obligation, en droit, de parler à la police. L'obtention des documents représenterait donc tout au plus un avantage minime pour l'enquête sur le faux. L'identification de la source confidentielle n'aurait plus pour but que de découvrir l'identité de la personne à l'origine de cette controverse publique, ce qui ne justifie pas en soi d'entraver la liberté de la presse. Finalement, la faible possibilité de résoudre la question du faux — un crime de gravité modérée — est loin d'être suffisamment importante pour l'emporter sur les avantages pour le public de protéger une presse rigoureusement responsable, qui va au fond des choses.

La perquisition dans les locaux d'un média constitue une intrusion particulièrement grave, et la décision sur l'opportunité de l'autoriser ne devrait pas être rendue sans que le principal intéressé puisse présenter ses observations. Une présomption devrait s'appliquer selon laquelle le caractère institutionnel unique des médias leur donne le droit d'être avisés du dépôt d'une demande de mandat de perquisition les visant à moins de circonstances urgentes justifiant une audience *ex parte*. Le *National Post* n'a bénéficié d'aucun préavis, et de telles circonstances n'existaient pas en l'espèce. Il a par conséquent perdu l'occasion de présenter des observations en temps opportun en ce qui concerne la

known, the outcome of the hearing might have been different.

Cases Cited

By Binnie J.

Referred to: *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 230 C.C.C. (3d) 199; *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421; *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572; *Ashworth Hospital Authority v. MGN Ltd.*, [2002] UKHL 29, [2002] 1 W.L.R. 2033; *McGuinness v. Attorney-General of Victoria* (1940), 63 C.L.R. 73; *John Fairfax & Sons Ltd. v. Cojuangco* (1988), 165 C.L.R. 346; *Branzburg v. Hayes*, 408 U.S. 665 (1972); *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *O'Neill v. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389; *R. v. Murray* (2000), 144 C.C.C. (3d) 289; *Financial Times Ltd. v. The United Kingdom*, [2009] ECHR 2065 (BAILII); *Financial Times Ltd. v. Interbrew*, [2002] EWCA Civ 274 (BAILII), leave to appeal to the House of Lords denied, 9 July 2002; E.C.H.R., *Goodwin v. The United Kingdom* judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II; *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487; *John v. Express Newspapers*, [2000] 3 All E.R. 257; *Sanoma Uitgevers B.V. v. The Netherlands*, E.C.H.R., No. 38224/03, 31 March 2009 (online: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc.en>); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (2005); *R. v. Canadian Broadcasting Corp.* (2001), 52 O.R. (3d) 757, leave to appeal dismissed, [2001] 2 S.C.R. vii; *R. v. Serendip Physiotherapy Clinic* (2004), 73 O.R. (3d) 241; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860.

By Abella J. (dissenting)

Moysa v. Alberta (Labour Relations Board), [1989] 1 S.C.R. 1572; *Branzburg v. Hayes*, 408 U.S. 665 (1972); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (2005); *New York Times Co. v. Gonzales*, 459 F.3d 160 (2006); *X Ltd. v. Morgan-Grampian Ltd.*, [1991] 1 A.C. 1; *Ashworth Hospital Authority v. MGN Ltd.*, [2002]

nature confidentielle de la source et les graves lacunes informationnelles dans la dénonciation en vue d'obtenir un mandat. Si le dossier amplifié et ses arguments avaient été présentés, l'issue de l'audience aurait pu être tout autre.

Jurisprudence

Citée par le juge Binnie

Arrêts mentionnés : *St. Elizabeth Home Society c. Hamilton (City)*, 2008 ONCA 182, 230 C.C.C. (3d) 199; *Société Radio-Canada c. Lessard*, [1991] 3 R.C.S. 421; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1991] 3 R.C.S. 459; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. McClure*, 2001 CSC 14, [2001] 1 R.C.S. 445; *Grant c. Torstar Corp.*, 2009 CSC 61, [2009] 3 R.C.S. 640; *R. c. Gruenke*, [1991] 3 R.C.S. 263; *Moysa c. Alberta (Labour Relations Board)*, [1989] 1 R.C.S. 1572; *Ashworth Hospital Authority c. MGN Ltd.*, [2002] UKHL 29, [2002] 1 W.L.R. 2033; *McGuinness c. Attorney-General of Victoria* (1940), 63 C.L.R. 73; *John Fairfax & Sons Ltd. c. Cojuangco* (1988), 165 C.L.R. 346; *Branzburg c. Hayes*, 408 U.S. 665 (1972); *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157; *Slavutych c. Baker*, [1976] 1 R.C.S. 254; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *O'Neill c. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389; *R. c. Murray* (2000), 144 C.C.C. (3d) 289; *Financial Times Ltd. c. The United Kingdom*, [2009] ECHR 2065 (BAILII); *Financial Times Ltd. c. Interbrew*, [2002] EWCA Civ 274 (BAILII), autorisation d'appel refusée, Chambre des lords, 9 juillet 2002; C.E.D.H., arrêt *Goodwin c. Royaume-Uni* du 27 mars 1996, *Recueil des arrêts et décisions* 1996-II; *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487; *John c. Express Newspapers*, [2000] 3 All E.R. 257; *Sanoma Uitgevers B.V. c. Pays-Bas*, C.E.D.H., n° 38224/03, 31 mars 2009 (en ligne : <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-fr>); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (2005); *R. c. Canadian Broadcasting Corp.* (2001), 52 O.R. (3d) 757, autorisation d'appel rejetée, [2001] 2 R.C.S. vii; *R. c. Serendip Physiotherapy Clinic* (2004), 73 O.R. (3d) 241; *Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860.

Citée par la juge Abella (dissidente)

Moysa c. Alberta (Labour Relations Board), [1989] 1 R.C.S. 1572; *Branzburg c. Hayes*, 408 U.S. 665 (1972); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (2005); *New York Times Co. c. Gonzales*, 459 F.3d 160 (2006); *X Ltd. c. Morgan-Grampian Ltd.*, [1991] 1 A.C. 1; *Ashworth Hospital Authority c. MGN Ltd.*, [2002]

UKHL 29, [2002] 1 W.L.R. 2033; E.C.H.R., *Goodwin v. The United Kingdom* judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II; *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 230 C.C.C. (3d) 199; *John v. Express Newspapers*, [2000] 3 All E.R. 257; *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127; *Ernst v. Belgium* (2004), 39 E.H.R.R. 724; *Voskuil v. Netherlands* (2007), 24 B.H.R.C. 306; *Prosecutor v. Brdjanin and Talic*, ICTY, No. IT-99-36-AR73.9, 11 December 2002; *Van den Biggelaar v. Dohmen/Langenberg*, Hoge Raad der Nederlanden, Judgment of 10 May 1996, NJ 1996/578; *British Steel Corp. v. Granada Television Ltd.*, [1981] 1 All E.R. 417; *Financial Times Ltd. v. The United Kingdom*, [2009] ECHR 2065 (BAILII); *R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. Chambers*, [1990] 2 S.C.R. 1293; *R. v. Turcotte*, 2005 SCC 50, [2005] 2 S.C.R. 519; *O'Neill v. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389; *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421; *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459; *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487.

Statutes and Regulations Cited

28 C.F.R. § 50.10(a) (2009).
Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 3, 7, 8, 24(2).
Contempt of Court Act 1981 (U.K.), 1981, c. 49, s. 10.
Criminal Code, R.S.C. 1985, c. C-46, ss. 487, 487.01, 487.02.
Criminal Procedure Act (S. Afr.), No. 51 of 1977, ss. 189, 205.
Free Flow of Information Act of 2009, H.R. 985, 111th Congr. (2009).

Treaties and Other International Instruments

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 10.

Authors Cited

Abramowicz, David. "Calculating the Public Interest in Protecting Journalists' Confidential Sources" (2008), 108 *Colum. L. Rev.* 1949.
 Article 19 and Interights. *Briefing Paper on Protection of Journalists' Sources: Freedom of Expression Litigation Project*, May 1998 (online: www.article19.org/pdfs/publications/right-to-protect-sources.pdf).

UKHL 29, [2002] 1 W.L.R. 2033; C.E.D.H., arrêt *Goodwin c. Royaume-Uni* du 27 mars 1996, *Recueil des arrêts et décisions* 1996-II; *Slavutych c. Baker*, [1976] 1 R.C.S. 254; *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157; *Grant c. Torstar Corp.*, 2009 CSC 61, [2009] 3 R.C.S. 640; *St. Elizabeth Home Society c. Hamilton (City)*, 2008 ONCA 182, 230 C.C.C. (3d) 199; *John c. Express Newspapers*, [2000] 3 All E.R. 257; *Reynolds c. Times Newspapers Ltd.*, [2001] 2 A.C. 127; *Ernst c. Belgique*, C.E.D.H., n° 33400/96, 15 juillet 2003 (en ligne : <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-fr>); *Voskuil c. Netherlands* (2007), 24 B.H.R.C. 306; *Procureur c. Brdjanin et Talic*, TPIY, n° IT-99-36-AR73.9, 11 décembre 2002; *Van den Biggelaar v. Dohmen/Langenberg*, Hoge Raad der Nederlanden, jugement du 10 mai 1996, NJ 1996/578; *British Steel Corp. c. Granada Television Ltd.*, [1981] 1 All E.R. 417; *Financial Times Ltd. c. The United Kingdom*, [2009] ECHR 2065 (BAILII); *R. c. Hebert*, [1990] 2 R.C.S. 151; *R. c. Chambers*, [1990] 2 R.C.S. 1293; *R. c. Turcotte*, 2005 CSC 50, [2005] 2 R.C.S. 519; *O'Neill c. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389; *Société Radio-Canada c. Lessard*, [1991] 3 R.C.S. 421; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1991] 3 R.C.S. 459; *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487.

Lois et règlements cités

28 C.F.R. § 50.10(a) (2009).
Charte canadienne des droits et libertés, art. 1, 2(b), 3, 7, 8, 24(2).
Code criminel, L.R.C. 1985, ch. C-46, art. 487, 487.01, 487.02.
Contempt of Court Act 1981 (R.-U.), 1981, ch. 49, art. 10.
Criminal Procedure Act (Afr. S.), No. 51 of 1977, art. 189, 205.
Free Flow of Information Act of 2009, H.R. 985, 111th Congr. (2009).

Traité et autres instruments internationaux

Convention de sauvegarde des droits de l'homme et des libertés fondamentales, 213 R.T.N.U. 221, art. 10.

Doctrine citée

Abramowicz, David. « Calculating the Public Interest in Protecting Journalists' Confidential Sources » (2008), 108 *Colum. L. Rev.* 1949.
 Article 19 and Interights. *Briefing Paper on Protection of Journalists' Sources: Freedom of Expression Litigation Project*, May 1998 (online : www.article19.org/pdfs/publications/right-to-protect-sources.pdf).

- Bartlett, Peter. "Australia", in Charles J. Glasser Jr., ed., *International Libel and Privacy Handbook*, 2nd ed. New York: Bloomberg, 2009.
- Brabyn, Janice. "Protection Against Judicially Compelled Disclosure of the Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions" (2006), 69 *Mod. L. Rev.* 895.
- Canadian Association of Journalists. *Guidelines for Investigative Journalism*, approved at the 2004 Annual General Meeting (online: <http://www.eagle.ca/caj/principles/principles-statement-investigative-2004.htm>).
- Editorial. "Shielding a Basic Freedom", *The New York Times*, September 12, 2005, p. A20.
- Freedman, Eric M. "Reconstructing Journalists' Privilege" (2008), 29 *Cardozo L. Rev.* 1381.
- Gora, Joel M. "The Source of the Problem of Sources: The First Amendment Fails the Fourth Estate" (2008), 29 *Cardozo L. Rev.* 1399.
- New Shorter Oxford English Dictionary on Historical Principles*, 6th ed., vol. 2. Oxford: Clarendon Press, 2007, "sedulous".
- Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 5th ed. Toronto: Irwin Law, 2008.
- Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd ed. by Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst. Markham, Ont.: Lexis-Nexis, 2009.
- United States. Congressional Research Service. CRS Report for Congress. *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes*, June 27, 2007.
- Wigmore, John Henry. *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 2nd ed. Boston: Little, Brown and Co., 1923.
- Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. 8. Revised by John T. McNaughton. Boston: Little, Brown & Co., 1961.
- Youm, Kyu Ho. "International and Comparative Law on the Journalist's Privilege: The Randal Case as a Lesson for the American Press" (2006), 1 *J. Int'l Media & Ent. L.* 1.
- Association canadienne des journalistes. *Guidelines for Investigative Journalism*, approved at the 2004 Annual General Meeting (online : <http://www.eagle.ca/caj/principles/principles-statement-investigative-2004.htm>).
- Bartlett, Peter. « Australia », in Charles J. Glasser Jr., ed., *International Libel and Privacy Handbook*, 2nd ed. New York : Bloomberg, 2009.
- Brabyn, Janice. « Protection Against Judicially Compelled Disclosure of the Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions » (2006), 69 *Mod. L. Rev.* 895.
- Editorial. « Shielding a Basic Freedom », *The New York Times*, September 12, 2005, p. A20.
- États-Unis. Congressional Research Service. CRS Report for Congress. *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings : State Shield Statutes*, June 27, 2007.
- Freedman, Eric M. « Reconstructing Journalists' Privilege » (2008), 29 *Cardozo L. Rev.* 1381.
- Gora, Joel M. « The Source of the Problem of Sources : The First Amendment Fails the Fourth Estate » (2008), 29 *Cardozo L. Rev.* 1399.
- New Shorter Oxford English Dictionary on Historical Principles*, 6th ed., vol. 2. Oxford : Clarendon Press, 2007, « sedulous ».
- Paciocco, David M., and Lee Stuesser. *The Law of Evidence*, 5th ed. Toronto : Irwin Law, 2008.
- Sopinka, Lederman & Bryant : The Law of Evidence in Canada*, 3rd ed. by Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst. Markham, Ont. : Lexis-Nexis, 2009.
- Wigmore, John Henry. *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 2nd ed. Boston : Little, Brown and Co., 1923.
- Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. 8. Revised by John T. McNaughton. Boston : Little, Brown & Co., 1961.
- Youm, Kyu Ho. « International and Comparative Law on the Journalist's Privilege : The Randal Case as a Lesson for the American Press » (2006), 1 *J. Int'l Media & Ent. L.* 1.

APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Simmons and Gillese JJ.A.), 2008 ONCA 139, 230 C.C.C. (3d) 472, 290 D.L.R. (4th) 655, 56 C.R. (6th) 163, 168 C.R.R. (2d) 193, 234 O.A.C. 101, 89 O.R. (3d) 1, [2008] O.J. No. 744 (QL), 2008 CarswellOnt 1104, setting aside a decision of Benotto J. (2004), 69 O.R. (3d) 427, 19 C.R. (6th) 393, 115 C.R.R. (2d) 65, [2004] O.T.C. 50,

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (les juges Laskin, Simmons et Gillese), 2008 ONCA 139, 230 C.C.C. (3d) 472, 290 D.L.R. (4th) 655, 56 C.R. (6th) 163, 168 C.R.R. (2d) 193, 234 O.A.C. 101, 89 O.R. (3d) 1, [2008] O.J. No. 744 (QL), 2008 CarswellOnt 1104, qui a annulé la décision de la juge Benotto (2004), 69 O.R. (3d) 427, 19 C.R. (6th) 393, 115 C.R.R. (2d) 65, [2004] O.T.C.

[2004] O.J. No. 178 (QL), 2004 CarswellOnt 173. Appeal dismissed, Abella J. dissenting.

Marlys A. Edwardh, John Norris and Jessica Orkin, for the appellants.

Robert Hubbard and Susan Magotiaux, for the respondent.

Cheryl J. Tobias, Q.C., Jeffrey G. Johnston and Robert J. Frater, for the intervener the Attorney General of Canada.

Written submissions only by *Gaétan Migneault*, for the intervener the Attorney General of New Brunswick.

Jolaine Antonio, for the intervener the Attorney General of Alberta.

Peter M. Jacobsen and Tae Mee Park, for the intervener Bell GlobeMedia Inc.

Daniel J. Henry, for the intervener the Canadian Broadcasting Corporation.

Tim Dickson, for the intervener the British Columbia Civil Liberties Association.

Jamie Cameron and Matthew Milne-Smith, for the intervener the Canadian Civil Liberties Association.

Brian MacLeod Rogers and Iain A. C. MacKinnon, for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, the Canadian Journalists for Free Expression, the Canadian Association of Journalists, the Professional Writers Association of Canada, RTNDA Canada/Association of Electronic Journalists, Magazines Canada, the Canadian Publishers' Council, the Book and Periodical Council, the Writers' Union of Canada and PEN Canada.

The judgment of McLachlin C.J. and Binnie, Deschamps, Fish, Charron, Rothstein and Cromwell JJ. was delivered by

[1] BINNIE J. — The public has the right to every person's evidence. That is the general rule. The

50, [2004] O.J. No. 178 (QL), 2004 CarswellOnt 173. Pourvoi rejeté, la juge Abella est dissidente.

Marlys A. Edwardh, John Norris et Jessica Orkin, pour les appelants.

Robert Hubbard et Susan Magotiaux, pour l'intimée.

Cheryl J. Tobias, c.r., Jeffrey G. Johnston et Robert J. Frater, pour l'intervenant le procureur général du Canada.

Argumentation écrite seulement par *Gaétan Migneault*, pour l'intervenant le procureur général du Nouveau-Brunswick.

Jolaine Antonio, pour l'intervenant le procureur général de l'Alberta.

Peter M. Jacobsen et Tae Mee Park, pour l'intervenante Bell GlobeMedia Inc.

Daniel J. Henry, pour l'intervenante la Société Radio-Canada.

Tim Dickson, pour l'intervenante l'Association des libertés civiles de la Colombie-Britannique.

Jamie Cameron et Matthew Milne-Smith, pour l'intervenante l'Association canadienne des libertés civiles.

Brian MacLeod Rogers et Iain A. C. MacKinnon, pour les intervenants l'Association canadienne des journaux, Ad IDEM/Canadian Media Lawyers Association, les Journalistes canadiens pour la liberté d'expression, l'Association canadienne des journalistes, Professional Writers Association of Canada, ACDIRT Canada/Association des journalistes électroniques, Magazines Canada, Canadian Publishers' Council, Book and Periodical Council, Writers' Union of Canada et PEN Canada.

Version française du jugement de la juge en chef McLachlin et des juges Binnie, Deschamps, Fish, Charron, Rothstein et Cromwell rendu par

[1] LE JUGE BINNIE — Le public a droit à la preuve émanant de toutes les sources. Voilà la règle

question raised by this appeal is whether the appellants can exempt themselves from this obligation on the basis of a journalistic privilege rooted either in s. 2(b) of the *Canadian Charter of Rights and Freedoms* which guarantees freedom of expression, “including freedom of the press and other media of communication”, or in the common law.

[2] Specifically, the *National Post*, its editor-in-chief and one of its journalists apply to set aside a search warrant obtained from the Ontario Court of Justice authorizing the police to seize what are alleged to be forged bank records and the envelope in which the appellants received the records from secret source(s). The police believe that seizure of the physical documents is essential to proof of the forgery, and that forensic analysis may lead them directly or indirectly to the identity of the perpetrators. The appellants, for their part, seek to protect the identity of their secret source(s), who may or may not be directly implicated in the forgery. If the police are correct, therefore, the documents in the control of the *National Post* and its co-appellants are not merely links in the chain of criminal investigation but constitute in themselves the essential physical evidence of alleged crimes — the forgery itself and the “uttering” (or putting into circulation) of the doctored bank records in the plain brown envelope.

[3] The courts should strive to uphold the special position of the media and protect the media’s secret sources where such protection is in the public interest, but this is not the usual case of journalists seeking to avoid testifying about their secret sources. This is a physical evidence case. It involves what is reasonably believed to be a forged document. Forgery is a serious crime. For the reasons that follow I agree with the Ontario Court of Appeal that the media claim to immunity from production of the physical evidence is not justified in the circumstances disclosed in the evidence before the court even if the end result proves to be information that may lead to the identification

générale. La question soulevée dans le présent pourvoi est celle de savoir si les appelants peuvent se soustraire à leur obligation de fournir un élément de preuve en invoquant un privilège journalistique fondé sur l’al. 2b) de la *Charte canadienne des droits et libertés* — qui garantit la liberté d’expression, « y compris la liberté de la presse et des autres moyens de communication » — ou issu de la common law.

[2] Plus précisément, le *National Post*, son rédacteur en chef et l’un de ses journalistes demandent l’annulation d’un mandat de perquisition décerné par la Cour de justice de l’Ontario qui autorise les policiers à saisir des documents bancaires qui seraient contrefaits et l’enveloppe dans laquelle une ou des sources secrètes ont transmis ces documents aux appelants. La police estime que la saisie des documents matériels est essentielle pour la preuve de l’infraction de faux et qu’une analyse criminalistique est susceptible de révéler, directement ou indirectement, l’identité des contrevenants. Les appelants, pour leur part, cherchent à protéger l’identité de leur ou leurs sources secrètes, dont on ne sait pas si elles sont directement impliquées dans la commission du faux. Par conséquent, si la police a raison, les documents détenus par le *National Post* et ses co-appellants ne constituent pas seulement un chaînon dans l’enquête criminelle; ils constituent la preuve matérielle essentielle des crimes reprochés — le faux et l’emploi (ou la mise en circulation) des documents bancaires falsifiés dans l’enveloppe brune ordinaire.

[3] Les tribunaux devraient s’efforcer de reconnaître la situation très particulière des médias et protéger leurs sources secrètes lorsqu’une telle protection sert l’intérêt public. Toutefois, il ne s’agit pas en l’espèce d’une affaire typique où des journalistes cherchent à éviter de témoigner sur leurs sources secrètes. Il s’agit d’une affaire portant sur les éléments de preuve matérielle d’une infraction, soit sur un document que l’on a des motifs raisonnables de croire contrefait. Commettre un faux est un crime grave. Pour les motifs qui suivent, je conviens avec la Cour d’appel de l’Ontario que la revendication par les médias d’une immunité les soustrayant à l’obligation de produire la

of the secret source(s). I would dismiss the appeal.

I. Overview

[4] This dispute is a controversy of undoubted public importance. It involves an attempt by a person or persons unknown to dupe the *National Post* into publishing an allegedly forged bank document which, on its face, implicated the then Prime Minister of Canada, Jean Chrétien, in a serious financial conflict of interest. The courts below concluded that the police possess reasonable and probable grounds to believe that the inculpatory entries on the “leaked” document are false. The document, if authentic, would have suggested that at the same time the Prime Minister was said to be exerting influence on the federal Business Development Bank of Canada (“BDBC”) to grant a \$615,000 loan to the Auberge Grand-Mère, a private business in his riding, the Auberge Grand-Mère allegedly owed the Chrétien family investment company \$23,040. Unless the Auberge Grand-Mère could be saved from insolvency, the story went, the debt would likely go unpaid. The Prime Minister’s private financial interest, on this theory of events, conflicted with his public duty. Some in the media referred to cluster of events around the loan controversy as “Shawinigate”.

[5] The public interest in freedom of expression is of immense importance but it is not absolute and in circumstances such as the present it must be balanced against other important public interests, including the investigation and suppression of crime. The courts understand the need in appropriate circumstances to protect from disclosure the identity of secret sources who provide the media, on condition of confidentiality, with information of public interest, but even the journalist Andrew

preuve matérielle n’est pas justifiée dans les circonstances telles qu’elles ont été établies en preuve, même si sa production a pour effet de révéler de l’information susceptible de permettre d’identifier la ou les sources secrètes. Je suis d’avis de rejeter le pourvoi.

I. Aperçu

[4] Le litige dont nous sommes saisis est une controverse d’une importance indéniable pour le public. Une ou plusieurs personnes dont on ne connaît pas l’identité auraient tenté de bernier le *National Post* pour l’amener à publier un document bancaire qui aurait été contrefait et qui, à première vue, impliquait le premier ministre du Canada de l’époque, Jean Chrétien, dans un grave conflit d’intérêts financiers. Les juridictions inférieures ont conclu que les policiers ont des motifs raisonnables et probables de croire que les renseignements incriminants figurant dans le document « divulgué clandestinement » sont faux. Le document, s’il était authentique, donnait à croire que le premier ministre aurait cherché à influencer la Banque de développement du Canada (« BDC ») pour qu’elle accorde un prêt de 615 000 \$ à l’Auberge Grand-Mère, une entreprise privée de son comté, à un moment où cette même auberge devait 23 040 \$ à la société d’investissement de la famille Chrétien. On disait aussi que cette dette allait probablement demeurer impayée, à moins qu’on parvienne à préserver l’Auberge Grand-Mère de l’insolvabilité. Selon cette version des faits, les intérêts financiers privés du premier ministre entraient en conflit avec la charge publique qu’il occupait. Certains médias ont employé le terme « Shawinigate » pour désigner les faits entourant le prêt controversé.

[5] L’intérêt public à la liberté d’expression est d’une importance considérable, mais il n’est pas absolu et, dans une situation comme celle-ci, il doit être mis en balance avec d’autres intérêts publics importants, comme la conduite d’enquêtes criminelles et la répression du crime. Les tribunaux reconnaissent la nécessité, dans certaines circonstances, de préserver l’anonymat des personnes qui fournissent des renseignements d’intérêt public aux médias à la condition d’être protégées par une

McIntosh recognized that if his source had provided the document “to deliberately mislead me” the source would no longer be worthy of protection (A.R., vol. 4, p. 1, McIntosh Affidavit, at para. 227). It is true that Mr. McIntosh believed his source to be sincere. Nevertheless, according to Mr. McIntosh, the source acknowledged participation (he or she says innocently) in forwarding the alleged forgery. There would not be many successful criminal investigations if the police were required to accept at face value protestations of innocence by unknown persons relayed at third hand.

[6] The reviewing judge, Benotto J., quashed the warrant in part because she considered it unlikely that the outcome of the forensic analysis of the appellants’ documents would be successful ((2004), 69 O.R. (3d) 427). With respect, I do not think the possibility of failure is a reason to prevent the police from undertaking forensic inquiry by well-established techniques such as DNA analysis of documents which the appellants concede are reasonably linked to the alleged criminal offences. A search to retrieve the physical instrumentality by which the offence was allegedly committed would likely satisfy the test in s. 487 of the *Criminal Code*, R.S.C. 1985, c. C-46, even if the documents did not shed light on the identity of the offender. Moreover, if Benotto J. is correct, and the envelope is unlikely to identify the confidential source, then there is little public interest in refusing its production to the police.

[7] In terms of the *Charter*, the appellants go too far in claiming a broad immunity from production of physical evidence. A claim that secret sources may be disclosed is not a complete answer to a criminal investigation. I conclude that the warrant in question does not infringe the appellants’ s. 2(b) *Charter* freedom of expression. Nor, in my view, are the documents in question protected by a common law journalistic privilege. Nor, for the reasons to be discussed, does the warrant at issue in this case give rise to an unreasonable search or seizure within the meaning of s. 8 of the *Charter*.

entente de confidentialité. Toutefois, même le journaliste, Andrew McIntosh, a reconnu que sa source ne mériterait plus d’être protégée si elle lui avait fourni le document [TRADUCTION] « dans le but délibéré de [l]’induire en erreur » (d.a., vol. 4, p. 1, affidavit de M. McIntosh, par. 227). M. McIntosh croyait en la sincérité de sa source. Cependant, aux dires de ce dernier, la source a admis avoir participé (en toute innocence, à ce qu’elle dit) à la transmission du prétendu document contrefait. Peu d’enquêtes criminelles aboutiraient si les policiers étaient tenus d’ajouter foi d’emblée aux protestations d’innocence d’une personne inconnue qui leur sont transmises de troisième main.

[6] La juge Benotto, siégeant en révision, a annulé le mandat notamment parce qu’elle doutait du succès d’une analyse criminalistique des documents détenus par les appelants ((2004), 69 O.R. (3d) 427). Avec égards, je ne crois pas que la possibilité d’un échec soit une raison valable d’empêcher la police de procéder à une analyse criminalistique par des techniques reconnues comme l’analyse génétique d’échantillons prélevés sur des documents dont les appelants ne nient pas le rapport raisonnable avec les infractions reprochées. Une perquisition visant à découvrir l’instrument matériel de la perpétration de l’infraction reprochée respecterait probablement le critère établi à l’art. 487 du *Code criminel*, L.R.C. 1985, ch. C-46, et ce, même si les documents ne révélaient pas l’identité du contrevenant. En outre, si la juge Benotto a vu juste et qu’il est peu probable que l’enveloppe permette d’identifier la source confidentielle, l’intérêt public ne justifie guère le refus de la remettre à la police.

[7] Au regard de la *Charte*, les appelants vont trop loin en revendiquant une immunité générale les soustrayant à l’obligation de produire des éléments de preuve matérielle. La prétention que des sources secrètes risquent d’être divulguées ne constitue pas une parade complète à une enquête criminelle. Je conclus que le mandat contesté ne porte pas atteinte à la liberté d’expression conférée aux appelants par l’al. 2b) de la *Charte*. De plus, les documents ne sont protégés selon moi par aucun privilège journalistique issu de la common law. Enfin, pour les motifs que j’expliquerai, le mandat en l’espèce n’a

Journalistic privilege is very context specific. The appellants have not, in my view, made out their claim on the facts. The warrant is valid.

II. Facts

[8] The appellant Andrew McIntosh was employed by the *National Post* from August 1998 until February 2005. He took an interest in then Prime Minister Jean Chrétien's involvement with the Grand-Mère Golf Club located in Mr. Chrétien's home riding of St-Maurice, Quebec. His investigation led him to suspect Mr. Chrétien's involvement with a 1997 loan from the BDBC to the Auberge Grand-Mère, a hotel located next to the golf club, and with other federal grants in the riding. During his investigations, Mr. McIntosh contacted a person known to us only as X, but at that time X was unwilling to talk to Mr. McIntosh, even on a confidential basis.

A. *The Secret Source*

[9] However, in the Fall of 2000, another individual known only as Y contacted Mr. McIntosh and indicated that he or she had important information but would only disclose it in return for a promise of confidentiality. Mr. McIntosh was generally authorized by the then editor-in-chief of the *National Post* to give promises of confidentiality and he routinely did so. The editor-in-chief testified that he considers himself a party to such promises of confidentiality. Indeed, the reviewing judge found that “[a]ll of Mr. McIntosh's work was done with the support of the then Editor-in-Chief” (para. 8).

[10] Mr. McIntosh testified that “[t]he condition I agreed to in order to gain access to these materials was that I would . . . give a blanket, unconditional promise of confidentiality to protect the identity of both X and Y” (McIntosh Affidavit, at para. 156).

entraîné aucune fouille, perquisition ni saisie abusive au sens de l'art. 8 de la *Charte*. Le privilège journalistique est étroitement lié au contexte. Au vu des faits de l'affaire, j'estime que les appelants n'ont pas établi le bien-fondé de leur revendication. Le mandat est donc valide.

II. Les faits

[8] L'appelant, Andrew McIntosh, était employé par le *National Post* du mois d'août 1998 au mois de février 2005. Il s'est alors intéressé au rapport entre le premier ministre de l'époque, Jean Chrétien, et le club de golf Grand-Mère situé dans le comté de M. Chrétien, St-Maurice (Québec). Son enquête l'a amené à soupçonner M. Chrétien d'avoir joué un rôle dans un prêt consenti en 1997 par la BDC à l'Auberge Grand-Mère, un hôtel situé à côté du club de golf, et dans l'octroi d'autres subventions fédérales dans son comté. Au cours de son enquête, M. McIntosh a communiqué avec X, une personne dont nous ne connaissons pas l'identité, mais X ne voulait pas lui parler à cette époque, même à titre confidentiel.

A. *La source secrète*

[9] Toutefois, à l'automne 2000, une autre personne connue seulement comme Y a communiqué avec M. McIntosh et lui a dit détenir des renseignements importants, qu'elle ne divulguerait qu'en échange d'une promesse de confidentialité. Le rédacteur en chef du *National Post* de l'époque avait donné à M. McIntosh l'autorisation générale de promettre la confidentialité et ce dernier le faisait régulièrement. Dans son témoignage, le rédacteur en chef a dit qu'il se considérait lié par ces promesses de confidentialité. En effet, la juge siégeant en révision a conclu que [TRADUCTION] « [t]out le travail de M. McIntosh avait l'aval du rédacteur en chef de l'époque » (par. 8).

[10] M. McIntosh a déclaré ce qui suit : [TRADUCTION] « Afin d'avoir accès à ces documents, j'ai consenti à donner une promesse générale et inconditionnelle de confidentialité pour protéger l'identité de X et de Y » (affidavit de M. McIntosh, par. 156).

[11] Y told Mr. McIntosh that he was acting on X's behalf and explained that X was willing to provide McIntosh with documents and information concerning the Auberge Grand-Mère loan. Based on materials received from Y, including what appeared to be copies of original documents from BDBC files and information received from other sources, Mr. McIntosh reported in the *National Post* that Mr. Chrétien had called the president of the BDBC and urged approval of the bank loan to Auberge Grand-Mère. When asked by reporters to comment, Mr. Chrétien acknowledged that the story was accurate. Numerous articles followed.

B. *The Plain Brown Envelope*

[12] On April 5, 2001, Mr. McIntosh received a sealed plain brown envelope at the Ottawa Bureau of the *National Post*. The envelope contained a document that appeared to be a copy of a BDBC internal loan authorization for a \$615,000 mortgage to Les Entreprises Yvon Duhaime Inc. (Auberge Grand-Mère) in August 1997. On the face of it, the document purported to show that, at the time it applied for and received the loan, Auberge Grand-Mère listed an outstanding debt of \$23,040 to "JAC Consultants", a Chrétien family investment company. Mr. McIntosh concluded that if the document were genuine, it would represent a major escalation in the Shawinigate story.

[13] To check the authenticity of the document, Mr. McIntosh faxed copies to the BDBC, the Prime Minister's office, and to a lawyer for the Prime Minister. All three said that the document was a forgery. The BDBC sent two letters to the *National Post* on April 6, 2001. The first claimed that the BDBC's records showed no indication of a debt owed to JAC Consultants. In the second letter, the BDBC warned the *National Post* that bank documents were confidential and should not be disclosed. A short time after receiving these letters, Mr. McIntosh put the document and its envelope somewhere, he claims, only he is able to access them.

[11] Y a dit à M. McIntosh qu'il agissait au nom de X et a expliqué que X était disposé à donner à M. McIntosh des documents et des renseignements relatifs au prêt consenti à l'Auberge Grand-Mère. Sur la foi des documents fournis par Y, notamment ce qui semblait être des copies de documents originaux provenant des dossiers de la BDC et des renseignements fournis par d'autres sources, M. McIntosh a écrit dans le *National Post* que M. Chrétien avait téléphoné au président de la BDC et l'avait exhorté à approuver le prêt à l'Auberge Grand-Mère. Questionné par des journalistes à ce propos, M. Chrétien a reconnu la véracité de l'information. De nombreux articles sont parus par la suite.

B. *L'enveloppe brune ordinaire*

[12] Le 5 avril 2001, M. McIntosh a reçu, au bureau du *National Post* à Ottawa, une enveloppe brune ordinaire scellée. L'enveloppe contenait un document qui semblait être la copie d'une autorisation de prêt de la BDC concernant un emprunt hypothécaire de 615 000 \$ consenti à Les Entreprises Yvon Duhaime Inc. (Auberge Grand-Mère) en août 1997. À première vue, le document paraissait démontrer que, au moment où elle a demandé et reçu le prêt, l'Auberge Grand-Mère devait 23 040 \$ à « JAC Consultants », une société d'investissement de la famille Chrétien. M. McIntosh a conclu que, si le document était authentique, il ferait prendre un tournant significatif à l'affaire Shawinigate.

[13] Pour vérifier l'authenticité du document, M. McIntosh en a transmis des copies par télécopieur à la BDC, au Cabinet du premier ministre et à un avocat du premier ministre. Tous ont répondu que le document était contrefait. Le 6 avril 2001, la BDC a envoyé deux lettres au *National Post*. Dans la première, elle indiquait que ses dossiers ne révélaient l'existence d'aucune dette envers JAC Consultants. Dans la seconde, elle avertissait le *National Post* que les documents bancaires étaient confidentiels et ne devaient pas être divulgués. Peu de temps après avoir reçu ces lettres, M. McIntosh a rangé le document et l'enveloppe dans un endroit où, dit-il, lui seul peut y avoir accès.

[14] The Bloc Québécois also received a copy of the BDBC “document” which it photocopied and distributed to its members and others. The story was picked up by some news sources. The police believe, however, that only the *National Post* has an envelope and document that could disclose fingerprint or DNA evidence that might in turn lead to identification of the perpetrator(s) and provide physical evidence of the alleged crime(s).

[15] Since it was unable to confirm the document’s authenticity, the *National Post* hesitated to publish the allegations. However, other news organizations published details about the leaked document and the reference to the alleged \$23,040 loan and eventually the *National Post* picked up the story and reported that the *Globe and Mail*, SunMedia and CTV had already published some details of the alleged bank document, as had the *Ottawa Citizen*.

C. *The Modified Undertaking of Confidentiality*

[16] Sometime during the week after the receipt of the document, X sought a meeting with Mr. McIntosh, who then consulted legal counsel and editors. X confirmed that it was he or she who had sent the envelope and asked that it be destroyed. X expressed concern that the police might try to use it to identify him or her through fingerprint or DNA analysis, and feared that the envelope might link him or her to the bank document now alleged to be a forgery. Mr. McIntosh testified that he told X “that I would not dispose of them. I said this would be both improper and highly unethical given the serious allegation that the document had been forged” (McIntosh Affidavit, at para. 225).

[17] However, as stated earlier, Mr. McIntosh also told X that so long as “I believed that [X] had not provided the document to deliberately mislead me, my undertaking of confidentiality would remain binding. I also told Confidential Source X that

[14] Une copie du « document » de la BDC a également été envoyée au Bloc québécois. Le document a été photocopie et distribué à ses membres et à d’autres personnes. La nouvelle a été reprise par quelques médias. La police croit toutefois que seul le *National Post* détient une enveloppe et un document susceptibles de fournir des éléments de preuve — empreintes digitales ou génétiques — qui pourraient permettre d’identifier le ou les contrevenants et servir de preuve matérielle du crime ou des crimes reprochés.

[15] N’étant pas en mesure de confirmer l’authenticité du document, le *National Post* a hésité à publier les allégations. Toutefois, d’autres organes de presse ont publié certains détails à propos du document divulgué clandestinement et de la mention du prétendu prêt de 23 040 \$. Finalement, le *National Post* a repris la nouvelle et relaté que le *Globe and Mail*, SunMedia et CTV avaient déjà publié certains détails du prétendu document bancaire, tout comme l’*Ottawa Citizen*.

C. *L’engagement de confidentialité modifié*

[16] Au cours de la semaine suivant la réception du document, X a demandé à rencontrer M. McIntosh, lequel a ensuite consulté un avocat et des directeurs de la rédaction. X a confirmé avoir envoyé l’enveloppe et a demandé qu’elle soit détruite. X a dit craindre que la police tente de l’utiliser pour l’identifier par des empreintes digitales ou une analyse génétique et que l’enveloppe puisse le ou la relier au document bancaire que l’on disait maintenant contrefait. Dans son témoignage, M. McIntosh a déclaré : [TRADUCTION] « [J’ai dit à X] que je ne m’en débarrasserais pas. Je lui ai dit que ce serait inapproprié et tout à fait contraire à l’éthique compte tenu de la grave allégation, à savoir que le document était contrefait » (affidavit de M. McIntosh, par. 225).

[17] Rappelons toutefois que M. McIntosh a également dit : [TRADUCTION] « J’ai affirmé [à X] qu’aussi longtemps que je croirais qu’il/elle n’avait pas fourni le document dans le but délibéré de m’induire en erreur, mon engagement de

should irrefutable evidence to the contrary emerge, our agreement of confidentiality would become null and void. X agreed to these terms” (McIntosh Affidavit, at para. 227).

[18] Mr. McIntosh testified that X explained that he or she had received the document in the mail anonymously and had passed it on to Mr. McIntosh in the belief that it was genuine. On at least one other occasion, Mr. McIntosh had been able to confirm the authenticity of documents that X claimed to have received in the same way. In his evidence, Mr. McIntosh said he was satisfied that X was a reliable source and that the loan authorization was genuine. If the loan authorization was a forgery, Mr. McIntosh did not believe X knew that.

D. *The Police Investigation*

[19] In the meantime, the BDBC had complained to the RCMP about the alleged forgery. On June 7, 2001, RCMP Corporal Roland Gallant met with Mr. McIntosh, his editor-in-chief, another editor of the *National Post*, and its legal counsel. Counsel for the *National Post* refused Corporal Gallant’s request to produce the documents. The police officer was told that before becoming aware of the police investigation, Mr. McIntosh had placed the document and envelope in a secure location not on *National Post* premises. Mr. McIntosh declined to identify the secret source.

[20] Corporal Gallant indicated that he would have to apply for a search warrant and assistance order in relation to two offences — forgery (creation of a false document with the intent that it be acted upon as genuine) and uttering a forged document (attempting to cause Mr. McIntosh and the *National Post* to act on the forged loan authorization as if it were genuine). The *National Post* expressed “grave concerns” about the constitutionality of a warrant to disclose a confidential source and requested an *inter partes* hearing on the warrant application.

confidentialité demeurerait valide. J’ai ajouté que si une preuve contraire irréfutable devait apparaître, notre entente de confidentialité serait nulle et sans effet. X a accepté ces conditions » (affidavit de M. McIntosh, par. 227).

[18] Selon la déposition de M. McIntosh, X a expliqué avoir reçu le document par la poste d’une source anonyme et, le croyant authentique, l’avoir ensuite transmis à M. McIntosh. Ce dernier avait déjà pu, au moins une fois, confirmer l’authenticité de documents que X affirmait avoir reçus de la même façon. M. McIntosh a affirmé être convaincu que X était une source fiable et que l’autorisation de prêt était authentique. Si l’autorisation de prêt était un document contrefait, M. McIntosh ne croyait pas que X le savait.

D. *L’enquête policière*

[19] Entre-temps, la BDC avait porté plainte à la GRC au sujet du prétendu document contrefait. Le 7 juin 2001, le caporal Roland Gallant de la GRC a rencontré M. McIntosh, son rédacteur en chef, un autre directeur de la rédaction et l’avocat du *National Post*. L’avocat a refusé de communiquer les documents que le caporal Gallant demandait. Le policier a été informé que M. McIntosh, avant d’apprendre qu’une enquête policière était en cours, avait mis le document et l’enveloppe en lieu sûr, hors des locaux du *National Post*. M. McIntosh a refusé de révéler l’identité de la source secrète.

[20] Le caporal Gallant a indiqué qu’il devrait demander un mandat de perquisition et une ordonnance d’assistance relativement à deux infractions — faux (fabrication d’un faux document avec l’intention qu’on y donne suite comme authentique) et emploi d’un document contrefait (tentative de faire agir M. McIntosh et le *National Post* à l’égard de l’autorisation de prêt contrefaite comme si elle était authentique). Le *National Post* a exprimé « d’importantes réserves » à propos de la constitutionnalité d’un mandat l’obligeant à révéler l’identité d’une source confidentielle et a demandé l’audition *inter partes* de la demande de mandat.

E. *The Search Warrant and Assistance Order*

[21] On July 4, 2002, Corporal Gallant applied to the Ontario Court of Justice for a warrant assistance order stating that the evidence he wished to seize was not available from any other source because the document and envelope formed part of the *actus reus* of these offences and would be required to substantiate any charges. He intended to submit the document and envelope for forensic testing to determine if they had “fingerprints or other identifying markings which might assist in identifying the source of the document”. These other possible identifying markers included saliva, from which a DNA sample could be obtained.

[22] Khawly J. was advised of the desire of the *National Post* for notice and a hearing but decided to proceed *ex parte*. The search warrant and assistance order were issued without written reasons. The intended effect of the assistance order was to require the editor-in-chief of the *National Post* to assist in locating the two documents in question and to make them available to Corporal Gallant.

[23] In relation to procedural protection, the terms of the orders attempted to accommodate the special position of the media. It was provided that the orders were to be served on July 5, 2002. The appellants would thereafter be given a month to consider their position. On August 9, 2002 (or such earlier date as the appellants agreed to) Corporal Gallant was again to attend at the offices of the *National Post* and request production of the BDBC loan authorization and the “associated” brown envelope. The warrant then provided that after waiting two hours (to give the appellants an opportunity for voluntary compliance without prejudice to any subsequent challenge they might see fit to make to the issuance or execution of the warrant) the police officer would then be free to search the *National Post* premises. The police were directed to interfere “as little as possible with the operations of the place being searched and avoid, to the extent

E. *Le mandat de perquisition et l’ordonnance d’assistance*

[21] Le 4 juillet 2002, le caporal Gallant a présenté une demande à la Cour de justice de l’Ontario en vue d’obtenir un mandat et une ordonnance d’assistance, affirmant qu’il ne pouvait obtenir d’une autre source la preuve qu’il désirait saisir parce que le document et l’enveloppe faisaient partie de l’*actus reus* des infractions et étaient nécessaires pour prouver les accusations. Il avait l’intention de soumettre le document et l’enveloppe à une analyse criminalistique afin de déterminer s’ils portaient [TRADUCTION] « des empreintes digitales ou d’autres marques distinctives pouvant servir à identifier la source du document ». Ces autres marques distinctives comprenaient la salive, susceptible de contenir de l’ADN.

[22] Le juge Khawly savait que le *National Post* souhaitait être avisé de la tenue de l’audience et être entendu, mais il a décidé d’entendre la demande *ex parte*. Le mandat de perquisition et l’ordonnance d’assistance ont été décernés sans motifs écrits. L’ordonnance visait à enjoindre au rédacteur en chef du *National Post* d’aider à trouver les deux documents en question et de permettre au caporal Gallant d’y avoir accès.

[23] En fait de protection procédurale, le juge a tenté de tenir compte de la situation très particulière des médias en rédigeant les modalités des ordonnances. Les ordonnances devaient être signifiées le 5 juillet 2002. Les appelants avaient ensuite un mois pour décider comment ils y réagiraient. Le 9 août 2002 (ou à une date antérieure convenue par les appelants), le caporal Gallant devait de nouveau se présenter aux bureaux du *National Post* et demander la production de l’autorisation de prêt de la BDC et de l’enveloppe brune s’y rapportant. Le mandat permettait au policier, après avoir attendu deux heures (pour donner aux appelants la possibilité de se conformer volontairement aux ordonnances sans qu’il soit porté atteinte à leur droit de contester la délivrance ou l’exécution du mandat comme ils le jugeraient indiqué), de fouiller librement les locaux du *National Post*. Les policiers avaient reçu la directive d’entraver [TRADUCTION]

possible, examining any notes, documents, records or lists unconnected with securing the location of the things subject to seizure”. If found, the documents would on request be marked for identification and sealed in a package and delivered for safekeeping to the Ontario Court of Justice. The appellants would then have 14 days to apply “for the continued sealing and return of any things sealed”.

« le moins possible les activités du lieu de la perquisition et [d’]éviter, dans la mesure du possible, d’examiner des notes, documents, dossiers ou listes sans rapport avec la recherche des objets à saisir ». Sur demande, les documents trouvés devaient être identifiés, placés dans un paquet scellé et confiés à la Cour de justice de l’Ontario. Les appelants disposaient ensuite d’un délai de 14 jours pour demander [TRADUCTION] « que la mise sous scellés soit maintenue et que les objets mis sous scellés soient retournés ».

[24] The appellants duly applied to quash the warrant and assistance order. Relying upon a considerably amplified record which included the cross-examination of Mr. McIntosh and the filing of 15 affidavits from experienced journalists on the use and importance of secret sources, Benotto J., the reviewing judge, concluded that while there was “sufficient information to conclude the document was a forgery” (para. 22), there was “only a remote and speculative possibility that the fingerprints were those of the alleged forgerer” and “[d]isclosure of the document will minimally, if at all, advance the investigation while at the same time damage freedom of expression” (para. 79). Accordingly, she set aside the search warrant and assistance order. Her decision was reversed by the Ontario Court of Appeal on February 29, 2008 in reasons jointly authored by Justices Laskin and Simmons (2008 ONCA 139, 89 O.R. (3d) 1). References will be made in what follows to the reasons of the reviewing judge and the Court of Appeal.

[24] Les appelants ont demandé en bonne et due forme l’annulation du mandat et de l’ordonnance d’assistance. Après une amplification considérable du dossier, notamment par le contre-interrogatoire de M. McIntosh et le dépôt de 15 affidavits de journalistes d’expérience sur l’utilisation et l’importance de sources secrètes, la juge Benotto, siégeant en révision, a conclu qu’il y avait [TRADUCTION] « suffisamment de renseignements pour conclure qu’il s’agissait d’un document contrefait » (par. 22), mais qu’il n’existait « qu’une faible possibilité hypothétique que les empreintes digitales soient celles de l’auteur du prétendu faux » et que « [l]a divulgation du document ne fera que très peu, voire aucunement, progresser l’enquête, tout en portant atteinte à la liberté d’expression » (par. 79). Par conséquent, elle a annulé le mandat de perquisition et l’ordonnance d’assistance. Sa décision a été infirmée le 29 février 2008 par la Cour d’appel de l’Ontario, dont les motifs ont été rédigés par les juges Laskin et Simmons (2008 ONCA 139, 89 O.R. (3d) 1). Je me reporterai ci-après aux motifs de la juge siégeant en révision et à ceux de la Cour d’appel.

III. Statutory Provisions

III. Dispositions législatives

[25] *Canadian Charter of Rights and Freedoms*

[25] *Charte canadienne des droits et libertés*

2. Everyone has the following fundamental freedoms:

2. Chacun a les libertés fondamentales suivantes :

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

b) liberté de pensée, de croyance, d’opinion et d’expression, y compris la liberté de la presse et des autres moyens de communication;

8. Everyone has the right to be secure against unreasonable search or seizure.

Criminal Code, R.S.C. 1985, c. C-46

487.01 (1) [Information for general warrant] A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if

(a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;

(b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and

(c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

487.02 [Assistance Order] Where an authorization is given under section 184.2, 184.3, 186 or 188, a warrant is issued under this Act or an order is made under subsection 492.2(2), the judge or justice who gives the authorization, issues the warrant or makes the order may order any person to provide assistance, where the person's assistance may reasonably be considered to be required to give effect to the authorization, warrant or order.

IV. Analysis

[26] The investigation and punishment of crime is vital in a society based on the rule of law but so is the freedom of the press and other media of communication. The general principle that the public has the right to every person's evidence is not absolute. Narrow exceptions have been recognized as necessary to further precisely defined and overriding public interests. Thus the identity of the police informant is shielded from an accused. A civil litigant has no right to know what the opposing party

8. Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives.

Code criminel, L.R.C. 1985, ch. C-46

487.01 (1) [Dénonciation pour mandat général] Un juge de la cour provinciale, un juge de la cour supérieure de juridiction criminelle ou un juge au sens de l'article 552 peut décerner un mandat par écrit autorisant un agent de la paix, sous réserve du présent article, à utiliser un dispositif ou une technique ou une méthode d'enquête, ou à accomplir tout acte qui y est mentionné, qui constituerait sans cette autorisation une fouille, une perquisition ou une saisie abusive à l'égard d'une personne ou d'un bien :

a) si le juge est convaincu, à la suite d'une dénonciation par écrit faite sous serment, qu'il existe des motifs raisonnables de croire qu'une infraction à la présente loi ou à toute autre loi fédérale a été ou sera commise et que des renseignements relatifs à l'infraction seront obtenus grâce à une telle utilisation ou à l'accomplissement d'un tel acte;

b) s'il est convaincu que la délivrance du mandat servirait au mieux l'administration de la justice;

c) s'il n'y a aucune disposition dans la présente loi ou toute autre loi fédérale qui prévoit un mandat, une autorisation ou une ordonnance permettant une telle utilisation ou l'accomplissement d'un tel acte.

487.02 [Ordonnance d'assistance] Le juge ou le juge de paix qui a accordé une autorisation en vertu des articles 184.2, 184.3, 186 ou 188, décerné un mandat en vertu de la présente loi ou rendu une ordonnance en vertu du paragraphe 492.2(2) peut ordonner à toute personne de prêter son assistance si celle-ci peut raisonnablement être jugée nécessaire à l'exécution des actes autorisés, du mandat ou de l'ordonnance.

IV. Analyse

[26] La conduite d'enquêtes criminelles et la sanction des crimes sont essentielles dans une société fondée sur la primauté du droit, mais la liberté de la presse et des autres moyens de communication l'est tout autant. Le principe général selon lequel le public a droit à la preuve émanant de toutes les sources n'est pas absolu. Des exceptions restreintes ont été jugées nécessaires au nom d'intérêts publics rigoureusement définis et prépondérants. Par exemple, l'identité de l'indicateur

privately confided to its lawyer. Spouses cannot generally be compelled to testify against each other. Information pertaining to national security and Cabinet confidences may be withheld on the basis of what is called public interest immunity.

[27] The appellants say that the public interest in getting the Shawinigate story before Canadians, which in part relied on the use of confidential sources, outweighs the public interest in pursuing this particular criminal investigation which they imply may have more to do with avenging political embarrassment than vindicating the rule of law. They ask that this Court quash the general warrant and assistance order issued against them, either because it infringes their freedom of expression under s. 2(b) of the *Charter*, or because it is otherwise unreasonable under s. 8, which guarantees “the right to be secure against unreasonable search or seizure”. In any event, they say, the secret sources are protected by the common law of privilege.

A. *The Importance of Confidential Sources*

[28] It is well established that freedom of expression protects readers and listeners as well as writers and speakers. It is in the context of the *public* right to knowledge about matters of public interest that the legal position of the confidential source or whistleblower must be located. The public has an interest in effective law enforcement. The public also has an interest in being informed about matters of importance that may only see the light of day through the cooperation of sources who will not speak except on condition of confidentiality. Benotto J. accepted the evidence that many important controversies were unearthed only because of secret sources (often internal whistleblowers) including:

1. The tainted tuna scandal, that led to the resignation of the Minister of Fisheries in Canada.

de police n’est pas communiquée à un accusé. Une partie à une instance civile n’a pas le droit de savoir ce que la partie adverse a confié à son avocat. En général, les conjoints ne peuvent être contraints à témoigner l’un contre l’autre. L’exception d’intérêt public permet de refuser de divulguer des renseignements relatifs à la sécurité nationale et des documents confidentiels du Cabinet.

[27] Les appelants prétendent que l’intérêt public à ce que l’affaire Shawinigate soit révélée aux Canadiens, ce qui a été fait en partie grâce à des sources confidentielles, l’emporte sur l’intérêt public à la conduite de l’enquête criminelle qui, selon eux, tient peut-être davantage des représailles pour une situation politique embarrassante que de la défense de la primauté du droit. Ils demandent à la Cour d’annuler le mandat général ainsi que l’ordonnance d’assistance délivrés contre eux parce qu’ils portent atteinte à leur liberté d’expression protégée par l’al. 2b) de la *Charte* ou parce qu’ils sont par ailleurs abusifs au sens de l’art. 8, qui leur garantit le « droit à la protection contre les fouilles, les perquisitions ou les saisies abusives ». Quoiqu’il en soit, à leur avis, les sources secrètes sont protégées par un privilège issu de la common law.

A. *L’importance des sources confidentielles*

[28] Il est bien reconnu que la liberté d’expression protège tant les lecteurs et les auditeurs que les rédacteurs et les orateurs. C’est dans le contexte du droit du *public* d’être informé des affaires d’intérêt public que doit être envisagée la situation juridique de la source confidentielle ou du dénonciateur d’irrégularités. Le public a un intérêt à l’application effective de la loi. Il a aussi un intérêt à ce que lui soit communiquée l’information sur des sujets importants susceptibles de n’être mis au jour qu’avec la collaboration de sources qui ne parleront que sous le couvert de la confidentialité. La juge Benotto a retenu la preuve selon laquelle plusieurs controverses importantes ont été mises au jour uniquement grâce à des sources secrètes (souvent, des employés dénonciateurs), notamment :

1. Le scandale du thon avarié, qui a entraîné la démission du ministre des Pêches du Canada.

- | | |
|--|--|
| <p>2. The story that Airbus Industrie paid secret commissions in the sale of Airbus aircraft.</p> <p>3. The book <i>For Services Rendered</i> about the search for a suspected KGB mole in the RCMP Security Service, and CBC's <i>The Fifth Estate</i> program on that mole, code-named "Long Knife".</p> <p>4. Stories dealing with the City of Toronto's health inspection system for restaurants.</p> <p>5. A story describing the operation of an illegal slaughterhouse that created a major health hazard.</p> <p>6. Stories about the fall of Nortel Networks that contrasted optimistic public forecasts by Nortel executives with internal Nortel discussions warning of a potential devastating market downturn.</p> <p>7. Stories about wrongdoing by members of the RCMP security service in early 1977, including a break-in to obtain documents from a left-wing news agency in Montreal, Agence Presse Libre du Québec, illegal wiretaps in Vancouver and pen-registers.</p> | <p>2. L'information selon laquelle Airbus Industrie a payé des commissions secrètes dans le cadre de la vente d'appareils Airbus.</p> <p>3. Le livre intitulé <i>For Services Rendered</i> relatant l'enquête sur un employé du Service de sécurité de la GRC soupçonné d'être un espion au service du KGB et l'émission <i>The Fifth Estate</i> à CBC sur cet espion, dont le nom de code était « Long Knife ».</p> <p>4. Les informations concernant le système d'inspection sanitaire des restaurants de la ville de Toronto.</p> <p>5. L'information décrivant les activités d'un abattoir illégal qui représentait de graves risques pour la santé.</p> <p>6. Les informations sur la chute de Nortel Networks, lesquelles opposaient les prévisions publiques optimistes des dirigeants de Nortel et les discussions au sein de l'entreprise qui appréhendait un repli éventuel dévastateur du marché.</p> <p>7. Les informations sur le comportement répréhensible de membres du Service de sécurité de la GRC au début de 1977, notamment sur une introduction par effraction dans les locaux d'une agence de presse de gauche située à Montréal, l'Agence Presse Libre du Québec, dans le but de découvrir des documents et sur l'utilisation illégale de dispositifs d'écoute à Vancouver et d'enregistreurs de numéros.</p> |
|--|--|

It is important, therefore, to strike the proper balance between two public interests — the public interest in the suppression of crime and the public interest in the free flow of accurate and pertinent information. Civil society requires the former. Democratic institutions and social justice will suffer without the latter.

[29] The media perspective was forcefully put in a 2005 editorial in *The New York Times*:

In such [whistleblowing] cases, press secretaries and public relations people are paid not to give out the

Il est donc important de trouver le juste équilibre entre deux intérêts publics — l'intérêt public à la répression du crime, qu'exige la société civile, et l'intérêt public à la libre circulation d'informations exactes et pertinentes, sans laquelle les institutions démocratiques et la justice sociale seraient affectées.

[29] Le point de vue des médias a été vigoureusement exprimé dans un article du *New York Times* daté de 2005 :

[TRADUCTION] En pareil cas [de dénonciation d'irrégularités], les attachés de presse et les agents des relations

whole story. Instead, inside sources trust reporters to protect their identities so they can reveal more than the official line. Without that agreement and that trust between reporter and source, the real news simply dries up, and the whole truth steadily recedes behind a wall of image-mongering, denial and even outright lies.

(Editorial, “Shielding a Basic Freedom”, *The New York Times*, September 12, 2005, at p. A20)

[30] If a reporter, usually in consultation with an editor, gives an assurance of confidentiality, professional journalistic ethics understandably command that the promise be kept. The courts have long accepted the desirability of avoiding where possible putting a journalist in the position of breaking a promise of confidentiality or being held in contempt of court. See, e.g., *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 230 C.C.C. (3d) 199. Nevertheless, most journalistic codes of ethics recognize that the promise of confidentiality cannot be absolute, see, e.g., the Canadian Association of Journalists’ *Guidelines for Investigative Journalism* regarding “[u]se of confidential and anonymous sources”.

[31] Our Court has previously recognized the special position of the news media in two search warrant cases that did not involve secret sources, namely *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421, and *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459. In these cases, Cory J., for the majority, emphasized that a justice of the peace or judge must “consider all of the circumstances in determining whether to exercise his or her discretion to issue a warrant” (*Lessard*, at p. 445 (emphasis added)). The majority of the Court laid down nine principles applicable to media cases, and in particular:

The justice of the peace should ensure that a balance is struck between the competing interests of the state in the investigation and prosecution of crimes and the right to privacy of the media in the course of their news

publiques sont payés pour ne pas dévoiler toute l’information. À l’inverse, les sources internes comptent sur les journalistes pour protéger leur identité de façon à pouvoir faire des révélations qui vont au-delà de la version officielle. Sans cette entente et sans la confiance qui unit un journaliste et sa source, les vraies nouvelles se tarissent, et la vérité cède de plus en plus le pas au jeu de l’image, au déni et même aux mensonges éhontés.

(Éditorial, « Shielding a Basic Freedom », *The New York Times*, 12 septembre 2005, p. A20)

[30] Lorsqu’un journaliste s’engage à préserver la confidentialité, habituellement après avoir consulté le rédacteur en chef, la déontologie journalistique exige naturellement qu’il honore sa promesse. Les tribunaux reconnaissent depuis longtemps l’opportunité d’éviter, si possible, au journaliste le choix délicat de violer une promesse de confidentialité ou d’être reconnu coupable d’outrage. Voir p. ex. *St. Elizabeth Home Society c. Hamilton (City)*, 2008 ONCA 182, 230 C.C.C. (3d) 199. Néanmoins, la plupart des codes de déontologie des journalistes reconnaissent que la promesse de confidentialité ne peut être absolue, voir p. ex. *Guidelines for Investigative Journalism* de l’Association canadienne des journalistes à propos du [TRADUCTION] « [r]ecours à des sources confidentielles et anonymes ».

[31] La Cour a déjà reconnu la situation très particulière des médias dans deux affaires concernant des mandats de perquisition auxquelles n’était mêlée aucune source secrète, à savoir *Société Radio-Canada c. Lessard*, [1991] 3 R.C.S. 421, et *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1991] 3 R.C.S. 459. Dans ces arrêts, le juge Cory, au nom de la majorité, a souligné qu’un juge de paix ou un juge doit « examiner toutes les circonstances pour déterminer s’il doit exercer son pouvoir discrétionnaire de décerner un mandat » (*Lessard*, p. 445 (je souligne)). Les juges majoritaires de la Cour ont énoncé neuf principes applicables aux affaires concernant les médias, dont les suivants :

Le juge de paix doit s’assurer qu’on a bien pondéré l’intérêt de l’État à découvrir et à poursuivre les criminels et le droit des médias à la confidentialité des renseignements dans le processus de collecte et de diffusion

gathering and news dissemination. It must be borne in mind that the media play a vital role in the functioning of a democratic society. Generally speaking, the news media will not be implicated in the crime under investigation. They are truly an innocent third party. This is a particularly important factor to be considered in attempting to strike an appropriate balance, including the consideration of imposing conditions on that warrant.

des informations. Il faut se rappeler que les médias jouent un rôle primordial dans le fonctionnement d'une société démocratique. En règle générale, les médias ne sont pas impliqués dans l'acte criminel faisant l'objet de l'enquête. Ils sont vraiment des tiers innocents. C'est un facteur tout particulièrement important à prendre en considération pour essayer de trouver un bon équilibre, notamment en étudiant la possibilité d'assortir ce mandat de certaines conditions.

... Although it is not a constitutional requirement, the affidavit material should ordinarily disclose whether there are alternative sources from which the information may reasonably be obtained and, if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted. [p. 445]

... Bien qu'il ne s'agisse pas d'une exigence constitutionnelle, l'affidavit devrait ordinairement indiquer s'il y a d'autres sources de renseignements raisonnables et, le cas échéant, qu'elles ont été consultées et que tous les efforts raisonnables pour obtenir les renseignements ont été épuisés. [p. 445]

[32] The appellants and their media supporters argue that these principles are too general. The media interest, they say, is not just one of many factors to be taken into account in "all of the circumstances". The *Charter*, they contend, entitles them to greater protection than *Lessard* and *New Brunswick* provide. Thus, armed with ss. 2(b) and 8 of the *Charter*, the appellants seek a re-examination of the existing law. The Court of Appeal in this case, they say, focussed too narrowly on the needs of law enforcement while downplaying, if not effectively ignoring, the broader public interest in the media being able to play its important role as public watchdog. This skewed perspective led the court, the appellants argue, to relieve the Crown of the usual and appropriate onus of establishing that compelled disclosure in this case was a demonstrable limit on the constitutionally guaranteed freedom of expression in a free and democratic society.

[32] Les appelants et les médias qui les appuient soutiennent que ces principes sont trop généraux. Selon eux, l'intérêt des médias ne constitue pas seulement l'un des nombreux facteurs parmi « toutes les circonstances » à prendre en considération. Ils prétendent que la *Charte* leur donne droit à une protection supérieure à celle qui leur est accordée suivant *Lessard* et *Nouveau-Brunswick*. Par conséquent, invoquant l'al. 2b) et l'art. 8 de la *Charte*, les appelants demandent le réexamen du droit en vigueur. Selon eux, la Cour d'appel a trop centré son examen sur les exigences de l'application de la loi et a minimisé, voire ignoré dans les faits, l'intérêt public général à ce que les médias puissent jouer leur important rôle d'observateur critique. Les appelants affirment que cette vision tronquée a amené la cour, en l'espèce, à relever le ministère public de la charge qui lui revient habituellement et à juste titre de démontrer que la divulgation forcée, qui porte atteinte à la liberté d'expression garantie par la Constitution, est justifiée dans le cadre d'une société libre et démocratique.

[33] In *Lessard* and *New Brunswick*, the Court accepted that freedom to publish the news necessarily involves a freedom to gather the news. We should likewise recognize in this case the further step that an important element in the news gathering function (especially in the area of investigative

[33] Dans *Lessard* et *Nouveau-Brunswick*, la Cour a reconnu que la liberté de diffuser les informations emporte nécessairement la liberté de recueillir les informations. Dans la présente affaire, nous devrions faire un pas de plus et reconnaître, de la même façon, que la capacité des médias de

journalism) is the ability of the media to make use of confidential sources. The appellants and their expert witnesses make a convincing case that unless the media can offer anonymity in situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be badly compromised. Important stories will be left untold, and the transparency and accountability of our public institutions will be lessened to the public detriment.

[34] Viewed in this light, the law should and does accept that in some situations the public interest in protecting the secret source from disclosure outweighs other competing public interests — including criminal investigations. In those circumstances the courts will recognize an immunity against disclosure of sources to whom confidentiality has been promised.

[35] In light of these preliminary observations I propose to address the relevant questions with respect to the claim of journalist-confidential source privilege in this case in the following order:

- Firstly, how should the journalists’ claim for protection of secret sources be characterized in law? In particular, does s. 2(b) of the *Charter* create a constitutionally entrenched immunity to protect journalists against the compelled disclosure of secret sources, and if so, in what circumstances may breaches of such an immunity be justified under s. 1?
- Secondly, if there is no such s. 2(b) immunity, is there nevertheless a common law privilege, to be applied in light of the important public interest in freedom of expression, and if so, is it properly conceived of as a class privilege or a case-by-case privilege?

recourir à des sources confidentielles constitue un élément important de la collecte de l’information (surtout dans le domaine du journalisme d’enquête). Les appelants et leurs témoins experts présentent des arguments convaincants pour démontrer que, si les médias ne peuvent assurer l’anonymat dans des situations où les sources se tariraient autrement, la liberté d’expression dans les débats sur des questions d’intérêt public sera grandement compromise. Des faits importants ne seront jamais relatés, et la transparence et l’obligation redditionnelle de nos institutions publiques s’en trouveront amoindries au détriment du public.

[34] Compte tenu de ce qui précède, le droit devrait accepter — et accepte effectivement — que, dans certaines situations, l’intérêt public à protéger la source secrète contre toute divulgation l’emporte sur les autres intérêts publics — y compris la conduite d’enquêtes criminelles. Dans de telles situations, les tribunaux reconnaissent l’existence d’une immunité contre la divulgation des sources auxquelles on a garanti la confidentialité.

[35] À la lumière de ces observations préliminaires, je propose d’aborder dans l’ordre suivant les questions pertinentes concernant la revendication du privilège du secret des sources des journalistes dans le présent dossier.

- Premièrement, comment doit-on caractériser sur le plan juridique le droit revendiqué par les journalistes de protéger leurs sources secrètes? En particulier, l’al. 2b) de la *Charte* accorde-t-il aux journalistes une immunité constitutionnelle contre la divulgation forcée de leurs sources secrètes et, dans l’affirmative, dans quelles circonstances une atteinte à cette immunité serait-elle justifiée au sens de l’article premier?
- Deuxièmement, si l’al. 2b) ne confère aucune immunité de la sorte, existe-t-il néanmoins en common law un privilège applicable en raison de l’importance de l’intérêt public à la liberté d’expression et, dans l’affirmative, s’agit-il d’un privilège générique ou d’un privilège fondé sur les circonstances de chaque cas?

- Thirdly, if the journalist-confidential source privilege is constituted on a case-by-case basis, what are the elements that must be established, and who has the onus to do so? This was the main battleground of this appeal.
- Fourthly, were the elements of a case-by-case privilege established on the expanded record before the reviewing judge here in relation to suppression of the physical evidence described in the general warrant and assistance order?

B. *How Should Journalists' Claims for Protection of Secret Sources Be Characterized in Law?*

[36] The appellants and supporting interveners put forward a number of conceptual models by which to protect the identity of secret sources. None of the parties or interveners asserts an *absolute* protection of sources, but there is a difference of opinion about the provenance of a qualified privilege and its limitations.

(1) The Constitutional Model

[37] The broadest conception was put forward by the intervener Canadian Civil Liberties Association (“CCLA”) supported in part by the intervener the British Columbia Civil Liberties Association (“BCCLA”). In their view, the applicable concept is not a common law privilege but some form of constitutional immunity against compelled disclosure of secret sources. The CCLA argues that a s. 2(b) immunity is established by a claimant showing (i) that he or she is a journalist; (ii) engaged in news gathering activity; (iii) who has acquired information under a promise of confidentiality (transcript, at p. 42). At that point, the CCLA submits, testimonial immunity against disclosure of the source is constitutionally guaranteed subject to the Crown being able to show a countervailing and fact-specific overriding public interest through what the CCLA called “a full press

– Troisièmement, si le privilège du secret des sources confidentielles des journalistes est reconnu au cas par cas, quels éléments doivent être établis et à qui en incombe le fardeau? Il s’agit là de la principale question en litige dans le pourvoi.

– Quatrièmement, les éléments d’un privilège fondé sur les circonstances de chaque cas ont-ils été établis au vu du dossier amplifié dont disposait la juge siégeant en révision relativement à la rétention des éléments de preuve matérielle décrits dans le mandat général et l’ordonnance d’assistance?

B. *Comment doit-on caractériser sur le plan juridique le droit revendiqué par les journalistes de protéger leurs sources secrètes?*

[36] Les appelants et les intervenants qui les appuient ont présenté plusieurs modèles conceptuels pour la protection de l’identité des sources secrètes. Aucune des parties ni aucun des intervenants ne prétend que les sources bénéficient d’une protection *absolue*, mais les opinions diffèrent sur le fondement et les limites d’une immunité relative.

(1) Le modèle constitutionnel

[37] La conception la plus large a été présentée par l’Association canadienne des libertés civiles (« ACLC »), appuyée en partie par l’Association des libertés civiles de la Colombie-Britannique (« ALCCB »), intervenantes en l’espèce. À leur avis, le concept applicable n’est pas un privilège issu de la common law, mais une forme d’immunité constitutionnelle contre la divulgation forcée des sources secrètes. L’ACLC fait valoir qu’une immunité fondée sur l’al. 2b) est établie lorsque celui qui la revendique démontre (i) qu’il est journaliste; (ii) qu’il recueille de l’information; (iii) qu’il a obtenu de l’information en promettant la confidentialité (transcription, p. 42). Selon elle, l’immunité testimoniale contre la divulgation de la source est alors garantie par la Constitution, à moins que le ministère public réussisse à démontrer, par ce que l’ACLC appelle [TRADUCTION] « une analyse

Section 1 analysis” (p. 45). Reliance is placed on *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, which recognized the importance of free expression even in the context of ensuring trial fairness. The BCCLA advances a similar series of propositions derived, it argues, from the dissent of McLachlin J. (now Chief Justice) in *Lessard*.

[38] The position of the CCLA and the BCCLA is built on the premise that protection of confidential sources should be treated as if it were an enumerated *Charter* right or freedom. But this is not so. What is protected by s. 2(b) is freedom of expression. News gathering, while not specifically mentioned in the text of s. 2(b) is implicit in news publication, but there are many techniques of news gathering and it carries the argument too far, in my view, to suggest that each of those news gathering techniques (including reliance on secret sources) should itself be regarded as entrenched in the Constitution. Chequebook journalism is also a routine method of gathering the news, but few would suggest that this too should be constitutionalized. Journalists are quick to use long-range microphones, telephoto lenses or electronic means to hear and see what is intended to be kept private (as in the case of then Finance Minister Marc Lalonde whose budget had to be amended because a cameraman captured parts of what were intended to be secret budget documents on Mr. Lalonde’s desk). Such techniques may be important for journalists (who, unlike prosecutors, have to get along without the power of subpoena), but this is not to say that just because they *are* important that news gathering techniques as such are entrenched in the Constitution.

[39] The courts have leaned against conferring constitutional status on testimonial immunities. Even solicitor-client privilege, one of the most ancient and powerful privileges known to our jurisprudence, is generally seen as a “fundamental and substantive rule of law” (*R. v. McClure*, 2001 SCC

de fond en comble en application de l’article premier » (p. 45), qu’un intérêt public prépondérant lié aux faits s’y oppose. Elle s’appuie sur *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835, qui a reconnu l’importance de la liberté d’expression même lorsque la garantie d’un procès équitable est en cause. L’ALCCB fait valoir des arguments semblables, qui découlent selon elle des motifs dissidents de la juge McLachlin (maintenant Juge en chef) dans *Lessard*.

[38] La position de l’ALC et de l’ALCCB repose sur la prémisse que la protection des sources confidentielles devrait être traitée comme s’il s’agissait d’un droit ou d’une liberté expressément visé par la *Charte*. Or, ce n’est pas le cas. C’est la liberté d’expression qui est garantie à l’al. 2b). Même si elle n’est pas expressément mentionnée à l’al. 2b), la collecte de l’information fait implicitement partie de la publication de l’information. Cependant, il existe de nombreuses façons de recueillir l’information et j’estime que la thèse selon laquelle chacune d’elles (y compris le recours à des sources secrètes) serait protégée par la Constitution pousse l’argument trop loin. La pratique qui consiste à rémunérer les sources est aussi une méthode courante de collecte de l’information, mais rares sont ceux qui diraient que cette méthode devrait également être consacrée dans la Constitution. Les journalistes n’hésitent pas à utiliser des micros longue portée, des téléobjectifs ou des appareils électroniques permettant d’entendre et de voir ce qui est censé être privé (comme le budget du ministre des Finances de l’époque, M. Marc Lalonde, qui avait dû être modifié parce qu’un cameraman avait filmé des extraits de documents budgétaires secrets sur le bureau du ministre). De telles techniques sont peut-être importantes pour les journalistes (qui, contrairement aux poursuivants, ne disposent pas du pouvoir de sommation), mais ce n’est pas parce qu’elles le *sont* qu’elles sont protégées par la Constitution.

[39] Les tribunaux ont hésité à élever les immunités testimoniales au rang de protections constitutionnelles. Même le secret professionnel de l’avocat, l’un des privilèges les plus anciens et les plus puissants reconnus dans notre jurisprudence, est en général considéré comme une « règle de droit

14, [2001] 1 S.C.R. 445, at para. 17), rather than as “constitutional” even though solicitor-client privilege is supported by and impressed with the values underlying s. 7 of the *Charter*.

[40] There are cogent objections to the creation of such a “constitutional” immunity. As recently pointed out in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, the protection attaching to freedom of expression is not limited to the “traditional media”, but is enjoyed by “everyone” (in the words of s. 2(b) of the *Charter*) who chooses to exercise his or her freedom of expression on matters of public interest whether by blogging, tweeting, standing on a street corner and shouting the “news” at passing pedestrians or publishing in a national newspaper. To throw a constitutional immunity around the interactions of such a heterogeneous and ill-defined group of writers and speakers and whichever “sources” they deem worthy of a promise of confidentiality and on whatever terms they may choose to offer it (or, as here, choose to amend it with the benefit of hindsight) would blow a giant hole in law enforcement and other constitutionally recognized values such as privacy.

[41] The law needs to provide solid protection against the compelled disclosure of secret source identities in appropriate situations but the history of journalism in this country shows that the purpose of s. 2(b) can be fulfilled without the necessity of implying a constitutional immunity. Accordingly, a judicial order to compel disclosure of a secret source would not in general violate s. 2(b). There is thus no need on this branch of the case to consider a s. 1 justification.

(2) Class Privilege Model

[42] At common law, privilege is classified as either relating to a class (e.g. solicitor and client privilege) or established on a case-by-case basis. In

fondamentale et substantielle » (*R. c. McClure*, 2001 CSC 14, [2001] 1 R.C.S. 445, par. 17), plutôt que comme une règle « constitutionnelle », et ce, même si le secret professionnel de l’avocat découle et est empreint des valeurs qui sous-tendent l’art. 7 de la *Charte*.

[40] La reconnaissance d’une telle immunité « constitutionnelle » suscite des objections convaincantes. Comme l’a récemment souligné la Cour dans *Grant c. Torstar Corp.*, 2009 CSC 61, [2009] 3 R.C.S. 640, la protection accordée à la liberté d’expression ne se limite pas aux « médias traditionnels », mais elle est accordée à « chacun » (aux termes de l’al. 2b) de la *Charte*), soit à quiconque décide d’exercer sa liberté d’expression sur des questions d’intérêt public, que ce soit en bloguant ou en microbloguant, en criant les « nouvelles » aux passants ou en publiant un article dans un journal national. Conférer une immunité constitutionnelle aux interactions entre un groupe de rédacteurs et d’orateurs aussi hétérogène et mal défini et toute « source » que ces derniers estiment digne d’une promesse de confidentialité, assortie des conditions qu’ils déterminent (ou, comme en l’espèce, modifient rétrospectivement), aurait pour effet de miner considérablement l’application de la loi et d’autres valeurs constitutionnelles, comme le respect de la vie privée.

[41] Le droit doit offrir une solide protection contre la divulgation forcée de l’identité des sources secrètes dans les situations qui le requièrent, mais l’histoire du journalisme au pays démontre que l’objectif de l’al. 2b) peut être atteint sans qu’il soit nécessaire de reconnaître implicitement une immunité constitutionnelle. Ainsi, une ordonnance judiciaire visant à forcer la divulgation d’une source secrète ne va généralement pas à l’encontre de l’al. 2b). Par conséquent, point n’est besoin, pour trancher cet aspect du pourvoi, d’examiner la question de la justification au sens de l’article premier.

(2) Le modèle du privilège générique

[42] En common law, un privilège est soit générique (p. ex. le secret professionnel de l’avocat) soit reconnu au cas par cas. Dans le cas d’un privilège

a class privilege what is important is not so much the content of the particular communication as it is the protection of the type of relationship. Once the relevant relationship is established between the confiding party and the party in whom the confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation. Class privilege necessarily operates in derogation of the judicial search for truth and is insensitive to the facts of the particular case. Anything less than this blanket confidentiality, the cases hold, would fail to provide the necessary assurance to the solicitor's client or the police informant to do the job required by the administration of justice. The law recognizes very few "class privileges" and as Lamer C.J. observed in rejecting the existence of a class privilege for communications passing between pastor and penitent in *R. v. Gruenke*, [1991] 3 S.C.R. 263:

Unless it can be said that the policy reasons to support a class privilege for religious communications are as compelling as the policy reasons which underlay the class privilege for solicitor-client communications, there is no basis for departing from the fundamental "first principle" that all relevant evidence is admissible until proven otherwise. [p. 288]

It is likely that in future such "class" privileges will be created, if at all, only by legislative action.

[43] Journalistic-confidential source privilege has not previously been recognized as a class privilege by our Court (*Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572), and has been rejected by courts in other common law jurisdictions with whom we have strong affinities. The reasons are easily stated. First is the immense variety and degrees of professionalism (or the lack of it) of persons who now "gather" and "publish" news said to be based on secret sources. In contrast to the legal profession there is no formal accreditation process to "licence" the practice of journalism, and no professional organization (such as a law society) to regulate its members and attempt

générique, l'important n'est pas tant le contenu de la communication que la protection du genre de relation. En principe, une fois que la relation nécessaire est établie entre la partie qui se confie et celle à qui elle se confie, les renseignements ainsi confiés sont présumés confidentiels par application du privilège, sans égard aux circonstances. Le privilège générique déroge nécessairement à la recherche judiciaire de la vérité et ne dépend pas des faits de l'espèce. Suivant la jurisprudence, sans cette confidentialité générale, il serait impossible de donner au client de l'avocat ou à l'indicateur de police la garantie nécessaire pour qu'il puisse faire ce que l'administration de la justice exige de lui. Le droit reconnaît très peu de « privilèges génériques » et le juge en chef Lamer a dit ce qui suit en rejetant l'existence d'un privilège générique relatif aux communications entre ministre du culte et fidèle dans *R. c. Gruenke*, [1991] 3 R.C.S. 263 :

À moins que l'on puisse dire que les raisons de principe justifiant l'existence d'un privilège générique en matière de communications religieuses sont aussi sérieuses que les raisons de principe qui sous-tendent le privilège générique en matière de communications entre l'avocat et son client, il n'y a aucun motif de s'écarter du « principe premier » fondamental selon lequel tous les éléments de preuve pertinents sont admissibles jusqu'à preuve du contraire. [p. 288]

Il est probable qu'à l'avenir, tout nouveau privilège « générique » sera créé, le cas échéant, par une intervention législative.

[43] La Cour n'a jamais reconnu le privilège du secret des sources des journalistes comme un privilège générique (*Moysa c. Alberta (Labour Relations Board)*, [1989] 1 R.C.S. 1572) et des tribunaux d'autres ressorts de common law avec lesquels nous avons de grandes affinities l'ont rejeté. Les raisons en sont simples. La première tient à l'immense diversité et au niveau variable de professionnalisme (ou de non-professionnalisme) des personnes qui, de nos jours, « recueillent » et « publient » des informations qu'elles disent avoir obtenues de sources secrètes. Contrairement aux avocats, les journalistes ne sont assujettis à aucun processus d'agrément officiel pour exercer leur

to maintain professional standards. Nor, given the scope of activity contemplated as journalism in *Grant v. Torstar*, could such an organization be readily envisaged.

[44] A second problem arises in determining the respective rights and immunities of the journalist and the source to whom confidentiality has been promised. In the past, secret sources have voluntarily stepped out from the shadows to reveal themselves (as in the *St. Elizabeth Home* case) with or without the journalist's consent. Is the journalist now to be given the right to object because, for example, disclosure might reveal "journalist methods" and "journalistic networks"? I do not think such a restriction would in general serve the public interest in the search for truth. On the other hand, the source cannot be said to be the holder of the privilege if, as here, the journalist reserves the right to "out" the secret source unilaterally if, in the journalist's personal view, the conditions on which anonymity were offered have not been met. In the case of solicitors and their clients, the privilege clearly belongs to the client. Are we to say that journalistic privilege attaches both to the journalist and the secret source? If so, what happens if they fall into disagreement? It is particularly important in the case of class privilege that the rules be clear in advance to all participants so that they may govern themselves accordingly.

[45] Thirdly, no one has suggested workable criteria for the creation or loss of the claimed immunity. The evidence shows that journalistic practice varies considerably as to when promises of confidentiality are properly made. Many news organizations require the journalist to consult with an editor before making such a promise. Others, including the *National Post*, do not. What would be the criteria for such a class privilege to apply? The various media codes of ethics are themselves in disagreement. In the present case, Mr. McIntosh's original

profession et ils n'appartiennent à aucune organisation professionnelle (comme le barreau) ayant pour fonction de régir la conduite de ses membres et de veiller au respect de normes professionnelles. De plus, compte tenu de la fourchette d'activités définies dans l'arrêt *Grant c. Torstar* comme relevant du journalisme, une telle organisation pourrait difficilement voir le jour.

[44] Une deuxième difficulté consiste à déterminer quels sont les droits et les immunités dont bénéficient respectivement le journaliste et la source à laquelle on a promis la confidentialité. Il est déjà arrivé que des sources secrètes sortent de l'ombre de leur propre gré (comme dans l'affaire *St. Elizabeth Home*) avec ou sans le consentement du journaliste. Doit-on accorder au journaliste le droit de s'y opposer au motif, par exemple, que des « méthodes » et des « réseaux journalistiques » risquent d'être révélés? Je ne crois pas qu'une telle restriction servirait en général l'intérêt public à la recherche de la vérité. En revanche, la source ne saurait être considérée comme le bénéficiaire du privilège si, comme en l'espèce, le journaliste se réserve unilatéralement le droit de révéler son identité dans le cas où, à ses yeux, les conditions de la promesse de confidentialité n'auraient pas été respectées. En ce qui a trait au secret professionnel de l'avocat, le client est sans contredit le bénéficiaire du privilège. Faut-il conclure que le privilège journalistique est l'apanage à la fois du journaliste et de la source secrète? Dans l'affirmative, qu'arrive-t-il s'ils ont un différend? Il est particulièrement important, lorsqu'il s'agit d'un privilège générique, que tous les participants connaissent les règles dès le départ pour pouvoir agir en conséquence.

[45] Troisièmement, aucun critère pratique n'a été proposé pour définir les circonstances entraînant la création ou la perte de l'immunité revendiquée. La preuve révèle des pratiques journalistiques qui varient considérablement quant aux conditions relatives à la conclusion d'ententes de confidentialité valables. En effet, de nombreux organes de presse exigent de leurs journalistes qu'ils consultent un directeur de la rédaction avant de faire une telle promesse. D'autres, comme le *National Post*, ne l'exigent pas. Quels critères serviraient à déterminer

“blanket, unconditional promise of confidentiality to protect the identity of both X and Y” (McIntosh Affidavit, at para. 156 (emphasis added)) became burdened with an important condition. It was retroactively modified by Mr. McIntosh to last only so long as Mr. McIntosh personally “believed that [X] had not provided the document to deliberately mislead me” (para. 227). Mr. McIntosh says his secret source agreed to this modification, but at that point he or she was not in much of a bargaining position having already delivered up the documents to the appellants. What are the limits to retroactive modification of the journalist’s undertaking? Must the secret source consent to the modification? The media argument raises more questions about the scope and operation of the claimed class privilege than it provides solutions.

[46] Fourthly, while the result of any privilege is to impede the search for truth, and thereby to run the risk of an injustice to the persons opposed in interest to the claimant, a class privilege is more rigid than a privilege constituted on a case-by-case basis. It does not lend itself to the same extent to be tailored to fit the circumstances.

[47] In the United Kingdom, no class privilege attached to journalists at common law: *Ashworth Hospital Authority v. MGN Ltd.*, [2002] UKHL 29, [2002] 1 W.L.R. 2033. The same is true in Australia, see *McGuinness v. Attorney-General of Victoria* (1940), 63 C.L.R. 73, and *John Fairfax & Sons Ltd. v. Cojuangco* (1988), 165 C.L.R. 346. In the United States, the concurring judgment of Powell J. in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which from the media perspective put the best face on the majority’s rejection of any First Amendment journalistic privilege, rejected a class privilege but held open the possibility of a case-by-case privilege:

si un privilège générique s’applique? Les différents codes d’éthique des médias se contredisent. En l’espèce, M. McIntosh avait d’abord consenti [TRADUCTION] « une promesse générale et inconditionnelle de confidentialité pour protéger l’identité de X et de Y » (affidavit de M. McIntosh, par. 156 (je souligne)), mais il a par la suite assorti cette promesse d’une condition importante. Il l’a modifiée rétroactivement de sorte qu’elle soit valide tant qu’il croirait personnellement « que [X] n’avait pas fourni le document dans le but délibéré de [l’]induire en erreur » (par. 227). Selon M. McIntosh, sa source secrète a acquiescé à cette modification, mais elle ne jouissait pas d’un grand pouvoir de négociation à ce moment-là, puisqu’elle avait déjà transmis les documents aux appelants. Quelles limites restreignent la modification rétroactive de la promesse donnée par le journaliste? La source secrète doit-elle consentir à la modification? L’argument des médias soulève plus de questions qu’il n’apporte de solutions à propos de l’étendue et de l’application du privilège générique revendiqué.

[46] Quatrièmement, bien qu’un privilège, quel qu’il soit, ait pour effet de nuire à la recherche de la vérité, et de créer de ce fait un risque d’injustice pour les personnes dont l’intérêt est opposé à l’intérêt de celui qui l’invoque, un privilège générique est plus rigide qu’un privilège reconnu au cas par cas. Il n’est pas possible de le redéfinir aussi librement pour l’adapter aux circonstances.

[47] Au Royaume-Uni, les journalistes ne jouissent d’aucun privilège générique issu de la common law : *Ashworth Hospital Authority c. MGN Ltd.*, [2002] UKHL 29, [2002] 1 W.L.R. 2033. Il en est de même en Australie, voir *McGuinness c. Attorney-General of Victoria* (1940), 63 C.L.R. 73, et *John Fairfax & Sons Ltd. c. Cojuangco* (1988), 165 C.L.R. 346. Aux États-Unis, le juge Powell, dans son opinion concordante dans l’affaire *Branzburg c. Hayes*, 408 U.S. 665 (1972), qui a présenté le rejet par la majorité d’un privilège journalistique fondé sur le Premier Amendement sous son jour le plus positif du point de vue des médias, a rejeté l’argument du privilège générique sans toutefois écarter la possibilité d’un privilège fondé sur les circonstances de chaque cas :

... if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. [Emphasis added; p. 710.]

[48] In the United Kingdom, journalistic-secret source privilege is now covered by the *Contempt of Court Act 1981* (U.K.), 1981, c. 49. The U.K. Parliament has created a presumptive immunity in defined circumstances, subject to being overridden on enumerated grounds. Section 10 provides that:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Statutes offering similar protections exist in a number of states of the United States. In Australia there exists a “shield law” both at the federal level and in New South Wales. New Zealand enacted such a law in 2006.

[49] In Canada a number of legislative proposals have been considered both at the federal and provincial level but none has received legislative approval.

(3) The Case-by-Case Model of Privilege

[50] The appellants themselves advocate a balancing of interests based on Professor Wigmore’s

[TRADUCTION] ... si le journaliste est appelé à fournir des renseignements qui n’ont qu’un lien indirect et ténu avec l’objet de l’enquête, ou s’il a d’autres raisons de croire que son témoignage met en cause ses relations avec des sources confidentielles sans qu’il y ait nécessité légitime en ce qui concerne l’application de la loi, il pourra présenter une requête en annulation au tribunal, et une ordonnance de confidentialité pourrait être rendue. La revendication du privilège devrait être appréciée en fonction des faits, par la recherche d’un juste équilibre entre la liberté de la presse, d’une part, et l’obligation pour tous les citoyens de témoigner sur un comportement criminel, d’autre part. La conciliation au cas par cas de ces intérêts constitutionnels et sociétaux d’importance capitale concorde avec la méthode éprouvée traditionnellement utilisée pour statuer sur de telles questions. [Je souligne; p. 710.]

[48] Au Royaume-Uni, le privilège relatif aux sources secrètes des journalistes est maintenant régi par la *Contempt of Court Act 1981* (R.-U.), 1981, ch. 49. Le législateur y a créé une présomption d’immunité qui s’applique dans certaines circonstances, mais qui peut être réfutée pour des motifs précis. L’article 10 prévoit ce qui suit :

[TRADUCTION] Aucun tribunal ne peut ordonner à une personne de dévoiler, et nul ne peut être reconnu coupable d’outrage au tribunal pour avoir refusé de dévoiler, l’identité de la source des renseignements contenus dans une publication dont il est responsable, à moins qu’il ne soit établi, de l’avis du tribunal, que la divulgation est nécessaire dans l’intérêt de la justice, de la sécurité nationale ou de la prévention des troubles et du crime.

Des lois offrant des protections semblables ont été adoptées par plusieurs États américains. En Australie, une loi fédérale et une loi de la Nouvelle-Galles du Sud garantissent la confidentialité des sources. La Nouvelle-Zélande a adopté une loi de ce genre en 2006.

[49] Au Canada, un certain nombre de projets de loi ont été étudiés tant au fédéral qu’au provincial, mais aucun n’a été adopté.

(3) Modèle du privilège fondé sur les circonstances de chaque cas

[50] Les appelants eux-mêmes préconisent une pondération des intérêts fondée sur le test du

criteria for establishing confidentiality at common law as set out in *McClure*, at para. 29, *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 30, *Gruenke*, at pp. 289-90, and *Slavutych v. Baker*, [1976] 1 S.C.R. 254, at p. 261, but is informed by the *Charter* guarantee of freedom of expression and the rights “of the press and other media of communication”. It is well established that the common law may properly be developed to reflect *Charter* values: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 603; *Ryan*, at para. 21.

[51] As mentioned, *Gruenke* dealt with a claim for confidentiality for communications passing between priest and penitent or, more broadly, “religious communications” (pp. 290-91). Just as the claim here is said to grow out of the s. 2(b) *Charter* guarantee of freedom of expression, the claim in *Gruenke* was said to be required by the s. 2(a) *Charter* guarantee of freedom of religion and conscience. Despite the constitutional protection for freedom of religion, the Court rejected the existence of a class privilege but adopted instead Professor Wigmore’s distillation and synthesis of a wide range of situations where privilege has been recognized on a case-by-case basis. Here the law finds a mechanism with the necessary flexibility to weigh up and balance competing public interests in a context-specific manner.

[52] When applied to journalistic secret sources, the case-by-case privilege, if established on the facts, will not necessarily be restricted to testimony, i.e. available only at the time that testimony is sought from a journalist in court or before an administrative tribunal. The protection offered may go beyond a mere rule of evidence. Its scope is shaped by the public interest that calls the privilege into existence in the first place. It is capable, in a proper case, of being asserted against the issuance or execution of a search warrant, as in *O’Neill v. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389 (Ont. S.C.J.). The scope of the case-by-case privilege will depend, as does its very existence, on a case-by-case analysis, and may be total or partial (*Ryan*, at para. 18).

professeur Wigmore pour établir la confidentialité en common law, comme il est énoncé dans *McClure*, par. 29, *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157, par. 30, *Gruenke*, p. 289-290, et *Slavutych c. Baker*, [1976] 1 R.C.S. 254, p. 261. Ce privilège s’inspirerait de la liberté d’expression garantie par la *Charte* et des droits « de la presse et des autres moyens de communication ». Il est bien établi que la common law peut évoluer pour refléter les valeurs consacrées dans la *Charte* : *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, p. 603; *Ryan*, par. 21.

[51] Comme je l’ai déjà signalé, l’arrêt *Gruenke* portait sur la confidentialité des communications entre ministre du culte et fidèle ou, en termes plus généraux, sur les « communications religieuses » (p. 290-291). Tout comme la liberté d’expression garantie par l’al. 2b) de la *Charte* est invoquée à l’appui du présent pourvoi, la liberté de conscience et de religion garantie par l’al. 2a) servait de fondement à la revendication dans *Gruenke*. Malgré la protection que la Constitution accorde à la liberté de religion, la Cour a nié l’existence d’un privilège générique, mais elle a retenu la synthèse faite par le professeur Wigmore de situations très diverses dans lesquelles un privilège a été reconnu au cas par cas. Le droit y trouve un mécanisme suffisamment flexible pour soupeser et mettre en balance les intérêts publics contradictoires, selon le contexte.

[52] Dans le cas de la protection des sources secrètes des journalistes, le privilège fondé sur les circonstances de chaque cas, s’il est établi au vu des faits, ne s’applique pas nécessairement qu’au témoignage, c.-à-d. au moment où le journaliste est contraint à témoigner devant un tribunal judiciaire ou administratif. La protection offerte peut déborder la simple règle de preuve. Sa portée dépend de l’intérêt public auquel elle doit son existence. Elle peut, dans certains cas, être opposable à la délivrance ou à l’exécution d’un mandat de perquisition, comme dans l’affaire *O’Neill c. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389 (C.S.J. Ont.). Le privilège fondé sur les circonstances de chaque cas peut être absolu ou partiel et sa portée dépend, comme son existence même, d’une analyse effectuée au cas par cas (*Ryan*, par. 18).

[53] The “Wigmore criteria” consist of four elements which may be expressed for present purposes as follows. First, the communication must originate in a confidence that the identity of the informant will not be disclosed. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be “sedulously fostered” in the public good (“Sedulous[ly]” being defined in the *New Shorter Oxford English Dictionary on Historical Principles* (6th ed. 2007), vol. 2, at p. 2755, as “diligent[ly] . . . deliberately and consciously”). Finally, if all of these requirements are met, the court must consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth. See *Wigmore on Evidence* (McNaughton Rev. 1961), vol. 8, at § 2285; *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (3rd ed. 2009), at paras. 14.19 *et seq.*; D. M. Paciocco and L. Stuesser, *The Law of Evidence* (5th ed. 2008), at pp. 254-59. Further, as Lamer C.J. commented in *Gruenke*:

This is not to say that the Wigmore criteria are now “carved in stone”, but rather that these considerations provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court. [p. 290]

[54] It is of passing interest that Professor Wigmore himself was not a supporter of journalistic-secret source privilege. He described an early legislative attempt to craft a shield law (Maryland, 1923) “as detestable in substance as it is crude in form”. He predicted (wrongly) that it “will probably remain unique” (*Wigmore on Evidence* (2nd ed. 1923), vol. 5, at § 2286, n. 7).

[53] Le test ou « critère de Wigmore » comporte quatre volets qui peuvent se résumer comme suit dans le contexte qui nous occupe. Premièrement, les communications doivent avoir été transmises confidentiellement avec l’assurance que l’identité de l’informateur ne serait pas divulguée. Deuxièmement, le caractère confidentiel doit être essentiel aux rapports dans le cadre desquels la communication est transmise. Troisièmement, les rapports doivent être des rapports qui, dans l’intérêt public, devraient être « entretenus assidûment », adverbe qui évoque l’application constante et la persévérance (selon le *New Shorter Oxford English Dictionary on Historical Principles* (6^e éd. 2007), vol. 2, p. 2755, le terme anglais « *sedulous[ly]* » utilisé par Wigmore signifie : « *diligent[ly]* [. . .] *deliberately and consciously* »). Enfin, si toutes ces exigences sont remplies, le tribunal doit déterminer si, dans l’affaire qui lui est soumise, l’intérêt public que l’on sert en soustrayant l’identité à la divulgation l’emporte sur l’intérêt public à la découverte de la vérité. Voir *Wigmore on Evidence* (rév. McNaughton 1961), vol. 8, § 2285; *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (3^e éd. 2009), par. 14.19 *et suiv.*; D. M. Paciocco et L. Stuesser, *The Law of Evidence* (5^e éd. 2008), p. 254-259. De plus, le juge en chef Lamer, dans *Gruenke*, a fait le commentaire suivant :

Cela veut dire non pas que le critère de Wigmore est maintenant « gravé dans la pierre », mais plutôt que ces considérations constituent un cadre général à l’intérieur duquel des considérations de principe et les exigences en matière de recherche des faits peuvent être évaluées et comparées en fonction de leur importance relative dans l’affaire particulière soumise à la cour. [p. 290]

[54] Il est intéressant de noter que le professeur Wigmore lui-même n’était pas en faveur d’un privilège du secret des sources des journalistes. Une mesure législative visant à prévoir une telle protection dès 1923 au Maryland lui semblait [TRADUCTION] « tout aussi déplorable sur le plan du fond que grossière sur le plan de la forme ». À l’égard de cette mesure, il a prédit (à tort) : [TRADUCTION] « elle demeurera sans doute un cas isolé » (*Wigmore on Evidence* (2^e éd. 1923), vol. 5, § 2286, n^o 7).

[55] However, the world of journalism has moved on since Professor Wigmore's day. The role of investigative journalism has expanded over the years to help fill what has been described as a democratic deficit in the transparency and accountability of our public institutions. The need to shine the light of public scrutiny on the dark corners of some private institutions as well is illustrated by Benotto J.'s reference to corporate delinquencies in the list reproduced above at para. 28. Professor Wigmore's criteria provide a workable structure within which to assess, in light of society's evolving values, the sometimes-competing interests of free expression and the administration of justice and other values that promote the public interest. This will provide the necessary flexibility and an opportunity for growth that is essential to the proper function of the common law.

C. Proceeding on a Case-by-Case Basis, What Are the Elements That Must Be Established, and Who Bears the Burden of Proof?

[56] There is little disagreement about the first two Wigmore criteria. The media accepts that privilege can only be claimed where the communication is made *explicitly* in exchange for a promise of confidentiality. Wigmore was concerned with the confidentiality of the *contents* of the communication itself (which is not the issue here because it was the mutual intention of the journalist and the source to make the content of the communication public). However, I think the rationale underlying the Wigmore criteria may be applied equally to a new role, namely the maintenance of the confidentiality of the *identity* of the source. Secondly, the necessity for confidentiality is the *raison d'être* for the existence of the privilege. If the source does not insist on confidentiality as a condition precedent to the disclosure then no promise of confidentiality will be made and no privilege arises. Journalists prefer in any event to have a source on the record to enable their readers or listeners to evaluate its likely credibility.

[57] The third criterion (that the source-journalist relationship is one that should be "sedulously

[55] Toutefois, la presse a bien évolué depuis l'époque du professeur Wigmore. Le rôle du journalisme d'enquête s'est élargi au fil des ans pour combler ce qui a été décrit comme un déficit démocratique dans la transparence et l'obligation redditionnelle de nos institutions publiques. La nécessité de mettre aussi au jour, à la faveur d'un examen public, les facettes obscures de certaines institutions privées ressort de l'allusion aux délits commis par des entreprises, faite par la juge Benotto, dans la liste reproduite précédemment au par. 28. Le test du professeur Wigmore fournit un cadre pratique pour apprécier, au gré des changements de la société, les intérêts à la liberté d'expression et à l'administration de la justice, qui s'opposent parfois, ainsi que d'autres valeurs d'intérêt public. Il offre ainsi la souplesse nécessaire et une occasion propice à l'évolution, qui est indispensable au bon fonctionnement de la common law.

C. Dans une analyse au cas par cas, quels éléments doivent être établis et à qui en incombe le fardeau?

[56] Les deux premiers volets du test de Wigmore ne suscitent guère de débat. Les médias conviennent qu'un privilège ne peut être invoqué que si la communication est faite *expressément* sous le sceau de la confidentialité. Le professeur Wigmore s'intéressait au caractère confidentiel du *contenu* même de la communication (qui n'est pas en jeu en l'espèce, car le journaliste et sa source souhaitaient tous les deux rendre public le contenu de la communication). Or, je pense que le raisonnement qui sous-tend le test de Wigmore pourrait s'appliquer tout autant à une nouvelle fin, c'est-à-dire lorsqu'il s'agit de maintenir secrète l'*identité* de la source. Deuxièmement, l'exigence de confidentialité est la raison d'être de l'existence du privilège. Si la source n'insiste pas pour faire de la confidentialité une condition préalable à la divulgation, aucune promesse de confidentialité n'est faite et le privilège n'existe pas. Les journalistes préfèrent de toute façon pouvoir citer leurs sources pour que les lecteurs ou les auditeurs puissent en apprécier la crédibilité.

[57] Le troisième volet du test (selon lequel les rapports source-journaliste devraient, dans l'intérêt

fostered” in the public good) introduces some flexibility in the court’s evaluation of different sources and different types of “journalists”. The relationship between the source and a blogger might be weighed differently than in the case of a professional journalist like Mr. McIntosh, who is subject to much greater institutional accountability within his or her own news organization. These distinctions need not be canvassed in detail here since the appellants have made out on their evidence, in my opinion, that in general the relationship between professional journalists and their secret sources is a relationship that ought to be “sedulously” fostered and no persuasive reason has been offered to discount the value to the public of the relationship between Mr. McIntosh and his source(s) in this particular case.

[58] The fourth Wigmore criterion does most of the work. Having established the value to the public of the relationship in question, the court must weigh against its protection any countervailing public interest such as the investigation of a particular crime (or national security, or public safety or some other public good).

[59] Underlying this analysis is the need to achieve proportionality in striking a balance among the competing interests.

[60] The appellants argue that once the first three Wigmore criteria are established the onus should switch to the Crown (or other party seeking disclosure) to show why, on a balance of probabilities, disclosure should be ordered (Factum, at para. 62). This is particularly so in the search warrant context, they argue, because the court is dealing with the state as a prosecutorial antagonist and the media as a bystander to the crime. Indeed, in this case, the media is in a sense the intermediate *victim* of the alleged crime (but has made no complaint). The eventual intended victim was the then Prime Minister. This three steps forward one step backward argument with respect to onus is unpersuasive because it presupposes that a privilege arises after the third step and is then subject to rebuttal by the opposing party at the fourth step. However,

public, être « entretenus assidûment ») offre une certaine souplesse à la cour appelée à évaluer le cas de différentes sources et de différents types de « journalistes ». Ainsi, il se peut qu’on accorde un poids différent à la relation entre une source et un blogueur qu’à celle qu’entretiennent une source et un journaliste professionnel comme M. McIntosh, qui est tenu à une obligation redditionnelle beaucoup plus rigoureuse au sein de son organe de presse. Nul besoin d’analyser ces distinctions en détail puisque les appelants ont, à mon avis, prouvé que le rapport entre un journaliste professionnel et ses sources secrètes est une relation qui doit généralement être « assidûment » entretenue, et aucune raison convaincante n’a été avancée pour atténuer l’importance, pour le public, des rapports entre M. McIntosh et sa ou ses sources dans la présente affaire.

[58] C’est donc le quatrième volet du test de Wigmore qui sera le plus déterminant. Une fois établie l’importance pour le public des rapports en question, le tribunal doit mettre en balance la protection de ces rapports et tout autre intérêt public opposé, comme la tenue d’une enquête sur un crime précis (ou la sécurité nationale, la sécurité publique ou une autre considération intéressant le bien collectif).

[59] Cette analyse est guidée par l’objectif d’une certaine proportionnalité dans la recherche d’un équilibre entre les intérêts qui s’opposent.

[60] Les appelants font valoir qu’une fois les trois premiers volets du test de Wigmore établis, il revient au ministère public (ou à toute autre partie cherchant à obtenir la divulgation) de démontrer pourquoi, suivant la prépondérance des probabilités, il y a lieu d’ordonner la divulgation (mémoire, par. 62). D’après eux, cela est d’autant plus vrai dans le contexte d’une demande de mandat de perquisition parce que, devant le tribunal, l’État agit à titre de poursuivant et le média à titre de simple observateur du crime. En fait, en l’espèce, le média est en un sens la *victime* intermédiaire du crime reproché (mais il n’a pas porté plainte). La véritable cible du crime était le premier ministre de l’époque. Cet argument relatif au fardeau de la preuve, qui nous fait faire trois pas en avant, puis un pas en arrière, n’est pas convaincant parce qu’il suppose que le

this is not the case. Until the media have met all *four* Wigmore criteria no journalistic source privilege arises. The evidence is presumptively compelling and admissible. It is the media that advances the proposition that the public interest in protecting its secret source outweighs the public interest in the criminal investigation. The burden of persuasion therefore lies on the media. That said, I expect that onus will rarely play a pivotal role at the fourth step, where “[t]he exercise is essentially one of common sense and good judgment” (*Ryan*, at para. 32).

[61] The weighing up will include (but of course is not restricted to) the nature and seriousness of the offence under investigation, and the probative value of the evidence sought to be obtained, measured against the public interest in respecting the journalist’s promise of confidentiality. The Crown argues that the existence of any crime is sufficient to vitiate a privilege but that is too broad a generalization. The *Pentagon Papers* case originated in circumstances amounting to an offence, yet few would now argue that the publication of the true facts in that situation was not in the greater public interest.

[62] The underlying purpose of the investigation, as inferred from the objective circumstances, is also relevant at the fourth stage. When investigative reporting strikes at those in power it would not be unexpected that those in power including the police may wish to strike back. There may be circumstances where the criminal investigation appears to be contrived to silence improperly the secret source, and in such cases the court may decline to order production. Thus, in *O’Neill*, an investigation was launched under the *Security of Information Act* to identify the secret source of a leak to a reporter for the *Ottawa Citizen*. The reviewing judge, Ratushny J. found that the RCMP sought the warrant with the intent to intimidate the reporter into giving up her sources. The result, the police might have expected,

privilege prend naissance après la troisième étape et que son existence peut ensuite être réfutée par la partie adverse à la quatrième étape. Or, ce n’est pas le cas. Jusqu’à ce que le média ait satisfait aux *quatre* volets du test de Wigmore, aucun privilège ne protège la source du journaliste. Il existe une présomption selon laquelle toute preuve est admissible et le tribunal peut en ordonner la production. C’est le média qui affirme que l’intérêt public à ce que sa source soit protégée l’emporte sur l’intérêt public à ce qu’une enquête criminelle soit menée à bien. Il lui incombe donc d’en faire la preuve. Cela étant dit, à mon avis, le fardeau de la preuve jouera rarement un rôle décisif à la quatrième étape où « [i]l s’agit essentiellement de faire preuve de bon sens et de discernement » (*Ryan*, par. 32).

[61] On mettra en balance (entre autres, bien sûr), d’un côté, la nature et la gravité de l’infraction faisant l’objet de l’enquête et la valeur probante des éléments que l’on cherche à obtenir et, de l’autre côté, l’intérêt public à ce que la promesse de confidentialité faite par un journaliste soit respectée. Le ministère public soutient que la seule existence d’un crime suffit pour annuler un privilège, mais il s’agit là d’une généralisation outrancière. L’affaire des documents du Pentagone (*Pentagon Papers*) découle de circonstances constituant une infraction et pourtant, de nos jours, rares sont ceux qui douteraient qu’il n’était pas dans le plus grand intérêt public de faire connaître la vérité.

[62] Le but sous-jacent de l’enquête, qui ressort objectivement des circonstances, est aussi un facteur pertinent à la quatrième étape. Lorsque le reportage d’enquête vise des gens au pouvoir, il ne serait pas surprenant que ces derniers, y compris la police, souhaitent riposter. Dans certaines circonstances, par exemple, il se peut que l’enquête criminelle vise à faire taire la source secrète de façon injustifiée et, dans de tels cas, le tribunal peut refuser d’ordonner la communication. Ainsi, dans *O’Neill*, une enquête a été menée sous le régime de la *Loi sur la protection de l’information* pour identifier la source secrète ayant divulgué clandestinement des renseignements à une journaliste de l’*Ottawa Citizen*. La juge Ratushny, qui siégeait en révision, a conclu que la GRC avait demandé le mandat de perquisition

might well have been to disincline the journalist to publish further material on a story that was embarrassing to both the police and to the government (para. 154). In such a case, the demand to deliver up even physical evidence that would disclose the identity of the secret source might well be refused. That is not this case. The alleged forgery is distinct from whistleblowing. In terms of getting out the truth, the “leak” of a forged document undermines rather than advances achievement of the *purpose* of the privilege claimed by the media in the *public* interest.

[63] In a test of balancing the public interest in disclosure versus the public interest in confidentiality neither the journalist nor the secret source “owns” the privilege. Thus, where a secret source decides for whatever reason to cast aside the cloak of anonymity the public interest no longer “sedulously fosters” the continuation of the confidential relationship in preference to openness and the search for the truth. In such a case, the journalist would have no basis to seek to restrain the self-outing of the secret source. On the other hand, where a journalist decides that the confidentiality arrangement no longer binds (as for example, in this case, if Mr. McIntosh had concluded that the forged bank records had been provided by the source to mislead the *National Post* deliberately, and had thereby, in his view, forfeited its protection), the balance would again tilt in favour of disclosure. The role and function of the privilege is to facilitate the freedom of expression of the media and their readers and listeners. Where the journalist concludes that the relationship in a particular case should no longer be “sedulously” fostered, the substratum of the claimed privilege is eliminated. The *public* interest would no longer be served in the particular case by suppression of the identity, but of course in the event of such disclosure, the source might have some sort of *private* law claim for breach of contract or breach of confidence or other private common law cause of action. Such private law remedies are not before us in this appeal.

dans le but d’intimider la journaliste et de l’inciter à divulguer ses sources. Les policiers s’attendaient peut-être à ce que l’exécution du mandat puisse avoir pour effet de décourager la journaliste de publier d’autres renseignements sur une affaire gênante tant pour la police que pour le gouvernement (par. 154). Dans une situation comme celle-là, même une demande de remise d’éléments de preuve matérielle mettant au jour l’identité de la source secrète pourrait bien être refusée. Ce n’est pas le cas en l’espèce. Le prétendu faux n’a rien à voir avec la dénonciation d’irrégularités. Sur le plan de la découverte de la vérité, la « divulgation clandestine » d’un document contrefait compromet, au lieu d’aider, la réalisation de l’*objectif* du privilège revendiqué par les médias dans l’intérêt *public*.

[63] Dans le cadre de la mise en balance de l’intérêt public à la divulgation et de l’intérêt public à la confidentialité, ni le journaliste, ni la source secrète ne « possède » pour ainsi dire le privilège. Par conséquent, lorsqu’une source secrète décide de lever le voile de l’anonymat, pour quelque raison que ce soit, l’intérêt public ne justifie plus que les rapports confidentiels soient « entretenus assidûment » et leur préfère la transparence et la recherche de la vérité. En pareil cas, le journaliste ne disposerait d’aucun moyen pour empêcher la source de révéler sa propre identité. Par ailleurs, lorsqu’un journaliste détermine qu’il n’est plus lié par l’entente de confidentialité (comme si, en l’espèce, M. McIntosh avait conclu que la source avait transmis les documents bancaires contrefaits dans le but délibéré d’induire le *National Post* en erreur et ne pouvait ainsi plus, selon le journaliste, bénéficier d’une protection), la balance penche également en faveur de la divulgation. Le privilège a pour fonction de faciliter la liberté d’expression des médias ainsi que de leurs lecteurs et auditeurs. Dès que le journaliste est d’avis que les rapports avec une certaine source ne devraient plus être entretenus « assidûment », le fondement du privilège invoqué disparaît. Dans ce cas, il n’est plus dans l’intérêt *public* que l’identité demeure secrète. Toutefois, il se peut bien sûr que la source dispose d’un recours de droit *privé* en common law, notamment pour rupture de contrat ou abus de confiance. De tels recours n’ont pas été plaidés dans le présent pourvoi.

[64] In summary, at the fourth stage, the court will weigh up the evidence on both sides (supplemented by judicial notice, common sense, good judgment and appropriate regard for the “special position of the media”). The public interest in free expression will *always* weigh heavily in the balance. While confidential sources are not constitutionally protected, their role is closely aligned with the role of the “freedom of the press and other media of communication”, and will be valued accordingly but, to repeat, at the end of the analysis the risk of non-persuasion rests at all four steps on the claimant of the privilege.

[65] At this point it is important to remind ourselves that there is a significant difference between testimonial immunity against compelled disclosure of secret sources and the suppression by the media of relevant physical evidence. If a client walks into a lawyer’s office and leaves a murder weapon covered with fingerprints and DNA evidence on the lawyer’s desk the law would not allow the lawyer to withhold production of the gun on the basis of solicitor-client confidentiality, notwithstanding the thoroughgoing protection that the law affords that relationship. In *R. v. Murray* (2000), 144 C.C.C. (3d) 289 (Ont. S.C.J.), the court affirmed this principle in the case of a lawyer charged with suppressing sexual abuse tapes. Journalists, too, have no blanket right to suppress physical evidence of a crime, even where its production may disclose the identity of a confidential source. The immunity, where it exists, is situation specific.

[66] After the hearing of this appeal, counsel for the appellants provided us with a copy of the recent decision of the European Court of Human Rights in *Financial Times Ltd. v. The United Kingdom*, [2009] ECHR 2065 (BAILII), where a corporate plaintiff was ultimately denied access to confidential source documents. In that case the plaintiff Interbrew, a Belgian brewing company, brought civil proceedings in the United Kingdom to obtain from the media leaked documents that, it claimed,

[64] En résumé, à la quatrième étape, le tribunal soupèse la preuve appuyant les deux thèses (complétée par les faits admis d’office et ceux qui relèvent du bon sens, du discernement et de la prise en compte de la « situation très particulière des médias »). L’intérêt public à la liberté d’expression joue *toujours* un grand rôle dans la pondération. Bien que les sources confidentielles ne jouissent pas d’une protection constitutionnelle, leur rôle est étroitement lié à celui de la « liberté de la presse et des autres moyens de communication » et l’importance qu’on lui accorde est à l’avenant. Cependant, je le répète, c’est la partie qui revendique le privilège qui assume en définitive le risque de non-persuasion à chacune des quatre étapes.

[65] À ce stade-ci, il est important de se rappeler qu’il y a une grande différence entre l’immunité testimoniale contre la divulgation forcée des sources secrètes et la rétention d’éléments de preuve matérielle et pertinente par les médias. Si un client entre dans le cabinet d’un avocat et dépose sur son bureau l’arme du crime couverte d’empreintes digitales et génétiques, l’avocat n’est pas autorisé en droit à ne pas la remettre au nom du secret professionnel et ce, malgré la protection exhaustive que le droit accorde aux rapports entre un avocat et son client. La cour a confirmé ce principe dans l’affaire *R. c. Murray* (2000), 144 C.C.C. (3d) 289 (C.S.J. Ont.), concernant un avocat accusé d’avoir caché l’existence des bandes vidéo montrant des agressions sexuelles. Les journalistes ne bénéficient pas eux non plus d’un droit général de retenir un élément de preuve matérielle, même si la production de cet élément risque de révéler l’identité d’une source confidentielle. L’immunité, lorsqu’elle s’applique, est liée aux faits de l’espèce.

[66] Après l’audition du présent pourvoi, l’avocat des appelants nous a fourni une copie de la décision récente de la Cour européenne des droits de l’homme dans l’affaire *Financial Times Ltd. c. The United Kingdom*, [2009] ECHR 2065 (BAILII), où une société s’est finalement vu nier l’accès à des documents provenant d’une source confidentielle. Dans cette affaire, la demanderesse Interbrew, une brasserie belge, a intenté des poursuites civiles au Royaume-Uni en vue d’obtenir des médias

had been doctored with false information to suggest Interbrew was on the brink of making a takeover bid for South African Breweries. The allegedly misleading information was published by the media. Thereafter Interbrew suffered a drop in the value of its shares. Interbrew sought production of the documents from the *Financial Times* and other newspapers on the basis that it needed to identify the “source” in order to launch a proposed civil action for breach of confidence against the person or persons unknown. The English Court of Appeal upheld the disclosure order on the ground that the “relatively modest leak” was nevertheless intended to “maximize the mischief” ([2002] EWCA Civ. 274 (BAILII), at paras. 54-55 (leave to appeal denied, House of Lords, 9 July 2002)) and thus fell within the “interests of justice” exception to journalistic source privilege under the U.K. *Contempt of Court Act 1981*. The European Court of Human Rights disagreed. Unlike the plaintiff in the earlier case of *Goodwin v. The United Kingdom*, judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II, Interbrew had not sought an injunction in the U.K. to prevent publication (i.e. did not avail itself of alternate means to avert the damage). Interbrew had also failed to demonstrate that information about the identity of the person who leaked the documents was unavailable from other sources (para. 69). The “alternate sources” principle has been part of Canadian law since *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C.S.C.), as it has been in the U.K. See, e.g., *John v. Express Newspapers*, [2000] 3 All E.R. 257 (C.A.). It was not even clear in the *Financial Post* case that the leaked documents were, in fact, “doctored”.

[67] On the other hand in *Sanoma Uitgevers B.V. v. The Netherlands*, E.C.H.R., No. 38224/03 of 31 March 2009, the court upheld the police

des documents divulgués clandestinement et qui, disait-elle, avaient été falsifiés de manière à laisser entendre qu’elle était sur le point de faire une offre publique d’achat visant South African Breweries. Les renseignements qualifiés de trompeurs ont été publiés dans les médias. La valeur des actions d’Interbrew a par la suite chuté. Interbrew a cherché à obtenir une ordonnance enjoignant au *Financial Times* et à d’autres journaux de communiquer les documents en question parce qu’il était nécessaire qu’elle en identifie la « source » pour tenter une action civile pour abus de confiance contre la ou les personnes inconnues. La Cour d’appel d’Angleterre a confirmé l’ordonnance de communication au motif que la [TRADUCTION] « fuite relativement peu importante » avait néanmoins pour objectif de « causer un maximum de dégâts » ([2002] EWCA Civ. 274 (BAILII), par. 54-55 (autorisation d’appel refusée, Chambre des lords, 9 juillet 2002)) et donc qu’il s’agissait manifestement d’un cas où l’« intérêt de la justice » écartait l’application du privilège du secret des sources des journalistes selon la loi du Royaume-Uni intitulée *Contempt of Court Act 1981*. La Cour européenne des droits de l’homme était de l’avis contraire. À l’opposé du demandeur visé dans l’arrêt antérieur de la Cour européenne des droits de l’homme *Goodwin c. Royaume-Uni* du 27 mars 1996, *Recueil des arrêts et décisions* 1996-II, la demanderesse Interbrew n’avait pas demandé d’injonction au Royaume-Uni pour empêcher la publication (c.-à-d. qu’elle n’avait pas exercé les autres recours dont elle disposait pour prévenir le préjudice). Interbrew n’avait pas non plus réussi à démontrer qu’elle ne pouvait compter sur d’autres sources pour obtenir des renseignements sur l’identité de l’auteur de la fuite (par. 69). Le principe des « autres sources » est reconnu en droit canadien depuis l’arrêt *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (C.S.C.-B.), tout comme il l’est au Royaume-Uni. Voir également *John c. Express Newspapers*, [2000] 3 All E.R. 257 (C.A.). Dans l’affaire *Financial Post*, il n’avait même pas été clairement établi que les documents divulgués clandestinement avaient été « falsifiés ».

[67] Par contre, dans *Sanoma Uitgevers B.V. c. Pays-Bas*, C.E.D.H., n° 38224/03, 31 mars 2009, la cour a confirmé la saisie par la police d’un

seizure of a CD-ROM from the Dutch magazine *Autoweek* which had photographed an illegal street race on a promise of confidentiality to the participants. The court recognized the potential chilling effect of the seizure and breach of confidentiality but said:

... it does not follow *per se* that the authorities are in all such cases prevented from demanding such handover; whether this is so will depend on the facts of the case. In particular, the domestic authorities are not prevented from balancing the conflicting interests served by prosecuting the crimes concerned against those served by the protection of journalistic privilege; relevant considerations will include the nature and seriousness of the crimes in question, the precise nature and content of the information demanded, the existence of alternative possibilities of obtaining the necessary information, and any restraints on the authorities' procurement and use of the materials concerned. [para. 57]

This all sounds very much like the fourth Wigmore step.

[68] Accordingly, in my view, the Strasbourg jurisprudence is not of much assistance to the appellants. Both *Goodwin* and *Financial Times* concerned a leak to the media by corporate whistleblowers of confidential internal documents. Neither involved criminal proceedings. Both involved private actions in the U.K. courts where the corporate plaintiffs, in the view of the European Court of Human Rights, had failed to demonstrate a public interest that outweighed the public interest in free expression. *Sanoma* is closer to our case. It is true that the European Court locates journalist-source privilege in art. 10 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, but that is necessarily so because the Convention is the source of its jurisdiction. For the reasons already stated I would not locate journalist-source protection in s. 2(b) of the *Charter* but in the common law of privilege that is supportive of it.

CD-ROM auprès du magazine néerlandais *Autoweek* qui avait photographié une course de rue illégale après avoir promis la confidentialité aux participants. La cour a reconnu l'effet potentiellement paralysant d'une saisie et de la rupture de la promesse de confidentialité, mais elle a néanmoins dit :

Il n'en résulte toutefois pas forcément que les autorités se trouvent dans tous les cas empêchées de requérir pareille remise; la réponse à cette question dépend des faits de la cause. En particulier, il n'est pas interdit aux autorités internes de mettre en balance les intérêts servis par la poursuite des infractions et ceux servis par la protection des sources journalistiques; parmi les éléments à prendre en compte à cet égard figurent la nature et la gravité des infractions en cause, la nature et le contenu précis des informations demandées, la disponibilité d'autres moyens d'obtenir les informations en question et les modalités selon lesquelles les autorités peuvent se procurer et utiliser les éléments concernés. [par. 57]

Cette interprétation s'apparente tout à fait à la quatrième étape du test de Wigmore.

[68] Je suis donc d'avis que la jurisprudence de Strasbourg n'aide guère les appelants en l'espèce. Tant l'arrêt *Goodwin* que l'arrêt *Financial Times* concernaient des documents internes confidentiels divulgués clandestinement aux médias par des dénonciateurs d'irrégularités. Ni l'un ni l'autre ne portaient sur des poursuites criminelles. Il s'agissait dans les deux cas d'actions privées intentées devant les tribunaux du Royaume-Uni, dans lesquelles, selon la Cour européenne des droits de l'homme, les sociétés demandresses n'avaient pas établi l'existence d'un intérêt public l'emportant sur l'intérêt public à la liberté d'expression. L'affaire *Sanoma* se rapproche davantage de celle dont nous sommes saisis. Certes, aux yeux de la Cour européenne, le privilège du secret des sources des journalistes tire son origine de l'art. 10 de la *Convention de sauvegarde des droits de l'homme et des libertés fondamentales*, 213 R.T.N.U. 221, mais il ne saurait en être autrement puisque c'est cette dernière qui lui confère sa compétence. Pour les raisons déjà mentionnées, j'estime que la protection des sources des journalistes repose non pas sur l'al. 2b) de la *Charte*, mais plutôt sur le privilège de common law qui le sous-tend.

[69] The bottom line is that no journalist can give a source a total assurance of confidentiality. All such arrangements necessarily carry an element of risk that the source's identity will eventually be revealed. In the end, the extent of the risk will only become apparent when all the circumstances in existence at the time the claim for privilege is asserted are known and can be weighed up in the balance. What this means, amongst other things, is that a source who uses anonymity to put information into the public domain maliciously may not in the end avoid a measure of accountability. This much is illustrated by recent events in the United States involving *New York Times* reporter Judith Miller and the subsequent prosecution of her secret source, vice-presidential aide Lewis "Scooter" Libby, arising out of proceedings subsequent to his "outing" of CIA agent Valerie Plame: *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), at pp. 968-72. The simplistic proposition that it is always in the public interest to maintain the confidentiality of secret sources is belied by such events in recent journalistic history.

D. *Were the Elements of a Case-by-Case Privilege Established on the Expanded Record Placed Before the Reviewing Judge in Relation to Suppression of the Physical Evidence?*

[70] The evidence shows that the communication between Mr. McIntosh and source Y respecting the relationship between the Prime Minister and the BDBC originated in confidence. Had confidentiality not been assured the initial information about Mr. Chrétien's contacts with the BDBC would not have been provided. Secondly, confidentiality was essential to the relationship because without the confidentiality there would have been no disclosure and no relationship. Thirdly, given the importance of investigative journalism in exploring potential conflicts of interest in decision making at the highest levels of government, the relationship between the appellants and their secret sources ought in general to be "sedulously fostered". Mr. McIntosh testified to a belief that his source is sincere in denying

[69] En définitive, aucun journaliste ne peut donner une garantie de confidentialité absolue à l'une de ses sources. Une telle entente est toujours assortie d'un risque que l'identité de la source soit dévoilée. Il ne sera possible de connaître l'étendue véritable du risque qu'au moment où le privilège sera revendiqué, lorsque toutes les circonstances seront connues et pourront être soupesées. Cela signifie notamment qu'une source qui profite de l'anonymat pour verser de façon malveillante des renseignements dans le domaine public pourrait être tenue de rendre des comptes. On en trouve un bon exemple dans les faits récents survenus aux États-Unis concernant la journaliste du *New York Times*, Judith Miller, et les poursuites engagées par la suite contre sa source secrète, le secrétaire général du vice-président, Lewis « Scooter » Libby, après qu'il eut « divulgué » l'identité de l'agente de la CIA, Valerie Plame : *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), p. 968-972. Le principe simpliste selon lequel il est toujours dans l'intérêt public de préserver la confidentialité des sources secrètes est démenti par de telles affaires survenues récemment dans le domaine journalistique.

D. *Les éléments d'un privilège fondé sur les circonstances de chaque cas ont-ils été établis au vu du dossier amplifié dont disposait la juge siégeant en révision relativement à la rétention des éléments de preuve matérielle?*

[70] La preuve montre que la communication entre M. McIntosh et la source Y portant sur les rapports entre le premier ministre et la BDC s'est faite sous le sceau de la confidentialité. Sans garantie de confidentialité, les renseignements initiaux concernant les échanges entre la BDC et M. Chrétien n'auraient pas été fournis. Deuxièmement, la garantie de confidentialité était un élément essentiel de la relation : n'eût été de celle-ci, il n'y aurait eu ni divulgation ni relation. Troisièmement, comme il importe que les journalistes d'enquête puissent s'enquérir des conflits d'intérêts potentiels des décideurs au plus haut niveau du gouvernement, la relation entre les appelants et leurs sources secrètes devrait, de façon générale, être « entretenue assidûment ». Dans son témoignage, M. McIntosh a dit

involvement in any offences. The transparency and accountability of government are issues of enormous public importance. The disclosures related to a public controversy over the Prime Minister's relationship to private promoters seeking loans from a federally funded bank. The public ventilation of this controversy, whatever its ultimate merits, was clearly in the public interest.

[71] Coming now to the “weighing up” at the fourth stage of the Wigmore analysis, the alleged crime was described by Mr. McIntosh himself as “serious”. Certainly, the dissemination of forged bank entries designed to “prove” an egregious conflict of personal financial interest on the part of the Prime Minister involving public funds is of sufficient seriousness to justify amply the decision of the police to investigate the criminal allegations within the limits of their ability and resources.

[72] The real possibility of obtaining DNA evidence or other identification from the envelope was first raised as plausible by the source himself or herself in conversation with Mr. McIntosh. This suggests that even X believed that forensic testing could advance the investigation to his or her detriment. Apart from anything else, we do not know what other evidence (if any) the police possess or to whom they are attempting to find a DNA match. While it is appropriate under the fourth Wigmore criterion to assess the likely probative value of the evidence sought, the reviewing judge ought not to have pre-empted the forensic investigation by seemingly prejudging the outcome when she wrote that “[d]isclosure of the document will minimally, if at all, advance the investigation” (para. 79) without first considering all the relevant factors in her assessment.

croire à la sincérité de sa source qui nie être impliquée dans les infractions. La transparence et l'obligation redditionnelle du gouvernement sont des questions d'une importance fondamentale pour le public. En l'espèce, les divulgations concernaient une controverse publique portant sur les rapports du premier ministre avec des promoteurs privés qui cherchaient à obtenir des prêts d'une banque fédérale. Il ne fait pas de doute qu'il était dans l'intérêt public que cette controverse soit révélée, peu importe que, tout compte fait, elle s'avère fondée ou non.

[71] Passons maintenant à la « pondération » de la quatrième étape du test de Wigmore. Selon M. McIntosh lui-même, le prétendu crime était « grave ». Certes, le fait de divulguer des écritures bancaires falsifiées dans le but d'« établir » l'existence d'un conflit flagrant d'intérêts financiers impliquant le premier ministre personnellement et mettant en jeu des fonds publics est suffisamment grave pour justifier amplement la décision de la police d'enquêter sur les allégations criminelles dans les limites de sa compétence et de ses ressources.

[72] La source elle-même, lors d'une conversation avec M. McIntosh, a été la première à qualifier de plausible la possibilité concrète d'obtenir, à partir de l'enveloppe, des éléments de preuve, notamment sous forme d'empreinte génétique, qui permettraient de l'identifier. Cela laisse croire que la source elle-même pensait qu'une analyse criminalistique risquait de faire avancer l'enquête à son détriment. En dépit de tout le reste, nous ne savons pas quels autres éléments de preuve la police détient (si elle en détient) ni quelle est la personne dont elle tente d'associer l'ADN à l'échantillon prélevé. Bien qu'il soit approprié à la quatrième étape du test de Wigmore d'évaluer la valeur probante éventuelle de la preuve recherchée, la juge siégeant en révision n'aurait pas dû anticiper l'enquête criminalistique en préjugant apparemment le résultat en ces termes : [TRADUCTION] « La divulgation ne fera que très peu, voire aucunement, progresser l'enquête » (par. 79) sans d'abord tenir compte de tous les facteurs pertinents dans son évaluation.

[73] My colleague Abella J. shares Benotto J.'s pessimism regarding the fruitfulness of forensic analysis in this case. However, the reviewing judge Benotto J. seemed to focus on fingerprint evidence and did not canvass the merits of DNA analysis, yet DNA analysis is capable of producing results even under exceptionally unpromising circumstances (as was shown in the exoneration of Guy Paul Morin). It cannot be correct that the RCMP forensic lab should be prevented from applying well-established modes of analysis to pieces of physical evidence that have been directly linked to a serious crime simply on the basis that in the end such analysis *may* prove to be unsuccessful. I agree with the Ontario Court of Appeal that the reviewing judge's exercise of discretion was, in these circumstances, unreasonable.

[74] Moreover, let us suppose that Benotto J. and my colleague Abella J. are correct in their scepticism about the outcome of the forensic analysis, and that the envelope is extremely unlikely to disclose the identity of Mr. McIntosh's secret source(s). The court in that event would have to balance the weak public interest in protecting an identity that is not likely to be disclosed against the strong public interest in the production of physical evidence of the offense. On this alternative view, as well, the injury that is likely to result from disclosure does not outweigh the public interest in correctly disposing of the criminal investigation.

[75] In her reasons Abella J. refers to the "fatal disconnect between the envelope, the documents, the identity of X and the alleged forgery" (para. 134). This conclusion hinges on the credibility of X's story that he or she was not the perpetrator of the forgery, but an innocent recipient, who passed it on to Mr. McIntosh in good faith. I do not think the police are required to accept as true the version of events told by X as relayed through Mr. McIntosh, who has his own interest in the outcome of this litigation. The police believe, and all three courts below accepted, that there *are* reasonable grounds to believe that entries had been forged on

[73] Ma collègue, la juge Abella, partage le pessimisme de la juge Benotto à l'égard du résultat de l'analyse criminalistique en l'espèce. Toutefois, la juge Benotto, siégeant en révision, semble s'être surtout intéressée aux empreintes digitales, et non au bien-fondé d'une analyse génétique. Or, l'analyse génétique peut produire des résultats même dans des circonstances très peu prometteuses (comme l'a démontré l'affaire de Guy Paul Morin, qui a été innocenté). Il ne saurait être acceptable que le laboratoire judiciaire de la GRC soit empêché d'appliquer des méthodes d'analyse bien établies à des éléments de preuve matérielle directement liés à un crime grave simplement parce que l'analyse *pourrait*, au bout du compte, se révéler infructueuse. Je souscris à l'opinion de la Cour d'appel de l'Ontario selon laquelle la juge siégeant en révision a exercé son pouvoir discrétionnaire de façon déraisonnable dans les circonstances.

[74] De plus, supposons que la juge Benotto et ma collègue, la juge Abella, ont raison d'être sceptiques au sujet du résultat de l'analyse criminalistique et que l'enveloppe ne révélera très probablement pas l'identité de la ou des sources secrètes de M. McIntosh. Le tribunal devrait alors mettre en balance le faible intérêt public à la protection d'une identité qui ne sera vraisemblablement pas divulguée et le fort intérêt public à la production d'un élément de preuve matérielle de l'infraction. Même de ce point de vue différent, le préjudice qui risque de résulter de la divulgation ne l'emporte pas sur l'intérêt public à ce que l'enquête criminelle soit menée à bien.

[75] De l'opinion de la juge Abella, il n'existe « aucun lien entre l'enveloppe, les documents, l'identité de X et le prétendu faux, et cette absence de lien est fatale » (par. 134). Cette conclusion dépend de la crédibilité du récit de X, qui nie être l'auteur du faux et prétend plutôt avoir reçu le document en toute innocence et l'avoir transmis à M. McIntosh de bonne foi. Je ne pense pas que la police doive tenir pour avérée la version des faits donnée par X et rapportée par M. McIntosh, qui est aussi une partie intéressée dans l'issue du litige. La police estime qu'il *existe* des motifs raisonnables de croire que des écritures sur le document

the alleged bank document. In my view the police need not accept X's anonymous, uncorroborated and self-exculpatory statements as a reason to terminate their investigation of the physical evidence any more than they need accept the disclaimers of any other potential witness to a crime, especially when the witness may also be the perpetrator.

[76] I accept, of course, that the problematic transmission from X must be assessed in light of a history of providing information and documents that turned out to be authentic. Nevertheless, it appears from Corporal Gallant's statement in a passage cited by Abella J. (para. 137), that he had no reason to believe that what X said on this particular occasion was true. Nor was he obliged to proceed on the basis that it was true. A denial of criminal involvement, whether communicated directly or indirectly, is not a sufficient ground to put an end to a serious criminal investigation, even where the intermediate (though not the ultimate) intended victim of the alleged crime happens to be a media organization.

[77] Recognizing the seriousness of the situation Mr. McIntosh says he told the source that notwithstanding his earlier "blanket, unconditional promise of confidentiality to protect the identity of both X and Y" (McIntosh Affidavit, at para. 156), he would not now consider himself bound by that promise "should irrefutable evidence" emerge that the document had been provided "to deliberately mislead me" (para. 227). It is the courts, however, and not individual journalists or media outlets, that must ultimately determine whether the public interest requires disclosure. Mr. McIntosh's belief in the good faith of his source cannot prevent the courts from reaching a different conclusion. Moreover, as Laskin and Simmons J.J.A. noted, "[t]he document and the envelope are not merely pieces of evidence tending to show that a crime has been committed. They are the very *actus reus* [or *corpus delicti*] of the alleged crime" (para. 115). In such circumstances the identity of the individual who shipped Mr. McIntosh the forged document

bancaire ont été contrefaites et les trois tribunaux d'instance inférieure ont retenu cette hypothèse. À mon avis, la police n'est pas plus tenue de mettre fin à son enquête sur un élément de preuve matérielle sur la foi des déclarations anonymes, non corroborées et disculpatoires de X qu'elle n'est tenue d'ajouter foi aux dénégations de tout autre témoin potentiel, à plus forte raison quand ce dernier pourrait être aussi l'auteur du crime.

[76] Je reconnais, bien sûr, qu'il faut examiner la transmission problématique d'un document par X en tenant compte du fait qu'il avait déjà transmis une série de renseignements et de documents qui se sont avérés authentiques. Malgré tout, il ressort d'un passage de la déclaration du caporal Gallant cité par la juge Abella, au par. 137, qu'il n'avait aucune raison de croire que ce que X avait dit cette fois était vrai. Il n'était pas non plus tenu d'agir comme si c'était vrai. La dénégation de toute participation à une activité criminelle, reçue directement de son auteur ou rapportée par quelqu'un d'autre, ne constitue pas une raison suffisante pour mettre un terme à une enquête sur une infraction grave, même si c'est un organe de presse qui est la cible intermédiaire (et non la cible ultime) du prétendu crime.

[77] Reconnaisant la gravité de la situation, M. McIntosh dit avoir mentionné à sa source qu'en dépit du fait qu'il avait préalablement consenti [TRADUCTION] « une promesse générale et inconditionnelle de confidentialité pour protéger l'identité de X et Y » (affidavit de M. McIntosh, par. 156), il ne s'estimerait plus lié par sa promesse si [TRADUCTION] « une preuve contraire irréfutable » devait démontrer que le document lui avait été fourni « dans le but délibéré de [l']induire en erreur » (par. 227). Toutefois, il incombe aux tribunaux, et non aux journalistes ou aux médias, de déterminer si l'intérêt public exige la divulgation. Même si M. McIntosh croit en la bonne foi de sa source, les tribunaux peuvent arriver à une conclusion différente. De plus, comme les juges d'appel Laskin et Simmons l'ont fait remarquer, [TRADUCTION] « [l]e document et l'enveloppe ne sont pas de simples éléments de preuve tendant à démontrer qu'un crime a été commis. Ils constituent l'*actus reus* même [ou le *corpus delicti*] du crime reproché » (par. 115).

has no continuing claim to the protection of the law.

E. *Notwithstanding a Finding That the Appellants Have Not Established Secret Source Privilege on the Facts of This Case, Were the Court Orders Nevertheless “Unreasonable” Within the Meaning of Section 8 of the Charter?*

[78] Even where no privilege is found to exist, warrants and assistance orders against the media must take into account their “special position” and be reasonable in the “totality of circumstances” as required by s. 8 of the *Charter* (“Everyone has the right to be secure against unreasonable search and seizure”). It is not sufficient for the Crown to establish that the formal statutory requirements of ss. 487.01 and 487.02 were met. Physical searches of media premises may be highly disruptive. Searches may cause temporary or even permanent suspension of print publication or broadcasting. Search warrant cases like this one constitute a head-to-head clash between the government and the media, and the media’s ss. 2(b) and 8 interests are clearly implicated. As McLachlin J. observed in her dissenting reasons in *Lessard*:

The ways in which police search and seizure may impinge on the values underlying freedom of the press are manifest. First, searches may be physically disruptive and impede efficient and timely publication. Second, retention of seized material by the police may delay or forestall completing the dissemination of the news. Third, confidential sources of information may be fearful of speaking to the press, and the press may lose opportunities to cover various events because of fears on the part of participants that press files will be readily available to the authorities. Fourth, reporters may be deterred from recording and preserving their recollections for future use. Fifth, the processing of news and its dissemination may be chilled by the prospect that searches will disclose internal editorial deliberations. Finally, the press may resort to self-censorship to conceal the fact that it possesses information that may be of interest to the police in an effort to protect its sources

Dans de telles circonstances, le droit ne saurait continuer à protéger l’identité de la personne qui a transmis le document contrefait à M. McIntosh.

E. *Malgré la conclusion que les appelants n’ont pas établi l’existence d’un privilège protégeant les sources secrètes au vu des faits de l’espèce, les ordonnances étaient-elles néanmoins « abusives » au sens de l’art. 8 de la Charte?*

[78] Même si l’on ne conclut pas à l’existence d’un privilège, les mandats de perquisition et les ordonnances d’assistance visant les médias doivent tenir compte de leur « situation très particulière » et être raisonnables compte tenu de « l’ensemble des circonstances » comme le requiert l’art. 8 de la *Charte* (« Chacun a droit à la protection contre les fouilles, les perquisitions ou les saisies abusives »). Il ne suffit pas pour le ministère public d’établir que les exigences formelles énoncées aux art. 487.01 et 487.02 ont été respectées. Les perquisitions dans les locaux des médias peuvent entraîner de très graves perturbations. Elles peuvent avoir pour effet la suspension temporaire — ou même permanente — de la publication ou de la diffusion. Les affaires concernant des mandats de perquisition comme celle qui nous occupe opposent ouvertement le gouvernement et les médias, et mettent manifestement en jeu les droits que l’al. 2b) et l’art. 8 garantissent aux médias. Comme le dit la juge McLachlin dans ses motifs de dissidence dans l’arrêt *Lessard* :

Les façons dont les perquisitions et les saisies effectuées par la police peuvent empiéter sur les valeurs qui sous-tendent la liberté de la presse sont manifestes. Premièrement, les perquisitions peuvent entraîner des perturbations sur le plan matériel et empêcher la publication efficace et opportune du journal. Deuxièmement, la retenue par les policiers d’objets saisis peut retarder ou empêcher la diffusion complète des informations. Troisièmement, les sources confidentielles de renseignements peuvent craindre de parler aux journalistes, et la presse peut ainsi perdre des chances d’assurer la couverture de différents événements en raison des craintes des participants que les autorités puissent facilement prendre connaissance des dossiers de la presse. Quatrièmement, cela peut dissuader les journalistes d’enregistrer et de conserver les renseignements recueillis pour s’en servir ultérieurement. Cinquièmement, le traitement et la diffusion des informations peuvent être gênés par

and its ability to gather news in the future. All this may adversely impact on the role of the media in furthering the search for truth, community participation and self-fulfillment. [p. 452]

[79] As previously observed, *Lessard* laid down nine conditions to provide a suitable framework to assess s. 8 reasonableness in a s. 2(b) context. The first requirement, of course, is that the statutory prerequisites of s. 487.01 are met. Here the issuing judge held, and both the reviewing judge (Benotto J.) and the Court of Appeal have affirmed, that the police established reasonable grounds to believe that criminal offences have been committed and that information relevant to those offences will be obtained through the use of the search warrant and the supporting assistance order. Nevertheless, the appellants have raised a number of issues in addition to journalistic-confidential source privilege which, they argue, are fatal to the reasonableness of the general warrant and assistance order.

(1) The Issue of Notice to the Media

[80] The reviewing judge, Benotto J., concluded that “[g]iven the public interest at stake, this is one of the rare instances where failure on the part of the justice to give notice amounts to a jurisdictional error” (para. 84 (emphasis added)). It is true that different standards govern before and after a warrant is issued. On the warrant application, the burden is on the police to show reasonable and probable grounds. Once the warrant has been issued, however, the burden shifts to the media applicant on the motion to quash to establish that there was no reasonable basis for its issuance. Moreover, the reviewing judge is generally bound, in deciding this issue, to afford a measure of deference to the determination of the issuing justice.

l'éventualité que les délibérations internes de la rédaction soient rendues publiques à la suite de perquisitions. En dernier lieu, la presse peut recourir à l'auto-censure pour cacher le fait qu'elle est en possession de renseignements qui peuvent intéresser les policiers, dans le but de protéger ses sources et sa capacité de recueillir des informations à l'avenir. Tout cela peut avoir des répercussions néfastes sur le rôle joué par les médias pour favoriser la recherche de la vérité, la participation au sein de la collectivité et l'accomplissement personnel. [p. 452]

[79] Comme je l'ai déjà souligné, l'arrêt *Lessard* a établi neuf conditions pour encadrer convenablement l'analyse du caractère abusif au sens de l'art. 8 dans le contexte de l'application de l'al. 2b). La première veut, évidemment, que les prescriptions de l'art. 487.01 soient respectées. En l'espèce, le juge ayant décerné le mandat a conclu que les policiers avaient démontré l'existence de motifs raisonnables de croire que des infractions criminelles avaient été commises et que le mandat de perquisition ainsi que l'ordonnance d'assistance permettraient d'obtenir des renseignements pertinents, conclusion que tant la juge siégeant en révision (la juge Benotto) que la Cour d'appel ont confirmée. Les appelants ont quand même soulevé, outre la question du privilège du secret des sources des journalistes, un certain nombre d'arguments qui, prétendent-ils, établissent le caractère abusif du mandat de perquisition général et de l'ordonnance d'assistance.

(1) La question de l'avis au média

[80] La juge Benotto, qui siégeait en révision, a statué que [TRADUCTION] « [c]ompte tenu de l'intérêt public en jeu, il s'agit de l'un de ces rares cas où l'omission du juge de donner un avis constitue une erreur juridictionnelle » (par. 84 (je souligne)). Certes, des normes différentes s'appliquent avant et après la délivrance d'un mandat. À l'étape de la demande de mandat, il incombe à la police de démontrer l'existence de motifs raisonnables et probables. Toutefois, une fois le mandat décerné, il revient au média demandeur, dans la requête en annulation, de démontrer l'absence de motifs raisonnables. De plus, le juge siégeant en révision est habituellement tenu, à cet égard, de faire preuve d'une certaine retenue à l'égard de la décision du juge qui a entendu la demande de mandat.

[81] In *R. v. Canadian Broadcasting Corp.* (2001), 52 O.R. (3d) 757 (Ont. C.A.), leave to appeal dismissed, [2001] 2 S.C.R. vii, Moldaver J.A. noted that failure to give notice to the media *could* constitute jurisdictional error in some instances, but he considered such a possibility to be “remote in the extreme” (para. 5).

[82] However, in *New Brunswick* the majority of this Court held that the special position of the media did not “import any new or additional [procedural] requirements” (p. 475). McLachlin J., dissenting in *Lessard*, observed that “[i]n some cases”, a justice *may* wish to hear from media representatives on whether a warrant should issue (p. 457). In her view, notice was a matter of discretion and did not rise to a constitutional requirement. See also *R. v. Serendip Physiotherapy Clinic* (2004), 73 O.R. (3d) 241 (C.A.).

[83] I agree with the appellants that the media should have the opportunity to put their case against the warrant at the earliest reasonable opportunity, but the timing is generally a matter within the discretion of the issuing judge. There may be circumstances where the best course of action will be to proceed as Khawly J. did here. Given the broad definition of “media” and “journalists” covered by a potential claim for privilege, the issuing judge may conclude that an outstanding warrant will help ensure that the evidence is not made to disappear while the merits of issuing a warrant are debated. An issued and outstanding warrant may discourage such misconduct. There will be cases of urgency or other circumstances supporting the need to proceed *ex parte*. In the absence of such circumstances the issuing judge may well conclude that it is desirable to proceed on notice to the media organization rather than *ex parte*.

[84] Moreover, where the issuing judge does proceed *ex parte*, adequate terms must be inserted in

[81] Dans *R. c. Canadian Broadcasting Corp.* (2001), 52 O.R. (3d) 757 (C.A. Ont.), autorisation d’appel refusée, [2001] 2 R.C.S. vii, le juge Moldaver a indiqué que l’omission du juge appelé à décerner le mandat de perquisition de donner un préavis d’audience au média en cause *pouvait* dans certains cas constituer une erreur juridictionnelle, mais il a ajouté que de tels cas seraient [TRADUCTION] « extrêmement rares » (par. 5).

[82] Toutefois, dans *Nouveau-Brunswick*, les juges majoritaires de notre Cour ont statué que la situation très particulière des médias « n’ajoute pas d’exigences [procédurales] supplémentaires » (p. 475). Dans sa dissidence dans l’arrêt *Lessard*, la juge McLachlin a fait remarquer que « [d]ans certains cas » un juge *peut* souhaiter que les médias lui soumettent des observations sur l’opportunité de décerner le mandat demandé (p. 457). Selon elle, la décision d’aviser les médias est discrétionnaire et ne constitue pas une exigence constitutionnelle. Voir également *R. c. Serendip Physiotherapy Clinic* (2004), 73 O.R. (3d) 241 (C.A.).

[83] Je souscris à l’argument des appelants selon lequel les médias devraient avoir la possibilité de faire valoir leurs arguments contre la délivrance du mandat à la première occasion raisonnable, mais ce moment relève généralement du pouvoir discrétionnaire du juge saisi de la demande. Il se peut que, dans certaines circonstances, la meilleure solution consiste à procéder comme l’a fait le juge Khawly. Comme les « médias » et « journalistes » susceptibles de jouir d’un privilège sont définis en termes larges, le juge saisi de la demande peut conclure qu’un mandat non exécuté contribuera à empêcher la disparition de la preuve pendant le débat sur le bien-fondé de la délivrance du mandat. Un mandat délivré, mais non exécuté, peut avoir pour effet de décourager ce type de comportement répréhensible. Des situations d’urgence ou d’autres circonstances peuvent justifier la procédure *ex parte*. Hormis de telles circonstances, le juge saisi de la demande de mandat pourrait conclure à bon droit qu’il est préférable d’aviser le média plutôt que d’entendre la demande *ex parte*.

[84] En outre, lorsque le juge appelé à décerner le mandat entend la demande *ex parte*, il doit

any warrant to protect the special position of the media, and to permit the media ample time and opportunity to point out why, on the facts, the warrant should be set aside. The warrant and assistance order made by Khawly J. in this case allowed a period of a month between its issuance and its execution to ensure the appellants' ability to move to quash it before any seizure occurred. This procedure allowed the appellants to assemble an evidentiary record more ample than would have been possible on short notice. The appellants took full advantage of the opportunity thus provided. The record in this case fills 16 volumes. The review procedure lasted from the filing of an application to quash the warrant dated July 30, 2002 until its disposition by Benotto J. by judgment dated January 21, 2004. In these circumstances I do not believe the issues of onus and deference can or should play a significant role in the outcome, especially given the court's concern for the special position of the media in the context of the public interest.

[85] The appellants contend that the secret source issue was not adequately brought to Khawly J.'s attention. However, even a cursory reading of the affidavit and the attached correspondence included in the Information to Obtain made clear that the secret source issue lay at the heart of the controversy. In an appended letter to Crown counsel dated December 19, 2001, counsel for the *National Post* stated: "The search for this plain brown envelope is justified, if at all, by the belief that it could identify a confidential source . . . we are gravely concerned about the seriousness of the constitutional violation that is about to occur" (emphasis added). Counsel made similar statements in several of the other documents appended to the Information to Obtain. Given the disclosure of these facts, Khawly J. undoubtedly realized that his decision would simply be a stepping stone to a constitutional battle in the higher courts and proceeded accordingly.

assortir ce dernier de conditions adéquates pour protéger la situation très particulière du média et lui donner amplement le temps et la possibilité de justifier l'annulation du mandat, au vu des faits. Le mandat de perquisition et l'ordonnance d'assistance accordés par le juge Khawly en l'espèce prévoyaient un délai d'un mois avant leur exécution de sorte que les appelants puissent demander leur annulation avant toute saisie. Cette façon de procéder leur permettait de constituer un dossier de preuve plus complet que celui qu'ils auraient pu présenter s'ils avaient obtenu un court préavis. Les appelants ont pleinement profité de l'occasion qui leur était ainsi fournie. Leur dossier compte seize volumes. La procédure de révision a débuté au moment du dépôt d'une demande en annulation datée du 30 juillet 2002 et s'est terminée le 21 janvier 2004, date à laquelle la juge Benotto a rendu sa décision. Dans ces circonstances, je ne pense pas que les questions de fardeau et de retenue puissent ou doivent influencer sur le résultat, surtout compte tenu de l'attention que le tribunal a portée à la situation très particulière des médias dans le contexte de l'intérêt public.

[85] Les appelants prétendent que la question de la source secrète n'a pas été bien présentée au juge Khawly. Toutefois, il ressort clairement d'une lecture même rapide de l'affidavit et de la correspondance qui y est jointe, reproduite dans la dénonciation en vue d'obtenir un mandat de perquisition, que la question des sources secrètes est au cœur de la controverse. Dans une lettre datée du 19 décembre 2001 jointe en annexe et destinée à l'avocat du ministère public, l'avocate du *National Post* a écrit ce qui suit : [TRADUCTION] « La perquisition en vue de trouver l'enveloppe brune ordinaire est justifiée, le cas échéant, par la conviction qu'elle permettra éventuellement d'identifier une source confidentielle [. . .] nous sommes très préoccupés par la gravité de la violation constitutionnelle qui est sur le point de se produire » (je souligne). L'avocate a tenu des propos similaires dans plusieurs autres documents annexés à la dénonciation. Compte tenu de ces faits, le juge Khawly a certainement compris que sa décision ne serait qu'une étape d'une bataille constitutionnelle qui se livrerait devant les tribunaux supérieurs et il a agi en conséquence.

[86] Khawly J. gave no reasons for proceeding *ex parte* but the appellants' position was fully protected by the terms of his order and they have not demonstrated any prejudice on that account. I agree with the Court of Appeal that the *ex parte* nature of Khawly J.'s order is not a ground for setting the warrant aside on the facts of this case.

(2) Other Lessard Conditions

[87] Apart from the issue of confidential sources, already dealt with, the general warrant in this case complied with other *Lessard* conditions designed to respect the special position of the media. A detailed affidavit established that the search of a newspaper office was a necessity of last resort, as required by *Re Pacific Press; Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, and the cases that followed. This affirmative finding under s. 487.01 established the grounds for the search and compelled the appellants to invoke confidential source privilege by meeting the Wigmore test, which they failed to do, in my opinion. The order of Khawly J. set out conditions governing the search to ensure "that the media organization will not be unduly impeded [by a physical search] in the publishing or dissemination of the news" (*Lessard*, at p. 445). Perhaps most importantly, the order contained the usual clause directing that any documents seized be sealed on request.

[88] The appellants have not established any deficiency in the procedure laid out in the order.

(3) The Assistance Order

[89] The appellants strongly object to the issuance of an assistance order that directed the editor-in-chief of the *National Post* "to take such steps as are necessary" to give effect to the search warrant (A.R., vol. 1, at p. 7). On the evidence before Khawly J., both Mr. McIntosh and other representatives of the *National Post* had made statements

[86] Le juge Khawly n'a pas motivé sa décision d'entendre la demande *ex parte*, mais la situation des appelants était entièrement protégée par les conditions de l'ordonnance; du reste, ils n'ont démontré aucun préjudice à cet égard. Je souscris à l'opinion de la Cour d'appel selon laquelle le caractère *ex parte* de l'ordonnance rendue par le juge Khawly ne justifie pas l'annulation du mandat au vu des faits de l'affaire.

(2) Autres conditions énoncées dans Lessard

[87] Outre la question des sources confidentielles, dont nous avons traité précédemment, le mandat général respectait les autres conditions énoncées dans l'arrêt *Lessard*, qui visent à tenir compte de la situation très particulière des médias. Un affidavit détaillé a permis d'établir que la perquisition dans les locaux d'un journal était une mesure de dernier recours, ce qu'il faut démontrer suivant *Re Pacific Press; Descôteaux c. Mierzwinski*, [1982] 1 R.C.S. 860, et les jugements ultérieurs. Cette conclusion tirée en application de l'art. 487.01 établit l'existence des motifs justifiant une perquisition et a forcé les appelants à invoquer le privilège du secret des sources en appliquant le test de Wigmore, auquel ils n'ont pas satisfait, à mon avis. L'ordonnance du juge Khawly assortissait la perquisition de conditions visant à garantir « que le média ne soit pas indûment empêché [par une perquisition] de publier ou de diffuser les informations » (*Lessard*, p. 445). Fait peut-être plus important encore, l'ordonnance contenait la condition habituelle prévoyant la mise sous scellés sur demande de tout document saisi.

[88] Les appelants n'ont pas établi que la procédure prévue dans l'ordonnance comportait des vices.

(3) L'ordonnance d'assistance

[89] Les appelants s'opposent énergiquement au prononcé d'une ordonnance d'assistance qui enjoint au rédacteur en chef du *National Post* de prendre [TRADUCTION] « toute mesure jugée nécessaire » pour donner effet au mandat de perquisition (d.a., vol. 1, p. 7). Il ressort de la preuve soumise au juge Khawly que tant M. McIntosh que d'autres

suggesting that while the items described in the search warrant had been deliberately hidden they were within the control of the *National Post*. For instance, on December 13, 2001 counsel for the *National Post* advised Corporal Gallant that “the newspaper does not intend to deliver up to you the ‘plain brown envelope with no return address’ as referred to by Andrew McIntosh . . . at the Toronto meeting” (A.R., vol. 2, at p. 27). Correspondence from counsel for the *National Post* treated the protection of the source’s confidentiality as a *National Post* issue not just a McIntosh issue (A.R., vol. 2, at pp. 27-30). Given the concerted action between Mr. McIntosh and his editor-in-chief, it was entirely reasonable for the issuing judge to enlist the assistance of the editor-in-chief in locating and producing the concealed document.

[90] The appellants claim that the assistance order turns the editor-in-chief into an “agent of the police” in the collection of evidence. This is overly dramatic. Editors, journalists and sources do not, by reason of the important roles they play, cease to be members of the community in which they live. The claim for privilege in this case is rejected. The editor-in-chief, as every other member of the community, is required in the ordinary way to respect the law. From the media perspective, assistance orders requiring the surrender of the document are surely preferable to a physical search of the media premises. In my view, the assistance order was reasonable within the meaning of s. 8 of the *Charter*.

V. Conclusion

[91] I conclude that in the facts of this case the appellants have not established that the public interest in the protection of their secret source(s) outweighs the public interest in the production of the physical evidence of the alleged crimes. For this reason, and also because the warrant as issued was entirely respectful of the special position of the media, I conclude that the warrant and assistance order were properly issued and must be complied with even if the result is to disclose the identity of

représentants du *National Post* ont fait des déclarations selon lesquelles, bien que les éléments dont il est fait mention dans le mandat de perquisition aient été cachés de façon délibérée, le *National Post* en a le contrôle. Ainsi, le 13 décembre 2001, l’avocat du *National Post* a écrit au caporal Gallant : [TRADUCTION] « . . . le journal n’a pas l’intention de vous remettre “l’enveloppe brune ordinaire sans adresse de retour” qu’Andrew McIntosh a mentionnée [. . .] lors de l’entretien tenu à Toronto » (d.a., vol. 2, p. 27). La lettre de l’avocat du *National Post* montre que la question de la protection de la confidentialité de la source touche le *National Post* et pas seulement M. McIntosh (d.a., vol. 2, p. 27-30). Étant donné que M. McIntosh et le rédacteur en chef ont agi de concert, il était tout à fait raisonnable que le juge qui a décerné le mandat ordonne au rédacteur en chef de prêter son assistance en vue de trouver et de produire le document caché.

[90] Les appelants soutiennent que l’ordonnance d’assistance fait du rédacteur en chef un « mandataire de la police » dans la collecte des éléments de preuve. Ils dramatisent indûment la situation. Les rédacteurs en chef, les journalistes et les sources ne cessent pas d’être des membres de leur collectivité en raison du rôle important qu’ils jouent. La revendication du privilège est rejetée dans le présent dossier. Le rédacteur en chef, à l’instar de tout autre membre de la collectivité, doit respecter la loi de la manière ordinaire. Pour les médias, une ordonnance d’assistance exigeant la remise du document est sans doute préférable à une perquisition dans leurs locaux. Selon moi, l’ordonnance d’assistance n’était pas abusive au sens de l’art. 8 de la *Charte*.

V. Conclusion

[91] Compte tenu des faits de la présente affaire, je conclus que les appelants n’ont pas établi que l’intérêt public à la protection de la ou des sources secrètes l’emporte sur l’intérêt public à la production des éléments de preuve matérielle des crimes reprochés. Pour cette raison, et également parce que le mandat de perquisition décerné tenait parfaitement compte de la situation très particulière des médias, j’estime que le mandat et l’ordonnance d’assistance ont été délivrés régulièrement et doivent être

the “secret source” who, on the evidence, “uttered” a forged document. The appeal will therefore be dismissed without costs.

[92] The constitutional questions will be answered as follows:

1. In the context of a relationship between a journalist and a confidential source, when the state seeks to compel the production of information that could identify the source, does the common law Wigmore framework of case-by-case privilege infringe the principle of freedom of the press guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

3. Does s. 487.02 of the *Criminal Code*, R.S.C. 1985, c. C-46, when employed to compel a media organization or journalist to assist in giving effect to an authorization, warrant or order, infringe the principle of freedom of the press guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

5. Does s. 487.02 of the *Criminal Code*, R.S.C. 1985, c. C-46, when employed to compel a media organization or journalist to assist in giving effect to an authorization, warrant or order, infringe s. 8 of the *Canadian Charter of Rights and Freedoms*?

respectés même au risque que soit dévoilée l'identité de la « source secrète » qui, au vu de la preuve, a « mis en circulation » un document contrefait. L'appel est donc rejeté sans dépens.

[92] Les questions constitutionnelles doivent recevoir les réponses suivantes :

1. Dans le contexte des relations entre un journaliste et une source confidentielle, lorsque l'État cherche à contraindre à la production de renseignements susceptibles de permettre l'identification de la source, le cadre du privilège fondé sur les circonstances de chaque cas selon le critère de Wigmore en common law porte-t-il atteinte au principe de liberté de presse garanti par l'al. 2b) de la *Charte canadienne des droits et libertés*?

Réponse : Non.

2. Dans l'affirmative, s'agit-il d'une atteinte constituant une limite raisonnable, établie par une règle de droit et justifiée dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Réponse : Il n'est pas nécessaire de répondre à cette question.

3. L'article 487.02 du *Code criminel*, L.R.C. 1985, ch. C-46, lorsqu'il est invoqué pour contraindre un organe de presse ou un journaliste à prêter son assistance pour l'exécution d'une autorisation, d'un mandat ou d'une ordonnance, porte-t-il atteinte au principe de liberté de presse garanti par l'al. 2b) de la *Charte canadienne des droits et libertés*?

Réponse : Non.

4. Dans l'affirmative, s'agit-il d'une atteinte constituant une limite raisonnable, établie par une règle de droit et justifiée dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Réponse : Il n'est pas nécessaire de répondre à cette question.

5. L'article 487.02 du *Code criminel*, L.R.C. 1985, ch. C-46, lorsqu'il est invoqué pour contraindre un organe de presse ou un journaliste à prêter son assistance pour l'exécution d'une autorisation, d'un mandat ou d'une ordonnance, porte-t-il atteinte à l'art. 8 de la *Charte canadienne des droits et libertés*?

Answer: No.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: It is unnecessary to answer this question.

The following are the reasons delivered by

[93] LEBEL J. — I have read the reasons of my colleagues Binnie and Abella JJ. I agree with Binnie J. that there should be no class privilege to protect communications between journalists and their sources, and that claims of journalist-source privilege should be resolved on a case-by-case basis applying the Wigmore criteria. I am in particular agreement with his weighing of the relevant rights and interests at the last stage of the Wigmore analysis.

[94] However, and with respect for the contrary view of Binnie J., I agree with Abella J. that notice should have been given to the *National Post* in this case. In my opinion, when an application for a search warrant is made, there should, as Abella J. recommends, be a presumptive requirement of notice to the affected media organization. While valid questions may remain as to what constitutes a media organization for the purpose of giving notice, there can be no dispute in the present appeal that a large news media business like the *National Post* belongs to this class.

[95] Even in the most traditional format, the print media, such organizations play a key role in disseminating information and triggering debate on public issues. The process of applying for a search warrant should be sensitive to the need to prevent undue or overly intrusive interference in their operations, regardless of whether the activity in question is investigation, reporting or commentary. The presumption of a notice requirement would allow media organizations to raise their concerns at the

Réponse : Non.

6. Dans l'affirmative, s'agit-il d'une atteinte constituant une limite raisonnable, établie par une règle de droit et justifiée dans le cadre d'une société libre et démocratique au sens de l'article premier de la *Charte canadienne des droits et libertés*?

Réponse : Il n'est pas nécessaire de répondre à cette question.

Version française des motifs rendus par

[93] LE JUGE LEBEL — J'ai pris connaissance des motifs de mes collègues les juges Binnie et Abella. Je conviens avec le juge Binnie qu'aucun privilège générique ne devrait protéger les communications entre les journalistes et leurs sources et que la revendication du privilège du secret des sources des journalistes doit être tranchée au cas par cas par l'application du test de Wigmore. Je souscris tout particulièrement à la pondération par mon collègue des droits et des intérêts pertinents au dernier volet de cette analyse.

[94] Cependant, avec égard pour l'opinion contraire du juge Binnie, je partage l'avis de la juge Abella selon laquelle le *National Post* aurait dû recevoir un préavis en l'espèce. Selon moi, et comme le recommande la juge Abella, une demande de mandat de perquisition devrait être présumée emporter l'obligation de donner un préavis au média visé. Bien qu'on puisse s'interroger avec raison sur ce qui constitue un média aux fins de la communication d'un préavis, il ne fait aucun doute en l'espèce qu'une importante entreprise de presse comme le *National Post* entre dans la définition d'un média.

[95] Même dans leur manifestation la plus traditionnelle, soit la presse écrite, les médias jouent un rôle essentiel en diffusant l'information et en suscitant des débats sur des questions d'intérêt public. La procédure de demande d'un mandat de perquisition doit donc tenir compte de la nécessité d'éviter des interventions indues ou trop envahissantes dans leurs activités, que ces dernières tiennent du journalisme d'enquête, du reportage ou du commentaire. L'obligation présumée d'aviser les médias

first opportunity, thereby precluding or minimizing unnecessary intrusions into their activities.

[96] I emphasize that this requirement should be presumptive. If the applicant feels that notice should not be given because the situation is urgent or because the information or documents being sought might be lost, the application should state this and explain why the notice requirement should be waived. It would then fall to the authorizing judge to determine whether the requirement should in fact be waived and to craft conditions that would, so far as possible, limit interference with the operations of the affected media organization.

[97] In the circumstances of this case, however, I do not think that the lack of notice rendered the search unreasonable. Moreover, since the authorizing judge proceeded on the basis of established law, I would not quash the search warrant. For these reasons, I would dismiss the appeal.

The following are the reasons delivered by

[98] ABELLA J. (dissenting) — The media's role in disseminating information is pivotal in its contribution to public debate and thoughtful decision-making. Where there is a potential impediment to the responsible performance of this role, a careful weighing of interests must be undertaken.

[99] It is also undisputed that the investigation of crime is an important public objective, and that the gathering of relevant evidence is integral to this pursuit. But our justice system has always recognized that not all evidence, however relevant, is necessarily available. The laws of hearsay, informer and solicitor-client privilege, as well as the constitutionally mandated exclusion of evidence under s. 24(2) of the *Canadian Charter of Rights and Freedoms*, are all examples of the way the legal system is engaged in a constant balancing of competing interests, eschewing absolutes and mandating that in each case, a judgment must be

permettrait à ces derniers d'exprimer leurs préoccupations à la première occasion, ce qui réduirait, voire préviendrait, les intrusions inutiles dans leurs activités.

[96] Je souligne que l'existence de cette obligation devrait être présumée. Si, de l'avis du demandeur, l'urgence de la situation ou le risque de perte de l'information ou des documents recherchés le dispense du préavis, il devrait le mentionner dans la demande et expliquer pourquoi il convient de lever l'obligation de donner un préavis. Il reviendra alors au juge saisi de la demande de déterminer si l'exigence doit effectivement être levée et d'assortir le mandat de conditions limitant, dans la mesure du possible, les perturbations dans les activités du média visé.

[97] Toutefois, en l'espèce, je ne crois pas que l'absence de préavis rend la perquisition abusive. De plus, puisque le juge a appuyé sa décision sur des règles de droit établies, je n'annulerais pas le mandat de perquisition. Pour les motifs qui précèdent, je suis d'avis de rejeter l'appel.

Version française des motifs rendus par

[98] LA JUGE ABELLA (dissidente) — En tant que diffuseurs de l'information, les médias jouent un rôle capital par leur contribution au débat public et à la prise de décisions réfléchies. Lorsqu'ils risquent d'être empêchés de s'acquitter de leur rôle de façon responsable, les intérêts en jeu doivent être sopesés avec soin.

[99] Il est en outre incontesté que la réalisation d'enquêtes criminelles constitue un objectif public important et que la collecte d'éléments de preuve pertinents fait partie intégrante du processus d'enquête. Cependant, notre système de justice a toujours reconnu que le recours à certains éléments de preuve, si pertinents soient-ils, peut être exclu. Les règles du oui-dire, les privilèges relatifs aux indicateurs et au secret professionnel de l'avocat et l'obligation constitutionnelle d'exclure des éléments de preuve imposée par le par. 24(2) de la *Charte canadienne des droits et libertés* constituent autant d'exemples de la façon dont le système juridique

made about which of several significant interests should prevail.

[100] In this case, the state seeks to obtain evidence that is of only questionable assistance in connection with a crime of moderate seriousness. It is information that could, theoretically, identify a journalist's confidential source, a person who may not even be in a position to provide information of any utility whatever to the investigation. When both sides of the scales are weighed in this light, there is, in my view, no contest. I would refuse to order disclosure and quash both the search warrant and assistance order.

Background

[101] In April 2001, Andrew McIntosh, an investigative reporter at the *National Post*, received a sealed brown envelope with no return address. Inside the envelope was a document which, Mr. McIntosh later confirmed, was sent to him by "X", a confidential source. X told Mr. McIntosh that the document was received in the mail from another person whose identity X did not know. X also said that he/she had discarded the envelope the document came in, then mailed the document to Mr. McIntosh in a fresh envelope.

[102] The document appeared to be a copy of a loan authorization prepared by the Business Development Bank of Canada in connection with a loan application by a hotel in Quebec, the Auberge Grand-Mère. One of the document's footnotes included a debt to "JAC Consultants", a Chrétien family investment company.

[103] Mr. McIntosh had taken an interest in the relationship between the then Prime Minister and the owner of the Auberge in the late 1990s. He wrote several articles about it in the *National*

requiert constamment la mise en balance d'intérêts divergents, évite les absolus et oblige le tribunal à décider, dans chaque cas, lequel de divers intérêts importants doit l'emporter.

[100] En l'espèce, l'État cherche à obtenir des éléments de preuve qui sont d'une utilité discutable en rapport avec un crime de gravité modérée. Il s'agit de renseignements qui pourraient permettre, en théorie, d'identifier la source confidentielle d'un journaliste, alors que cette source ne serait peut-être même pas en mesure de fournir des renseignements d'une quelconque utilité pour l'enquête. Dans ce contexte, le résultat de la mise en balance des intérêts opposés me paraît d'une évidence implacable. Je suis d'avis de refuser d'ordonner la divulgation et d'annuler le mandat de perquisition et l'ordonnance d'assistance.

Contexte

[101] En avril 2001, Andrew McIntosh, journaliste d'enquête au *National Post*, a reçu une enveloppe brune scellée, qui ne portait pas l'adresse de l'expéditeur. À l'intérieur de l'enveloppe se trouvait un document qui, comme M. McIntosh l'a confirmé par la suite, lui avait été envoyé par « X », une source confidentielle. X a dit à M. McIntosh qu'il/elle avait reçu le document par la poste d'une autre personne dont il/elle ne connaissait pas l'identité. X a également indiqué avoir jeté l'enveloppe dans laquelle se trouvait le document et avoir ensuite transmis ce dernier à M. McIntosh dans une nouvelle enveloppe.

[102] Le document semblait être une copie d'une autorisation de prêt préparée par la Banque de développement du Canada relativement à une demande d'emprunt par un hôtel du Québec, l'Auberge Grand-Mère. L'une des notes de bas de page du document faisait état d'une dette envers « JAC Consultants », une société d'investissement appartenant à la famille Chrétien.

[103] M. McIntosh s'était intéressé au rapport entre le premier ministre de l'époque et le propriétaire de l'Auberge à la fin des années 1990. Il avait publié plusieurs articles à ce sujet dans le *National*

Post, relying heavily on confidential sources whose information he was able to authenticate.

[104] Mr. McIntosh contacted both the Prime Minister's office and the Bank to verify the latest document. Both said the document was a forgery, and the Bank complained to the RCMP about it. This launched an investigation into the forgery claim. At a meeting with Mr. McIntosh and senior *National Post* personnel on June 7, 2001, the RCMP, through Corporal Roland Gallant, asked for the document and the envelope it came in. Corporal Gallant also asked for the identity of the sender. These requests were refused.

[105] Without notice to the *National Post* or Mr. McIntosh, Corporal Gallant obtained a search warrant and an assistance order. Both were quashed by Benotto J. ((2004), 69 O.R. (3d) 427), but were subsequently reinstated by the Ontario Court of Appeal (2008 ONCA 139, 89 O.R. (3d) 1).

[106] With respect, I do not share the view of the majority that the Court of Appeal was correct in concluding that the documents should be disclosed. In my view, the harm caused by the possible disclosure of the identity of the confidential source in this case is far weightier than any benefit to the investigation of the crime. Moreover, unlike the majority, I am of the view that the *National Post* ought to have received notice of the application for a search warrant. As a result, I would allow the appeal.

Analysis

Journalist-Source Privilege

[107] While the nature and extent of a journalist-source privilege have received extensive judicial consideration in the United States, the United Kingdom, and Europe, they have received little evaluation in this Court (see *Moysa v. Alberta*

Post, en grande partie grâce à des renseignements, dont il avait pu vérifier l'authenticité, provenant de sources confidentielles.

[104] M. McIntosh a communiqué avec le Cabinet du premier ministre et la Banque afin de vérifier le dernier document reçu. Dans les deux cas, on lui a répondu que le document était un faux. La Banque a porté plainte à la GRC, qui a ouvert une enquête sur l'allégation de faux. Le 7 juin 2001, lors d'une rencontre avec M. McIntosh et des cadres supérieurs du *National Post*, la GRC a demandé, par l'intermédiaire du caporal Roland Gallant, qu'on lui remette le document et l'enveloppe dans laquelle il était arrivé. Le caporal Gallant a également demandé qu'on lui révèle l'identité de l'expéditeur. Ces demandes ont essuyé un refus.

[105] Sans préavis au *National Post* ni à M. McIntosh, le caporal Gallant a obtenu un mandat de perquisition et une ordonnance d'assistance, qui ont été tous les deux annulés par la juge Benotto ((2004), 69 O.R. (3d) 427), mais rétablis par la suite par la Cour d'appel de l'Ontario (2008 ONCA 139, 89 O.R. (3d) 1).

[106] En toute déférence, je ne partage pas le point de vue des juges majoritaires selon lequel la Cour d'appel a eu raison de conclure que les documents doivent être divulgués. À mon avis, le préjudice causé par la divulgation éventuelle de l'identité de la source confidentielle en l'espèce pèse beaucoup plus dans la balance que n'importe quel avantage dont pourrait bénéficier l'enquête criminelle. En outre, contrairement aux juges majoritaires, j'estime que le *National Post* aurait dû être avisé de la demande de mandat de perquisition. En conséquence, je suis d'avis d'accueillir le pourvoi.

Analyse

Privèlège du secret des sources des journalistes

[107] Bien que la nature et l'étendue de la protection des sources des journalistes aient été abondamment examinées par les tribunaux aux États-Unis, au Royaume-Uni et en Europe, notre Cour ne s'est guère prononcée à leur égard (voir *Moysa c.*

(*Labour Relations Board*), [1989] 1 S.C.R. 1572). It is, as a result, instructive to explore briefly how other jurisdictions have approached the issue.

[108] Its inherent complexity is perhaps best exposed by the opinions in *Branzburg v. Hayes*, 408 U.S. 665 (1972). In this landmark decision, the Supreme Court of the United States dealt with journalist-source privilege for the first time, refusing to recognize any constitutional or common law privilege that would allow a reporter to refuse to reveal confidential information to a grand jury. The grand jury in the United States reviews all relevant evidence to determine whether someone should be charged with a crime and, accordingly, has broad investigatory powers.

[109] In the context of this mandate, White J. unequivocally favoured protecting the ability to investigate crime over protecting the media (p. 695). In concurring reasons, Powell J. qualified White J.'s reasons by advocating a more nuanced approach that would require the examination of each case on its own merits (pp. 709-10).

[110] Stewart J. wrote strong dissenting reasons that reflect unambiguous and overriding support for the protection of an independent media and its ability to disseminate news, including the protection of a journalist's confidential sources (p. 725). His three-part test (at p. 743) for deciding whether such a source should be disclosed can be paraphrased as follows:

- Is there probable cause to believe that the journalist has information that is clearly relevant to a specific probable violation of law?
- Can the information be obtained by alternative means that are less destructive of First Amendment rights? and

Alberta (Labour Relations Board), [1989] 1 R.C.S. 1572). Il est donc instructif de regarder brièvement comment cette question a été traitée ailleurs.

[108] Ce sont peut-être les opinions exprimées dans *Branzburg c. Hayes*, 408 U.S. 665 (1972), qui illustrent le mieux la complexité inhérente de la question. Cet arrêt de principe est le premier dans lequel la Cour suprême des États-Unis s'est prononcée sur le privilège du secret des sources des journalistes, en refusant de reconnaître quelque privilège constitutionnel ou de common law que ce soit qui permettrait à un journaliste de refuser de révéler des renseignements confidentiels à un grand jury. Aux États-Unis, le grand jury examine tous les éléments de preuve pertinents pour déterminer si une personne devrait être inculpée d'un crime et il dispose, en conséquence, de vastes pouvoirs d'enquête.

[109] Dans le contexte de ce rôle du grand jury, le juge White a clairement accordé priorité à la protection de la capacité d'enquêter sur un crime plutôt qu'à la protection des médias (p. 695). Dans ses motifs concordants, le juge Powell a apporté une réserve aux motifs du juge White en préconisant une approche plus nuancée qui obligerait les tribunaux à examiner chaque affaire en fonction des faits qui lui sont propres (p. 709-710).

[110] Le juge Stewart a rédigé une forte dissidence qui témoigne d'un appui prépondérant et non équivoque à la protection de médias indépendants et à leur capacité à diffuser des nouvelles, et notamment à la protection des sources confidentielles des journalistes (p. 725). Le test en trois volets qu'il propose (p. 743) pour décider s'il y a lieu de divulguer une telle source peut être paraphrasé ainsi :

- Existe-t-il un motif probable de croire que le journaliste possède des renseignements manifestement pertinents concernant la perpétration probable d'une violation précise de la loi?
- Peut-on obtenir ces renseignements en ayant recours à d'autres moyens qui porteraient moins atteinte aux droits garantis par le Premier amendement?

- Is there a compelling and overriding interest in the information?

[111] American cases decided after *Branzburg* appear to have preferred Stewart J.'s case-by-case approach, balancing the interests of the press against other societal interests such as crime prevention, prosecution and investigation (see *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005); *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006); Eric M. Freedman, "Reconstructing Journalists' Privilege" (2008), 29 *Cardozo L. Rev.* 1381, at pp. 1384-85; Joel M. Gora, "The Source of the Problem of Sources: The First Amendment Fails the Fourth Estate" (2008), 29 *Cardozo L. Rev.* 1399, at p. 1405).

[112] This balancing is the approach that has been adopted by the Department of Justice in the United States in its policy on the issuance of subpoenas to the news media, as codified in the *Code of Federal Regulations*:

... the approach in every case [of determining whether to request issuance of a subpoena to a member of the news media] must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice. [28 C.F.R. § 50.10(a) (2009)]

[113] The United Kingdom, Europe, Australia and South Africa are at various stages of development in terms of recognizing a journalist-source privilege but, like the United States, appear to apply a balancing approach (see *X Ltd. v. Morgan-Grampian Ltd.*, [1991] 1 A.C. 1 (H.L.); *Ashworth Hospital Authority v. MGN Ltd.*, [2002] UKHL 29, [2002] 1 W.L.R. 2033; E.C.H.R., *Goodwin v. The United Kingdom*, judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II; Peter Bartlett, "Australia", in Charles J. Glasser Jr., ed., *International Libel and Privacy Handbook* (2nd ed. 2009), 66, at p. 77; South Africa, *Criminal Procedure Act*, No. 51 of 1977, ss. 189 and 205; Janice Brabyn, "Protection Against Judicially Compelled Disclosure of the

- Les renseignements présentent-ils un intérêt impérieux et prépondérant?

[111] La jurisprudence américaine postérieure à l'arrêt *Branzburg* semble avoir privilégié la méthode d'examen au cas par cas proposée par le juge Stewart, en soupesant les intérêts de la presse par rapport à d'autres intérêts sociétaux comme la prévention, les poursuites et les enquêtes en matière criminelle (voir *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005); *New York Times Co. c. Gonzales*, 459 F.3d 160 (2d Cir. 2006); Eric M. Freedman, « Reconstructing Journalists' Privilege » (2008), 29 *Cardozo L. Rev.* 1381, p. 1384-1385; Joel M. Gora, « The Source of the Problem of Sources : The First Amendment Fails the Fourth Estate » (2008), 29 *Cardozo L. Rev.* 1399, p. 1405).

[112] C'est cette méthode de mise en balance qu'a retenue le département de la Justice des États-Unis dans sa politique relative à l'assignation des médias d'information, codifiée dans le *Code of Federal Regulations* :

[TRADUCTION] ... la façon de procéder dans chaque cas [pour décider s'il y a lieu de demander l'assignation d'un membre des médias d'information], consiste à trouver un juste équilibre entre l'intérêt du public à la libre diffusion des idées et de l'information et l'intérêt du public à l'application efficace de la loi et à une saine administration de la justice. [28 C.F.R. § 50.10(a) (2009)]

[113] Le Royaume-Uni, l'Europe, l'Australie et l'Afrique du Sud n'en sont pas au même point pour ce qui est de la reconnaissance d'un privilège du secret des sources des journalistes, mais, à l'instar des États-Unis, ils semblent se livrer à un exercice de pondération (voir *X Ltd. c. Morgan-Grampian Ltd.*, [1991] 1 A.C. 1 (H.L.); *Ashworth Hospital Authority c. MGN Ltd.*, [2002] UKHL 29, [2002] 1 W.L.R. 2033; C.E.D.H., arrêt *Goodwin c. Royaume-Uni* du 27 mars 1996, *Recueil des arrêts et décisions* 1996-II; Peter Bartlett, « Australia », dans Charles J. Glasser Jr., dir., *International Libel and Privacy Handbook* (2^e éd. 2009), 66, p. 77; Afrique du Sud, *Criminal Procedure Act*, n^o 51 de 1977, art. 189 et 205; Janice Brabyn, « Protection

Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions" (2006), 69 *Mod. L. Rev.* 895, at pp. 925-27).

[114] This international perspective leads me to agree with Binnie J. that journalist-source privilege should be assessed on a case-by-case basis. I accept the criticism that this approach can create some imprecision, but judges rarely have the luxury of applying absolute rules and adjudicate of necessity in fields of law bounded by designated borders within which discretion is exercised based on the particular circumstances of the case. In other words, balancing competing interests, with all its inherent nuance and imprecision, is a core and routine judicial function.

[115] Like Binnie J. too, I think that this balancing should be done in accordance with the four Wigmore criteria infused with *Charter* values (*Slavutych v. Baker*, [1976] 1 S.C.R. 254; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 30). And finally, I agree that the first three Wigmore criteria are met in this case.*

[116] Where I respectfully part company with Binnie J. is at the fourth and final stage of the

* The first three Wigmore criteria are:

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

(*Wigmore on Evidence* (McNaughton Rev. 1961), vol. 8, at § 2285 (emphasis in original))

Against Judicially Compelled Disclosure of the Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions » (2006), 69 *Mod. L. Rev.* 895, p. 925-927).

[114] Cette perspective internationale m'amène à souscrire à la conclusion du juge Binnie selon laquelle le privilège du secret des sources des journalistes devrait être examiné au cas par cas. J'accepte la critique selon laquelle cette façon de procéder peut engendrer une certaine imprécision, mais les juges ont rarement le luxe d'appliquer des règles absolues et rendent jugement, par la force des choses, dans des domaines du droit circonscrits par des limites bien définies à l'intérieur desquelles ils exercent leur pouvoir discrétionnaire en fonction des circonstances propres à chaque affaire. Autrement dit, la pondération d'intérêts divergents, avec les nuances et l'imprécision qui la caractérisent, représente une fonction judiciaire courante et essentielle.

[115] J'estime aussi, comme le juge Binnie, que la pondération doit s'effectuer en fonction des quatre critères énoncés par Wigmore, de manière à refléter les valeurs consacrées par la *Charte* (*Slavutych c. Baker*, [1976] 1 R.C.S. 254; *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157, par. 30). Enfin, je reconnais que les trois premiers critères énoncés par Wigmore sont remplis en l'espèce*.

[116] En toute déférence, cependant, je ne partage pas l'avis du juge Binnie en ce qui concerne

* Voici les trois premiers critères de Wigmore :

[TRADUCTION]

(1) Les communications doivent avoir été transmises *confidentiellement* avec l'assurance qu'elles ne seraient pas divulguées.

(2) Le *caractère confidentiel doit être* un élément *essentiel* au maintien complet et satisfaisant des relations entre les parties.

(3) Les *relations* doivent être de la nature de celles qui, selon l'opinion de la collectivité, doivent être *entretenu* assidûment.

(*Wigmore on Evidence* (rév. McNaughton 1961), vol. 8, § 2285 (en italique dans l'original))

Wigmore test. This is the step at which the claimant has the burden of demonstrating that “[t]he *injury* that would inure to the [relationship] by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation” (emphasis in original).

[117] This means looking first at what injury is caused by disclosing the material and potentially the identity of the confidential source. The context for considering the *particular* harm in this case is the role of confidential sources generally in the responsible performance of the media’s role. In my view, those sources represent a significant and legitimate journalistic tool, and where reasonable, good faith efforts have been made to confirm the reliability of the information from those sources, their confidentiality ought to be protected.

[118] In *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, this Court recognized that the use of confidential sources could be an integral part of responsible journalism in communicating matters of public interest:

It may be responsible to rely on confidential sources, depending on the circumstances; a defendant may properly be unwilling or unable to reveal a source in order to advance the defence. [para. 115]

(See also *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, 230 C.C.C. (3d) 199.)

[119] In the United States, approximately three dozen states have enacted press “shield laws” protecting the relationship between a news reporter and his or her source. All but one of the remaining states judicially recognize some form of journalist-source privilege. While the scope of the protection varies from state to state, most of these protective laws offer some form of qualified privilege to reporters consistent with the three-part test suggested by Stewart J. in *Branzburg*, that is, source

le quatrième et dernier volet du test proposé par Wigmore. Il s’agit de l’étape à laquelle le demandeur a le fardeau de démontrer qu’il a satisfait au critère selon lequel [TRADUCTION] « [l]e *préjudice* que subiraient les rapports par la divulgation des communications doit être *plus considérable que l’avantage* à retirer d’une juste décision » (en italique dans l’original).

[117] Ceci nous amène à déterminer en premier lieu quel préjudice est causé par la divulgation des documents et, éventuellement, de l’identité de la source confidentielle. En l’espèce, il faut envisager ce préjudice sous l’angle de l’importance générale des sources confidentielles dans l’exercice responsable du rôle des médias. À mon avis, ces sources représentent un outil journalistique important et légitime. Par conséquent, lorsque des mesures raisonnables ont été prises de bonne foi en vue de confirmer la fiabilité des renseignements transmis par de telles sources, la confidentialité de ces dernières mérite d’être protégée.

[118] Dans l’arrêt *Grant c. Torstar Corp.*, 2009 CSC 61, [2009] 3 R.C.S. 640, la Cour a reconnu que le recours à des sources confidentielles pourrait faire partie intégrante du journalisme responsable dans la communication touchant les questions d’intérêt public :

Se fier à des sources confidentielles peut, selon les circonstances, constituer une conduite responsable; un défendeur peut légitimement refuser [ou être incapable] de révéler l’identité d’une source pour se prévaloir de la défense . . . [par. 115]

(Voir également *St. Elizabeth Home Society c. Hamilton (City)*, 2008 ONCA 182, 230 C.C.C. (3d) 199.)

[119] Aux États-Unis, une trentaine d’États environ ont protégé la presse par des mesures législatives visant à préserver la relation entre un journaliste et sa source. Dans tous les autres États sauf un, les tribunaux reconnaissent une forme quelconque de privilège du secret des sources des journalistes. Bien que l’étendue de la protection varie d’un État à l’autre, la plupart de ces mesures législatives offrent aux journalistes une forme quelconque d’immunité relative compatible avec le test en trois

information is protected unless the party seeking disclosure can establish that (i) the information is relevant; (ii) the information is unavailable through other sources; and (iii) a compelling public interest exists for the disclosure of the information (CRS Report for Congress, *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes*, June 27, 2007, at pp. CRS-1 and CRS-2). A bill to provide such protection at the federal level (the *Free Flow of Information Act of 2009*, H.R. 985) was passed by the House of Representatives in March 2009 and is currently before the Senate. Similar legislative protection exists in the United Kingdom, Australia, Austria, France, Germany, Japan, Norway and Sweden (see Kyu Ho Youm, "International and Comparative Law on the Journalist's Privilege: The *Randal* Case as a Lesson for the American Press" (2006), 1 *J. Int'l Media & Ent. L.* 1; Article 19 and Interights, *Briefing Paper on Protection of Journalists' Sources: Freedom of Expression Litigation Project*, May 1998 (online)).

[120] The importance of confidential sources has also been judicially recognized in *John v. Express Newspapers*, [2000] 3 All E.R. 257 (C.A.), at p. 266; *Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 (H.L.), at p. 200; *Ernst v. Belgium* (2004), 39 E.H.R.R. 724, at paras. 91-93 and 102-5; *Voskuil v. Netherlands* (2007), 24 B.H.R.C. 306 (E.C.H.R.), at para. 65; *Prosecutor v. Brdjanin and Talic*, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-99-36-AR73.9, 11 December 2002, at paras. 43-44; *Van den Biggelaar v. Dohmen/Langenberg*, Hoge Raad der Nederlanden (Supreme Court of the Netherlands), 10 May 1996, NJ 1996/578; Bartlett, at p. 77; *Goodwin and Ashworth*.

[121] In the case before us, the information provided by X — and other confidential sources — was crucial to Mr. McIntosh's ability to write about the relationship between the then Prime Minister and the Auberge. And the record in the case before us contains affidavits from several journalists stressing the importance of protecting confidential sources

volets proposé par le juge Stewart dans *Branzburg*, en protégeant l'information fournie par la source à moins que la partie qui en demande la divulgation puisse établir que : (i) l'information est pertinente; (ii) l'information ne peut être obtenue d'autres sources; et (iii) un intérêt public impérieux milite en faveur de la divulgation de l'information (rapport du CRS au Congrès, *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes*, 27 juin 2007, p. CRS-1 et CRS-2). Un projet de loi visant à offrir une telle protection à l'échelle fédérale (*Free Flow of Information Act of 2009*, H.R. 985) a été adopté par la Chambre des représentants en mars 2009 et est actuellement à l'étude au Sénat. Il existe une protection législative semblable au Royaume-Uni, en Australie, en Autriche, en France, en Allemagne, au Japon, en Norvège et en Suède (voir Kyu Ho Youm, « International and Comparative Law on the Journalist's Privilege : The *Randal* Case as a Lesson for the American Press » (2006), 1 *J. Int'l Media & Ent. L.* 1; Article 19 and Interights, *Briefing Paper on Protection of Journalists' Sources: Freedom of Expression Litigation Project*, mai 1998 (en ligne)).

[120] Les tribunaux ont eux aussi reconnu l'importance des sources confidentielles dans *John v. Express Newspapers*, [2000] 3 All E.R. 257 (C.A.), p. 266; *Reynolds c. Times Newspapers Ltd.*, [2001] 2 A.C. 127 (H.L.), p. 200; *Ernst c. Belgique*, C.E.D.H., n° 33400/96, 15 juillet 2003, par. 91-93 et 102-105; *Voskuil c. Netherlands* (2007), 24 B.H.R.C. 306 (C.E.D.H.), par. 65; *Procureur c. Brdjanin et Talic*, Tribunal pénal international pour l'ex-Yougoslavie, n° IT-99-36-AR73.9, 11 décembre 2002, par. 43-44; *Van den Biggelaar c. Dohmen/Langenberg*, Hoge Raad der Nederlanden (Cour suprême néerlandaise), jugement du 10 mai 1996, NJ 1996/578; Bartlett, p. 77; *Goodwin et Ashworth*.

[121] Dans l'affaire qui nous occupe, l'information fournie par X — et d'autres sources confidentielles — était cruciale pour les articles de M. McIntosh au sujet du rapport entre le premier ministre de l'époque et l'Auberge. Le dossier en l'espèce contient des affidavits de plusieurs journalistes qui soulignent l'importance de protéger les sources

in their ability to gather and report the news. Peter Desbarats, former Dean of the Graduate School of Journalism at the University of Western Ontario, stressed the importance of such sources to “investigative journalists [in seeking] to serve the public interest by bringing to public attention matters that people in authority are less than anxious to have subjected to public scrutiny”. In his view:

Given my experience in the world of journalism, it is my opinion that the interests of a free press require the court to recognize the special relationship between a journalist and a confidential source who has been given a promise of secrecy. The giving of promises of secrecy is essential to a free and vigorous press, which in turn is essential to ensuring a well informed citizenry and a vibrant democracy.

As Mr. McIntosh himself stated in his affidavit, echoing the experiences expressed by other journalists in the various affidavits submitted in these proceedings:

... sometimes a source will share either confidential information and/or documents with me for use in a story on the explicit condition that under no circumstances is their identity as the source of the information or documents ever to be publicly disclosed to anyone, particularly in the event of a legal proceeding, public hearing or official inquiry of any kind that may result from the publication of the subsequent story

. . . .

... my effectiveness as an investigative reporter would be seriously impaired because key sources would no longer trust me to keep their identities confidential, thereby preventing me from getting the sensitive information I need to do my job and reveal matters of public interest that might otherwise remain unknown to the Canadian public.

[122] Nor can the chilling effect that could result from the compelled disclosure of confidential journalistic sources be ignored as a consequential harm. This concern was expressed nearly three decades ago by the House of Lords in *British Steel Corp. v. Granada Television Ltd.*, [1981] 1 All E.R. 417:

confidentielles pour qu'ils puissent recueillir et rapporter l'information. Peter Desbarats, l'ancien doyen de l'école supérieure de journalisme de l'Université Western Ontario, a souligné l'importance de ces sources pour les [TRADUCTION] « journalistes d'enquête [lorsqu'ils cherchent] à servir l'intérêt public en mettant en lumière des sujets que les gens au pouvoir sont loin d'être enchantés de voir soumis à un examen public approfondi ». À son avis :

[TRADUCTION] Compte tenu de mon expérience dans le monde du journalisme, j'estime que les intérêts d'une presse libre exigent des tribunaux qu'ils reconnaissent le rapport particulier entre un journaliste et la source à qui l'anonymat a été promis. De telles promesses sont essentielles à une presse libre et dynamique, qui est elle-même essentielle à l'information des citoyens et à une robuste démocratie.

M. McIntosh, se faisant l'écho de l'expérience décrite par d'autres journalistes dans les différents affidavits déposés en l'espèce, a lui-même déclaré dans le sien :

[TRADUCTION] ... une source me donne parfois des documents ou des renseignements confidentiels pour un article, à la condition expresse que son identité en tant que source des renseignements ou des documents ne soit jamais divulguée publiquement à qui que ce soit, quelles que soient les circonstances, particulièrement dans l'éventualité d'une procédure judiciaire, d'une audience publique ou d'une enquête officielle, de quelque nature que ce soit, qui pourrait découler de la publication de l'article . . .

. . . .

... mon efficacité en tant que journaliste d'enquête serait gravement compromise parce que mes sources essentielles ne me feraient plus confiance pour garder leur identité secrète, ce qui m'empêcherait d'obtenir les renseignements sensibles dont j'ai besoin pour faire mon travail et révéler des faits d'intérêt public qui risqueraient autrement de rester inconnus de la population canadienne.

[122] L'effet de dissuasion qui pourrait découler de la divulgation forcée des sources confidentielles des journalistes ne peut non plus être ignoré comme préjudice en résultant. La Chambre des lords a exposé ce problème il y a près de trois décennies dans *British Steel Corp. c. Granada Television Ltd.*, [1981] 1 All E.R. 417 :

[T]he newspapers should not in general be compelled to disclose their sources of information. Neither by means of discovery before trial. Nor by questions or cross-examination at the trial. Nor by subpoena. The reason is because, if they were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. . . . Misdeeds in the corridors of power, in companies or in government departments would never be known. Investigative journalism has proved itself as a valuable adjunct of the freedom of the press. [p. 441]

[123] Similarly, in the recent case of *Financial Times Ltd. v. The United Kingdom*, [2009] ECHR 2065 (BAILII), the European Court of Human Rights warned:

While . . . the applicants in the present case were not required to disclose documents which would directly result in the identification of the source but only to disclose documents which might, upon examination, lead to such identification, the Court does not consider this distinction to be crucial. In this regard, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources. In the present case, it was sufficient that information or assistance was required under the disclosure order for the purpose of identifying X. [Emphasis added; para. 70.]

[124] There is no doubt that caution must be exercised in ensuring the quality and veracity of the confidentially received information (see David Abramowicz, “Calculating the Public Interest in Protecting Journalists’ Confidential Sources” (2008), 108 *Colum. L. Rev.* 1949, at pp. 1966-70), but in the case before us, Mr. McIntosh had a sound basis for his confidence in X’s reliability.

[125] Although this was X’s first direct contact with Mr. McIntosh, X’s reliability had been previously confirmed. Through another confidential source, “Y”, Mr. McIntosh had ascertained that the Prime Minister had made several telephone calls to the Bank in connection with loans to the Auberge. Y had received this information from X, including:

[TRADUCTION] [L]es journaux ne devraient pas, en général, être forcés de révéler leurs sources d’information, ni au moyen d’un interrogatoire préalable au procès, ni par des questions ou un contre-interrogatoire pendant le procès, ni au moyen d’une assignation, car s’ils étaient contraints de révéler leurs sources, ils seraient vite privés des renseignements dont ils ont besoin. Leurs sources se tariraient. Les actes répréhensibles ne seraient pas dénoncés. [. . .] Les méfaits dans les coulisses du pouvoir, au sein d’entreprises ou de ministères ne seraient jamais connus. Le journalisme d’enquête s’est avéré un complément précieux de la liberté de presse. [p. 441]

[123] De même, récemment, dans l’affaire *Financial Times Ltd. c. The United Kingdom*, [2009] ECHR 2065 (BAILII), la Cour européenne des droits de l’homme a fait la mise en garde suivante :

[TRADUCTION] Bien que [. . .] on n’ait pas demandé aux demandeurs en l’espèce de divulguer des documents pouvant révéler directement l’identité de la source, mais uniquement des documents qui, après examen, pourraient conduire à sa découverte, la Cour estime que cette distinction n’est pas cruciale. À cet égard, la Cour souligne qu’un effet de dissuasion se produira chaque fois qu’on verra des journalistes aider à identifier des sources anonymes. En l’espèce, il suffisait que des renseignements ou de l’aide soient exigés en vertu de l’ordonnance de communication en vue d’identifier X. [Je souligne; par. 70.]

[124] Il ne fait aucun doute que la prudence est de mise lorsqu’il s’agit de vérifier la qualité et la véracité de l’information obtenue de source confidentielle (voir David Abramowicz, « Calculating the Public Interest in Protecting Journalists’ Confidential Sources » (2008), 108 *Colum. L. Rev.* 1949, p. 1966-1970). Or, en l’espèce, M. McIntosh avait de solides raisons de croire à la fiabilité de X.

[125] Même s’il s’agissait de la première fois que X entrait en communication directe avec M. McIntosh, sa fiabilité avait préalablement été confirmée. Par l’intermédiaire d’une autre source confidentielle, « Y », M. McIntosh avait pu vérifier le fait que le premier ministre avait fait plusieurs appels téléphoniques à la Banque au sujet des prêts consentis à l’Auberge. Y tenait ces renseignements de X, et ces derniers comprenaient :

- a letter from the manager of the Trois-Rivières Bank branch to a senior vice-president of the Bank expressing concern about the risky nature of the loan applied for by the Auberge and recommending the application's referral to a credit committee at the Bank;
- a letter from the owner of the Auberge to the Prime Minister urging him to intervene to ensure he got the loan he needed; and
- a Bank document containing “media lines” — “politically acceptable” responses — to respond to anticipated questions from reporters about the Prime Minister's telephone calls to the Bank to ensure the approval of the loans to the Auberge.
- une lettre de la directrice de la succursale de Trois-Rivières de la Banque à un premier vice-président de la Banque soulevant des réserves à propos du risque présenté par le prêt sollicité par l'Auberge et recommandant le renvoi de la demande à un comité de crédit de la Banque;
- une lettre du propriétaire de l'Auberge adressée au premier ministre dans laquelle il exhorte ce dernier à intercéder pour faire en sorte que le prêt demandé lui soit consenti;
- un document de la Banque présentant des « infocapsules » — des réponses « politiquement acceptables » — destinées aux questions attendues des journalistes à propos des appels du premier ministre à la Banque ayant pour objet l'approbation des prêts demandés par l'Auberge.

Y also showed Mr. McIntosh documents detailing the dates of telephone calls by the Prime Minister to the Bank.

Y a également montré à M. McIntosh des documents énumérant les dates des appels téléphoniques du premier ministre à la Banque.

[126] Several separate and independent confidential sources provided information to Mr. McIntosh that corroborated these telephone calls, both before and after Mr. McIntosh viewed the documents shown to him by Y. And despite originally denying any involvement in the Bank's decision to grant a loan to the Auberge, the Prime Minister later confirmed that he had indeed made the telephone calls to the Bank, but denied that there was anything improper or unusual about requesting the Bank to “settle” a file that “was not moving”.

[126] Plusieurs autres sources confidentielles indépendantes ont fourni des renseignements à M. McIntosh corroborant l'information sur les appels téléphoniques, avant et après la consultation par ce dernier des documents présentés par Y. Même s'il avait d'abord nié toute ingérence dans la décision prise par la Banque de consentir un prêt à l'Auberge, le premier ministre a par la suite reconnu avoir fait ces appels téléphoniques à la Banque. Toutefois, selon lui, demander à la Banque de « régler » un dossier qui « ne bougeait pas » n'avait rien d'irrégulier ni d'inusité.

[127] In addition to relying on this prior and positive experience with X, Mr. McIntosh explained in his affidavit that he sought to test X's credibility in connection with this latest document by asking for an affidavit from him/her:

[127] En plus de se fier à cette expérience antérieure avec X, qui avait été positive, M. McIntosh, comme il l'a expliqué dans son affidavit, a tenté de tester la crédibilité de X à l'égard du dernier document reçu en lui demandant de signer un affidavit :

I asked X whether he/she would be prepared to swear a confidential affidavit confirming that he/she did not alter or forge the loan authorization document. I used this approach to test X's integrity. As X agreed without hesitation to swear such an affidavit, I did not proceed further with this request.

[TRADUCTION] J'ai demandé à X s'il/elle accepterait de signer un affidavit confidentiel confirmant qu'il/elle n'avait pas modifié ou falsifié l'autorisation de prêt. J'ai utilisé cette approche pour tester l'intégrité de X. Comme X a accepté sans hésitation de signer un tel affidavit, je ne suis pas allé plus loin.

[128] And to protect his own integrity, Mr. McIntosh told X that he would only protect his/her confidentiality if he were satisfied that he was not being misled:

I stated to Confidential Source X that as long as I believed that he/she had not provided the document to deliberately mislead me, my undertaking of confidentiality would remain binding. I also told Confidential Source X that should irrefutable evidence to the contrary emerge, our agreement of confidentiality would become null and void. X agreed to these terms.

[129] Given Mr. McIntosh's reputation, it strikes me as counterintuitive to conclude that he would protect the identity of a source whom he suspects of *knowingly* providing him with false information. Mr. McIntosh should not be taken to have intended to risk his reputation or his livelihood so easily.

[130] Where, as here, the journalist has taken credible and reasonable steps to determine the authenticity and reliability of his source, one should respect his professional judgment and pause, it seems to me, before trespassing on the confidentiality which is the source of the relationship.

[131] Having identified what I see as demonstrable and profound injury to the journalist/source relationship resulting from disclosure of the documents and potentially the identity of the source in this case, the other side of the Wigmore balancing exercise requires consideration of the countervailing benefits of disclosure. For the reasons that follow, I see those benefits as ranging from speculative to negligible.

[132] Corporal Gallant said that he wanted the loan authorization document as well as the envelope it came in, in the hopes that these materials would reveal the identity of the source of the alleged forgery. As he said in his Information to Obtain:

The brown envelope that contained the documents and that was received by the National Post can contain

[128] De plus, afin de protéger sa propre intégrité, M. McIntosh a expliqué à X qu'il ne garderait son identité secrète que s'il était convaincu de ne pas avoir été induit en erreur :

[TRADUCTION] J'ai assuré à la source confidentielle X que, tant que je croirais qu'il/elle ne m'avait pas remis le document afin de m'induire délibérément en erreur, je demeurerais lié par mon engagement de confidentialité. Je lui ai également dit que si une preuve contraire irréfutable était portée à ma connaissance, notre entente de confidentialité deviendrait nulle. X a accepté ces conditions.

[129] Étant donné la réputation de M. McIntosh, il me semble illogique de conclure qu'il protégerait l'identité d'une source qu'il soupçonne de lui avoir *sciemment* communiqué de faux renseignements. Il n'y a pas lieu de présumer qu'il était dans l'intention de M. McIntosh de risquer de ternir sa réputation ou de compromettre son gagne-pain aussi facilement.

[130] Lorsque, comme en l'espèce, le journaliste a pris des mesures raisonnables et crédibles pour vérifier l'authenticité et la fiabilité de sa source, il faut respecter son jugement professionnel et hésiter, il me semble, à compromettre la confidentialité à l'origine de la relation.

[131] Je viens de présenter le préjudice démontrable et grave, à mes yeux, que porterait aux rapports entre le journaliste et sa source la divulgation des documents et, éventuellement, de l'identité de la source en l'espèce. Il est maintenant temps de se tourner vers l'autre volet de l'exercice de mise en balance établi par Wigmore et de soupeser les avantages à retirer de la divulgation. Pour les motifs qui suivent, j'estime que ces avantages sont négligeables, voire hypothétiques.

[132] Aux dires du caporal Gallant, il voulait l'autorisation de prêt et l'enveloppe dans laquelle elle était arrivée dans l'espoir que ces documents révèlent l'identité de la source du prétendu faux. Voici ce qu'il a dit dans sa dénonciation en vue d'obtenir un mandat :

[TRADUCTION] L'enveloppe brune qui contenait les documents et qu'a reçue le National Post peut renfermer

information. I wish to submit it for forensic examination to determine whether it, or the false document, has fingerprints or other identifying markings which might assist in identifying the source of the document. As the forged object it will be required as evidence to substantiate any charge arising out of this investigation.

[133] Corporal Gallant had consulted a document examiner at the RCMP Central Forensic Laboratory in Ottawa to determine what forms of evidence an examination of the materials could yield:

She . . . confirmed for me that it may be possible to acquire biological material (saliva) left on a stamp or seal of an envelope, if the person placing the stamp or closing the seal licked the stamp/seal to engage the adhesive. Finally, she confirmed that it may be possible to fingerprint the documents to identify who had handled them. [Emphasis added.]

[134] At best, then, “it may be possible” to acquire identifying information. Based on the record, however, there is a fatal disconnect between the envelope, the documents, the identity of X and the alleged forgery, regardless of the fruits of the forensic testing.

[135] As previously noted, X told Mr. McIntosh that he/she received the document anonymously in the mail, had discarded the envelope, and forwarded the document to Mr. McIntosh in a different envelope. It also appears from the record that X did not know the document might be a forgery when it was sent to Mr. McIntosh. Since X did not know the identity of the person from whom he/she had received the document, learning X’s identity would yield virtually no evidence that could assist in determining who was responsible for the alleged forgery.

[136] Secondly, Corporal Gallant said in cross-examination that “[t]he more documents are manipulated, the least likely the chances of getting fingerprints off of it”, and acknowledged that there was a “far more remote and speculative possibility that that same document [had] the prints

des renseignements. Je désire la soumettre à une expertise criminalistique pour vérifier si cette enveloppe ou le faux document portent des empreintes digitales ou d’autres marques d’identification susceptibles d’aider à l’identification de la source du document. Comme le faux document, elle sera requise comme élément de preuve pour étayer toute accusation découlant de la présente enquête.

[133] Le caporal Gallant avait consulté une experte en écritures du Laboratoire judiciaire central de la GRC à Ottawa afin de déterminer le genre de preuve qu’un examen des documents pourrait générer :

[TRADUCTION] Elle [. . .] m’a confirmé qu’il pourrait être possible de trouver une matière biologique (salive) laissée sur un timbre ou sur le rabat d’une enveloppe si, en affranchissant ou en cachetant l’enveloppe, la personne a léché le timbre ou le rabat pour les coller. Enfin, elle a confirmé qu’il pourrait être possible de relever les empreintes digitales sur les documents pour identifier les personnes qui les ont manipulés. [Je souligne.]

[134] Au mieux, « il pourrait être possible », dans ce cas, de relever de l’information permettant d’identifier la source. Toutefois, le dossier ne révèle aucun lien entre l’enveloppe, les documents, l’identité de X et le prétendu faux, et cette absence de lien est fatale, quel que soit le résultat de l’analyse criminalistique.

[135] Comme je l’ai mentionné précédemment, X a dit à M. McIntosh qu’il/elle avait reçu le document d’une source anonyme par la poste, avait jeté l’enveloppe et envoyé le document à M. McIntosh dans une autre enveloppe. De plus, il ressort du dossier que X ne savait pas que le document pouvait être faux lorsqu’il/elle l’a envoyé à M. McIntosh. Comme X ne connaissait pas l’identité de la personne de qui il/elle avait reçu le document, apprendre l’identité de X ne fournirait pratiquement aucune preuve pouvant aider à déterminer qui était la personne responsable du prétendu faux.

[136] Deuxièmement, le caporal Gallant a dit en contre-interrogatoire que [TRADUCTION] « [p]lus les documents sont manipulés, moins on a de chances d’y relever des empreintes digitales » et a reconnu qu’il y avait une [TRADUCTION] « possibilité beaucoup plus faible et hypothétique que ce document

of the forger”. Both the document and the envelope had been extensively handled. Mr. McIntosh took the document and envelope with him from Ottawa to Toronto, where they were handled by the lawyer for the *National Post*, the editor-in-chief and the deputy editor. It is therefore possible that even forensic testing, including DNA testing of the materials, would not be of any assistance in identifying the alleged forger.

[137] And this brings us to another factor limiting the benefit to the criminal investigation of learning X’s identity. On cross-examination, Corporal Gallant explained that he wanted to learn X’s identity because he wanted to question X about X’s source, whose identity, it should be remembered, was unknown to X:

- A We knew that that person could potentially open other avenues for the investigation, and we could possibly determine from where that person obtained that information. So our role in this was in fact to find this person, but also to speak to this person to see if we could find -- to go backward in order to find the person that might have sent the document in the first place, and this person could potentially help us in our investigation, and this person could potentially be considered as a suspect or a witness, but at that time we did not know.
- Q And assuming if you accept what Mr. McIntosh has said, and you don’t have evidence to the contrary, “X” who sent the document to Mr. McIntosh also received the document anonymously; isn’t that correct?
- A That is in fact what Mr. McIntosh wrote, but, myself, I have not had an opportunity to speak to that person.
- Q And you have no information to the contrary that would indicate other than what Mr. McIntosh has said?
- A No, Your Honour.
- Q So, do you agree, Corporal Gallant, that as the matter is now known to stand, the person who sent the document is not -- there is no evidence that that person is the forger? No suggestion that he or she is the forger?

[porte] les empreintes du faussaire ». Le document et l’enveloppe avaient été tous les deux largement manipulés. M. McIntosh a apporté le document et l’enveloppe avec lui d’Ottawa à Toronto, où ils ont été manipulés par l’avocat du *National Post*, le rédacteur en chef et le rédacteur adjoint. En conséquence, il est possible que même une analyse criminalistique, notamment une analyse génétique, des documents ne soit d’aucune utilité pour identifier le prétendu faussaire.

[137] Ce qui nous amène à un autre facteur minimisant l’avantage que représente pour l’enquête criminelle le dévoilement de X. Lors du contre-interrogatoire, le caporal Gallant a expliqué qu’il voulait connaître l’identité de X parce qu’il souhaitait l’interroger sur sa source, dont l’identité, faut-il le rappeler, était inconnue de X :

[TRADUCTION]

- R Nous savions que cette personne pourrait peut-être nous orienter vers d’autres pistes d’enquête et que nous pourrions peut-être découvrir d’où cette personne tenait ces renseignements. Notre rôle consistait donc à trouver cette personne, mais aussi à lui parler pour voir si nous pourrions trouver -- à revenir en arrière afin de trouver la personne qui pourrait avoir envoyé le document en premier lieu, et cette personne pourrait peut-être nous aider dans notre enquête, et cette personne pourrait peut-être être considérée comme un suspect ou un témoin, mais à ce moment-là nous ne le savions pas.
- Q En supposant, si vous reconnaissez la véracité des propos tenus par M. McIntosh, et vous n’avez aucune preuve du contraire, que « X », qui a envoyé le document à M. McIntosh, a aussi reçu le document d’une source anonyme; est-ce exact?
- R C’est en effet ce que M. McIntosh a écrit, mais, pour ma part, je n’ai pas eu l’occasion de parler à cette personne.
- Q Et vous ne disposez d’aucun renseignement contraire qui indiquerait autre chose que ce qu’a dit M. McIntosh?
- R Non, Votre Honneur.
- Q Alors, caporal Gallant, êtes-vous d’accord pour dire que, compte tenu de ce que vous savez de la situation, la personne qui a envoyé le document n’est pas -- rien ne prouve que cette personne est le faussaire? Rien n’indique qu’il s’agit du faussaire?

A Yes, Your Honour. Well, to date, Your Honour, I had not had an opportunity to speak to that person, and to date I have no reason to believe or evidence to support that what Mr. McIntosh writes on that would be true.

[138] But in light of the right to remain silent, X, even if identified, would be under no legal obligation to speak to the police, a critical fact which was acknowledged by the Crown (*R. v. Hebert*, [1990] 2 S.C.R. 151; *R. v. Chambers*, [1990] 2 S.C.R. 1293, at pp. 1315-16; and *R. v. Turcotte*, 2005 SCC 50, [2005] 2 S.C.R. 519, at paras. 41-46).

[139] Since X is under no obligation to respond to questions from the police, since the evidence is that X received the document from an anonymous source whose identity he/she did not know, and since the envelope in which X received the document is not the envelope in the *National Post's* possession, the benefit to the forgery investigation of getting the documents is, at best, marginal. Based on all of this, it seems to me to be clear that X is in no position to provide any information of assistance in the investigation of the alleged forgery, even if he/she agreed to be questioned by the police.

[140] The only possible evidence the envelope could yield, and that only remotely, is the identity of X, not of the alleged forger. This would mean that the only purpose for learning the confidential source's identity is to discover who had created this public and awkward controversy. Corporal Gallant's Information to Obtain appears to confirm this purpose when he says:

... this investigation seeks to determine the identify [*sic*] of someone who has maliciously attempted to mislead the press with a view to the publication of false information. It is not intended to identify a person providing truthful information to a news outlet.

Curiosity about the identity of a confidential source may be understandable, but is never, by itself, an acceptable basis for interfering with freedom of the press (*O'Neill v. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389 (Ont. S.C.J.)).

R Oui, Votre Honneur. Bien, jusqu'ici, Votre Honneur, je n'ai pas eu l'occasion de parler à cette personne et, pour l'instant, je n'ai aucune raison de croire ni aucune preuve que ce que M. McIntosh écrit à ce sujet serait vrai.

[138] Vu le droit de garder le silence, même si l'identité de X était connue, X n'aurait pas l'obligation, en droit, de parler à la police, un fait crucial qu'a reconnu le ministère public (*R. c. Hebert*, [1990] 2 R.C.S. 151; *R. c. Chambers*, [1990] 2 R.C.S. 1293, p. 1315-1316; et *R. c. Turcotte*, 2005 CSC 50, [2005] 2 R.C.S. 519, par. 41-46).

[139] Étant donné que X n'a pas l'obligation de répondre aux questions de la police, que la preuve indique que X a reçu le document d'une source anonyme dont l'identité lui était inconnue et que l'enveloppe dans laquelle X l'a reçu n'est pas l'enveloppe que le *National Post* a en sa possession, l'obtention des documents représenterait tout au plus un avantage minime pour l'enquête sur le faux. Compte tenu de tout ce qui précède, il me semble évident que X n'est pas en mesure de fournir de renseignements utiles pour l'enquête sur le prétendu faux, même s'il/elle acceptait que la police l'interroge.

[140] L'identité de X, et non celle du prétendu faussaire, est le seul élément de preuve susceptible d'être tiré de l'enveloppe, et encore, cette possibilité est faible. Ainsi, l'identification de la source confidentielle n'aurait pour but que de découvrir l'identité de la personne à l'origine de cette controverse publique et embarrassante, et la dénonciation du caporal Gallant en vue d'obtenir un mandat semble confirmer ce but en ces termes :

[TRADUCTION] ... la présente enquête vise à déterminer l'identité de quelqu'un qui, par malveillance, a tenté d'induire la presse en erreur en vue de faire publier de faux renseignements. Elle ne vise pas à identifier une personne qui communique des renseignements véridiques à un média d'information.

La curiosité à l'égard de l'identité d'une source confidentielle, quoique peut-être compréhensible, ne justifie jamais en soi d'entraver la liberté de la presse (*O'Neill c. Canada (Attorney General)* (2006), 213 C.C.C. (3d) 389 (C.S.J. Ont.)).

[141] And that brings us to consider the seriousness of the crime at issue in this case, a factor that seems to me to be relevant in balancing the competing interests. As Professor Gora argues:

Have we solved or deterred important crimes that would not have been otherwise interdicted by law enforcement? Have journalists ever provided the smoking gun to help catch a killer or a terrorist, or just a leaker? . . . Has the gain to law enforcement been worth the loss to the First Amendment? A proper respect for the First Amendment requires that we at least ask these questions. [pp. 1420-21]

We must remember that what we are dealing with here is an alleged forgery. On a continuum of serious criminality, it strikes me as unhelpful to compare a possible forgery of a possible debt, as in our case, with the Paul Bernardo murder scenario the majority's reasons invoke by relying on *R. v. Murray* (2000), 144 C.C.C. (3d) 289 (Ont. S.C.J.). The remote possibility of resolving the debt forgery is far from sufficiently significant to outweigh the public benefit in protecting a rigorously thorough and responsible press.

[142] So on one side of the balance we have the slightest possible benefit to an investigation of an alleged forgery, and on the other we have the far weightier injury to the press interests at stake in revealing X's identity. Even if there is only a remote prospect of being able to identify X from the documents, the remoteness of this possibility hardly argues for disclosure, as the majority suggests. There may be no consequential harm to X, but neither will there be any consequential benefit to the investigation. This means that the harm and benefit of disclosure *in this particular case* is speculative at best. The major demonstrable harm, with no countervailing benefit, is to the ability of the press to carry out its public mandate.

[141] Ce qui nous amène à l'examen de la gravité du crime dont il est ici question, un facteur pertinent, à mon avis, dans la mise en balance des intérêts opposés. Comme l'affirme le professeur Gora :

[TRADUCTION] Avons-nous élucidé ou découragé d'importants crimes qui n'auraient pas été autrement empêchés par l'application de la loi? Les journalistes ont-ils déjà fourni une preuve irréfutable permettant d'arrêter un meurtrier ou un terroriste, ou tout simplement le responsable d'une fuite? [. . .] Le gain réalisé en ce qui concerne l'application de la loi justifiait-il la perte subie en ce qui concerne le Premier amendement? Le respect dû au Premier amendement exige qu'à tout le moins nous posions ces questions. [p. 1420-1421]

Il importe de rappeler que nous sommes ici en présence d'une allégation de faux. À mon avis, dans le spectre des crimes graves, la comparaison d'un prétendu faux faisant état d'une prétendue dette, comme en l'espèce, avec le scénario des meurtres commis par Paul Bernardo auquel les juges majoritaires font allusion dans leurs motifs en se reportant à l'arrêt *R. c. Murray* (2000), 144 C.C.C. (3d) 289 (C.S.J. Ont.), n'est d'aucune utilité. La faible possibilité de résoudre la question du faux est loin d'être suffisamment importante pour l'emporter sur les avantages pour le public de protéger une presse rigoureusement responsable, qui va au fond des choses.

[142] Ainsi, l'identification de X engendrerait, d'un côté, un avantage éventuel des plus minimes pour une enquête sur un prétendu faux et, de l'autre côté, un préjudice beaucoup plus important pour les intérêts de la presse qui sont en jeu. Même s'il existe une infime possibilité que l'on puisse se servir des documents pour identifier X, cette infime possibilité ne milite guère en faveur de la divulgation, comme le laissent entendre les juges majoritaires. Il n'en résultera peut-être aucun préjudice pour X, mais il n'en résultera non plus aucun avantage pour l'enquête. Donc, le préjudice et l'avantage de la divulgation *dans ce cas précis* relèvent au mieux de la conjecture. Le principal préjudice démontrable est une atteinte à la capacité de la presse d'exercer son mandat public, et il n'y correspond aucun avantage.

[143] The fourth and final Wigmore criterion for protecting the confidentiality of Mr. McIntosh's source has therefore been satisfied and the documents should not be disclosed.

Notice

[144] I have a remaining concern about the procedure followed in this case, namely, the failure to give notice to the *National Post* that a search warrant was being requested. The operating presumption should be that the media's unique institutional character entitles it to notice when a search warrant is sought against it. A search warrant of media premises is a particularly serious intrusion, and a decision should not be made about its propriety without submissions from the party most affected.

[145] The Crown informed the Justice of the Peace that the *National Post* had requested notification of the application, but he decided to proceed without notice. This is regrettable, since there were serious informational gaps in the Information to Obtain that were substantially narrowed by the *National Post* after the search warrant had been issued. Had the fuller record and arguments been known, the outcome of the hearing might well have been different.

[146] In *Canadian Broadcasting Corporation v. Lessard*, [1991] 3 S.C.R. 421, and *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, this Court dealt with search warrants involving the media. As Cory J. stated for the majority in *Lessard*, these are circumstances that warrant caution and accommodation:

. . . the media are entitled to particularly careful consideration, both as to the issuance of a search warrant and as to the conditions that may be attached to a warrant to ensure that any disruption of the gathering and dissemination of news is limited as much as possible. The media are entitled to this special consideration because

[143] Par conséquent, le quatrième et dernier volet du test de Wigmore auquel il faut satisfaire pour que la confidentialité de la source de M. McIntosh soit protégée a été rempli, et les documents ne devraient pas être divulgués.

Préavis

[144] J'ai une dernière réserve concernant la procédure suivie en l'espèce, soit l'omission d'aviser le *National Post* qu'un mandat de perquisition allait être demandé. Une présomption devrait s'appliquer selon laquelle le caractère institutionnel unique des médias leur donne le droit d'être avisés du dépôt d'une demande de mandat de perquisition les visant. La perquisition dans les locaux d'un média constitue une intrusion particulièrement grave, et la décision sur l'opportunité de l'autoriser ne devrait pas être rendue sans que le principal intéressé puisse présenter ses observations.

[145] Le ministère public a informé le juge de paix que le *National Post* avait demandé à être avisé de la demande, mais le juge de paix a décidé d'instruire l'affaire sans préavis. C'est regrettable, étant donné que les graves lacunes informationnelles de la dénonciation en vue d'obtenir un mandat ont été grandement comblées par le *National Post* après la délivrance du mandat de perquisition. Si le dossier amplifié et les arguments avaient été présentés, l'issue de l'audience aurait très bien pu être tout autre.

[146] Dans les arrêts *Société Radio-Canada c. Lessard*, [1991] 3 R.C.S. 421, et *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1991] 3 R.C.S. 459, la Cour a examiné des mandats de perquisition concernant les médias. Dans l'affaire *Lessard*, le juge Cory a indiqué, au nom des juges majoritaires, que la prudence et des mesures d'adaptation s'imposent dans de telles circonstances :

. . . [les] médias ont droit à une attention toute particulière en ce qui concerne tant l'attribution d'un mandat de perquisition que les conditions dont peut être assorti un mandat afin que toute perturbation de la collecte et de la diffusion des informations soit le plus possible limitée. Les médias ont droit à cette attention particulière

of the importance of their role in a democratic society. [p. 444]

[147] In her dissenting reasons in *Lessard*, McLachlin J. was alert to the potential for interference with freedom of the press. She pointed out that the “prospect of seizure of press material in future cases without the imposition of conditions to protect press freedom and the identity of informants . . . creates the chilling effect” (p. 453). Her proposed approach, like the balancing suggested by Stewart J. in *Branzburg* and in complete harmony with the fourth criterion in *Wigmore*, required that there be an absence of available alternative sources for the required information sought, and sufficient significance to that information to justify the interference with press freedom.

[148] Cory J. recognized that the media was usually an innocent third party in connection with a crime being investigated, and that the supporting affidavit should therefore contain the appropriate information, including whether alternative sources for obtaining the information sought by the warrant had been reasonably investigated and exhausted (*Lessard*, at p. 445; see also La Forest J.’s concurring reasons at pp. 431-32, and *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (B.C.S.C.), at p. 495). He warned that search warrants could be invalidated if it subsequently came to light that pertinent information that could have affected the decision to issue the warrant was not disclosed. The absence of such relevant information, it seems to me, is precisely what happened in the case before us.

[149] On the cross-examination of Corporal Gallant, for example, it emerged that alternative sources of the document had not been seriously investigated, despite Corporal Gallant’s statement in his Information to Obtain, that:

The evidence I wish to seize — the forged document and the envelope in which it was delivered — is not available from any other source. This evidence is unique and

en raison de l’importance de leur rôle dans une société démocratique. [p. 444]

[147] Dans ses motifs dissidents dans l’arrêt *Lessard*, la juge McLachlin était sensible à la possibilité d’atteinte à la liberté de la presse. Elle a indiqué que « l’éventualité d’une saisie de documents de presse à l’avenir sans l’imposition de conditions qui protègent la liberté de la presse et l’identité des informateurs [. . .] crée cet effet de dissuasion » (p. 453). L’approche qu’elle a proposée, semblable à l’exercice de pondération prôné par le juge Stewart dans *Branzburg* et en parfaite harmonie avec le quatrième critère de *Wigmore*, exigeait que les renseignements nécessaires recherchés ne puissent être obtenus d’aucune autre source et que l’information soit suffisamment importante pour justifier l’atteinte à la liberté de la presse.

[148] Le juge Cory a reconnu que les médias sont habituellement des tiers innocents en rapport avec le crime visé par une enquête et que l’affidavit produit à l’appui de la demande de mandat devrait donc contenir les renseignements nécessaires, et notamment indiquer si des mesures raisonnables ont été prises pour obtenir l’information auprès d’autres sources et si ces sources ont été épuisées (*Lessard*, p. 445; voir également les motifs concordants du juge La Forest, p. 431-432, et *Re Pacific Press Ltd. and The Queen* (1977), 37 C.C.C. (2d) 487 (C.S.C.-B.), p. 495). Il a précisé qu’un mandat de perquisition pourrait être invalidé si l’on découvrait après coup que des renseignements pertinents qui auraient pu influencer sur la décision de décerner le mandat n’ont pas été communiqués. L’absence de tels renseignements pertinents, il me semble, est exactement ce qui s’est produit en l’espèce.

[149] Le contre-interrogatoire du caporal Gallant a révélé, par exemple, qu’aucun effort sérieux n’avait été fait pour vérifier si le document pouvait être obtenu d’autres sources, malgré l’affirmation suivante faite par le caporal Gallant dans sa dénonciation en vue d’obtenir un mandat :

[TRADUCTION] Les éléments de preuve que je souhaite saisir — le faux document et l’enveloppe dans laquelle il a été expédié — ne peuvent être obtenus d’une autre

central to this investigation. The evidence is the *actus reus* of the offence.

[150] He confirmed that the Bloc Québécois had anonymously received a document identical to the one the *National Post* had, yet said he had not been able to get forensic evidence from it because the Bloc had distributed several copies of the document to members of the party and it was unclear which of them was the original.

[151] Nor did Corporal Gallant inquire into whether any other members of Parliament or other media outlets may have received the document:

Q . . . did you make inquiries of the other political parties, such as the Conservative party and the Alliance party, because they clearly were reviewing the documents? Did you make such inquiries before you got the search warrants in this case?

A At this time, no, Your Honour. I have not started anything with respect to political parties, whether it be the PC or the Alliance.

Q And just to complete this area, I also understand that you made no inquiries of other major media outlets like the Canadian Broadcasting Corporation or The Globe and Mail, to see whether they received such a document?

A No. That's correct, Your Honour. The complaint we got here at the RCMP related to The National Post, and we have not directed our attention to other media organizations.

[152] And although the information he gave in the Information to Obtain was that there was no outstanding debt from the Auberge to JAC Consultants, Corporal Gallant admitted on cross-examination that he had not examined the books of JAC Consultants prior to filing his request for the search warrant. This was of some significance because the cross-examination also revealed that

source. Il s'agit d'éléments de preuve uniques et essentiels pour la présente enquête. Les éléments de preuve constituent l'*actus reus* de l'infraction.

[150] Il a confirmé que le Bloc Québécois avait reçu d'une source anonyme un document identique à celui que le *National Post* avait en main, mais il a affirmé qu'il n'avait pas été en mesure d'en tirer de preuve criminalistique parce que le Bloc avait distribué plusieurs copies du document aux membres du parti et qu'on ignorait quel document était l'original.

[151] Le caporal Gallant n'a pas non plus vérifié s'il était possible que d'autres députés ou d'autres médias aient reçu le document :

[TRADUCTION]

Q . . . avez-vous effectué des vérifications auprès des autres partis politiques, comme le Parti conservateur et l'Alliance canadienne, étant donné qu'ils ont manifestement examiné le document? Avez-vous effectué ces vérifications avant d'obtenir les mandats de perquisition dans la présente affaire?

R À ce moment-ci, non, Votre Honneur. Je n'ai rien entrepris en ce qui concerne les partis politiques, que ce soit le PC ou l'Alliance.

Q Et juste pour vider cette question, je crois également comprendre que vous n'avez effectué aucune vérification auprès des autres principaux médias d'information, comme la Société Radio-Canada ou le Globe and Mail, afin de savoir s'ils avaient reçu ce document?

R Non. C'est exact, Votre Honneur. La plainte que nous avons reçue à la GRC concernait le National Post et nous ne nous sommes pas intéressés à d'autres médias.

[152] Par ailleurs, bien qu'il ait déclaré dans la dénonciation en vue d'obtenir un mandat que l'Auberge n'avait aucune dette en souffrance envers JAC Consultants, le caporal Gallant a admis en contre-interrogatoire qu'il n'avait pas examiné les livres de JAC Consultants avant de déposer sa demande de mandat de perquisition. Cela avait une certaine importance étant donné que le

there were problems with some of the corroborating documents provided by the Bank.

[153] The original suppliers' list that the Bank gave to Corporal Gallant, which he had reviewed at the start of the investigation, was missing the page where, alphabetically, "JAC Consultants" would have appeared. The Bank requested and received a new suppliers' list from the accountant for the owner of the Auberge, which did not show any debt to JAC Consultants. Through the cross-examination of Corporal Gallant, it was revealed that these two lists had different dates on them, and that they differed in some of the supplier names and amounts. By itself, this information might not have made a difference in the outcome, but when blended with the other missing pieces in the Information to Obtain, it arguably assumes some potential relevance.

[154] But the most notable fact missing from the narrative that was revealed by the cross-examination of Corporal Gallant, was that the document came from a confidential source:

Q From your perspective, did you or did you not believe it was important to tell the judge that the material you sought may have emanated from a confidential source?

A Well, the information I had at the time . . . was that the documents we were seeking came from an anonymous source. It was not described to us as a confidential source.

Counsel for the *National Post* then drew Corporal Gallant's attention to a letter he had received prior to seeking the warrant, in which the *National Post* had voiced its concern that what was being sought emanated from a confidential source:

Q And I take it, sir, that at no time did you draw, especially to the Justice of the Peace, that the document and envelope that you sought from The Post's

contre-interrogatoire a également révélé que certains documents corroborants fournis par la Banque posaient un problème.

[153] Il manquait à la liste initiale de fournisseurs que la Banque a remise au caporal Gallant, et qu'il a examinée au début de l'enquête, la page où « JAC Consultants » aurait dû figurer selon l'ordre alphabétique. Après en avoir fait la demande, la Banque a reçu du comptable du propriétaire de l'Auberge une nouvelle liste de fournisseurs, sur laquelle ne figurait aucune dette envers JAC Consultants. Au cours du contre-interrogatoire du caporal Gallant, il s'est avéré que ces deux listes portaient des dates différentes et que certains noms de fournisseurs et montants qui y figuraient étaient différents. À elle seule, cette information aurait pu ne rien changer au résultat, mais combinée aux autres pièces manquantes dans la dénonciation en vue d'obtenir un mandat, elle pourrait sans doute présenter une certaine pertinence.

[154] Toutefois, l'omission la plus flagrante dans l'exposé révélée par le contre-interrogatoire du caporal Gallant, était la provenance du document, soit qu'il émanait d'une source confidentielle :

[TRADUCTION]

Q Selon vous, vous pensiez ou vous ne pensiez pas qu'il était important de dire au juge que les documents que vous vouliez pouvaient provenir d'une source confidentielle?

R Bien, l'information que j'avais alors [. . .] était que les documents que nous voulions provenaient d'une source anonyme. On ne nous a pas dit que c'était une source confidentielle.

L'avocate du *National Post* a ensuite attiré l'attention du caporal Gallant sur une lettre qu'il avait reçue avant de demander le mandat de perquisition, dans laquelle le *National Post* s'était dit inquiet de ce que l'objet de la demande provenait d'une source confidentielle :

[TRADUCTION]

Q Je présume, Monsieur, que vous n'avez jamais précisé, en particulier au juge de paix, que le document et l'enveloppe que vous vouliez obtenir provenaient,

perspective emanated from a confidential source? You did not draw that to his attention? Beyond putting this letter in the appendix?

A No. That is not included in the search warrant . . . except for the fact that it's written here.

This information, if disclosed, would logically have led to an inquiry into whether the confidentiality of the source ought to be protected.

[155] It seems logical to me that given the inherent legal complexities in authorizing a search warrant against the media, any problems with the Information to Obtain should be canvassed *prior* to deciding whether to issue the warrant. The *National Post* lost the opportunity to make *timely* submissions not only on the confidential nature of the source, but also about the deficiencies in the information. Taken together, the information elicited through cross-examination might well have resulted in the search warrant not being issued at all.

[156] The media will always be in the best position to provide relevant information about the particular context, including whether a confidential relationship is at stake. As a general rule, therefore, it is entitled to notice of a request for a search warrant unless there are exceptional and urgent circumstances justifying an *ex parte* hearing.

[157] Here there were no such circumstances. The Bank complained to the RCMP about the forgery by telephone on April 7, 2001, and formally complained by letter on April 11, 2001. Mr. McIntosh was interviewed on June 7, 2001, and the search warrant was issued over a year later on July 4, 2002. Clearly there was ample time for the *National Post* to receive notice of the application for a search warrant, to cross-examine Corporal Gallant, and to make its submissions.

[158] The Crown argued that the one-month delay between the granting of the search warrant and its

selon The Post, d'une source confidentielle? Vous n'avez pas attiré son attention sur ce point? Si ce n'est qu'en joignant cette lettre en annexe?

R Non. Ce n'est pas inclus dans le mandat de perquisition [. . .] mis à part le fait que c'est écrit ici.

Ce fait, eût-il été révélé, aurait en toute logique suscité des questions visant à déterminer s'il fallait protéger la confidentialité de la source.

[155] Étant donné les complexités juridiques inhérentes à la décision d'autoriser un mandat de perquisition contre des médias, il m'apparaît logique que tout problème concernant la dénonciation en vue d'obtenir le mandat soit examiné en profondeur *avant* que cette décision soit rendue. Le *National Post* a perdu l'occasion de présenter des observations *en temps opportun*, non seulement en ce qui concerne la nature confidentielle de la source, mais aussi en ce qui a trait aux lacunes informationnelles. Pris ensemble, les renseignements révélés lors du contre-interrogatoire auraient bien pu conduire à la décision de ne pas délivrer le mandat de perquisition.

[156] Les médias seront toujours les mieux placés pour fournir des renseignements pertinents sur le contexte particulier en cause, notamment pour ce qui est de savoir si une relation confidentielle est en jeu. Par conséquent, en règle générale, ils ont le droit d'être avisés lorsqu'un mandat de perquisition est demandé, à moins de circonstances exceptionnelles et urgentes justifiant une audience *ex parte*.

[157] De telles circonstances n'existaient pas en l'espèce. La Banque a porté plainte à la GRC relativement au faux document par téléphone le 7 avril 2001, puis formellement par lettre le 11 avril 2001. M. McIntosh a été interrogé le 7 juin 2001 et le mandat de perquisition a été délivré plus d'un an plus tard, le 4 juillet 2002. De toute évidence, le *National Post* aurait eu amplement le temps de recevoir un préavis de la demande de mandat de perquisition, de contre-interroger le caporal Gallant et de présenter ses observations.

[158] Le ministère public a allégué que le délai d'un mois entre la délivrance du mandat

execution gave the *National Post* time to respond to the issuance of the warrant with a *certiorari* application. This, with respect, is an untimely — and needless — public expense. The *National Post* should have had the opportunity to make its submissions *before* the warrant was issued.

Conclusion

[159] I would therefore allow the appeal, set aside the judgment of the Ontario Court of Appeal, and restore the judgment of Benotto J. quashing the search warrant and the assistance order.

Appeal dismissed, ABELLA J. dissenting.

Solicitors for the appellants: Marlys Edwardh Barristers Professional Corporation, Toronto.

Solicitor for the respondent: Crown Law Office — Criminal, Toronto.

Solicitor for the intervener the Attorney General of Canada: Department of Justice, Vancouver.

Solicitor for the intervener the Attorney General of New Brunswick: Office of the Attorney General, Fredericton.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Calgary.

Solicitors for the intervener Bell GlobeMedia Inc.: Bersenas Jacobsen Chouest Thomson Blackburn, Toronto.

Solicitor for the intervener the Canadian Broadcasting Corporation: Canadian Broadcasting Corporation, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Osgoode Hall Law School of York University, North York; Davies Ward Phillips & Vineberg, Toronto.

de perquisition et son exécution avait laissé au *National Post* le temps de répondre à la délivrance du mandat par une demande de *certiorari*. Soit dit avec égards, il s'agit d'une dépense inopportune — et inutile — des fonds publics. Le *National Post* aurait dû avoir l'occasion de présenter ses observations *avant* la délivrance du mandat.

Conclusion

[159] Par conséquent, je suis d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel de l'Ontario et de rétablir la décision de la juge Benotto annulant le mandat de perquisition et l'ordonnance d'assistance.

Pourvoi rejeté, la juge ABELLA est dissidente.

Procureurs des appelants : Marlys Edwardh Barristers Professional Corporation, Toronto.

Procureur de l'intimée : Bureau des avocats de la couronne — Droit criminel, Toronto.

Procureur de l'intervenant le procureur général du Canada : Ministère de la Justice, Vancouver.

Procureur de l'intervenant le procureur général du Nouveau-Brunswick : Cabinet du procureur général, Fredericton.

Procureur de l'intervenant le procureur général de l'Alberta : Justice Alberta, Calgary.

Procureurs de l'intervenante Bell GlobeMedia Inc. : Bersenas Jacobsen Chouest Thomson Blackburn, Toronto.

Procureur de l'intervenante la Société Radio-Canada : Société Radio-Canada, Toronto.

Procureurs de l'intervenante l'Association des libertés civiles de la Colombie-Britannique : Farris, Vaughan, Wills & Murphy, Vancouver.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Osgoode Hall Law School of York University, North York; Davies Ward Phillips & Vineberg, Toronto.

Solicitor for the interveners the Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, the Canadian Journalists for Free Expression, the Canadian Association of Journalists, the Professional Writers Association of Canada, RTNDA Canada/Association of Electronic Journalists, Magazines Canada, the Canadian Publishers' Council, the Book and Periodical Council, the Writers' Union of Canada and PEN Canada: Brian MacLeod Rogers, Toronto.

Procureur des intervenants l'Association canadienne des journaux, Ad IDEM/Canadian Media Lawyers Association, les Journalistes canadiens pour la liberté d'expression, l'Association canadienne des journalistes, Professional Writers Association of Canada, ACDIRT Canada/Association des journalistes électroniques, Magazines Canada, Canadian Publishers' Council, Book and Periodical Council, Writers' Union of Canada et PEN Canada : Brian MacLeod Rogers, Toronto.

TAB 14

RTC Engineering Consultants Ltd. v. Her Majesty the Queen
in Right of Ontario as represented by the Ministry of the
Solicitor General and Correctional Services - Office of the
Fire Marshal

[Indexed as: RTC Engineering Consultants Ltd. v. Ontario
(Solicitor General)]

58 O.R. (3d) 726
[2002] O.J. No. 1001
Docket No. C34588

Court of Appeal for Ontario
Laskin, Sharpe and Simmons JJ.A.
March 18, 2002

Torts -- Libel and slander -- Defences -- Qualified privilege
-- Plaintiff engineer sent letter to investigators of explosion
suggesting that explosion was caused by defect in heater to
which defendant supplied natural gas -- Defendant's lawyer sent
letter to recipients of plaintiff's letter stating that
plaintiff's allegations were "professionally irresponsible if
not deceitful or at worst malicious" -- Statements defamatory
but defence of qualified privilege available to defendants --
Plaintiff's letter constituted attack on defendant's interests
-- Defendant's lawyer entitled to protect his client's
legitimate interests by writing to recipients of plaintiff's
letter -- Malice was not dominant motive for lawyer's letter --
Letter reasonably germane and appropriate to occasion.

The plaintiff, a professional engineer, was retained to
investigate the cause of an explosion. He theorized that the
explosion was caused by a design defect in a heater to which
the defendant C Co. supplied natural gas. Other investigators
rejected this theory. After his retainer ended, the plaintiff
wrote those other investigators alleging that the explosion had

probably been caused by defective wiring in the heater. The defendant O, a lawyer, replying to the same individuals on behalf of his client C Co., described the plaintiff's allegations as "at best professionally irresponsible if not deceitful or at worst malicious". Before sending that letter, O had satisfied himself, on the basis of a number of reports, that the heater did not in fact have an electrical wiring problem. O sought a retraction or an apology from the plaintiff. The plaintiff offered neither, and instead brought an action for damages for defamation. The action was dismissed on the ground of qualified privilege. The plaintiff appealed.

Held, the appeal should be dismissed.

O's letter was admittedly defamatory of the plaintiff but the trial judge was correct in finding that the defence of qualified privilege defeated the plaintiff's action. A lawyer may have a qualified privilege in trying to protect the legitimate interests of a client. Moreover, a person attacked may respond in kind, in the same way and to the same audience chosen by the person making the attack. The plaintiff's letter constituted an attack on C Co.'s interests. O was thus entitled to protect his client's legitimate interests by writing to the very same people to whom the plaintiff had sent his letter. O was careful to restrict the recipients of his letter to those who had received the plaintiff's letter. Had he not done so, the defendants' qualified privilege may have been lost. In the circumstances, O's letter was sent on an occasion of qualified privilege.

To defeat the defence of qualified privilege, the law requires a plaintiff to show that malice was the dominant motive for the communication. The trial judge did not err in finding no dominant malicious motive in O's letter.

A qualified privilege will be defeated if the communication is not reasonably germane and appropriate to the occasion. The trial judge did not err in holding that O's letter was reasonably appropriate. The plaintiff's letter merited a strongly worded response, and a person whose interests are attacked is entitled to reasonable latitude in responding. Even

accepting that O's language was "indelicate" and even taking into account that O was a lawyer, his letter did not exceed the bounds of reasonable latitude.

Cases referred to

Botiuk v. Toronto Free Press Publications Ltd., [1995] 3 S.C.R. 3, 126 D.L.R. (4th) 609, 186 N.R. 1, 26 C.C.L.T. (2d) 109 (sub nom. Botiuk v. Bardyn); Douglas v. Tucker, [1952] 1 S.C.R. 275, [1952] 1 D.L.R. 657; Falk v. Smith (1940), [1941] O.R. 17, [1940] 4 D.L.R. 765 (H.C.J.), affirmed (1940), [1941] O.R. 17 at 19, [1940] O.W.N. 515 (C.A.); Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130, 24 O.R. (3d) 865n, 126 D.L.R. (4th) 129, 184 N.R. 1, 30 C.R.R. (2d) 189, 25 C.C.L.T. (2d) 89, affg (1994), 18 O.R. (3d) 385, 114 D.L.R. (4th) 1, 20 C.C.L.T. (2d) 129 (C.A.); Netupsky v. Craig, [1973] S.C.R. 55, 28 D.L.R. (3d) 742, affg [1971] 1 O.R. 51, 14 D.L.R. (3d) 387 (C.A.)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 57.01

Authorities referred to

Brown, *The Law of Defamation in Canada*, 2nd ed. (Toronto: Carswell, 1999)

APPEAL from a judgment dismissing an action for damages for defamation.

Lorne M. Honickman, for appellants.

Julian Porter, Q.C., for respondent Outerbridge.

Cynthia R.C. Sefton, for respondent Consumers' Gas.

The judgment of the court was delivered by

A. Introduction

[1] The appellants Richard Carlstrom and his company RTC Engineering Consultants Ltd. sued for libel because of a defamatory letter written by the respondent Ian Outerbridge, a lawyer, on behalf of his client, the other respondent, Consumers' Gas Company. The main question on this appeal is whether the trial judge erred in holding that the defence of qualified privilege defeated the appellants' action.

[2] The action arose out of an explosion in Concord, Ontario. Carlstrom, a professional engineer, was retained to investigate the cause of the explosion. He theorized that the explosion was caused by a design defect in a heater to which Consumers' Gas supplied natural gas. Everyone else who had investigated the explosion, including the provincial regulators, rejected his theory. After his retainer ended, Carlstrom persisted with his theory and wrote these other investigators alleging that the explosion had probably been caused by defective wiring in the heater. Outerbridge replied to the same individuals and said that Carlstrom's allegations were "at best professionally irresponsible if not deceitful or at worst malicious".

[3] The appellants sued. The trial judge, Roberts J., dismissed the action on the ground of qualified privilege. He assessed the appellants' damages at \$40,000 for general damages and nothing for either special or punitive damages. The appellants appeal on four grounds:

1. The trial judge erred in holding that Outerbridge's letter was written on a privileged occasion;
2. the trial judge erred in holding that the letter was written without malice;
3. the trial judge erred in holding that the letter was reasonably appropriate; and
4. the trial judge's assessment of general damages was

unreasonably low.

We called on counsel for the respondents only on the third ground of appeal. For the reasons that follow, I would dismiss the appeal.

B. Background Facts

[4] The explosion took place on November 27, 1992 in a building rented by Inline Fibreglass Limited, a manufacturer of fibreglass and vinyl windows and doors. Both the Fuels Safety Branch of the Ministry of Consumer and Commercial Relations and the Ontario Fire Marshal's Office investigated the explosion. They concluded that it was caused by the overheating of a 45-gallon acetone drum located in Inline's premises.

[5] Carlstrom, who had been retained by Trow Engineering on behalf of Inline, came to a different conclusion. In his opinion, not one but two explosions had occurred. The first explosion had been caused by design failure in a unit heater above the acetone drum. The design failure allowed natural gas to accumulate in one chamber of the heater, where it was ignited by the open pilot light in the other chamber. According to Carlstrom, the explosion in the acetone drum was the second explosion. No one else supported Carlstrom's opinion.

[6] Although Carlstrom's retainer with Trow ended in January 1993, he mounted a letter writing campaign to persuade others of the validity of his theory. He claimed to have done so because the explosion raised a question of public safety.

[7] Because of Carlstrom's persistence, the Fuels Safety Branch and the Ontario Fire Marshal's Office agreed to test the unit heater. The heater was pre-tested on May 5th and fully tested on May 9, 1994. Carlstrom was present for the May 9th testing. The heater worked perfectly and disclosed no deficiencies. Still, Don Beck, an engineer with the Fuels Safety Branch who watched the test, did not rule out the possibility that the heater had been miswired. Beck asked to review photographs of the heater and Carlstrom supplied him with one he had taken.

[8] The next day, however, without waiting for Beck's review, Carlstrom wrote a strongly worded letter to Trow reiterating his opinion that there had been two explosions, that natural gas had exploded first, and that the design of the heater "was involved as part of the first explosion". He noted the government's "[i]ncredible resistance" to his concerns and said "[o]bviously something was seriously wrong somewhere". He also referred to the May 5th and 9th testings, claiming that they showed "a very serious wiring problem" and concluding that it was "fortunate that no fatality was involved". He ended his letter with a "special request":

Please advise INLINE as soon as possible of this probable deficiency with this specific unit heater, and possible identical problem with other unit heaters, so that they can contact CONSUMERS GAS to discuss the efforts necessary [to] ensure that all electrical circuit wiring to these unit heaters is as required by CGA, (which electrical circuit wiring must include at all times the safety controls).

[9] Significantly for this appeal, Carlstrom sent a copy of his letter to the president of Consumers' Gas, three adjusters who had investigated the explosion, three employees of the Fuels Safety Branch, including Beck, and two employees of the Ontario Fire Marshal's Office. The trial judge concluded that the letter constituted an "attack" on Consumers' Gas' interests.

[10] On receipt of the letter, Consumers' Gas became concerned that it had a safety problem. By regulation it was prohibited from supplying natural gas to an unsafe appliance. It asked its lawyer, Outerbridge, to deal with Carlstrom's allegations. Outerbridge already had a report from Consumers' Gas' own adjuster suggesting no safety problem existed but he was not content with it. He asked an experienced paralegal on his staff to investigate further. Within two weeks of receiving Carlstrom's letter, Outerbridge's office had three reports -- two from engineers with the Ontario Fire Marshal's Office and one from Beck -- all stating that the heater did not have an electrical wiring problem. Outerbridge was briefed by his

paralegal on the two reports from the Fire Marshal's Office and he read Beck's report. Beck summarized his conclusion that the heater was not miswired in the following paragraph:

An analysis of photographs taken shortly after the incident occurred do not provide any evidence that supports a possibility that mis-wiring of the power supply lines to the appliance could have resulted in an unsafe condition. The tests demonstrated good ignition and combustion of the unit heater. The tests also showed that the pilot safety shut-off components would actuate as intended in less than approximately 45 seconds after a pilot outage.

[11] Armed with these three opinions, Outerbridge then drafted a reply to Carlstrom. His letter dated June 1, 1994 and sent on June 3rd to the same people to whom Carlstrom had written is the subject of the appellants' libel action. The gravamen of the appellant's complaint is found in the second last paragraph of the letter. The full text of Outerbridge's letter -- with the offending paragraph italicized for emphasis -- is as follows:

RTC Engineering Consultants Ltd.
P.O. Box 245
Rexdale, Ontario
M9W 5L1

Dear Sirs:

Re: Fire Loss November 27, 1992
141 Syndercroft Road, Concord, Ontario
Our File No. 0001/09241

We act for Consumers Gas Company

Mr. R. Carlstrom, P. Eng., caused to be delivered to our client a report dated May 10, 1994, on the letterhead of your company addressed to Trow Consultants Ltd. ostensibly prepared by him on their instructions at the request of Inline Fibreglass. This report was published and made public by Mr. Carlstrom by providing a copy of same to the following

persons:

Consumers Gas: President

Fuels Safety Branch: M. Philip; Don Beck; Ken Taylor

G.W. Cleary: Bob Krywiak

S.B. Sobel: Steve Sobel

Lowthian Smith Sharoun: Raymond Smith

Ontario Fire Marshal: Mr. Moyle; Armen Kassabien

There is no privilege attaching to this publication.

Specifically the statements on page 4 under the heading "Conclusion" and under the heading "Special Request" are untrue and known to be untrue by Mr. Carlstrom or alternatively, should have been known to be untrue and constitute a defamation of Consumers Gas.

In consequence of the publication by Mr. Carlstrom, we have caused an intensive investigation into the facts and circumstances underlying his allegations and have determined that there is no substance whatever to his suggestion that the unit in question was incorrectly wired on the premises of Inline.

The wiring "problem" to which he alludes was one which was created deliberately by Mr. Hilla on or about the first week of May, 1994, in order to facilitate the testing of the individual components of the heater and this information was known or should have been known to Mr. Carlstrom.

His opinion premised on the possibility that such a wiring configuration "probably" occurred prior to having been made by Mr. Hilla is at best professionally irresponsible if not deceitful, or at worst malicious.

That being the case we request of you on behalf of our client that you disassociate yourself from this publication or alternatively acknowledge that the publication was done on your authority and with your knowledge, in which event, we ask for an apology and a retraction forthwith addressed to the Consumers Gas Company.

[12] As the last paragraph of the letter shows, Outerbridge sought a retraction or an apology from Carlstrom. But Carlstrom offered neither. Instead, he sued for libel.

C. Discussion

(a) The defence of qualified privilege

[13] Outerbridge's letter is admittedly defamatory of Carlstrom and his company. The appellant's action failed because of the trial judge's conclusion that the respondents were entitled to rely on qualified privilege.

[14] Qualified privilege is a defence to a defamation action. The privilege attaches to the occasion when a defamatory statement is made, not to the statement itself. But on an occasion of qualified privilege a person may defame another -- either orally or in writing -- without attracting liability. The law presumes that the defamatory statement was made honestly and in good faith.

[15] The rationale for the defence is that the interest sought to be protected by the statement is considered important enough to justify a limited immunity from an action for defamation. Immunity is limited because it extends only to statements that are germane and reasonably appropriate, and that are made honestly and in good faith or without malice. Thus, the defence of qualified privilege reflects a balancing of competing interests: the interest the maker of the statement seeks to serve and the interest in reputation that the defamed party seeks to protect.

[16] At the heart of the defence of qualified privilege is the notion of reciprocity or mutuality. A defendant must have some interest in making the statement and those to whom the statement is made must have some interest in receiving it. "Interest", however, should not be viewed technically or narrowly. The interest sought to be served may be personal, social, business, financial, or legal. The context is important. The nature of the statement, the circumstances under

which it was made, and by whom and to whom it was made are all relevant in determining whether the defence of qualified privilege applies.

[17] Two examples are relevant here. First, a lawyer may have a qualified privilege in trying to protect the legitimate interests of a client. And second, a person attacked by another may respond in kind, in the same way and to the same audience chosen by the person making the attack: *Netupsky v. Craig*, [1971] 1 O.R. 51, 14 D.L.R. (3d) 387 (C.A.), *affd* [1973] S.C.R. 55, 28 D.L.R. (3d) 742; *Falk v. Smith*, [1941] O.R. 17, [1940] 4 D.L.R. 765 (H.C.J.). And see generally *Brown*, *The Law of Defamation in Canada*, 2nd ed. (Toronto: Carswell, 1999), Vol. 2, Ch. 13; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129; *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3, 126 D.L.R. (4th) 609.

[18] Not everything said or written on an occasion of qualified privilege is protected. As is evident from the term "qualified privilege" itself and from the previous discussion, the privilege is not absolute. It may be lost in one of two ways. First, it may be lost if the dominant motive for making the statement was malice. In this context, malice means not just ill will towards another but any ulterior motive that conflicts with the interest or duty created by the occasion. And it includes recklessness. Both dishonesty and a reckless disregard for the truth may amount to malice. Second, a privilege may be lost if the statement is not commensurate with the occasion, either because the statement is not germane and reasonably appropriate to the occasion or because the recipients of the statement have no interest in receiving it. Put differently, to maintain privilege a defendant must communicate appropriate information to appropriate people. See *Hill v. Church of Scientology*, *supra*, and *Douglas v. Tucker*, [1952] 1 S.C.R. 275, [1952] 1 D.L.R. 657.

[19] I turn now to the issues on the appeal.

(b) The issues

1. Did the trial judge err in holding that Outerbridge's letter was written on an occasion of qualified privilege?

[20] The trial judge held that Carlstrom's May 10th letter, especially the last paragraph headed "Special Request", constituted an "attack" on Consumers' Gas' interests. He therefore concluded that Carlstrom's letter created an occasion of qualified privilege, triggering "an interest or duty in the defendants to reply". The appellants acknowledge that Consumers' Gas, through its lawyer, was entitled to respond to the letter to protect its interests but submit that Outerbridge should have replied only to Carlstrom. The appellants point out that as an engineer Carlstrom had a professional obligation to report a situation he believed may endanger the safety or welfare of the public. If Consumers' Gas did not agree with Carlstrom's opinion it should have communicated with him alone. Thus, the appellants contend that whatever privilege might have existed was lost because Outerbridge sent his letter to more people than he should have.

[21] I do not accept this contention. The trial judge was correct in characterizing Carlstrom's strongly worded letter as an attack on Consumers' Gas' interests. Consumers' Gas carries on business in a highly regulated industry. If the heater at Inline and others like it in the province were unsafe, Consumers' Gas was obligated to inspect them, no doubt at great cost to itself. Outerbridge was thus entitled to protect his client's legitimate interests by writing to the very same people to whom Carlstrom had sent his letter. Indeed, Outerbridge was careful to restrict the recipients of his letter to those who had received Carlstrom's letter. Had he not done so, the respondents' qualified privilege may have been lost. In the context of what occurred here, however, I agree with the trial judge that Outerbridge's letter was sent on an occasion of qualified privilege.

2. Did the trial judge err in holding that Outerbridge's letter was written without malice?

[22] The trial judge found as a fact that Mr. Outerbridge

honestly believed the statements he made. And he held that "on all the evidence . . . there was no malicious motive nor were the defendants reckless with respect to the truth." The appellants attack the trial judge's finding of no malice. They submit that Outerbridge's ulterior motive in writing the letter was to teach Carlstrom a lesson. They note Outerbridge's own testimony that he thought Carlstrom was "sort of trolling for business".

[23] Even if this evidence reflects some ill will toward Carlstrom, it was but a minor motive for the letter. To defeat the defence of qualified privilege the law requires a plaintiff to show that malice was the dominant motive for the communication. Here, the trial judge found no dominant malicious motive and that finding is amply supported by the evidence.

[24] Outerbridge testified that he honestly and on reasonable grounds believed what he wrote was true and necessary. He was not cross-examined and his evidence was not otherwise contradicted. Outerbridge knew that his client's interests were threatened by Carlstrom's letter. But instead of relying on the report of Consumers' Gas' own adjuster, he carefully researched the question whether the heater was defective before replying. When he wrote his letter on June 1, 1994, Outerbridge had the benefit of three engineering reports, each of which had concluded that the heater was not defective. The care taken by Outerbridge may be contrasted with the reckless behaviour of the defendant lawyers in Botiuk, supra, whose failure to investigate the facts before defaming the plaintiff Mr. Botiuk was properly criticized by the Supreme Court of Canada. I would not give effect to this ground of appeal.

3. Did the trial judge err in holding that the letter was reasonably appropriate?

[25] This was the main ground of appeal and the only ground on which we called on the respondents.

[26] A qualified privilege will be defeated if the communication is not reasonably germane and appropriate to the

occasion. The appellants accept that Outerbridge's letter was germane to the occasion in the sense that it addressed the matters raised by Carlstrom in his letter. But the appellants submit that the trial judge erred in concluding that the words used by Outerbridge were reasonably appropriate. The appellants particularly complain about Outerbridge's statement that Carlstrom's opinion was "at best professionally irresponsible if not deceitful or at worst malicious." In support of this submission the appellants argue that because Outerbridge was a lawyer the trial judge should have scrutinized his words and actions more carefully. The appellants point to the following proposition from the reasons of Cory J. in *Botiuk*, supra, at p. 35 S.C.R.:

However, when the defendants are lawyers who must be presumed to be reasonably familiar with both the law of libel and the legal consequences flowing from the signing of a document, their actions will be more closely scrutinized than would those of a lay person.

The trial judge did not ignore this proposition but the appellants submit that he did not give it enough weight.

[27] I do not agree with this submission, and I do not agree that the trial judge erred in concluding that Outerbridge's words were reasonably appropriate to the occasion. Three main considerations support the trial judge's conclusion.

[28] First, Carlstrom's letter merited a strongly worded response. Indeed, in my view, Outerbridge was entitled to question Carlstrom's professional responsibility, truthfulness, and bona fides. Carlstrom wrote as a professional engineer, yet he did not refer at all to the many professional opinions that contradicted his own. Moreover, when he wrote his letter, as the trial judge found, he "knew or ought to have known . . . that at the very least there was no definitive evidence of miss-wiring [sic] and further . . . that Mr. Beck was reviewing the two photographs to see if they disclosed any further evidence of miss-wiring". Despite what he knew or ought to have known, Carlstrom referred to a "very serious wiring problem" and urged that Inline be told not of a possible

deficiency with its heater but of a "probable deficiency", a distinction whose significance could not be lost on a professional engineer. In addition, Carlstrom raised the spectre of Consumers' Gas having been fortunate to have avoided a fatality, a scare tactic some might well consider malicious. I therefore agree with the trial judge's holding that "the seriousness of the attacks contained in the May 10th letter based on misstatements of the facts and omissions including the omissions of any reference or qualification arising from the multitude of contrary opinions, required strong language from the defendants to protect their interests."

[29] A second relevant consideration is that a person whose interests are attacked is entitled to reasonable latitude in responding. Even accepting that Outerbridge's language was, to use the trial judge's word, "indelicate" and even taking into account that Outerbridge is a lawyer, I do not think his letter exceeded the bounds of reasonable latitude.

[30] A final consideration, pointed out by Mr. Porter in his argument, is that Outerbridge had a wider scope to comment because he investigated the issues raised by Carlstrom before responding to them. See *Hill v. Church of Scientology*, supra, at p. 1193 S.C.R.

[31] For these reasons, I would not give effect to this ground of appeal. I would therefore dismiss the appellant's appeal.

4. Was the trial judge's assessment of damages unreasonably low?

[32] It is not necessary to address this ground of appeal because I would dismiss the appeal on liability. That said, I see no reviewable error in the trial judge's assessment of \$40,000 for general damages. That figure is not so low that it warrants this court's intervention.

(c) Costs

[33] The respondents are entitled to their costs of the appeal on a partial indemnity scale. The amendments to rule 57.01 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] effective in January of this year require this court to fix the respondents' costs in accordance with rule 57.01(1) and the Tariff. I would fix their costs at \$20,000.

[34] Although Mr. Porter acted for Outerbridge and Ms. Sefton for Consumers' Gas, their position was identical. Thus, they quite properly prepared a joint factum and Mr. Porter made oral submissions on behalf of both respondents. For costs purposes, I would treat the respondents as a single party. The argument of the appeal took 2 3/4 hours. Both Mr. Porter and Ms. Sefton have over 20 years experience at the bar. Their total fees claimed, using the top hourly rate of \$350 per hour, are approximately \$40,000. I have no doubt that they spent the hours they said they did. Nevertheless, having regard to the factors set out in rule 57.01(1)(a), (c) and (d) I think that \$20,000 is a fair figure for the respondents' fees.

D. Conclusion

[35] I would dismiss the appeal with costs on a partial indemnity scale. I would fix the respondents' costs at \$20,000 plus the disbursements set out in Ms. Sefton's bill of costs together with the appropriate amount for GST.

Appeal dismissed.

TAB 15

CITATION: SANDU v. FAIRMONT HOTELS AND ANOTHER, 2014 ONSC 5919
COURT FILE NO.: CV-08-363445
DATE: 20141230

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
SEVILLYA SANDU	)	<i>Andrew MacDonald</i> , for the Plaintiff
)	
	)	Plaintiff
)	
– and –)	
	)	<i>Lorne Honickman</i> and <i>David Elmaleh</i> , for
FAIRMONT HOTELS INC. and DARREN	)	the Defendants
SKOMOROWSKY)	
)	
	)	Defendants
)	
)	
)	
	)	HEARD: January 27, 28, 29, 30, 31 and
	)	March 18, 19, 2014
)	

2014 ONSC 5919 (CanLII)

STEWART J.

Nature of the Action

[1] The Plaintiff Sevillya Sandu (“Sevillya”) seeks damages for defamation as against the Defendant Fairmont Hotels Inc. (“Fairmont”) and its employee, Darren Skomorowsky (“Skomorowsky”).

[2] Fairmont and Skomorowsky deny that Sevillya was defamed. Alternatively, they argue that if any communication was made by them which amounts to defamation of her, such communication was made in circumstances which are subject to qualified privilege.

Facts

[3] Sevillya is married to Stefan Sandu (“Stefan”). At the time these events occurred, Stefan was employed by Fairmont as a senior chef at the Royal York Hotel.

[4] The sequence of events giving rise to the alleged defamation as demonstrated by the evidence at trial, when examined objectively, is actually not in any serious or major dispute. What is in contention are certain ingredients of and the general tone of an encounter at the Royal York Hotel between Sevillya, and Stefan and Skomorowsky.

[5] On the evening of December 20, 2007, Fairmont hosted a holiday party for its employees at the Royal York Hotel.

[6] On that same evening, Skomorowsky was on duty as Night Manager at the Royal York with responsibility for supervising and reporting on all activities related to the functioning of the hotel’s front desk.

[7] Sevillya and Stefan planned to attend the party with their daughter, Amber-Rose. Stefan had booked a room at the hotel at the substantially discounted rate offered to employees attending the party. A non-smoking room had been requested by him.

[8] The availability of discounted rooms to employees on that evening was subject to very strict rules. All rooms were to be pre-assigned and no room changes would be offered. Bed type and smoking or non-smoking requirements were to be the subjects of request only with no guarantee that such requests would be fulfilled.

[9] On the afternoon of December 20, Stefan received two keys for the room he had reserved. He later met Sevillya and Amber-Rose in the hotel lobby and escorted them to their room where they dropped off their luggage.

[10] Although the room they were given was a room on the second floor of the hotel designated as a non-smoking floor, when Sevillya first stepped in the room she noticed a slight smell of smoke. Sevillya has asthma and is particularly sensitive to smoke. She opened a window to get rid of the smell. Then she and Amber-Rose headed to the party, leaving the window open.

[11] Because Stefan was working that evening, he did not join his family at the party until midnight. When he did join them, he drank a couple of bottles of beer.

[12] Sevillya does not drink alcohol. She stated that she and Amber-Rose only drank water and Diet Cokes that entire evening. There is no direct evidence to the contrary. I accept that Sevillya and Amber-Rose had not been consuming any alcohol that evening and were in no way under the influence of alcohol or otherwise intoxicated.

[13] Sevillya and Amber Rose returned to their hotel room around 12:30 a.m. Stefan was not with them as he had stopped along the way to speak with some fellow employees. When Sevillya and Amber-Rose entered the room, the smell of cigarette smoke in the room was noticeable to them even though the window had been left open.

[14] When Stefan returned to the room, the Sandus discussed what to do about the smoke odour problem. They decided to leave the room as the smell was intolerable to Sevillya, and took their luggage with them.

[15] The Sandus arrived at the front desk with their luggage just before 1:00 a.m. While Amber-Rose sat nearby, Sevillya and Stefan spoke with Josh Herbert, the desk clerk on duty. They reported the issue of the smoke odour in the room and said they could not stay in that room as the smell of smoke was intolerable.

[16] The Sandus asked for a refund of the cost of the room. Because Stefan was an employee attending the holiday party, Hebert told them that they could not be offered a refund but offered them a change of rooms. The Sandus then asked to speak to the Night Manager, Skoromowsky.

[17] Sevillya and Stefan repeated their complaint about the smell of cigarette smoke in their room to Skomorowsky. The Sandus argued that, since the room had been represented as being non-smoking, they should be given a refund of their money. If that were not possible, they wanted to be moved to a non-smoking room on a floor where Sevillya's asthma could be safely accommodated. Stefan was prepared to pay extra for an upgrade, if that were necessary.

[18] Skomorowsky told them that he could offer the Sandus another non-smoking room but under no circumstances could he refund the room charge. When a room on an alternate non-smoking floor was suggested, Sevillya demanded to be assured that the room was acceptable to her and completely smoke-free by inspecting it with Skomorowsky present.

[19] By this time, other hotel guests were waiting to be attended to. Skomorowsky and Herbert could not leave the front desk.

[20] The Sandus swear that Skomorowsky then ordered them to leave and pointed to the front entrance. Skomorowsky denies this, but does admit that he indicated that he could not leave the front desk to go to inspect a room with Sevillya to ensure that it was acceptable to her.

[21] Stefan advised Skomorowsky that he would take the issue up with the hotel's General Manager with whom he was acquainted from his employment there. He asked for Skomorowsky's full name as well as the name of the desk clerk.

[22] The Sandus then left the hotel and went home.

[23] Skomorowsky made the following entry in the hotel's Midnight Log:

1. Mr. Stefan Sandu – Rm. 2-259 GRYHX7

The guest came to the desk upset, claiming that they had been placed into a smoking room for accommodation. The guest was informed that the second floor is non-smoking and that they had been booked into a non-smoking room. The agent apologized and offered an immediate

room change to accommodate. They then stated that this was unacceptable and that they should not be treated in this manner. They were then set up with a new room. At this point they stated that they wanted to check out and should not be charged anything for the outrage. The agent apologized and offered have the manager speak with them.

We apologized if other guests were deciding to smoke on non-smoking floors and offered a room change. The guest refused stating that they were going to check out and did not want to be charged. We apologized but at the room had been utilized since 3:00pm yesterday afternoon. The guests' accompany began screaming in front of a line up of guests that we had placed them deliberately in a smoking area. Again we offered them a room change to more suitable accommodation. This did not seem to suffice as the guests continued to yell. She demanded that the manager accompany her up to the floor. They were informed that it was currently very busy, that we believed them, and that we could accommodate a room change. They were very intoxicated and quite belligerent. They continued pointedly stating we had stuck them in a smoking room and there should be no charge. At this point the guests were informed that if this discussion continued any further that they would be asked to leave the hotel as they were disturbing the other guests checking in.

They began to demand to speak to the General Manager with whom they had just been sitting upstairs. I stated that Ms. McCrory had left the building for the evening, and stated that I was speaking for her. The guests began to yell louder and demanded the Night Managers' card and the name of the desk agent. They stated that this treatment was unacceptable and that they would be following up with the GM tomorrow. They checked out and returned to the desk once again to demand the agents name and another card from the Night Manager.

*** The guest was accompanied by his wife and their daughter, a minor. We conducted a lock audit to ensure that this wasn't simply a case of the guest going up to the room after the function and finding it smokey. The room was accessed at 5:23pm, 6:15pm, 11:54pm and 12:25pm. The guest came down to speak with the NM at 00:52am. (Please see Lock audit report below).

[24] The Midnight Log is a document required by Fairmont to be completed each evening by the Night Manager. It is designed to be a record of any events or occurrences of note of which hotel management are to be informed. The Midnight Log is circulated to a list of management

personnel within the hotel as a matter of routine each morning so that they might be kept apprised of any incidents occurring in the hotel.

[25] The Midnight Log which included a report of this incident as noted above was circulated on December 21, 2007 to the usual recipients and to the hotel's human resources personnel because a staff member had been involved.

[26] Sevillya felt that her Christmas had been ruined and what was to be a happy event for her family ended in shambles. On December 21, 2007, Sevillya pursued her complaint about how she felt that she and her family had been treated at the front desk with senior management. She met with Gregory Day, Assistant General Manager of the Royal York Hotel. She was dissatisfied with Day's response.

[27] Soon after meeting with him, Sevillya wrote a letter to Day which included the following statements:

Instead of listening to our story and trying to help, you behaved in a most outrageous and terrible manner. What is even more upsetting and difficult to understand is that you did not want to listen to us because you have already made up your mind about the situation. We did not come to advocate for my husband Stefan Sandu who is the employee of the Fairmont Royal York Hotel. We had come to talk to you and discuss in a reasonable manner about the fact that we were insulted and humiliated by the hotel employees because we had complained about the room given on December 21, 2007. There was heavy smoke on the second floor and in the room that made us sick, and this was the reason we decided to leave. Instead of being accommodated and treated with respect, the night manager became angry that we had complained, and threw us out of the hotel. Today we had hoped that you were able to resolve this matter, but found you in a most disagreeable mood and finally in a violent way you threw us out of your office. We were shocked and in disbelief that a person in your position could act with such an aggressive behavior.

...

Your behavior was unacceptable and most unprofessional and unbecoming of a Manager of such a reputable hotel such as Fairmont Royal York. Your action spoke volume and the kind of treatment and disrespect you have for the guests, employees and family of the employee. It is very, very, very sad that you have decided to display such an abhorrent behavior

[28] Sevillya followed up her letter to Day with further correspondence dated December 5, 2007 directed to Heather McCrory, General Manager of the Royal York Hotel. In her letter, she accused Skomorowsky of having carried out “a senseless, imprudent and unwise set of actions” and stated that he had acted and spoken improperly to her and Stefan. She also alleged that Day had “thrown” her and her daughter out of his office “in a most violent and aggressive manner”.

[29] On December 23, 2007, Stefan was told he must meet with his supervisors David Garcelon and J.C. Dupoire to discuss the incident. He attended this meeting with a representative of his union. Garcelon had a copy of the Midnight Log entry with him and during the meeting he referred to the incident of the previous evening.

[30] Stefan was disciplined for violation of hotel policy, harassment of a colleague and insubordination. The penalty imposed was a six-month suspension of his entitlement to use the “Destinations Program”, a system of company-wide discounts for employees.

[31] Stefan commenced a grievance under his union’s collective agreement to challenge the discipline and penalty imposed. That grievance was settled to the satisfaction of management and his Union. The discipline was expunged and the penalty was removed.

[32] I note that Stefan is not a Plaintiff in this civil action and seeks no remedy from either Defendant. He remains a valued Fairmont employee.

Issues:

- A. Was Sevillya defamed?
- B. Was the entry in the Midnight Log justified?
- C. Was the circulation of the Midnight Log entry and any reference to its contents during a discipline meeting with Stefan made an occasion of qualified privilege?
- D. What are Sevillya’s damages?

Issue A: Was Sevillya defamed?

[33] In applying the general principles of defamation to a particular set of facts, the Court must consider and weigh the delicate balance between the protection of reputation and the safeguarding of freedom of expression (see: *Leenen v. Canadian Broadcasting Corp.*, [2000] O.J. No. 1359 (S.C.J.)).

[34] The threshold test is whether the statement is defamatory either through its natural and ordinary meaning or through innuendo. A defamatory statement is one which has a tendency to

injure the reputation of the person to whom it refers, a statement which tends to lower that person in the estimation of right-thinking members of society generally.

[35] To establish defamation, the onus is on a plaintiff to prove that the words complained of were “published”, that the words complained of refer to the plaintiff, and that the words complained of, in their natural and ordinary meaning, are defamatory of the plaintiff.

[36] In considering whether or not words are defamatory, it is for the trier of fact to determine whether the words, “when considered in context in which they were presented, would reasonably lower the plaintiff in the estimation of an ordinary, objective, reasonable member of society, who has common sense, is reasonably thoughtful and informed, but who does not have an overly fragile sensibility” (see: *Myers v. Canadian Broadcasting Corp.*, [1999] O.J. No. 4380 (S.C.J.)).

[37] In my view, the contents of the Midnight Log defamed Sevillya. The words were published by being distributed to a list of persons working at the hotel. The description of her conduct in the Midnight Log was that of a person who was inebriated, demanding, shouting and generally behaving in a belligerent and inappropriate manner toward hotel staff. A fair reading of its contents would cause a reasonable person to believe that this description embraced and applied to Sevillya.

[38] In all of the circumstances and the context of the incident, I am satisfied that the description as pleaded in her Statement of Claim and as demonstrated by the Midnight Log referred to Sevillya and was defamatory of her in accordance with the above-cited legal test.

Issue B: Was the entry in the Midnight Log justified?

[39] Sevillya was not “very intoxicated”. She had not been consuming alcohol that evening, although Stefan had.

[40] However, I consider the balance of the entry to be substantially true and justified in the circumstances. I accept the evidence of Josh Herbert and Skomorowsky as to the incident at the front desk and their efforts to appease and mollify the Sandus who I conclude were upset and angry and disappointed and belligerent, as the content of the Midnight Log depicts.

[41] I prefer the evidence of Herbert and Skomorowsky as to the belligerent tone of Sevillya’s demands and her behavior toward them to that offered by the Sandus. The front desk staff and Manager would have no reason to be anything other than polite and accommodating toward her. Indeed, much of their work involves addressing complaints and mollifying guests.

[42] Skomorowsky did not challenge the assertion that the room assigned to the Sandus was uninhabitable due to the smell of smoke. An alternate room was offered. No refund was available according to the conditions of booking. I note the room had been entered and occupied. There is nothing unreasonable about the no-refund policy in these circumstances.

[43] Moreover, I would consider it reasonably expected that people who are disappointed and upset by the nature of their hotel accommodations will be emotional and express their dissatisfaction to the desk clerk and Night Manager in emotional terms and in raised voices. I therefore do not believe the Sandus' testimony insofar as they attempt to describe themselves as perfectly controlled, unemotional, polite and constrained in their expression of their complaints to hotel staff that evening. That playing down of their demeanour does not accord with the nature of their complaint and the circumstances.

[44] Further, the tone and content of the letters to Day and McCrory sent by Sevillya supports a conclusion that she has the capability of becoming excited and engaging in angry hyperbole when she meets resistance to her demands. I conclude on the evidence that Sevillya's response to the disappointments of the evening was a gross over-reaction, substantially as depicted in the Midnight Log.

[45] When the contents of the Midnight Log are considered in their entirety, I find that the account and description contained therein are true and justified.

Issue C: Was the circulation of the Midnight Log entry and any reference to its contents during a discipline meeting with Stefan made an occasion of qualified privilege?

[46] The defence of qualified privilege applies to the occasion when a defamatory statement is made, not to the statement itself. On an occasion of qualified privilege a person may actually defame another without attracting liability (see: *RTC Engineering Consultants v. Ontario et al.*, [2002] O.J. No. 1001 (C.A.)).

[47] At the heart of the defence of qualified privilege is the notion of reciprocity or mutuality. A defendant must have some interest in making the statement and those to whom the statement is made must have some interest in receiving it. The interest sought to be served may be personal, social, business, financial, or legal. The context is important.

[48] I conclude on the evidence at trial that Skomorowsky had a duty to relate the details of the incident as he recalled them as part of the fulfillment of his management responsibilities at the hotel. Distributing the Midnight Log to those on the list of usual recipients plus Human Resources personnel was entirely within the scope of that duty. Similarly, those who received the Midnight Log via e-mail or otherwise had a corresponding duty to do so, to review its contents and to take whatever steps were considered necessary in light of the employment relationship. As such, the publication was made on an occasion of qualified privilege.

[49] Qualified privilege may be defeated if there is proof of actual malice. Malice must be proved by the plaintiff to defeat the presumption of good faith or honest belief in the truth of what was published that applies in such a case.

[50] A defendant is not required to investigate all sources of information, to satisfy themselves as to the 100% accuracy of the specific words incorporated into the impugned publication. I accept the evidence of Skomorowsky, as corroborated by Herbert, that he honestly believed the statements recorded by him in the Midnight Log were true and in particular, believed that Sevillya and Stefan were inebriated because of their conduct and appearance. Such a belief would be reasonable in all of the circumstances. Skomorowsky, in particular, did not fabricate or deliberately exaggerate the details of his description of the altercation in the Midnight Log.

[51] Similarly, the use of the Midnight Log and any reference to it by those involved in meeting with Stefan to discuss an issue of possible employee discipline likewise falls within the ambit of an occasion of qualified privilege. Indeed, it was necessary to inform Stefan of the purpose for which he was being met with and purportedly disciplined.

[52] I find that the Midnight Log entry was circulated by Fairmont and Skomorowsky only for legitimate purposes associated with fulfillment of their respective duties as Fairmont employees and has been restricted to those who are appropriate internal recipients of it.

[53] Accordingly, the defence of qualified privilege attaches to the publication of all statements defamatory of Sevillya in this instance and serves to defeat her claim.

Issue D: What are Sevillya's damages?

[54] In the event that I am found to be wrong in arriving at these conclusions, I must consider the quantum of Sevillya's damages.

[55] As mentioned above, the contents of the Midnight Log were circulated only within the circle of individuals within Fairmont who were its appropriate recipients. To that extent, the publication of the words complained of was contained.

[56] I accept that Sevillya was upset and embarrassed as a result of the publication. This must be separated, however, from her upset at what she perceived to be mistreatment at the front desk and lack of response by management when she complained.

[57] Sevillya did not require any special treatment or incur any special expenses as a result of this publication. Her damages are largely characterized a loss of reputation and hurt feelings.

[58] In all of the circumstances, I would assess her damages at \$25,000.00.

Conclusion

[59] For these reasons, the action is dismissed.

Costs

[60] If the parties cannot agree on the subject of costs, written submissions may be delivered by the Defendants within 30 days of this decision, and by the Plaintiff within 15 days thereafter.

STEWART J.

Released: December 30, 2014

CITATION: SANDU v. FAIRMONT HOTELS AND ANOTHER, 2014 ONSC 5919
COURT FILE NO.: CV-08-363445
DATE: 20141230

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SEVILLYA SANDU

Plaintiff

and –

FAIRMONT HOTELS INC. and DARREN
SKOMOROWSKY

Defendants

REASONS FOR JUDGMENT

STEWART J.

Released: December 30, 2014

TAB 16

CITATION: Thompson v. Cohodes, 2017 ONSC 2590

COURT FILE NO.: CV-16-555861

DATE: 20170426

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Mark Thompson, Plaintiff

AND:

Marc Cohodes, Defendant(s)/Respondent(s)

BEFORE: Madam Justice Kristjanson

COUNSEL: *Peter Downard*, for the Plaintiff/Respondent

Mark Wiffen, for the Defendant/Moving Party

HEARD: January 26, 2017

ENDORSEMENT

[1] The Plaintiff Thompson, then CEO of a publicly traded corporation, Concordia International Inc., commenced a libel action against Cohodes, a former hedge fund manager and short seller critical of Concordia. The alleged libel is an imputation of fraud against Thompson when he was a junior lawyer at Biovail Corporation more than a decade ago. Cohodes brought this motion under s. 137.1 of the *Courts of Justice Act (CJA)* to dismiss the proceeding on the basis that it limits expression on a matter of public interest.

[2] Section 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 provides that where a proceeding is brought regarding a statement relating to a matter of public interest, a defendant may seek a preliminary judicial assessment of the merits of the claim. In a preliminary review under s. 137.1, *CJA*, the defendant must establish that the impugned expression is on a matter of public interest. The plaintiff then bears the onus of showing that: (1) there are grounds to believe his or her claim has substantial merit; (2) there are grounds to believe that the defendant has no valid defence; and (3) the harm that has been or is likely to be suffered by the plaintiff is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

[3] I have found that management of publicly traded corporations is a matter of public interest. However, in this case an unsupported allegation of committing fraud or participation in fraud against a specific individual relating to alleged actions a decade earlier, when he was a lawyer, leads me to conclude that the public interest in permitting Thompson to proceed with his libel action outweighs the public interest in protecting Cohodes' expression.

The Facts

[4] Until November, 2016 when he resigned, Thompson was Chairman and CEO of Concordia International Inc. ("Concordia"), a publicly traded pharmaceutical company. Thompson was called to the bar in 1998 and began his career as a corporate associate with Osler, Hoskin & Harcourt in Toronto. As a third year lawyer he joined the legal department of Biovail Corporation as Associate General Counsel from 2001 to 2004, and then as Vice-President, Business Development. He left Biovail in early 2005, and was never a director or officer of Biovail.

[5] Cohodes is a chicken farmer, former hedge fund manager and outspoken critic of Concordia and other companies whom he believes are mismanaged. He is also an active short seller, who in 2016 was a frequent critic of Concordia (and other companies) on his Twitter account, making statements such as "Concordia is just a shell game loaded with legacy Biovail Cats. Oh the leverage", "[m]aybe people are starting to figure out that Concordia's leverage make [Valeant Pharmaceutical] look like [Merck & Co.]" and "Concordia is a low quality copycat with former Biovail execs running it at 2x more leverage than [Valeant Pharmaceutical]".

[6] At the April, 2016 Annual General Meeting of Concordia, Thompson responded to Cohodes' attack on Concordia by stating: "If you are a chicken farmer, your chickens will come home to roost," which Cohodes (as a chicken farmer) took as an attack on him.

[7] After Thompson's comment at the Concordia AGM, Business News Network (BNN) invited Cohodes on for an interview to respond to Thompson's comments and address his views on Concordia's stock. The BNN interviewer quoted Thompson's statement from the Concordia AGM, noted that "I think it's directed very specifically at you", and asked for Cohodes' response. Cohodes' response, which Thompson alleges was defamatory, was as follows:

One of the things that I always try to do is I bet the jockey and not the horse. And one thing I look at is career failures. And the management of Concordia, their past gig was at something called Biovail which I was short a long time ago which was a complete and utter fraud. So Thompson has a history of nonsense when he was at Biovail. He started up a company called Trimel Pharmaceuticals. I last quoted that at 18 cents. And for a guy who pays himself 9 million dollars U.S. per year and as leveraged as he is he should focus a little more on running his business and a little less on me. (emphasis added)

[8] Cohodes said later in the interview that in his statements about Thompson and Biovail he was "speaking out against complete and utter nonsense and frauds."

[9] The interview continued to discuss Cohodes' views on Concordia, including specific comments regarding issues Cohodes took with Concordia's business. Cohodes also made additional comments such as "[e]veryone can come to their own conclusions and whatever the

market decides, the market decides. The market is a court of public opinion, it's not a court of law ...". The broadcast is available on BNN's website.

Alleged Libel

[10] The underlined portions in paragraphs 7-8 constitute the alleged libel. Cohodes spoke specifically about the "jockey" of Concordia, Mr. Thompson. He stated that Thompson was employed by Biovail which was a "complete and utter fraud", and that Thompson had "a history of nonsense" when Thompson was employed by Biovail. The use of the term "nonsense" in this context are grounds to believe there is an imputation of fraud. The only "nonsense" at Biovail referred to by Cohodes is that Biovail was "a complete and utter fraud". Later in his interview, Cohodes stated that he was speaking about "complete and utter nonsense and frauds". Cohodes' statement is therefore reasonably interpreted as stating that Thompson committed fraud, or participated in the commission of fraud, during his employment at Biovail early in his career.

Issues

[11] Under s. 137.1 of the *CJA*, Cohodes must first establish that his expression relates to a matter of public interest. Thompson will not be entitled to maintain his action unless he establishes that: (1) there are grounds to believe his claim has substantial merit; (2) there are grounds to believe the defendant has no valid defence; and (3) the harm likely to be or that has been suffered by the plaintiff is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

Issue #1: Expression Relates to a Matter of Public Interest

[12] It is not in dispute that the statement complained of relates to a matter of public interest. The plaintiff has conceded, and I find, that the management of a publicly traded corporation is a matter of public interest.

Issue # 2: Grounds to Believe the Proceeding has Substantial Merit

[13] The burden is on Thompson to establish that there are grounds to believe the proceeding has substantial merit: s.137. 1(4)(a)(i), *CJA*. I agree with Justice Dunphy in *Able Translations Limited v. Express International Translations Inc.*, 2016 ONSC 6785 at paras. 46-48, that Thompson must establish "an objective basis for the belief which is based on compelling and credible information."

[14] There are three elements to a libel case. First, the plaintiff must establish that the words refer to the plaintiff. That has been conceded. Second, the plaintiff must establish the words were published by being communicated to at least one other person. That has also been conceded. Finally, the plaintiff must establish that words complained of were defamatory, in the sense of tending to lower the plaintiff's reputation in the eyes of a reasonable person: *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at p. 24 (S.C.C.) per Cory J.

[15] Cohodes argues that the statement that Thompson had a history of “nonsense” at Biovail, in the context of the interview referring to fraud and utter nonsense at Biovail, should be interpreted in context, including considering how much is publicly known about the plaintiff, and the nature of the audience. (*WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 69). Cohodes argues that a reasonable viewer would view this matter as a well-known critic of Concordia and its management criticizing Concordia and its management. Cohodes submits that: “Cohodes’ comment would simply be construed by the reasonable viewer as Cohodes expressing an opinion that Concordia is a bad investment, because its management (including Thompson) has a history of being involved in poorly managed companies (including Biovail and Trimel).” I do not agree.

[16] In this case, the alleged libel referred to Thompson personally. The words are reasonably interpreted as alleging that Thompson committed fraud, or participated in committing fraud, at a company where he was employed as a lawyer at an early stage of his career. The libel was widely disseminated, both publicly broadcast on BNN and posted on BNN’s website. I find there are reasonable grounds to believe the substantial requirements of the plaintiff’s claim in libel are satisfied.

Issue #3: No Valid Defences

[17] Cohodes has not yet filed a statement of defence. For the purposes of this motion, Cohodes advances two defences: justification and fair comment. I discuss each of these below, and find that there are reasonable grounds to believe there is no valid defence.

(a) Justification

[18] To establish a defence of truth, or justification, the defendant must prove the substantial truth of the “sting”, or main thrust, of the libel complained of: *Cusson v Quan* 2007 ONCA 771 at para. 35; rev’d on other grounds 2009 SCC 62. In this case the words complained of are reasonably interpreted as conveying the defamatory sting that Thompson committed fraud, or participated in fraud, when he was employed at Biovail early in his career. Thompson has given evidence that he did not engage in any fraudulent conduct, or any misconduct, during his employment at Biovail.

[19] Cohodes led evidence that Thompson has, both during and after his Biovail tenure (where he was one of one two to four lawyers in the Biovail legal department), been closely associated with both Biovail and Eugene Melnyk, the former CEO of Biovail. Thompson was employed by Biovail as Associate General Counsel, and then as a Vice President of Business Development, from 2001 to 2005. Biovail was founded by Eugene Melnyk, and Melnyk was the CEO of Biovail during Thompson’s employment there.

[20] Cohodes relied on evidence including newspaper articles, press releases, litigation claims, and administrative and court orders to establish that during Thompson’s tenure at Biovail, Biovail was involved in a number of proceedings involving allegations of fraud or similar conduct including:

- (a) The US Securities and Exchange Commission (the “SEC”) issued a civil complaint against Biovail for conduct between 2001 and 2003, alleging “chronic fraud” and a “corrupt strategy” of misleading investors and analysts.
- (b) As a result of the SEC complaint, there was a consent judgment in which Biovail paid a \$10 million civil fine, and Melnyk paid a \$150,000 fine and was barred from serving as an officer and director of a public company for 5 years.
- (c) The Ontario Securities Commission (the “OSC”) brought its own proceedings against Biovail and its management. Among other things, the OSC fined Melnyk \$565,000 and barred him from acting as an officer and director of a reporting issuer for 5 years.
- (d) Biovail was sued by its shareholders in 2003 for fraud. It paid \$138 million to settle that proceeding.
- (e) In 2000 (slightly before Thompson’s time at Biovail) and in 2002 (after Thompson began at Biovail), a Bank of America analyst named Jerry Treppel published negative reports about Biovail. Mr. Treppel sued Biovail, alleging that Biovail retaliated against him by distributing defamatory information about him, and causing him to lose his job in May 2002, and
- (f) Biovail pleaded guilty in either a criminal or administrative proceeding in a scheme related to paying doctors in 2002 and 2003 to buy a drug called Cardizem, and paid a \$24.6 million fine.

[21] Cohodes alleged that Thompson was involved in at least some of the matters giving rise to the OSC complaint (and the similar SEC complaint) against Biovail, since: (a) Thompson gave evidence before the OSC on a Biovail matter; (b) Thompson’s hard drive from when he was employed at Biovail was included as part of a court ordered search in connection with the claim by Mr. Treppel against Biovail, Melnyk and Cancellera (whom Thompson directly reported to while at Biovail), and (c) in 2007 Thompson founded Trimel Pharmaceuticals with Eugene Melnyk, although Melnyk’s involvement in that going public process (which involved a reverse merger with J5 Acquisition Corp.) was restricted by the OSC order against him. This does not establish the truth of Thompson’s involvement in fraudulent conduct.

[22] I accept the evidence of Thompson on this motion that:

- (a) Thompson has no history of fraud, or any misconduct, whether styled as “nonsense” or otherwise, during or related to his employment at Biovail;
- (b) No one has ever made any allegation in any legal proceeding that Thompson ever engaged in fraud or misconduct while he was employed at Biovail;
- (c) Thompson was never deposed in litigation in the United States involving Biovail;

- (d) He was not involved in the Treppel matter, and he had no information as to why in 2006, after he had left Biovail, a court order directed production of a 2005 hard drive storing information of Thompson and others;
- (e) He was not involved in the Cardizem matter;
- (f) Thompson was never deposed in any Securities and Exchange Commission matter in the United States involving Biovail; and
- (g) In Canada, Mr. Thompson appeared as a witness in an OSC proceeding involving a former director of Biovail. In that matter he did so as a witness for the Ontario Securities Commission. No allegation was made against Thompson.

[23] I find that Thompson has established that there are reasonable grounds to believe there is not a valid defence of justification.

(b) Fair Comment

[24] To establish a defence of fair comment, the comment must be (1) on a matter of public interest; (2) based on fact; (3) recognizable as comment (though a comment may include inherently debatable inferences of fact); and (4) fairly made, in the sense that a person could honestly make the comment on the proved facts. If the defendant establishes these elements, the defence may still be defeated if the plaintiff establishes that the defendant was actuated by malice: *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420 at para. 28, *per* Binnie J. Under *CJA* s. 137.1(4)(a), the burden is on the plaintiff to demonstrate there are grounds to believe the defence is not made out.

[25] Cohodes submits that since Thompson was employed by Biovail, and for the purposes of the motion Biovail's fraud was sufficiently established, the reference to Thompson's "history of nonsense" is a statement that is not capable of being objectively proven true or false since nonsense is neither true nor false, and as such it is a comment. Cohodes also argued that the test to be applied is whether any person could honestly express that opinion on the proved facts such that there is "a nexus or relationship between the comment and the underlying facts" (*WIC Radio*, at para. 40).

[26] In this case, Cohodes has no defence of fair comment since the statement complained of is a statement of fact, not comment. Statements of comment are statements of opinion, or inherently subjective and debatable inferences from facts: *WIC Radio* at para. 26. They are distinguished from defamatory statements of fact, which purport to assert objective truth. If the words are presented in a manner which does not indicate with reasonable clarity that they are comment and not statements of fact, the words may be found to be a statement of fact.

[27] The sting that one has committed or participated in fraud is an allegation of fact. In *Wasserman v. Freilich*, Eady J. stated that an allegation that a person has been dishonest is

“generally regarded as a factual allegation”: [2016] EWHC 312 at para. 16 (Q.B.), stating at paras. 16 and 22:

Juries are deciding on every day of the week, as a matter of fact, whether a particular defendant was, or was not, dishonest. Accordingly, it is an allegation which in the context of libel is readily understood as being susceptible to a plea of truth...It is not thought to be a matter of opinion: nor can one convert an allegation of dishonesty (or for that matter, of murder or rape) into a matter of opinion by merely inserting in front of it a formula such as “I believe...” or “she thinks...An allegation of dishonesty, fraud or attempted fraud will usually fall fairly and squarely on the side of fact rather than opinion.

[28] The defence of fair comment is only available for comment based on facts proven to have been true: *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420 at para. 31 (S.C.C.). I have found that on this motion, it has not been established that Thompson engaged in fraud at Biovail, and thus there are grounds to believe there is no defence of fair comment.

Issue #4: Public Interest

[29] The final aspect of the test is whether the harm that has been or is likely to be suffered by the plaintiff as a result of the libel complained of is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression: s. 137.1(4)(b), *Courts of Justice Act*.

[30] Justice Dunphy in *Able Translations* has held that in order for the plaintiff to meet this onus in a defamation claim, the evidence of damages suffered or likely to be suffered in consequence of the impugned statements must be such that there is “credible and compelling evidence of harm that appears reasonably likely to be proved at trial”: *Able Translations Ltd. v. Express International Translations*, 2016 ONSC 6785 at para 83; *Fortress Real Developments Inc. v. Rabidoux*, 2017 ONSC 167 at paras 28, 36.

[31] Cohodes submits that there was little, if any, consequence to Thompson from the comments made by Cohodes, pointing to evidence that:

- (a) Although it is suggested that Cohodes’ motivation in making his comments was to lower the reputation of both the company and its senior management in order to capitalize on the fall in Concordia’s stock price, there was no substantial decrease in the stock price at the time of the interview.
- (b) Thompson has acknowledged that his resignation from Concordia was not connected to Cohodes’ comments.
- (c) Thompson has delivered no libel notice to BNN, and brought no action against BNN. This, he states, is indicative of a claim brought to attack Cohodes, rather than to genuinely protect or vindicate Thompson’s reputation by having the

interview removed from BNN's website. On this point, I note that the jurisprudence regarding pursuing a claim of defamation against the media raises different issues and I place no weight on this point.

- (d) Although Thompson was invited on BNN "multiple times" after Cohodes' interview, he never appeared, and never took advantage of the opportunity to correct any alleged misstatements made by Cohodes.
- (e) This lawsuit itself appears to have received more coverage than the BNN interview.
- (f) Thompson has now been sued in securities class actions in the United States for deception and fraud, and has received substantial negative publicity due to the downfall of Concordia and the associated margin calls requiring him to divest shares of Concordia. This negative publicity is not the result of Cohodes' BNN interview.

[32] The harm that has or is likely to be suffered as a result of the libel must be established having regard to the law of libel as it relates to the assessment of damages. General damages are presumed from the publication of the libel, and need not be established by proof of actual loss: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 164 (S.C.C.). Valid purposes of a general damages award are to compensate the plaintiff for loss of reputation and injury to the plaintiff's feelings, and to vindicate the plaintiff, although the relevance of each of these may vary from case to case: *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 at 111 (C.A.).

[33] In this case I note the following factors are relevant to the harm that has and is likely to be suffered by the plaintiff. First of all, the seriousness of the charge is an important issue. An allegation that a plaintiff has committed fraud is treated seriously. In this case, the defamatory imputation that Thompson committed fraud or participated in the commission of fraud, which for a CEO of a public company, and a lawyer at the time of the allegations, is indeed a very serious charge.

[34] The mode and extent of publication is also important. The damages are increased if the libel is published in a major newspaper or widely broadcast. In this case, the libel was part of a national television broadcast, and is available on the internet.

[35] The court will also consider the position and standing of the plaintiff in the community. At the time of the libel, Thompson was the chairman and CEO of a public corporation. The court also considers the importance of the plaintiff's reputation to his or her employment or profession. Thompson's evidence is that a number of people including those who worked in his office and Concordia shareholders, asked him about Cohodes' allegation against him. He was in management at a publicly traded corporation, and the allegations relate to a time he was practising law.

[36] In addition, the conduct of the defendant before and after the time of publication may be taken into account in assessing general damages: *Dingle v. Associated Newspapers Ltd.*, [1964]

A.C. 371 at 395 (H.L.) Conduct of a defendant that may be regarded as having increased the plaintiff's damages include a repetition of the libel and conduct calculated to deter the plaintiff from proceeding or other persecution of the plaintiff. In this case there is evidence of such conduct by Cohodes.

[37] After the issuance of the claim, Cohodes has made further public statements about Thompson on Twitter. Cohodes has an audience of approximately 7,000 followers. Those followers may in turn pass on Cohodes' tweets to others. The tweets include the following:

- (a) **May 20, 2015:** "...Thompson came by the Hen House the other night and did him in with a shovel..." Beneath this message Cohodes placed a photograph of an opossum that Cohodes had killed at his farm by hitting him in the head with a shovel;
- (b) **June 5, 8 and 21, 2015:** Cohodes posted several 'tweets' referring to Thompson as a snake, posting photographs of snakes with each of them;
- (c) **August 2, 2015:** Cohodes responded to a 'tweet' by another Twitter user which asked, "Are you bringing your...umm...castration equipment with you when you visit Ontario?" Cohodes replied on Twitter, "Never leave home without it." Cohodes posted a photograph of a chicken and her chicks, with the words, "Of course. They hatched when that Cock Sucker served me with that Silly Ass Suit. When I see them I think of that shit stock." Cohodes testified that the "Silly Ass Suit" was this lawsuit, and in referring to the "cock sucker", it was either the law firm or Thompson;
- (d) **September 9, 2015:** "He is at a bar somewhere drinking out a shoe. That is what you get and deserve". Above this message Cohodes posted a photograph of Thompson;
- (e) **September 13, 2015:** "Not to mention I got sued for speaking out after Thompson grandstands. He will truly rot in Hell";
- (f) **September 16, 2015:** "Maybe Thompson should have called Gaston before he sued me...Only 5 more points to go. Someone collect his passport". Immediately below this message Cohodes posted a photograph of an individual named Gaston being led away in handcuffs by law enforcement officers. Cohodes accepts that in this post he implied that someone should collect Thompson's passport so he couldn't leave the country. On the same date Cohodes posted another tweet stating, "Thompson in the not to [*sic*] distant future". Beneath this message Cohodes posted a cartoon of an RCMP officer dragging behind him a cartoon villain;
- (g) **September 21, 2015:** "Thompson is a Bully and a Coward & suing people for having an opinion doesn't work. I hope to make an example of him gloating it is not...";

- (h) **September 29, 2015:** “The Joker Card. Don’t leave home without it.” Beneath this message Cohodes posted a photograph of a movie villain (the “Joker”) holding a card with a picture of Thompson’s face on it.

[38] For these reasons, I find that there are grounds to believe that Thompson will be entitled to damages in the action.

[39] An attack on professional reputation through an imputation of fraudulent conduct is a classic concern of the law of libel. The libel referred to the plaintiff personally and was widely disseminated. Following publication of the libel complained of, the defendant has continued to comment on Thompson’s character. These are all significant factors which I weigh in recognizing the public interest in allowing the plaintiff to continue his lawsuit.

[40] By contrast, the value of the defendant’s expression is low. The statement complained of was an allegation that the plaintiff committed or participated in fraudulent conduct when he was a lawyer at the start of his career with another company in the context of a larger discussion about the management of Concordia. There were no details with respect to the “nonsense” which Thompson allegedly engaged in Biovail and the statement focussed on the personal conduct of the plaintiff over a decade earlier. As such, I find the public interest in permitting Thompson to proceed with his action outweighs the public interest in the expression at issue.

Costs

[41] There is a special costs regime under s. 137.1 of the *CJA*. Section 137.1(8) provides that if a judge does not dismiss the proceeding, the plaintiff is not entitled to costs on the motion unless the judge determines that such an award is appropriate in the circumstances. The plaintiff seeks costs against the defendant on a substantial indemnity basis, citing conduct-based factors including (a) a high volume of “plainly irrelevant evidence”; (b) misuse of cross-examination to “harass” the plaintiff; (c) abuse during his cross; (d) continuing to assert the truth of the allegation of fraudulent conduct unsupported by evidence.

[42] I find no basis to depart from the presumption that costs not be awarded against an unsuccessful defendant. As suggested at para. 20 of the 2010 Anti-SLAPP Advisory Panel report, costs awards against unsuccessful defendants are intended to act as “costs sanctions against parties who bring frivolous motions for protection”. The motion was not frivolous, and did not raise the kind of high volume of issues or evidence of concern in *Platnick v. Bent*, 2017 ONSC 585. As a result, no costs awarded to the successful plaintiff.

Kristjanson J.

Date: April 26, 2017

TAB 17

**Insurance Corporation of British
Columbia** *Appellant*

v.

Unifund Assurance Company *Respondent*

**INDEXED AS: UNIFUND ASSURANCE CO. v. INSURANCE
CORP. OF BRITISH COLUMBIA**

Neutral citation: 2003 SCC 40.

File No.: 28745.

2002: December 12; 2003: July 17.

Present: McLachlin C.J. and Iacobucci, Major,
Bastarache, Binnie, LeBel and Deschamps JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR
ONTARIO

*Constitutional law — Extraterritorial limitation on
provincial legislation — Applicability of reimbursement
provisions of Ontario regulatory scheme to out-of-
province insurer.*

*Insurance — Motor vehicles — Interprovincial motor
vehicle liability insurance — Arbitrator — Jurisdic-
tion — Ontario residents injured while travelling in
British Columbia — Ontario residents receiving statu-
tory accident benefits under Ontario policy from Ontario
insurer — British Columbia law permitting insurer in
that province to deduct from damages payable amount
of benefits received by insured under automobile insur-
ance “wherever” issued — Ontario Insurance Act not
permitting deduction but providing for indemnification
of no-fault insurer by tortfeasors’ insurer for ben-
efits paid — Jurisdiction of arbitrator appointed under
Ontario Insurance Act to decide issues of jurisdiction
simpliciter, forum conveniens and choice of law — Insur-
ance Act, R.S.O. 1990, c. I.8, s. 275.*

Mr. and Mrs. B, Ontario residents, were injured when
their rented car was struck by a tractor-trailer in British
Columbia. All the vehicles involved in the accident
were registered in British Columbia and insured by the

**Insurance Corporation of British
Columbia** *Appelante*

c.

Unifund Assurance Company *Intimée*

**RÉPERTORIÉ : UNIFUND ASSURANCE CO. c.
INSURANCE CORP. OF BRITISH COLUMBIA**

Référence neutre : 2003 CSC 40.

N° du greffe : 28745.

2002 : 12 décembre; 2003 : 17 juillet.

Présents : La juge en chef McLachlin et les juges
Iacobucci, Major, Bastarache, Binnie, LeBel et
Deschamps.

EN APPEL DE LA COUR D’APPEL DE L’ONTARIO

*Droit constitutionnel — Limites de la portée extra-
territoriale d’une loi provinciale — Applicabilité à un
assureur de l’extérieur de la province des dispositions
en matière d’indemnisation entre assureurs prévues par le
régime de réglementation ontarien.*

*Assurance — Véhicules automobiles — Assurance-
responsabilité automobile interprovinciale — Arbi-
tre — Compétence — Résidents de l’Ontario victimes
d’un accident de la route en Colombie-Britannique —
Indemnités d’accident légales versées à ces résidents
de l’Ontario en vertu d’une police émise en Ontario par
un assureur de cette province — Loi de la Colombie-
Britannique permettant aux assureurs dans cette province
de déduire des dommages-intérêts les indemnités reçues
par les assurés en vertu d’une police d’assurance auto-
mobile « peu importe » où elle a été émise — Déduction
en question non permise par la Loi sur les assurances
de l’Ontario qui pourvoit toutefois à l’indemnisation par
l’assureur de l’auteur du délit civil de l’assureur ayant
versé les indemnités hors-faute — Pouvoir de l’arbitre
nommé en vertu de la Loi sur les assurances de l’Ontario
de statuer sur les questions de la simple reconnaissance
de compétence, du forum conveniens et du choix du droit
applicable — Loi sur les assurances, L.R.O. 1990, ch.
I.8, art. 275.*

M. et M^{me} B, des résidents de l’Ontario, ont été bles-
sés au cours d’un voyage en Colombie-Britannique lors-
que leur voiture de location a été heurtée par un camion
gros porteur. Tous les véhicules en cause dans l’accident

appellant. After their return to Ontario, both Mr. and Mrs. B received substantial statutory accident benefits (SABs) under their Ontario policy from their Ontario insurer, the respondent. Subsequently they were awarded substantial damages in an action brought in British Columbia against the negligent truck owner, truck driver and truck repair shop, all of whom were insured by the appellant. Pursuant to s. 25 of the British Columbia *Insurance (Motor Vehicle) Act*, the appellant deducted the no-fault benefits paid to the Bs from the award of damages in British Columbia.

Both the Ontario insurer and the British Columbia insurer were parties to a Power of Attorney and Undertaking (the “PAU”) exchanged by motor vehicle insurers to denote compliance with minimum coverage requirements and to facilitate acceptance of service. The PAU is part of a reciprocal scheme for the enforcement of motor vehicle insurance claims in Canada.

Under s. 275 of the Ontario *Insurance Act*, the payor of the SABs is entitled to seek indemnification from the insurer of any heavy commercial vehicle involved in the accident. The respondent applied to the Ontario Superior Court of Justice for the appointment of an arbitrator to determine the question of indemnification. The appellant made a cross-motion for a stay of proceedings on the basis, *inter alia*, that the Ontario insurance regulatory scheme could not constitutionally apply to it on the facts of this case, or, in the alternative, on the basis that British Columbia was the more convenient forum. The motions judge, applying *forum non conveniens* principles, granted the appellant’s cross-motion to stay the proceedings. The Court of Appeal reversed that decision, finding that the motions judge should have declined to hear the motion for a stay and proceeded with the appointment of an arbitrator who could then deal with any issues of jurisdiction and law, including the constitutional issue.

Held (Major, Bastarache and Deschamps JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Iacobucci, Binnie and LeBel JJ.: The principal issue is the constitutional applicability of the Ontario *Insurance Act* to the appellant on the facts of this particular case, and the motions court ought to have addressed it. If the Ontario insurance scheme is wholly inapplicable to the appellant on the facts here, an arbitrator appointed under the Act is without any

étaient immatriculés en Colombie-Britannique et assurés par l’appelante. Après leur retour en Ontario, M. et M^{me} B ont reçu de l’intimée, leur assureur dans cette province, des indemnités d’accident légales substantielles (IAL). Par la suite, ils ont reçu une somme considérable au titre des dommages-intérêts au terme d’une action intentée en Colombie-Britannique contre le propriétaire du camion, le camionneur et l’atelier qui avait réparé le camion, qui étaient tous assurés par l’appelante. Conformément à l’art. 25 de la loi de la Colombie-Britannique intitulée *Insurance (Motor Vehicle) Act*, l’appelante a soustrait de la somme accordée au titre de dommages-intérêts en Colombie Britannique les indemnités hors-faute versées à M. et M^{me} B.

Tant l’assureur ontarien que celui de la Colombie-Britannique étaient signataires du document appelé Procuration et engagements (le « formulaire P&E »), que s’échangent les assureurs automobiles et qui atteste le respect des exigences minimales en matière de garantie d’assurance et facilite l’acceptation de documents en cas de signification. Le formulaire P&E fait partie d’un régime de réciprocité visant l’exécution des demandes d’indemnités présentées au Canada.

La société qui verse des IAL a droit, en vertu de l’art. 275 de la *Loi sur les assurances* de l’Ontario, d’être indemnisée par l’assureur de tout véhicule commercial lourd impliqué dans l’accident. L’intimée a demandé à la Cour supérieure de justice de l’Ontario de nommer un arbitre pour trancher la question de l’indemnisation. L’appelante a présenté une motion sollicitant la suspension de l’instance, pour le motif, notamment, que le régime ontarien de réglementation du secteur des assurances est constitutionnellement inapplicable eu égard aux faits de l’espèce ou que la Colombie-Britannique est le ressort le plus approprié. Appliquant les principes relatifs au *forum non conveniens*, le tribunal des motions a accueilli la motion incidente de l’appelante sollicitant la suspension de l’instance. La Cour d’appel a infirmé la décision du juge des motions au motif que celui-ci aurait dû refuser d’entendre la requête en suspension de l’instance et nommer l’arbitre, lequel aurait alors examiné toutes les questions de compétence et de droit, y compris la question constitutionnelle.

Arrêt (les juges Major, Bastarache et Deschamps sont dissidents) : Le pourvoi est accueilli.

La juge en chef McLachlin et les juges Iacobucci, Binnie et LeBel : La principale question litigieuse est l’applicabilité constitutionnelle de la *Loi sur les assurances* de l’Ontario à l’appelante compte tenu des faits de l’espèce, et le juge des requêtes aurait dû se prononcer sur cette question. Si le régime d’assurance ontarien est entièrement inapplicable à l’appelante eu égard aux faits

statutory or other authority to decide anything in this case.

There is no doubt that an arbitrator or administrative tribunal can be vested with jurisdiction to determine questions of law, even questions of constitutional law going to its own jurisdiction, provided that the legislature has made plain that intention. Assuming that the Ontario legislature intended s. 17(1) of the *Arbitration Act, 1991* to be such a grant of jurisdiction, however, there is nothing in the Act to suggest that this jurisdiction was intended in all circumstances to be exclusive. When the authority of a court is invoked to appoint an arbitrator under a statute which one of the parties contends cannot constitutionally apply to it, the court should deal with the challenge.

Section 275 of the Ontario *Insurance Act* is constitutionally inapplicable to the appellant because its application in the circumstances of this case would not respect territorial limits on provincial jurisdiction. This territorial restriction is fundamental to our system of federalism in which each province is obliged to respect the sovereignty of the other provinces within their respective legislative spheres, and expects the same respect in return.

The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it. Different degrees of connection to the enacting province may be required according to the subject matter. A “real and substantial connection” sufficient to permit the court of a province to take jurisdiction over a dispute may nevertheless not be sufficient for the law of that province to regulate the outcome. What constitutes a “sufficient” connection depends on the relationships among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it. The applicability of an otherwise competent provincial regulatory scheme to an out-of-province defendant is conditioned by the requirements of order and fairness that underlie our federal arrangements.

Under ordinary constitutional principles the Ontario *Insurance Act* is inapplicable to the out-of-province appellant in this case. Not only is the appellant not authorized to sell insurance in Ontario, it does not in fact do so. Its insured vehicles in this case did not venture into Ontario. The accident did not take place in Ontario, and the appellant did not benefit from the deduction of the

de l'espèce, l'arbitre nommé en vertu de la Loi ontarienne ne dispose d'aucun pouvoir — d'origine législative ou autre — pour statuer sur quelque question que ce soit dans la présente affaire.

Il est certain qu'un arbitre ou un tribunal administratif peut se voir accorder le pouvoir de trancher des questions de droit — même des questions de droit constitutionnel touchant à sa propre compétence —, pourvu que le législateur ait clairement indiqué que telle était son intention. À supposer toutefois que la province d'Ontario entendait que le par. 17(1) ait pour effet de conférer une telle compétence, rien dans la *Loi de 1991 sur l'arbitrage* n'indique que cette compétence était censée être exclusive dans tous les cas. Lorsqu'on invoque la compétence d'un tribunal de nommer un arbitre en vertu d'une loi qui, selon la prétention d'une des parties, ne peut constitutionnellement s'appliquer à elle, le tribunal judiciaire devrait trancher la contestation.

L'article 275 de la *Loi sur les assurances* de l'Ontario est constitutionnellement inapplicable à l'appelante pour le motif que, dans les circonstances de la présente affaire, son application ne respecterait pas les limites territoriales de la compétence provinciale. Cette restriction de la portée territoriale est fondamentale dans notre régime fédéral, où chaque province est tenue de respecter la souveraineté législative des autres provinces dans leurs champs de compétence respectifs et s'attend au même respect en retour.

Les limites territoriales du pouvoir de légiférer des provinces empêchent les lois d'une province de s'appliquer aux affaires qui ne présentent pas de lien suffisant avec cette dernière. Différents degrés de rattachement à la province ayant légiféré peuvent être requis selon l'objet du différend. Un « lien réel et substantiel » qui serait par ailleurs suffisant pour permettre aux tribunaux d'une province de se déclarer compétents à l'égard d'un litige peut néanmoins ne pas être suffisant pour que les lois de cette province décident de l'issue de ce litige. Le caractère « suffisant » du lien dépend du rapport qui existe entre le ressort ayant légiféré, l'objet du texte de loi et l'individu ou l'entité qu'on cherche à assujettir à celui-ci. L'applicabilité d'un régime provincial de réglementation par ailleurs valide à un défendeur de l'extérieur de la province concernée est fonction des exigences d'ordre et d'équité qui sous-tendent nos structures fédérales.

Suivant les principes ordinaires du droit constitutionnel, la *Loi sur les assurances* de l'Ontario est inapplicable en l'espèce à l'appelante de l'extérieur de la province. Non seulement l'appelante n'est-elle pas autorisée à vendre de l'assurance en Ontario, mais, dans les faits, elle n'en vend pas. Aucun des véhicules assurés par l'appelante en l'espèce ne s'est rendu en Ontario.

SABs by virtue of Ontario law but by the law of British Columbia. If the respondent were correct, Ontario could attach whatever benefits it liked to an out-of-province accident and require the appellant to come to Ontario to reimburse the Ontario insurer irrespective of whether or not British Columbia law permitted any deduction in that respect from the judgment award.

The PAU signed by the appellant has no application to the facts of this case. Its operation is explicitly limited to a proceeding “arising out of a motor-vehicle accident in any of the respective Provinces or Territories”. The “respective Provinces or Territories” are those thereafter listed, namely (in this instance) provinces and territories other than British Columbia, whose name was crossed out on the standard form. The interpretation that the PAU is directed to out-of-province accidents is confirmed by the wording of the undertakings set out in the PAU itself. Moreover, even if the PAU could be interpreted to require the appellant’s appearance to defend the respondent insurer’s claim in Ontario, the appellant would not thereby be precluded from contesting the application of the Ontario *Insurance Act* to impose a civil obligation on an out-of-province insurer in respect of an out-of-province motor vehicle accident.

The PAU should not be interpreted as a general attornment by the appellant to Ontario insurance law in respect of a motor vehicle accident that occurred in British Columbia. The fact that the appellant has on occasion attorned to Ontario in defending British Columbia motorists involved in accidents in Ontario does not constitute a general attornment to Ontario in respect of all accidents wherever they take place and any consequent proceedings.

Since the Ontario regulatory scheme does not apply to the out-of-province appellant on the facts of this case, the issue of *forum non conveniens* is moot. There is no statutory cause of action available to the respondent to sue upon in Ontario or in British Columbia.

Per Major, Bastarache and Deschamps JJ. (dissenting): A superior court judge must decide the issues of

L’accident n’a pas eu lieu dans cette province et l’appelante a pu bénéficier de la déduction en vertu non pas des lois de l’Ontario mais de celles de la Colombie-Britannique. Si l’intimée a raison, l’Ontario pouvait, à son gré, accorder n’importe quelle sorte d’indemnité à l’égard d’un accident survenu dans une autre province et obliger l’appelante à venir en Ontario rembourser l’assureur ontarien, peu importe si les lois de la Colombie-Britannique permettaient de déduire de la somme accordée par le jugement quelque partie que ce soit de cette indemnité.

Le formulaire P&E signé par l’appelante ne s’applique pas aux faits de l’espèce. Son application est expressément limitée aux procédures intentées [TRADUCTION] « par suite d’un accident d’automobile survenu dans quelque province ou territoire concerné ». L’expression « province ou territoire concerné » s’entend des ressorts énumérés, à savoir (dans la présente affaire) les provinces et territoires autres que la Colombie-Britannique, province dont le nom a été biffé sur le formulaire type. Le libellé des engagements énoncés dans le formulaire P&E lui-même confirme l’interprétation selon laquelle le formulaire P&E vise les accidents d’automobile survenant à l’extérieur de la province. En outre, même s’il était possible de considérer que le formulaire P&E oblige l’appelante à comparaître, en défense, à l’action intentée en Ontario par la société d’assurance intimée, l’appelante ne serait pas de ce fait empêchée de contester la prétention selon laquelle la *Loi sur les assurances* de l’Ontario s’applique et a pour effet d’imposer à un assureur d’une autre province une obligation civile à l’égard d’un accident d’automobile survenu dans une autre province.

La signature du formulaire P&E ne saurait être considérée comme un acquiescement général par l’appelant à l’application du droit ontarien des assurances à l’égard de l’accident d’automobile survenu en Colombie-Britannique. Le fait que l’appelante ait, à l’occasion, acquiescé à la compétence des tribunaux de l’Ontario en présentant une défense au nom d’automobilistes de la Colombie-Britannique ayant eu des accidents en Ontario ne constitue pas un acquiescement général à la compétence des tribunaux ontariens relativement à tout accident — peu importe le lieu où il se produit — et aux procédures qui en découlent.

Étant donné que, eu égard aux faits de l’espèce, le régime ontarien ne s’applique pas à l’appelante de l’extérieur de la province, la question du *forum non conveniens* est devenue théorique. L’intimée ne dispose d’aucune cause d’action prévue par la loi la fondant à intenter des poursuites en Ontario ou en Colombie-Britannique.

Les juges Major, Bastarache et Deschamps (dissidents) : Il appartient aux juges des cours supérieures

jurisdiction *simpliciter* and *forum conveniens*. Even though it may be difficult to isolate these two issues of jurisdiction perfectly, the Court of Appeal could not decide to submit the whole matter to an arbitrator without inferentially deciding that the Ontario *Insurance Act* applied, since the appointment of the arbitrator depends on the application of s. 275 of that Act.

A link with the subject matter of the claim is sufficient to establish the jurisdiction *simpliciter* of a forum given the flexible approach that has been endorsed by this Court. On the facts of this case, the appellant has accepted the jurisdiction of Ontario in this matter by signing a PAU, which constitutes a sound foundation for the application of the Ontario *Insurance Act* to the parties in this case. The insurers, by signing the PAU, have recognized the interrelationship of insurance regimes across Canada and accepted that insurers in one province will sometimes be sued in other provinces. It is therefore reasonably foreseeable that the appellant will sometimes have to appear in Ontario to defend an action brought in that jurisdiction as a result of an accident having occurred in British Columbia. The appellant is, at least notionally, an insurer in Ontario, or one carrying out business in that province. It is not unfair that insurers involved in the interprovincial scheme underlying this appeal, and having accepted the risk of harm to extraprovincial parties to the agreement, be considered to have attorned to the jurisdiction of Ontario's courts. All of the reasons justifying a widened jurisdiction in *Morguard* apply in this case. Most importantly, the demands of Canadian federalism strongly favour this result. It is unreasonable, when deciding the issue of jurisdiction *simpliciter*, to enter into a piecemeal interpretation of the regime providing for the integration of insurance protection across Canada and to establish distinctions between benefits payable to the insured, on the one hand, and the indemnification of their insurers, on the other hand. There are a number of considerations which, taken together with the general language of the PAU, indicate that the appellant is subject to Ontario's jurisdiction. The benefits paid by the respondent to an Ontario resident that were later deducted by the appellant, the general undertaking to appear by the appellant, and its limited undertaking not to present certain defences in Ontario actions all militate in favour of a finding that jurisdiction *simpliciter* is made out.

de trancher les questions de la simple reconnaissance de compétence et du *forum conveniens*. Bien qu'il puisse être difficile de dissocier complètement ces deux questions de compétence, la Cour d'appel ne pouvait décider que toute l'affaire relevait de l'arbitre sans implicitement conclure à l'application de la *Loi sur les assurances* de l'Ontario, puisque la nomination de l'arbitre dépend de l'application de l'art. 275 de cette loi.

L'existence d'un lien avec l'objet de l'action suffit pour établir la simple reconnaissance de compétence d'un tribunal, vu la démarche souple à laquelle a souscrit notre Cour. Il ressort des faits en l'espèce que l'appelante a acquiescé à la compétence des tribunaux ontariens à l'égard de l'objet de l'action en signant le formulaire P&E, document qui constitue une assise solide pour justifier en l'espèce l'application aux parties de la *Loi sur les assurances* de l'Ontario. En signant le formulaire P&E, les assureurs ont reconnu la connexité entre les régimes d'assurance au Canada et le fait que les assureurs exerçant leurs activités dans une province puissent, à l'occasion, être poursuivis dans une autre. Il est donc raisonnablement prévisible que l'appelante sera parfois tenue de comparaître en Ontario afin de se défendre contre une action intentée dans cette province à la suite d'un accident survenu en Colombie-Britannique. L'appelante est, en principe à tout le moins, un assureur en Ontario ou un assureur exerçant des activités dans cette province. Comme les assureurs qui participent au régime interprovincial à l'origine du présent pourvoi ont accepté le risque que des parties à l'accord venant d'autres provinces subissent un préjudice, il n'est pas injuste de considérer qu'ils ont acquiescé à la compétence des tribunaux ontariens. Toutes les raisons ayant justifié la reconnaissance d'une compétence élargie dans l'arrêt *Morguard* s'appliquent dans la présente affaire. Qui plus est, les exigences du fédéralisme canadien militent fortement en faveur de ce résultat. Lorsqu'il s'agit de trancher la question de la simple reconnaissance de compétence, il n'est pas raisonnable de s'engager dans une interprétation élément par élément d'un régime pourvoyant à l'intégration des garanties d'assurance en vigueur dans l'ensemble du Canada, et d'établir des distinctions entre les indemnités payables à l'assuré, d'une part, et l'indemnisation de leurs assureurs, d'autre part. Il existe un certain nombre de facteurs qui, conjugués aux termes généraux du formulaire P&E, indiquent que l'appelante est assujetti aux lois et tribunaux de l'Ontario. Tous les éléments suivants incitent à conclure à la simple reconnaissance de compétence: les indemnités que l'intimé a versées à un résident de l'Ontario et que l'appelante a ensuite déduites, la promesse générale de comparaître faite par l'appelante et son engagement limité de ne pas présenter certains moyens de défense dans les actions intentées en Ontario.

The same arguments that justify having a court of justice, not an arbitrator, decide the issue of jurisdiction *simpliciter* in this case apply to the issue of whether the former or the latter should determine whether there exists a more convenient forum. The *forum non conveniens* inquiry is a preliminary one that must be raised at the earliest opportunity and its determination is necessary before the jurisdiction of an arbitrator can be effective in a case such as this. The proper test is to ask whether the existence of a more appropriate forum has been clearly established to displace the forum selected by the plaintiff. If neither forum is clearly more appropriate, the domestic forum wins by default. The application of the balance of convenience by the motions judge constituted an error of law since a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. In staying the proceedings in part because he was not satisfied that there would result a loss of a juridical advantage to the respondent, the motions judge established an unduly high threshold. Given the respondent's real and substantial connection to Ontario, it has a legitimate claim to take advantage of the interinsurer indemnification scheme which Ontario provides. There is a fair possibility that the respondent will gain an advantage by prosecuting the action in Ontario. The appellant did not provide any evidence that British Columbia was clearly the more appropriate forum. This action is altogether independent of the one before the British Columbia court; it was started in Ontario on the basis of payments made under an insurance policy contracted in Ontario. Many factors link the parties to Ontario. Furthermore, the possibility of interinsurer indemnification is the product of an Ontario statutory regime.

Valid provincial laws can affect matters which are sufficiently connected to the province. The respondent has shown that the subject matter which the *Insurance Act* covers, interinsurer indemnification, falls within provincial jurisdiction and is sufficiently connected to Ontario so as to render the statute applicable to the appellant.

Cases Cited

By Binnie J.

Distinguished: *Jevco Insurance Co. v. Continental Insurance Co. of Canada* (2000), 132 O.A.C. 379, aff'g [1999] O.J. No. 2267 (QL); *Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.)* (1936-1937), 56 C.L.R. 337; *R. v. Thomas Equipment Ltd.*, [1979] 2 S.C.R.

Les arguments justifiant qu'un tribunal judiciaire, et non un arbitre, statue sur la question de la simple reconnaissance de compétence dans la présente affaire s'appliquent également à la question de savoir si le tribunal ou l'arbitre doit décider s'il existe un autre tribunal plus approprié en l'espèce. La question de *forum non conveniens* est une question préliminaire qui doit être soulevée à la première occasion et tranchée avant que l'arbitre puisse avoir effectivement compétence dans une affaire comme celle dont nous sommes saisis. Le critère applicable consiste à se demander si on a clairement établi l'existence d'un tribunal plus approprié que celui choisi par le demandeur à l'action. Lorsqu'aucun des tribunaux n'est clairement le plus approprié, le tribunal interne l'emporte *ipso facto*. Le juge des motions a commis une erreur de droit en appliquant le critère de la prépondérance des inconvénients, puisque la partie dont la demande a un lien réel et substantiel avec un ressort peut légitimement faire valoir les avantages qu'elle peut tirer du fait d'ester en justice dans ce ressort. Le juge des motions a appliqué un critère excessivement exigeant lorsqu'il a sursis à l'instance, en partie parce qu'il n'était pas convaincu que l'intimée perdrait un avantage juridique. En raison du lien réel et substantiel que l'intimée possède avec l'Ontario, elle peut légitimement faire valoir les avantages qu'elle peut tirer du régime d'indemnisation entre assureurs de l'Ontario. L'intimée a de bonnes chances d'obtenir un avantage en étant en justice en Ontario. L'appelante n'a présenté aucune preuve établissant que la Colombie-Britannique était clairement le forum le plus approprié. La présente action est tout à fait indépendante de celle dont est saisi le tribunal de la Colombie-Britannique; elle a été introduite en Ontario, sur la base des paiements effectués en vertu d'une police d'assurance souscrite en Ontario. Bon nombre de facteurs rattachent les parties à l'Ontario. De plus, la possibilité qu'il y ait indemnisation entre assureurs découle d'un régime législatif ontarien.

Une loi provinciale valide peut produire des effets sur des « matières » qui présentent un lien suffisant avec la province. L'intimée a établi que la question traitée dans la *Loi sur les assurances* de l'Ontario, soit l'indemnisation entre assureurs, est un sujet de compétence provinciale qui présente avec l'Ontario un lien suffisant pour que la loi en question s'applique à l'appelante.

Jurisprudence

Citée par le juge Binnie

Distinction d'avec les arrêts : *Jevco Insurance Co. c. Continental Insurance Co. of Canada* (2000), 132 O.A.C. 379, conf. [1999] O.J. No. 2267 (QL); *Broken Hill South Ltd. c. Commissioner of Taxation (N.S.W.)* (1936-1937), 56 C.L.R. 337; *R. c. Thomas Equipment*

529; *Union Steamship Co. of Australia Proprietary Ltd. v. King* (1988), 166 C.L.R. 1; *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981); **referred to:** *Brennan v. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294; *Ruckheim v. Robinson* (1995), 1 B.C.L.R. (3d) 46; *Potts v. Gluckstein* (1992), 8 O.R. (3d) 556; *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854; *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733; *Royal Bank of Canada v. The King*, [1913] A.C. 283; *Gray v. Kerlake*, [1958] S.C.R. 3; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78; *R. v. Jameson*, [1896] 2 Q.B. 425; *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Attorney General for Ontario v. Scott*, [1956] S.C.R. 137; *Interprovincial Co-Operatives Ltd. v. The Queen*, [1976] 1 S.C.R. 477; *Credit Foncier Franco-Canadien v. Ross*, [1937] 3 D.L.R. 365; *Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission of Ontario*, [1937] O.R. 796; *Kalenczuk v. Kalenczuk* (1920), 52 D.L.R. 406; *The Queen in Right of Manitoba v. Air Canada*, [1980] 2 S.C.R. 303; *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Ladore v. Bennett*, [1939] A.C. 468; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21; *Ratyck v. Bloomer*, [1990] 1 S.C.R. 940; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359; *Insurance Corp. of British Columbia v. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705; *MacDonald v. Proctor* (1977), 86 D.L.R. (3d) 455, aff'd [1979] 2 S.C.R. 153; *Healy v. Interboro Mutual Indemnity Insurance Co.* (1999), 44 O.R. (3d) 404, leave to appeal refused, [2000] 1 S.C.R. xiii; *Corbett v. Co-operative Fire & Casualty Co.* (1984), 14 D.L.R. (4th) 531.

Ltd., [1979] 2 R.C.S. 529; *Union Steamship Co. of Australia Proprietary Ltd. c. King* (1988), 166 C.L.R. 1; *International Shoe Co. c. State of Washington*, 326 U.S. 310 (1945); *Allstate Insurance Co. c. Hague*, 449 U.S. 302 (1981); **arrêts mentionnés :** *Brennan c. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294; *Ruckheim c. Robinson* (1995), 1 B.C.L.R. (3d) 46; *Potts c. Gluckstein* (1992), 8 O.R. (3d) 556; *Citizens Insurance Co. of Canada c. Parsons* (1881), 7 App. Cas. 96; *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022; *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570; *Cuddy Chicks Ltd. c. Ontario (Commission des relations de travail)*, [1991] 2 R.C.S. 5; *Cooper c. Canada (Commission des droits de la personne)*, [1996] 3 R.C.S. 854; *St. Anne Nackawic Pulp & Paper Co. c. Section locale 219 du Syndicat canadien des travailleurs du papier*, [1986] 1 R.C.S. 704; *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929; *Regina Police Assn. Inc. c. Regina (Ville) Board of Police Commissioners*, [2000] 1 R.C.S. 360, 2000 CSC 14; *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307; *Northern Telecom Canada Ltée c. Syndicat des travailleurs en communication du Canada*, [1983] 1 R.C.S. 733; *Royal Bank of Canada c. The King*, [1913] A.C. 283; *Gray c. Kerlake*, [1958] R.C.S. 3; *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077; *Hunt c. T&N plc*, [1993] 4 R.C.S. 289; *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90; *Spar Aerospace Ltée v. American Mobile Satellite Corp.*, [2002] 4 R.C.S. 205, 2002 CSC 78; *R. c. Jameson*, [1896] 2 Q.B. 425; *Pennoyer c. Neff*, 95 U.S. 714 (1877); *Attorney General for Ontario c. Scott*, [1956] R.C.S. 137; *Interprovincial Co-Operatives Ltd. c. La Reine*, [1976] 1 R.C.S. 477; *Credit Foncier Franco-Canadien c. Ross*, [1937] 3 D.L.R. 365; *Beauharnois Light, Heat and Power Co. c. Hydro-Electric Power Commission of Ontario*, [1937] O.R. 796; *Kalenczuk c. Kalenczuk* (1920), 52 D.L.R. 406; *La Reine du chef du Manitoba c. Air Canada*, [1980] 2 R.C.S. 303; *Moran c. Pyle National (Canada) Ltd.*, [1975] 1 R.C.S. 393; *Ladore c. Bennett*, [1939] A.C. 468; *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297; *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21; *Ratyck c. Bloomer*, [1990] 1 R.C.S. 940; *Cunningham c. Wheeler*, [1994] 1 R.C.S. 359; *Insurance Corp. of British Columbia c. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705; *MacDonald c. Proctor* (1977), 86 D.L.R. (3d) 455, conf. par [1979] 2 R.C.S. 153; *Healy c. Interboro Mutual Indemnity Insurance Co.* (1999), 44 O.R. (3d) 404, autorisation de pourvoi refusée, [2000] 1 R.C.S. xiii; *Corbett c. Co-operative Fire & Casualty Co.* (1984), 14 D.L.R. (4th) 531.

By Bastarache J. (dissenting)

Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78; *Brennan v. Singh*, [1999] B.C.J. No. 520 (QL); *Brennan v. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294, aff'g (1999), 70 B.C.L.R. (3d) 342; *Brennan v. Singh* (2001), 15 C.P.C. (5th) 17, 2001 BCSC 1812; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147; *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20; *Long v. Citi Club*, [1995] O.J. No. 1411 (QL); *Brookville Transport Ltd. v. Maine* (1997), 189 N.B.R. (2d) 142; *Negrych v. Campbell's Cabins (1987) Ltd.*, [1997] 8 W.W.R. 270; *McNichol Estate v. Woldnik* (2001), 150 O.A.C. 68; *Oakley v. Barry* (1998), 158 D.L.R. (4th) 679; *O'Brien v. Canada (Attorney General)* (2002), 210 D.L.R. (4th) 668; *Pacific International Securities Inc. v. Drake Capital Securities Inc.* (2000), 194 D.L.R. (4th) 716; *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213; *Insurance Corp. of British Columbia v. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705; *Berg (Litigation guardian of) v. Farm Bureau Mutual Insurance Co.* (2000), 50 O.R. (3d) 109; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90; *Avenue Properties Ltd. v. First City Development Corp.* (1986), 32 D.L.R. (4th) 40; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

Statutes and Regulations Cited

Arbitration Act, 1991, S.O. 1991, c. 17, ss. 7(1), (2), (3), 8(2), (3), 10, 17, 48(1)(c).
Automobile Insurance Regulations, R.R.O. 1990, Reg. 664, s. 9.
Constitution Act, 1867, s. 92.
Insurance Act, R.S.O. 1990, c. I.8, ss. 267.1(8)2(i) [ad. 1993, c. 10, s. 25], 268(1) [rep. & sub. *idem*, s. 26], (2), 275 [am. *idem*, ss. 1, 31].
Insurance (Motor Vehicle) Act, R.S.B.C. 1996, c. 231, ss. 18, 25.
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 17.06.
United States Constitution, art. IV, Fourteenth Amendment.

Authors Cited

Black, Vaughan. "Interprovincial Inter-Insurer Interactions: *Unifund v. ICBC*" (2002), 36 *Can. Bus. L.J.* 436.

Citée par le juge Bastarache (dissident)

Morguard Investments Ltd. c. De Savoye, [1990] 3 R.C.S. 1077; *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, [2002] 4 R.C.S. 205, 2002 CSC 78; *Brennan c. Singh*, [1999] B.C.J. No. 520 (QL); *Brennan c. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 94, conf. (1999), 70 B.C.L.R. (3d) 342; *Brennan c. Singh* (2001), 15 C.P.C. (5th) 17, 2001 BCSC 1812; *Hunt c. T&N plc*, [1993] 4 R.C.S. 289; *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022; *Conseil canadien des relations du travail c. Paul L'Anglais Inc.*, [1983] 1 R.C.S. 147; *Moran c. Pyle National (Canada) Ltd.*, [1975] 1 R.C.S. 393; *Muscutt c. Courcelles* (2002), 60 O.R. (3d) 20; *Long c. Citi Club*, [1995] O.J. No. 1411 (QL); *Brookville Transport Ltd. c. Maine* (1997), 189 R.N.-B. (2^e) 142; *Negrych c. Campbell's Cabins (1987) Ltd.*, [1997] 8 W.W.R. 270; *McNichol Estate c. Woldnik* (2001), 150 O.A.C. 68; *Oakley c. Barry* (1998), 158 D.L.R. (4th) 679; *O'Brien c. Canada (Attorney General)* (2002), 210 D.L.R. (4th) 668; *Pacific International Securities Inc. c. Drake Capital Securities Inc.* (2000), 194 D.L.R. (4th) 716; *Cook c. Parcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213; *Insurance Corp. of British Columbia c. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705; *Berg (Litigation guardian of) c. Farm Bureau Mutual Insurance Co.* (2000), 50 O.R. (3d) 109; *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897; *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90; *Avenue Properties Ltd. c. First City Development Corp.* (1986), 32 D.L.R. (4th) 40; *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297.

Lois et règlements cités

Automobile Insurance Regulations, R.R.O. 1990, Règl. 664, art. 9.
Constitution des États-Unis d'Amérique, art. IV, Quatorzième amendement.
Insurance (Motor Vehicle) Act, R.S.B.C. 1996, ch. 231, art. 18, 25.
Loi constitutionnelle de 1867, art. 92.
Loi de 1991 sur l'arbitrage, L.O. 1991, ch. 17, art. 7(1), (2), (3), 8(2), (3), 10, 17, 48(1)(c).
Loi sur les assurances, L.R.O. 1990, ch. I.8, art. 267.1(8)2(i) [aj. 1993, ch. 10, art. 25], 268(1) [abr. & rempl. *idem*, art. 26], (2), 275 [mod. *idem*, art. 1, 31].
Règles de procédure civile, R.R.O. 1990, Règl. 194, r. 17.06.

Doctrine citée

Black, Vaughan. « Interprovincial Inter-Insurer Interactions : *Unifund v. ICBC* » (2002), 36 *Rev. can. dr. comm.* 436.

Castel, Jean-Gabriel, and Janet Walker. *Canadian Conflict of Laws*, 5th ed. Markham, Ont.: Butterworths, 2002 (loose-leaf updated December 2002, Issue 3).

Fortier, L. Yves. “Delimiting the Spheres of Judicial and Arbitral Power: ‘Beware, My Lord, of Jealousy’” (2001), 80 *Can. Bar Rev.* 143.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, loose-leaf ed. Scarborough, Ont.: Carswell, 1997 (updated 2002, release 1).

Sullivan, Ruth E. “Interpreting the Territorial Limitations on the Provinces” (1985), 7 *Supreme Court L.R.* 511.

Tribe, Laurence H. *American Constitutional Law*, vol. 1, 3rd ed. New York: Foundation Press, 2000.

United Nations. Commission on International Trade Law. *UNCITRAL Model Law on International Commercial Arbitration*, U.N. GAOR, 40th Sess., Supp. No. 17, U.N. Doc. A/40/17 (1985), Annex I, arts. 8(1), 16.

Watson, Garry D., and Frank Au. “Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*” (2000), 23 *Advocates’ Q.* 167.

APPEAL from a judgment of the Ontario Court of Appeal (2001), 204 D.L.R. (4th) 732, 146 O.A.C. 162, 28 C.C.L.I. (3d) 38, [2001] O.J. No. 1885 (QL), reversing a decision of the Superior Court of Justice (2000), 23 C.C.L.I. (3d) 96, [2000] O.J. No. 3212 (QL). Appeal allowed, Major, Bastarache and Deschamps JJ. dissenting.

Avon M. Mersey, Alan L. W. D’Silva, Michael Sobkin and Sophie Vlahakis, for the appellant.

Leah Price and Gerald George, for the respondent.

The judgment of McLachlin C.J. and Iacobucci, Binnie and LeBel JJ. was delivered by

BINNIE J. —

I. Introduction

This appeal raises important questions regarding an alleged extraterritorial application of a provincial regulatory statute. The respondent insurer seeks to recover in Ontario from the appellant British Columbian insurer about \$750,000 under certain statutory provisions of Ontario insurance law.

Castel, Jean-Gabriel, and Janet Walker. *Canadian Conflict of Laws*, 5th ed. Markham, Ont. : Butterworths, 2002 (loose-leaf updated December 2002, Issue 3).

Fortier, L. Yves. « Delimiting the Spheres of Judicial and Arbitral Power : “Beware, My Lord, of Jealousy” » (2001), 80 *R. du B. can.* 143.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, loose-leaf ed. Scarborough, Ont. : Carswell, 1997 (updated 2002, release 1).

Nations Unies. Commission des Nations Unies pour le droit commercial international. *Loi type de la CNUDCI sur l’arbitrage commercial international*, N.U. AGRO, 40^e sess., suppl. n^o 17, Doc. N.U. (A/40/17) (1985), ann. I, art. 8(1), 16.

Sullivan, Ruth E. « Interpreting the Territorial Limitations on the Provinces » (1985), 7 *Supreme Court L.R.* 511.

Tribe, Laurence H. *American Constitutional Law*, vol. 1, 3rd ed. New York : Foundation Press, 2000.

Watson, Garry D., and Frank Au. « Constitutional Limits on Service *Ex Juris* : Unanswered Questions from *Morguard* » (2000), 23 *Advocates’ Q.* 167.

POURVOI contre un arrêt de la Cour d’appel de l’Ontario (2001), 204 D.L.R. (4th) 732, 146 O.A.C. 162, 28 C.C.L.I. (3d) 38, [2001] O.J. No. 1885 (QL), qui a infirmé une décision de la Cour supérieure de justice (2000), 23 C.C.L.I. (3d) 96, [2000] O.J. No. 3212 (QL). Pourvoi accueilli, les juges Major, Bastarache et Deschamps sont dissidents.

Avon M. Mersey, Alan L. W. D’Silva, Michael Sobkin et Sophie Vlahakis, pour l’appelante.

Leah Price et Gerald George, pour l’intimée.

Version française du jugement de la juge en chef McLachlin et des juges Iacobucci, Binnie et LeBel rendu par

LE JUGE BINNIE —

I. Introduction

Le présent pourvoi soulève d’importantes questions touchant à la prétendue application extraterritoriale d’une loi provinciale de nature réglementaire. La société d’assurance intimée tente, en vertu de certaines dispositions législatives ontariennes concernant le droit des assurances, de recouvrer en Ontario la somme d’environ 750 000 \$ de la société d’assurance appelante de la Colombie-Britannique.

2 The dispute between these insurance companies stems from a serious motor vehicle accident in British Columbia. The appellant, a British Columbia insurer, responded there on behalf of the defendants. The injured plaintiffs returned to Ontario and collected statutory no-fault benefits from the respondent, an Ontario insurer, which now seeks reimbursement by subjecting the appellant to the loss transfer provisions of the Ontario scheme.

3 The appellant says it does not have any real and substantial connection with Ontario and therefore Ontario insurance law cannot impose on it a civil obligation arising out of a British Columbia accident. I agree that the respondent seeks to give the Ontario statute impermissible extraterritorial effect. In my view, the appeal should be allowed.

II. The Facts

4 Marcia and Ronald Brennan, who made their home in Cambridge, Ontario, flew to Vancouver in August 1995 for the wedding of one of their sons. While in British Columbia, they rented a car. Driving along the Upper Levels Highway in North Vancouver, the Brennans' rental car was struck from behind by a tractor trailer driven by Baljinder Singh, the impact of which catapulted their car across the centre line concrete barrier into the path of oncoming traffic. In a collision the trial judge described as "horrendous", the Brennans, particularly Mrs. Brennan, suffered terrible injuries. After their return to Ontario, the Brennans' home needed to be extensively renovated, a modified vehicle was purchased, and 24-hour attendant care was provided to Mrs. Brennan, who eventually died from her injuries in March 2001. The amount paid as statutory accident benefits ("SABs") has yet to be finally quantified but is about \$750,000.

Le litige entre ces sociétés d'assurance découle d'un grave accident automobile survenu en Colombie-Britannique. L'appelante, société d'assurance de Colombie-Britannique, a comparu dans cette province au nom des défendeurs. Les demandeurs blessés sont retournés en Ontario, où ils ont touché des indemnités d'assurance sans égard à la responsabilité versées par l'intimée, la société d'assurance faisant affaire en Ontario, laquelle sollicite maintenant le remboursement de ces indemnités en tentant d'assujettir l'appelante aux dispositions relatives à l'indemnisation des pertes entre assureurs prévues par le régime ontarien.

L'appelante dit n'avoir aucun lien réel et substantiel avec l'Ontario et que, en conséquence, le droit ontarien des assurances ne peut lui imposer d'obligation civile découlant d'un accident survenu en Colombie-Britannique. Je souscris à l'argument selon lequel l'intimée cherche à donner à la loi ontarienne des effets extraterritoriaux qu'elle ne saurait avoir. À mon avis, le pourvoi devrait être accueilli.

II. Les faits

En août 1995, Marcia et Ronald Brennan, qui vivent à Cambridge en Ontario, se sont rendus en avion à Vancouver pour assister au mariage d'un de leurs fils. Pendant leur séjour en Colombie-Britannique, ils ont loué une automobile. Alors qu'ils circulaient sur l'autoroute Upper Levels, dans la ville de North Vancouver, leur voiture de location a été heurtée à l'arrière par un camion gros porteur conduit par monsieur Baljinder Singh. Sous l'effet de la collision, l'automobile a été catapultée de l'autre côté du muret central, dans la voie réservée aux véhicules circulant en sens inverse. Les Brennan, M^{me} Brennan surtout, ont été grièvement blessés dans la collision, que le juge de première instance a qualifiée d'« horrible ». Une fois revenus en Ontario, les Brennan ont dû apporter des modifications majeures à leur résidence, ils ont fait l'achat d'un véhicule adapté et des soins auxiliaires ont été fournis 24 heures par jour à M^{me} Brennan, qui est décédée en mars 2001 des suites de ses blessures. La somme payable à titre d'indemnités d'accident légales (« IAL ») n'a pas encore été déterminée exactement, mais elle s'élève à environ 750 000 \$.

Meanwhile, the Brennans brought an action for damages in the Supreme Court of British Columbia and, on March 4, 1999, were awarded approximately \$2.5 million.

The respondent, Unifund Assurance Company (“Unifund”), had issued a motor vehicle insurance policy to the Brennans in Ontario. The policy included the mandatory, no-fault coverage (or SAB) payments, for which the Brennans paid a premium. The Ontario *Insurance Act*, R.S.O. 1990, c. I.8 (also referred to as the “Ontario Act”), provides that SABs are payable under an Ontario policy when insured persons are injured in motor vehicle accidents occurring anywhere in North America. Unifund, a Newfoundland company, was licensed to carry on business in Ontario, but not, at the time of the accident, in British Columbia.

The appellant Insurance Corporation of British Columbia (“ICBC”) insured the negligent truck owner, truck driver, and truck repair shop in British Columbia. It is on the hook for the \$2.5 million award of damages, but, under the law of that province, it is entitled to deduct any no-fault payments paid to the Brennans, even though it actually paid no part of that amount.

Unifund understandably feels aggrieved that the appellant, having contributed nothing to the payment of the no-fault benefits, is nevertheless taking a \$750,000 deduction created at Unifund’s expense. Unifund contends that the appellant should pay it the \$750,000.

III. The Statutory Cause of Action

Unifund’s problem is to find a cause of action. In this appeal, we are dealing only with Unifund’s quite separate and distinct claim under s. 275 of the Ontario Act, which provides a statutory mechanism for transferring losses between Ontario

Dans l’intervalle, les Brennan ont intenté une action en dommages-intérêts en Cour suprême de la Colombie-Britannique et se sont vus accorder, le 4 mars 1999, la somme d’environ 2,5 millions de dollars.

L’intimée, Unifund Assurance Company (« Unifund »), avait établi au nom des Brennan une police d’assurance automobile en Ontario. La police incluait la garantie obligatoire d’assurance pourvoyant au paiement d’indemnités sans égard à la faute (ou IAL) pour laquelle les Brennan avaient versé une prime. La *Loi sur les assurances* de l’Ontario, L.R.O. 1990, ch. I.8 (aussi appelée la « Loi ontarienne ») dispose que des IAL sont payables en vertu d’une police contractée en Ontario lorsque les assurés sont blessés dans un accident d’automobile survenant n’importe où en Amérique du Nord. Au moment de l’accident, Unifund, une société terre-neuvienne, était autorisée à exercer ses activités en Ontario, mais non en Colombie-Britannique.

L’appelante, Insurance Corporation of British Columbia (« ICBC »), est l’assureur en Colombie-Britannique des parties ayant été jugées négligentes, à savoir le propriétaire du camion, le camionneur et l’atelier qui a réparé le camion. L’appelante est tenue au paiement de la somme de 2,5 millions de dollars accordée au titre des dommages-intérêts. Toutefois, en vertu du droit de cette province, elle peut déduire tout paiement hors-faute fait aux Brennan, et ce même si, dans les faits, elle n’a versé aucune partie de cette somme.

Naturellement, Unifund s’estime lésée du fait que l’appelante, qui n’a pas contribué aux indemnités hors-faute, se prévaut, à ses dépens, d’une déduction de 750 000 \$. Unifund prétend que l’appelante devrait lui payer les 750 000 \$.

III. La cause d’action légale

Le problème que doit surmonter Unifund consiste à établir l’existence d’une cause d’action. Dans le présent pourvoi, nous n’examinons que la demande très précise de Unifund fondée sur l’art. 275 de la Loi ontarienne, disposition établissant un mécanisme

5

6

7

8

9

insurance companies arising out of the payment of SABs under the Ontario Act.

10 It is important to emphasize that Unifund asserts no common law or equitable cause of action against the appellant, ICBC, in these proceedings. In the case before us, Unifund either has a statutory cause of action against the British Columbia insurer under the Ontario Act or it has no cause of action at all.

11 The deduction of about \$750,000 claimed by the appellant, ICBC, is also a creature of statute. Under s. 25(5) of the British Columbia *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231, the British Columbia court is directed to deduct from a damages award “benefits” which include “accident insurance benefits similar” to British Columbia’s no-fault benefits “provided under a contract . . . of automobile insurance wherever issued . . .” (s. 25(1) (emphasis added)). The British Columbia Court of Appeal ordered the \$750,000 to be deducted from the \$2.5 million awarded to the Brennans, even though the appellant contributed nothing to the payment, because, in its view, the legislative purpose of s. 25(5) is to “prevent double recovery by allowing parties to deduct the ‘benefits’ that a claimant receives, or to which a claimant is entitled, from the award of damages”: *Brennan v. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294, at para. 4; see also *Ruckheim v. Robinson* (1995), 1 B.C.L.R. (3d) 46 (C.A.), at paras. 50-54. The deductibility approach was perhaps adopted in British Columbia because the appellant, ICBC, as the sole provider of motor vehicle insurance in the province, is generally the payor of both the no-fault benefits and the final award. For the same reason, the British Columbia legislation does not contain a loss transfer provision similar to s. 275 of the Ontario Act to redistribute the cost of no-fault benefits amongst insurance companies.

de contribution des sociétés d’assurance de l’Ontario au paiement des IAL prévues par cette loi.

Il est important de souligner que Unifund n’invoque en l’espèce aucune cause d’action en common law ou en equity contre l’appelante, ICBC. Dans la présente affaire, ou bien Unifund dispose d’une cause d’action contre la société d’assurance de la Colombie-Britannique en vertu de la Loi ontarienne, ou bien elle n’en a pas du tout.

La déduction d’environ 750 000 \$ réclamée par l’appelante, ICBC, est également un droit d’origine législative. Suivant le par. 25(5) de la loi de la Colombie-Britannique intitulée *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, ch. 231, les tribunaux de cette province sont tenus de soustraire de la somme accordée au titre de dommages-intérêts les diverses [TRADUCTION] « indemnités », y compris les [TRADUCTION] « prestations d’assurance accidents similaires » aux indemnités d’assurance sans égard à la responsabilité de la Colombie-Britannique [TRADUCTION] « versées en application d’un contrat [. . .] d’assurance automobile établi [. . .] en quelque lieu que ce soit . . . » (par. 25(1) (je souligne)). La Cour d’appel de la Colombie-Britannique a ordonné que les 750 000 \$ soient déduits des 2,5 millions de dollars accordés aux Brennan, et ce même si l’appelante n’a pas contribué au paiement des IAL, parce qu’elle estime que le par. 25(5) a pour objet [TRADUCTION] « d’éviter la double indemnisation en permettant aux parties de déduire des dommages-intérêts accordés au demandeur les “indemnités” qui lui sont versées — ou auxquelles il a droit — » : *Brennan c. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294, par. 4; voir aussi *Ruckheim c. Robinson* (1995), 1 B.C.L.R. (3d) 46 (C.A.), par. 50-54. Il est possible que la Colombie-Britannique ait adopté la déductibilité en raison du fait que, en tant que seul assureur automobile de la province, l’appelante, ICBC, est en général celle qui verse à la fois les indemnités d’assurance sans égard à la responsabilité et la somme accordée par le jugement définitif. Pour cette même raison, les lois de la Colombie-Britannique ne comportent pas de disposition analogue à l’art. 275 de la Loi ontarienne, qui autorise l’indemnisation, entre sociétés d’assurance, du coût des indemnités sans égard à la responsabilité.

The Ontario insurance scheme, on the other hand, which regulates numerous competing motor vehicle insurers, adopts a different approach. The non-pecuniary damages are calculated “without regard to” SABs (s. 267.1(8)2(i)). However, the payor of the SABs (usually the victim’s insurer) is entitled by statute to indemnification from the insurer of any “heavy commercial vehicle” (*Automobile Insurance Regulations*, R.R.O. 1990, Reg. 664, s. 9) involved in the motor vehicle accident in question, “according to the respective degree of fault of each insurer’s insured as determined under the fault determination rules” (s. 275(2)), i.e., allocated not by general principles of tort but by the rules set out in Ontario regulations. Section 275(4) of the Ontario Act provides that disputes about indemnification are to be resolved by arbitration, pursuant to the Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17. There is no doubt that if the appellant were an Ontario insurer, it would be required to arbitrate Unifund’s claim.

It is perhaps important to emphasize that if the Ontario Act applies, the respondent would be entitled to recover even if the appellant were *not* permitted to deduct the \$750,000 from the Brennans’ award. This is because the two provincial regulatory schemes function independently of one another, and deductibility by one insurer is not a condition precedent to recovery by the other insurer under s. 275 of the Ontario Act.

We are told that there is no legislation in British Columbia under which Unifund could pursue a statutory claim for reimbursement against the appellant in that province. The constitutional question of whether the Ontario *Insurance Act* applies to provide Unifund with a statutory cause of action is therefore dispositive of the respondent’s claim.

Pour ce qui est du régime d’assurance ontarien, qui réglemente de nombreuses sociétés d’assurance automobile concurrentes, un modèle différent a été adopté. Les dommages-intérêts pour pertes non pécuniaires sont calculés « sans égard » aux IAL (sous-disposition 267.1(8)2(i)). Toutefois, la société qui verse de telles indemnités (habituellement l’assureur de la victime) a droit, en vertu de la Loi, d’être indemnisée par l’assureur de tout [TRADUCTION] « véhicule commercial lourd » (*Automobile Insurance Regulations*, R.R.O. 1990, Règl. 664, art. 9) impliqué dans l’accident d’automobile en question, « en fonction du degré de responsabilité de l’assuré de chaque assureur tel qu’il est établi selon les règles de détermination de la responsabilité » (par. 275(2)), c’est-à-dire non pas selon les principes généraux de la responsabilité délictuelle mais selon les règles énoncées par règlement. Le paragraphe 275(4) de la Loi ontarienne dispose que les différends à l’égard de l’indemnisation doivent être réglés par voie d’arbitrage, conformément à la *Loi de 1991 sur l’arbitrage* de l’Ontario, L.O. 1991, ch. 17. Il ne fait aucun doute que si l’appelante était un assureur ontarien, elle serait tenue de faire trancher par arbitrage la demande de Unifund.

Il importe de souligner que si la Loi ontarienne s’applique l’intimée aurait droit de recouvrer les indemnités versées, et ce même si l’appelante *n’était pas* autorisée à déduire cette somme des dommages-intérêts accordés aux Brennan. Ce serait le cas parce que les deux régimes provinciaux de réglementation fonctionnent indépendamment l’un de l’autre et que la déductibilité d’une somme donnée par un assureur n’est pas un préalable au recouvrement de celle-ci par l’autre assureur en application de l’art. 275 de la Loi ontarienne.

On nous dit qu’il n’existe en Colombie-Britannique aucune loi qui permettrait à Unifund d’intenter dans cette province une action en remboursement contre l’appelante. La réponse à la question constitutionnelle consistant à décider si la *Loi sur les assurances* de l’Ontario s’applique et fournit à Unifund une cause d’action légale est par conséquent décisive en ce qui concerne la demande de l’intimée.

12

2003 SCC 40 (CanLII)

13

14

IV. The Statutory Arbitration

15 Unifund applied to the Ontario Superior Court of Justice for the appointment of an arbitrator pursuant to s. 275(4) of the Ontario Act. The appellant, ICBC, responded with a motion for an order “staying or dismissing” the application on the basis, *inter alia*, that “Ontario law, specifically the Ontario *Insurance Act*, and any procedure under it is not applicable in this matter and does not define the relationship between the parties”. In effect, the appellant’s motion alleged that Unifund’s application disclosed no cause of action against the out-of-province insurer on the facts of this case.

16 The Ontario Court of Appeal directed the appellant to make its objection before an arbitrator appointed pursuant to the Ontario Act. The appellant says that it ought not to be ordered to appear before an arbitrator appointed pursuant to the Ontario Act unless and until it is first determined that the appellant is subject to the Ontario Act with respect to the matters in dispute.

17 I think the appellant is correct on this procedural question as well as in objecting to the substantive application of the Ontario statute to this dispute. If the Ontario insurance scheme is wholly inapplicable to the appellant on the facts here, an arbitrator appointed under the Ontario Act is without any statutory or other authority to decide anything in this case. Practicality as well as principle required the constitutional issue raised by the appellant to be resolved by the superior court to which it was addressed, and it should have been answered, in my view, in the appellant’s favour.

V. The Power of Attorney and Undertaking

18 In order to assist motorists who travel outside their province or state of residence, all Canadian insurers of motor vehicles, and many insurers in the United States, have exchanged what is called a “Power of Attorney and Undertaking” (“PAU”) which denotes “compliance with minimum coverage requirements and facilitat[es] acceptance of

IV. L’arbitrage prévu par la loi

Unifund a demandé à la Cour supérieure de justice de l’Ontario de nommer un arbitre en vertu du par. 275(4) de la Loi ontarienne. L’appelante, ICBC, a répondu par une motion sollicitant une ordonnance portant [TRADUCTION] « suspension ou rejet » de la demande, invoquant notamment que « le droit ontarien, en particulier la *Loi sur les assurances*, et toute procédure fondée sur ces règles de droit, ne s’applique pas en l’espèce et ne régit pas les relations entre les parties ». Concrètement, l’appelante a plaidé dans sa requête que les faits invoqués dans la demande de Unifund ne révèlent aucune cause d’action contre l’assureur de l’autre province.

La Cour d’appel de l’Ontario a ordonné à l’appelante de faire valoir son objection devant un arbitre nommé en vertu de la Loi ontarienne. L’appelante affirme qu’on ne devrait pas lui ordonner de se présenter devant un arbitre nommé en vertu de la Loi ontarienne tant et aussi longtemps qu’il n’aura pas d’abord été jugé qu’elle est assujettie à cette loi en ce qui concerne les questions en litige.

J’estime que l’appelante a raison à l’égard de cette question d’ordre procédural, en plus d’être fondée à contester l’application de la Loi ontarienne au présent différend. Si le régime d’assurance ontarien est entièrement inapplicable à l’appelante eu égard aux faits de l’espèce, l’arbitre nommé en vertu de la Loi ontarienne ne dispose d’aucun pouvoir — d’origine législative ou autre — pour statuer sur quelque question que ce soit dans la présente affaire. Des considérations d’ordre pratique et de politique générale commandaient que la question constitutionnelle soulevée par l’appelante soit décidée par la cour supérieure qui en était saisie et, à mon avis, la cour aurait dû la trancher en faveur de l’appelante.

V. Le formulaire Procuratation et engagements

Afin d’aider les automobilistes qui se déplacent à l’extérieur de la province ou de l’État où ils résident, tous les assureurs automobiles du Canada et bon nombre d’assureurs américains ont convenu d’utiliser un document appelé Procuratation et engagements (le « formulaire P&E »), qui atteste [TRADUCTION] « le respect des exigences minimales en matière

service”. The PAU is part of a “reciprocal scheme for the enforcement of motor vehicle liability insurance policies in Canadian provinces and territories”: *Potts v. Gluckstein* (1992), 8 O.R. (3d) 556 (C.A.), at p. 557. As the terms of the PAU are important to the respondent’s position, I set out its relevant terms hereunder:

POWER OF ATTORNEY AND UNDERTAKING

(Denoting compliance with minimum coverage requirements and facilitating acceptance of service)

INSURANCE CORPORATION OF BRITISH COLUMBIA

the head office of which is in the City of North Vancouver

in the . . . Province of British Columbia

In . . . Canada, hereby, with respect to an action or proceeding against it or its insured, or its insured and another or others, arising out of a motor-vehicle accident in any of the respective Provinces or Territories, appoints severally the Superintendents of Insurance of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Quebec, and Yukon Territory and the Northwest Territories, to do and execute all or any of the following acts, deeds, and things, that is to say: To accept service of notice or process on its behalf.

. . .

Insurance Corporation of British Columbia aforesaid hereby undertakes:—

- A. To appear in any action or proceeding against it or its insured in any Province or Territory in which such action has been instituted and of which it has knowledge:
- B. That upon receipt from any of the officials aforesaid of such notice or process in respect of its insured, or in respect of its insured and another or others, it will forthwith cause the notice or process to be personally served upon the insured:

de garantie d’assurance et facilite l’acceptation de documents en cas de signification ». Le formulaire P&E fait partie d’un [TRADUCTION] « régime de réciprocité visant la mise en œuvre des polices d’assurance-responsabilité automobile dans les provinces et territoires du Canada » : *Potts c. Gluckstein* (1992), 8 O.R. (3d) 556 (C.A.), p. 557. Vu l’importance du texte de ce document pour la thèse de l’intimée, j’en reproduis les passages pertinents :

[TRADUCTION]

PROCURATION ET ENGAGEMENTS

(Le présent document atteste le respect des exigences minimales en matière de garantie d’assurance et facilite l’acceptation de documents en cas de signification.)

INSURANCE CORPORATION OF BRITISH COLUMBIA

dont le siège social est situé dans la ville de North Vancouver

dans la [. . .] province de la Colombie-Britannique

au [. . .] Canada, confie par les présentes au surintendant des assurances de la Colombie-Britannique, de l’Alberta, de la Saskatchewan, du Manitoba, de l’Ontario, du Nouveau-Brunswick, de la Nouvelle-Écosse, de l’Île-du-Prince-Édouard, de Terre-Neuve, du Québec, du territoire du Yukon et des territoires du Nord-Ouest, la charge d’accomplir tout ce qui est prévu par les présentes, à savoir : recevoir en son nom signification de tout avis ou acte de procédure relativement aux actions ou autres procédures intentées contre elle ou contre son assuré, ou contre son assuré et d’autres, par suite d’un accident d’automobile survenu dans quelque province ou territoire concerné » .

. . .

Par les présentes, Insurance Corporation of British Columbia s’engage :—

- A. À comparaître à toute action ou autre procédure qui est intentée contre elle ou contre son assuré dans quelque province ou territoire et dont elle a connaissance :
- B. Dès réception de la part de l’un quelconque des fonctionnaires susmentionnés, d’un avis ou acte de procédure qui lui est signifié à l’égard de l’assuré, ou à l’égard de son assuré et d’autres, à faire immédiatement signifier à l’assuré cet avis ou acte de procédure :

C. Not to set up any defence to any claim, action, or proceeding, under a motor-vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with the laws relating to motor-vehicle liability insurance contracts or plan of automobile insurance of the Province or Territory of Canada in which such action or proceeding may be instituted, and to satisfy any final judgement rendered against it or its insured by a Court in such Province or Territory, in the claim, action or proceeding, in respect of any kind or class of coverage provided under the contract or plan and in respect of any kind or class of coverage required by law to be provided under a plan or contracts of automobile insurance entered into in such Province or Territory of Canada up to the greater of

- (a) the amounts and limits for that kind or class of coverage or coverages provided in the contract or plan, or
- (b) the minimum for that kind or class of coverage or coverages required by law to be provided under the plan or contracts of automobile insurance entered into in such Province or Territory of Canada, exclusive of interest and costs and subject to any priorities as to bodily injury or property damage with respect to such minimum amounts and limits as may be required by the laws of the Province or Territory. [Emphasis added.]

(Note that the words “British Columbia” in the lead paragraph are crossed out in the original PAU.)

VI. Judicial History

A. *Ontario Superior Court of Justice* (2000), 23 C.C.L.I. (3d) 96

19

Campbell J. had before him the respondent’s motion to appoint an arbitrator and the appellant’s cross-motion to stay the proceedings for want of jurisdiction, or, in the alternative, for *forum non conveniens*. In his view the purpose of the arbitration under the Ontario Act “is to deal with matters that are clearly in issue within the rules applicable in Ontario” (para. 43). It is not, he concluded, designed to resolve legal issues that may arise because of conflict in the legislation in two different provinces. However, he did not dismiss the

C. À n’invoquer, à l’égard de toute demande, action ou autre procédure, aucun moyen de défense fondé sur le contrat d’assurance-responsabilité automobile qu’elle a conclu et qui ne pourrait être invoqué si ce contrat était intervenu dans la province ou le territoire canadien où cette action ou autre procédure est intentée et avait été conclu conformément aux lois y régissant les contrats d’assurance-responsabilité automobile ou le régime d’assurance automobile, et à exécuter tout jugement définitif prononcé contre elle ou son assuré par un tribunal de la province ou du territoire à l’égard de la demande, de l’action ou de la procédure, relativement à toute garantie prévue par le contrat ou régime applicable ou qui doit, selon la loi, être prévue par le régime ou les contrats d’assurance automobile dans cette province ou ce territoire du Canada, jusqu’à concurrence de la plus élevée des sommes suivantes :

- a) la somme maximale prévue par le contrat ou le régime pour ce genre ou cette catégorie de garanties ;
- b) la somme minimale qui doit, selon la loi, être prévue par un régime ou contrat d’assurance automobile conclu dans cette province ou ce territoire au Canada pour ce genre ou cette catégorie de garanties, à l’exclusion de l’intérêt et des frais, et sous réserve des priorités applicables en vertu des lois de la province ou du territoire en matière de préjudice corporel ou matériel, à l’égard de ces sommes minimales. [Je souligne.]

(Signalons que le mot « Colombie-Britannique » figurant dans le paragraphe liminaire est biffé dans le formulaire P&E.)

VI. Historique des procédures judiciaires

A. *Cour supérieure de justice de l’Ontario* (2000), 23 C.C.L.I. (3d) 96

Le juge Campbell était saisi de la motion de l’intimée sollicitant la nomination d’un arbitre et de la motion incidente de l’appelante demandant la suspension de l’instance pour cause d’absence de compétence ou de *forum non conveniens*. Selon lui, l’arbitrage prévu par la Loi ontarienne a pour objet [TRADUCTION] « de trancher les questions qui sont clairement litigieuses eu égard aux règles applicables en Ontario » (par. 43). Il n’est pas conçu, a-t-il conclu, pour régler des questions de droit susceptibles de se soulever en raison d’un

Ontario action. He applied *forum non conveniens* principles and ruled that “the balance favours the stay of the Ontario arbitration” (para. 43). While he did not specifically make a finding with respect to jurisdiction *simpliciter*, he stayed Unifund’s action rather than dismissing it. This disposition presupposed that, while the Ontario court had jurisdiction, it would not be appropriate in all the circumstances to exercise it.

B. *Ontario Court of Appeal* (2001), 204 D.L.R. (4th) 732

The Ontario Court of Appeal reversed the motions judge on the basis that “he should have declined to hear the motion [for a stay] and proceeded with the appointment of the arbitrator who could then deal with any issues of jurisdiction and law” (para. 3). Feldman J.A. approached the appeal as one relating to procedure. It was within the jurisdiction of the arbitrator appointed under the Ontario Act to make the initial determination of jurisdiction. In her view, the appellant’s execution of the PAU obliged it to participate in the Ontario arbitration. Further, an arbitrator appointed under the Ontario legislation is empowered to decide issues of *forum non conveniens*. The appeal was allowed on those procedural grounds.

VII. Relevant Statutory Provisions

The relevant provisions of the *Insurance Act*, R.S.O. 1990, c. I.8, and the *Arbitration Act, 1991*, S.O. 1991, c. 17, are set out in the Appendix.

VIII. Constitutional Question

On August 27, 2002, the Chief Justice stated the following constitutional question:

Is s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, constitutionally inapplicable to the appellant because its application in the circumstances of this case

conflit de lois dans deux provinces différentes. Toutefois, il n’a pas rejeté l’instance introduite en Ontario. Il a appliqué les principes relatifs au *forum non conveniens* et jugé que [TRADUCTION] « la balance penche en faveur de la suspension de l’arbitrage en Ontario » (par. 43). Quoiqu’il n’ait pas tiré de conclusion précise sur la question de la simple reconnaissance de compétence, il a suspendu l’instance introduite par Unifund au lieu de la rejeter. Cette décision présupposait que, bien que le tribunal ontarien était compétent, l’exercice de cette compétence pourrait ne pas être approprié eu égard à toutes les circonstances.

B. *Cour d’appel de l’Ontario* (2001), 204 D.L.R. (4th) 732

La Cour d’appel de l’Ontario a infirmé la décision du juge des motions au motif que [TRADUCTION] « celui-ci aurait dû refuser d’entendre la motion [sollicitant la suspension de l’instance] et nommer l’arbitre, lequel aurait alors examiné toutes les questions de compétence et de droit » (par. 3). La juge Feldman a examiné l’appel sous l’angle de la procédure. La décision initiale touchant la compétence était du ressort de l’arbitre nommé en vertu de la Loi ontarienne. Selon la juge, ayant signé le formulaire P&E, l’appelante avait l’obligation de prendre part à l’arbitrage en Ontario. De plus, l’arbitre nommé en vertu des lois de l’Ontario est habilité à trancher les questions concernant le *forum non conveniens*. L’appel a été accueilli pour ces motifs d’ordre procédural.

VII. Les dispositions législatives pertinentes

Les dispositions pertinentes de la *Loi sur les assurances*, L.R.O. 1990, ch. I.8, et de la *Loi de 1991 sur l’arbitrage*, L.O. 1991, ch. 17, sont reproduites à l’annexe.

VIII. La question constitutionnelle

Le 27 août 2002, la Juge en chef a formulé la question constitutionnelle suivante :

L’article 275 de la *Loi sur les assurances*, L.R.O. 1990, ch. I.8, et ses modifications, est-il constitutionnellement inapplicable à l’appelante pour le motif que, dans les

would not accord with territorial limits on provincial jurisdiction?

IX. Analysis

23 It is well established that motor vehicle insurance within a province is a matter within provincial legislative competence: *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96 (P.C.). Since 1881, of course, the mobility of Canadians has increased exponentially. Tractor-trailer trucks rumble across the country. Holiday makers are enticed to take their holidays in distant provinces and many travel by car. Other Canadians, like the Brennans, fly to their destination and rent a car upon arrival. Still others regularly drive south to Florida or Arizona for some respite from winter.

24 People assume that their insurance follows them and their car wherever they go, and so it does. If the Brennans had taken their car instead of an airplane to British Columbia, and become involved in the same accident, the PAU scheme would have ensured that their Ontario insurer, Unifund, could have been served with a British Columbia Statement of Claim through the Superintendent of Insurance, and could not have raised in the resulting British Columbia proceedings a defence not open to a British Columbia insurer in the same circumstances.

25 Similarly, if Baljinder Singh had driven the tractor-trailer east to Ontario and collided with the Brennans on Highway 401 near their home in Cambridge, the PAU would have permitted the appellant, ICBC, to be served through the Superintendent of Insurance. In that case, the appellant could not have raised any defence not open to an Ontario insurer under comparable coverage. Moreover, Ontario law would apply as the law of the place where the accident happened: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. The PAU would have facilitated service on, and the holding responsible

circonstances de la présente affaire, son application ne serait pas conforme aux limites territoriales de la compétence provinciale?

IX. Analyse

Il est bien établi que le pouvoir de légiférer sur l'assurance automobile relève des provinces : *Citizens Insurance Co. of Canada c. Parsons* (1881), 7 App. Cas. 96 (C.P.). Depuis 1881, évidemment, les déplacements des Canadiens se sont multipliés de façon exponentielle. Les camions gros porteurs font entendre leur vrombissement d'un bout à l'autre du pays. Invités à visiter des provinces éloignées, les vacanciers sont nombreux à s'y rendre en automobile. Certains Canadiens, comme les Brennan, prennent l'avion jusqu'à leur destination et louent une voiture à leur arrivée. Pour fuir l'hiver, d'autres prennent régulièrement la route du Sud et conduisent jusqu'en Floride ou en Arizona.

Les gens tiennent pour acquis qu'ils continuent d'être assurés, où qu'ils se déplacent avec leur automobile, et c'est effectivement le cas. Si les Brennan s'étaient rendus en automobile en Colombie-Britannique, au lieu de prendre l'avion, et qu'ils y avaient eu le même accident, leur assureur situé en Ontario, Unifund, aurait pu, conformément au régime prévu par le formulaire P&E, se voir signifier, par l'intermédiaire du surintendant des assurances, une déclaration introduite en Colombie-Britannique, auquel cas il n'aurait pu, dans le cadre de l'instance intentée en Colombie-Britannique, faire valoir une défense qu'un assureur de cette province n'aurait pu invoquer dans les mêmes circonstances.

De même, si M. Baljinder Singh avait fait route vers l'est jusqu'en Ontario et que son camion était entré en collision avec la voiture des Brennan sur l'autoroute 401, à proximité de la résidence de ceux-ci à Cambridge, l'appelante, ICBC, aurait pu, en application du même régime, recevoir signification d'une action par l'intermédiaire du surintendant des assurances. Dans un tel cas, elle n'aurait pu faire valoir aucune défense que n'aurait pu invoquer un assureur de l'Ontario tenu à une garantie comparable. En outre, le droit ontarien s'appliquerait en tant que droit du lieu où l'accident s'est produit :

of, the out-of-province tortfeasors and their out-of-province insurer.

In this case, the accident and all the lawsuits arising directly from the accident took place in British Columbia. It is only the quite separate statutory procedure initiated by Unifund against the appellant that is brought in Ontario.

The constitutional question stated by the Chief Justice identifies the dispositive issue:

Is s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, constitutionally inapplicable to the appellant because its application in the circumstances of this case would not accord with territorial limits on provincial jurisdiction?

While at one level, the argument is about which court has jurisdiction over the dispute (and if more than one court qualifies, then whether Ontario is the convenient forum for its resolution), the underlying issue is whether, in light of the territorial limitation on provincial legislation, the respondent, Unifund, has a viable cause of action at all against the out-of-province appellant. If it is concluded, as the constitutional question asks, that s. 275 of the Ontario Act is “constitutionally inapplicable to the appellant . . . [because of] territorial limits on provincial jurisdiction”, then Unifund’s action under the Ontario Act should be stopped irrespective of where it is brought.

The general policy objectives of order and fairness that underlie territorial limits were discussed by La Forest J. in *Tolofson*, *supra*, at pp. 1050-51, as follows:

Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that

Tolofson c. Jensen, [1994] 3 R.C.S. 1022. Le formulaire P&E aurait facilité la signification des actes de procédures et autres documents aux auteurs du délit civil de l’autre province et à leur assureur, ainsi que la poursuite de l’action en responsabilité contre eux.

En l’espèce, l’accident et toutes les poursuites en découlant directement ont eu lieu en Colombie-Britannique. Seule la procédure distincte prévue par la Loi ontarienne qu’a intentée Unifund contre l’appelante est présentée en Ontario.

La question constitutionnelle qu’a formulée la Juge en chef résume bien l’aspect décisif du litige :

L’article 275 de la *Loi sur les assurances*, L.R.O. 1990, ch. I.8, et ses modifications, est-il constitutionnellement inapplicable à l’appelante pour le motif que, dans les circonstances de la présente affaire, son application ne serait pas conforme aux limites territoriales de la compétence provinciale?

Bien que, d’une part, il s’agisse simplement de décider quel tribunal a compétence sur le différend (et, si plus d’un tribunal est compétent, de décider si le tribunal ontarien est le forum approprié pour trancher ce différend), la véritable question en litige consiste à se demander si, compte tenu des limites territoriales de l’application des lois provinciales, l’intimée, Unifund, dispose d’une quelconque cause d’action valable contre l’appelante de l’extérieur de la province. S’il est jugé, selon le texte de la question constitutionnelle, que l’art. 275 de la Loi ontarienne est « constitutionnellement inapplicable à l’appelante [. . .] [à cause des] limites territoriales de la compétence provinciale », il conviendrait alors de faire cesser l’action intentée par Unifund en vertu de la Loi ontarienne, indépendamment de l’endroit où elle est intentée.

Le juge La Forest a commenté ainsi, aux p. 1050-1051 de l’arrêt *Tolofson*, précité, les objectifs généraux d’ordre et d’équité sur lesquels reposent les limites territoriales restreignant l’application des lois :

Les gens s’attendent habituellement à ce que leurs activités soient régies par la loi du lieu où ils se trouvent et à ce que les avantages et les responsabilités juridiques s’y rattachant soient définis en conséquence. Le gouverne-

26

27

28

place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. [Emphasis added.]

29 The respondent, as stated, asserts only an Ontario statutory cause of action. Its request for the appointment of an arbitrator could only be granted if the loss transfer scheme of the Ontario Act applies. Section 275(4), to repeat for convenience, provides that “[i]f the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*” (emphasis added).

30 Under our federal structure, different provinces are quite free to adopt different statutory schemes for their respective motor vehicle insurance industries. British Columbia decided to confer a monopoly on the appellant to sell motor vehicle insurance in that province. British Columbia does not provide for claims for indemnification amongst rival motor vehicle insurance companies in the province because there are none. Of course, the appellant is not thereby immunized from common law causes of action arising elsewhere, as in the hypothetical case mentioned above of one of its insureds taking his or her motor vehicle to Ontario and getting into an accident: *Potts, supra*, at p. 560. The appellant remains contractually bound to its insured and the PAU is designed to facilitate its appearance and the discharge of its contractual responsibilities in the province where the accident occurred.

31 The respondent has identified two potential grounds on which Ontario law might apply to its claim for reimbursement: firstly, that the appellant does business in Ontario, and is therefore in general subject to the law of the Ontario insurance

ment de ce lieu est le seul habilité à régir ces activités. Les autres États et les étrangers partagent normalement les mêmes attentes. Si d’autres États appliquaient systématiquement leurs lois à des activités qui se déroulent ailleurs, il y aurait confusion. Étant donné la facilité de voyager dans le monde moderne et l’émergence d’un ordre économique mondial, la situation deviendrait souvent chaotique si le principe de la compétence territoriale n’était pas respecté, du moins de façon générale. [Je souligne.]

Comme je l’ai indiqué précédemment, l’intimée invoque uniquement une cause d’action fondée sur une loi ontarienne. Sa demande sollicitant la nomination d’un arbitre ne saurait être accueillie que si le régime d’indemnisation prévu entre assureurs par la Loi ontarienne s’applique. Le paragraphe 275(4), que je reproduis pour des raisons de commodité, dispose que « [s]i les assureurs n’arrivent pas à s’entendre à l’égard de l’indemnisation visée au présent article, le différent est réglé par voie d’arbitrage aux termes de la *Loi sur l’arbitrage* » (je souligne).

Dans notre régime fédéral, chaque province est entièrement libre d’adopter son propre régime législatif pour régir son secteur de l’assurance automobile. La Colombie-Britannique a décidé d’accorder à l’appelante le monopole de la vente d’assurance automobile dans cette province. La Colombie-Britannique n’autorise pas la présentation de demande d’indemnisation entre sociétés d’assurance rivales dans la province, et ce tout simplement parce que l’appelante n’a pas de rivale. Évidemment, l’appelante n’est pas à l’abri des causes d’action fondées sur la common law et prenant naissance dans d’autres provinces, comme l’illustre la situation hypothétique mentionnée précédemment, où un de ses assurés se rendrait en automobile en Ontario et y aurait un accident de la route : *Potts*, précité, p. 560. L’appelante continue d’être liée contractuellement à son assuré et le formulaire P&E vise à lui faciliter la tâche de comparaître et de s’acquitter de ses responsabilités contractuelles dans la province où l’accident s’est produit.

L’intimée a relevé deux motifs susceptibles de justifier l’application du droit ontarien à sa demande de remboursement : premièrement, le fait que l’appelante exerce des activités en Ontario et est donc généralement assujettie au droit qui régir le marché

market place, and, secondly, that under the terms of the PAU, the appellant has in any event undertaken by reciprocal agreement to be bound by Ontario's insurance scheme, including the loss transfer provisions applicable to competing Ontario insurance companies.

Neither of these issues was resolved by the Ontario Court of Appeal because, in its view, their determination should be left, in the first instance, to the arbitrator.

Accordingly, the following are the principal legal issues:

(i) Was the Ontario Court of Appeal correct that an arbitrator appointed under the Ontario Act was the appropriate forum for the determination as to whether the Ontario Act did or did not apply to the appellant in the circumstances of this case (“the arbitration issue”)?

(ii) If not, should the motions judge have determined that s. 275 of the Ontario Act was constitutionally applicable to the appellant having regard to the alleged “real and substantial connection” between the appellant and Ontario on the facts of this case, and/or the terms of the Power of Attorney and Undertaking (PAU) (“the constitutional issue”)?

(iii) If so, should the motions judge have dealt with the further issue of *forum non conveniens*, or, having found jurisdiction *simpliciter*, should the issue of *forum non conveniens* have been referred to the arbitrator, as held by the Court of Appeal (“the *forum non conveniens* issue”)?

I propose to deal with each of these issues in turn.

(i) *Was the Ontario Court of Appeal Correct that an Arbitrator Appointed Under the Ontario Act Was the Appropriate Forum for the Determination as to Whether the Ontario Act Did or Did Not Apply to the Appellant in the Circumstances of This Case (“the Arbitration Issue”)?*

de l'assurance en Ontario; deuxièmement, le fait que, suivant les modalités du formulaire P&E, l'appelante a de toute façon accepté, dans le cadre d'un accord de réciprocité, d'être liée par le régime d'assurance ontarien, y compris par les dispositions relatives à l'indemnisation entre assureurs applicable aux sociétés rivales du secteur de l'assurance en Ontario.

La Cour d'appel de l'Ontario n'a tranché aucune de ces questions, puisque, à son avis, elles devaient l'être en première instance par un arbitre.

En conséquence, voici les principales questions de droit en litige :

(i) La Cour d'appel de l'Ontario a-t-elle eu raison de conclure qu'un arbitre nommé en vertu de la Loi ontarienne constitue le forum approprié pour décider si cette loi s'applique ou non à l'appelante dans les circonstances de l'espèce (« la question de l'arbitrage »)?

(ii) Dans la négative, le juge des motions aurait-il dû conclure que l'art. 275 de la Loi ontarienne est constitutionnellement applicable à l'appelante compte tenu du « lien réel et substantiel » qui existerait entre cette dernière et l'Ontario, eu égard aux faits de l'espèce, et/ou des termes du formulaire P&E (« la question constitutionnelle »)?

(iii) Dans l'affirmative, le juge des motions aurait-il dû examiner la question additionnelle du *forum non conveniens*, ou, puisqu'il a conclu affirmativement à la question de la simple reconnaissance de compétence, la question du *forum non conveniens* aurait-elle dû être renvoyée à un arbitre, conclusion à laquelle est arrivée la Cour d'appel? (« la question du *forum non conveniens* »)?

Je me propose d'examiner chacune de ces questions à tour de rôle.

(i) *La Cour d'appel de l'Ontario a-t-elle eu raison de conclure qu'un arbitre nommé en vertu de la Loi ontarienne constitue le forum approprié pour décider si cette loi s'applique ou non à l'appelante dans les circonstances de l'espèce (« la question de l'arbitrage »)?*

32

33

34

35 The Court of Appeal concluded that “the scheme of the *Arbitration Act, 1991*” is that “it is the role of the arbitrator and not of the court, at least initially, to decide questions of jurisdiction, applicable law and questions of law including whether a party is an ‘insurer’ for the purposes of s. 275” (para. 19 (emphasis added)). The court thus dispatched all the jurisdictional and related legal issues to the arbitrator on the basis of s. 17(1) of the *Arbitration Act, 1991* (which applies by virtue of s. 275 of the Ontario Act) and which reads as follows:

17.—(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

36 Section 17 is based on art. 16 of the UNCITRAL model law which reflects the principle of “Kompetenz - Kompetenz”, i.e., that an arbitral tribunal ought to be competent to rule on its own competence. The concept is said to be “fundamental”: L. Y. Fortier, “Delimiting the Spheres of Judicial and Arbitral Power: ‘Beware, My Lord, of Jealousy’” (2001), 80 *Can. Bar Rev.* 143, at p. 145.

37 There is no doubt that an arbitrator or administrative tribunal can be vested with jurisdiction to determine questions of law, even questions of constitutional law going to its own jurisdiction, provided that the legislature has made plain that intention: see, e.g., *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, and *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 61.

38 Assuming in the respondent’s favour that the Ontario legislature intended s. 17(1) to be such a grant of jurisdiction, I do not think there is anything in the *Arbitration Act, 1991* to suggest that this

La Cour d’appel a estimé qu’il ressort de [TRADUCTION] « l’économie de la *Loi de 1991 sur l’arbitrage* » que « c’est à l’arbitre, et non au tribunal, qu’il appartient de trancher, en première instance à tout le moins, la question de la compétence, celle du droit applicable et les questions de droit, y compris celle de savoir si une partie est un “assureur” pour l’application de l’art. 275 » (par. 19 (je souligne)). La Cour d’appel a en conséquence renvoyé à l’arbitre la question de la compétence et toutes les questions de droit connexes, se fondant sur le par. 17(1) de la *Loi de 1991 sur l’arbitrage* (qui s’applique par l’effet de l’art. 275 de la Loi ontarienne) et qui est ainsi rédigé :

17 (1) Le tribunal arbitral peut statuer sur sa propre compétence en matière de conduite de l’arbitrage et peut, à cet égard, statuer sur les objections relatives à l’existence ou à la validité de la convention d’arbitrage.

L’article 17 est basé sur l’art. 16 de la Loi type de la CNUDCI, lequel s’inspire du principe de la « Kompetenz - Kompetenz », selon lequel un tribunal arbitral doit être compétent pour statuer sur sa propre compétence. Il s’agit d’une notion qu’on qualifie de « fondamentale » : L. Y. Fortier, « Delimiting the Spheres of Judicial and Arbitral Power : “Beware, My Lord, of Jealousy” » (2001), 80 *R. du B. Can.* 143, p. 145.

Il est certain qu’un arbitre ou un tribunal administratif peut se voir accorder le pouvoir de trancher des questions de droit — même des questions de droit constitutionnel touchant à sa propre compétence —, pourvu que le législateur ait clairement indiqué que telle était son intention : voir, par exemple, *Douglas/Kwantlen Faculty Assn. c. Douglas College*, [1990] 3 R.C.S. 570, *Cuddy Chicks Ltd. c. Ontario (Commission des relations de travail)*, [1991] 2 R.C.S. 5, et *Cooper c. Canada (Commission des droits de la personne)*, [1996] 3 R.C.S. 854, par. 61.

À supposer, comme le veut la thèse de l’intimée, que la province d’Ontario entendait que le par. 17(1) ait pour effet de conférer une telle compétence, j’estime que rien dans la *Loi de 1991 sur*

jurisdiction was intended in all circumstances to be exclusive. Here, we are dealing with a constitutional challenge before the arbitrator has been appointed. The challenge is raised as a preliminary objection in front of the very court that is asked to make the appointment.

The respondent's argument that the arbitrator's jurisdiction should be regarded as exclusive in the first instance rests largely on a series of labour relations cases where this Court held that courts should defer to labour arbitrators in disputes which, in their essential character, arise out of a collective agreement: *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14, at para. 24.

Those cases, however, are based on the Court's interpretation of the legislative intent expressed in labour relations legislation in favour of exclusivity (see *St. Anne, supra*, at pp. 718-19, and *Weber, supra*, at para. 41). The Court was not being asked to defer to the very arbitrator whose constitutional root of authority was being challenged.

There is nothing in the *Insurance Act* of Ontario, which was the Court of Appeal's springboard into the *Arbitration Act, 1991*, to suggest that the legislature intended an arbitrator appointed under that Act, usually an insurance specialist, to have *exclusive* jurisdiction (even in the first instance) to determine the constitutional applicability of that Act under the division of legislative powers in the Canadian Constitution.

The respondent also relies on *Jevco Insurance Co. v. Continental Insurance Co. of Canada* (2000), 132 O.A.C. 379 (C.A.), aff'g [1999] O.J. No. 2267 (QL) (S.C.J.), but that case turns on a different point. There, the issue sought to be raised before the

l'arbitrage n'indique que cette compétence était censée être exclusive dans tous les cas. En l'espèce, nous sommes en présence d'une contestation de nature constitutionnelle précédant la nomination de l'arbitre. Cette contestation a été soulevée, à titre d'objection préliminaire, devant le tribunal même à qui l'on demande de nommer l'arbitre.

L'argument de l'intimée selon lequel la compétence de l'arbitre devrait être considérée comme exclusive en première instance repose dans une large mesure sur une série d'arrêts en matière de relations du travail dans lesquels notre Cour a jugé que les tribunaux devaient s'en remettre aux arbitres du travail dans les litiges qui, dans leur essence, résultent d'une convention collective : *St. Anne Nackawic Pulp & Paper Co. c. Section locale 219 du Syndicat canadien des travailleurs du papier*, [1986] 1 R.C.S. 704; *Weber c. Ontario Hydro*, [1995] 2 R.C.S. 929; *Regina Police Assn. Inc. c. Regina (Ville) Board of Police Commissioners*, [2000] 1 R.C.S. 360, 2000 CSC 14, par. 24.

Toutefois, ces arrêts reposent sur l'interprétation de notre Cour en ce qui concerne les lois sur les relations du travail dans lesquelles le législateur s'est exprimé en faveur de l'exclusivité (voir les arrêts *St. Anne*, précité, p. 718-719, et *Weber*, précité, par. 41). Dans ces affaires, on ne demandait pas à notre Cour de s'en remettre à l'arbitre même dont la compétence était contestée du point de vue constitutionnel.

Rien dans la *Loi sur les assurances* de l'Ontario, qui a amené la Cour d'appel à examiner la *Loi de 1991 sur l'arbitrage*, ne tend à indiquer que le législateur entendait accorder à l'arbitre nommé en vertu de la première loi — habituellement un spécialiste du domaine des assurances — compétence *exclusive* (même en première instance) pour décider si cette loi est constitutionnellement applicable dans le cadre du partage des pouvoirs législatifs prévu par la Constitution canadienne.

L'intimée invoque également l'arrêt *Jevco Insurance Co. c. Continental Insurance Co. of Canada* (2000), 132 O.A.C. 379 (C.A.), conf. [1999] O.J. No. 2267 (QL) (C.S.J.), mais cette affaire a été décidée sur un point différent. Dans

39

40

41

42

arbitrator was whether the Workers' Compensation legislation relieves an insurer of responsibility for statutory no-fault benefits. All of the parties were in Ontario and subject to the laws of that province. It was open to the Ontario legislature to confer on an arbitrator the determination in the first instance of that legal point, and the Ontario Court of Appeal held that the legislature had done so. Here, by contrast, the issue is whether the laws passed by the Ontario legislature have any application at all to this dispute.

Jevco, la question qu'on voulait soumettre à l'arbitre était de savoir si les lois relatives aux accidents du travail dégagent l'assureur de toute responsabilité à l'égard des indemnités d'assurance hors-faute. Toutes les parties étaient de l'Ontario et étaient assujetties aux lois de cette province. Le législateur ontarien avait la capacité d'investir un arbitre du pouvoir de se prononcer en première instance sur ce point de droit et la Cour d'appel de l'Ontario a conclu qu'il l'avait fait. En l'espèce, par contre, il s'agit de décider si les dispositions législatives adoptées par le législateur ontarien s'appliquent de quelque façon au présent litige.

43 Legislative attempts to distance the provincial superior courts from issues of constitutional *applicability* as well as *validity* have generally proven to be unsuccessful. See, e.g., *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at pp. 328-29. In my view, when the authority of a court is invoked to appoint an arbitrator under a statute which one of the parties contends cannot constitutionally apply to it, the court should deal with the challenge. As observed by Estey J. in *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733, at p. 741, the courts are "the authority in the community to control the limits of the respective sovereignties of the two plenary governments, as well as to police agencies within each of these spheres to ensure their operations remain within their statutory boundaries".

Les législateurs qui ont tenté de soustraire à la compétence des cours supérieures des provinces des questions d'*applicabilité* et de *validité* constitutionnelles ont généralement échoué dans leur tentative : voir, par exemple, *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, p. 328-329. À mon avis, lorsqu'on invoque la compétence d'un tribunal de nommer un arbitre en vertu d'une loi qui, selon la prétention d'une des parties, ne peut constitutionnellement s'appliquer à elle, le tribunal devrait statuer sur la contestation. Comme l'a fait remarquer le juge Estey dans l'arrêt *Northern Telecom Canada Ltée c. Syndicat des travailleurs en communication du Canada*, [1983] 1 R.C.S. 733, p. 741, les tribunaux sont, « dans la société, l'autorité qui contrôle les bornes de la souveraineté propre des deux gouvernements pléniers et celle qui surveille les organismes à l'intérieur de ces sphères pour vérifier que leurs activités demeurent dans les limites de la loi ».

44 The jurisdiction of the courts in Ontario to appoint the arbitrator was itself dependent on the application of s. 275 of the Ontario *Insurance Act*. If the Act could not constitutionally apply to this dispute, then an appointment of an arbitrator pursuant to the Act would be ineffective.

Le pouvoir des tribunaux ontariens de nommer l'arbitre était lui-même tributaire de l'application de l'art. 275 de la *Loi sur les assurances* de l'Ontario. Si cette Loi n'était pas constitutionnellement applicable au litige, la nomination d'un arbitre en vertu de celle-ci serait sans effet.

45 Section 48(1)(c) of the *Arbitration Act, 1991* provides that the court may set aside an arbitral award on the basis that "the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law". I can think of no practical

L'alinéa 48(1)c) de la *Loi de 1991 sur l'arbitrage* dispose que le tribunal peut annuler la sentence arbitrale au motif que « l'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario ». Je ne vois aucune raison pratique de

reason to compel the parties to go through a doomed arbitration, where the very issue is the constitutional availability of the statutory cause of action being invoked, rather than having the court determine the issue in the first instance.

If, as the appellant contends, an arbitration would be unconstitutional, then issues of cost, delay and inconvenience all argue for judicial euthanasia at the outset.

I note, as well, that s. 8(2) of the *Arbitration Act, 1991* speaks of the arbitrator's jurisdiction to decide "any question of law that arises during the arbitration" (emphasis added). If the appellant is correct, there is no constitutional basis for the arbitration to come into existence in the first place.

The Ontario courts had jurisdiction to determine the constitutional applicability of the Ontario *Insurance Act* in this case. It involved a claim to reimbursement of a payment made in Ontario to an Ontario insured by an Ontario insurance company. By notice of motion dated July 28, 2000, under Rule 17.06 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the appellant sought various rulings all of which related to the constitutional applicability of the Ontario *Insurance Act*. There was no objection taken to the Ontario court dealing with the constitutional question. On the contrary, it was of the essence of the appellant's notice of motion.

I conclude, therefore, that the motions court ought to have addressed the issue of the constitutional applicability of the Ontario Act raised by the appellant.

(ii) *Is the Ontario Act Constitutionally Applicable to the Appellant on the Facts of This Case Having Regard to the Alleged "Real and Substantial Connection" Between the Appellant and Ontario and/or the Obligations Undertaken in the Power of Attorney and Undertaking ("PAU") ("the Constitutional Issue")?*

contraindre les parties à entreprendre un arbitrage inutile, dans les cas où la question fondamentale est l'applicabilité, du point de vue constitutionnel, de la cause d'action d'origine législative qui est invoquée, au lieu de demander au tribunal de se prononcer sur cette question en première instance.

Si, comme le prétend l'appelante, l'arbitrage est une mesure inconstitutionnelle, les coûts, les délais et les inconvénients d'une telle procédure sont autant d'arguments incitant à l'écarter d'entrée de jeu par euthanasie judiciaire.

Je tiens également à souligner que, aux termes du par. 8(2) de la *Loi de 1991 sur l'arbitrage*, l'arbitre peut statuer sur « toute question de droit qui est soulevée au cours de l'arbitrage » (je souligne). Si l'appelante a raison, la tenue même de l'arbitrage n'a aucune assise constitutionnelle.

Les tribunaux ontariens avaient compétence pour statuer sur l'applicabilité constitutionnelle de la *Loi sur les assurances* de l'Ontario à la présente affaire, qui concerne le remboursement d'une somme versée en Ontario à un assuré ontarien par une société d'assurance de cette province. Au moyen d'un avis de motion daté du 28 juillet 2000 et présenté en vertu de la règle 17.06 des *Règles de procédure civile* de l'Ontario, R.R.O. 1990, Règl. 194, l'appelante a sollicité diverses décisions touchant l'applicabilité constitutionnelle de la *Loi sur les assurances* de l'Ontario. Personne ne s'est opposé à ce que le tribunal ontarien connaisse de la question d'ordre constitutionnelle. Au contraire, l'avis de motion de l'appelante demandait au tribunal de trancher cette question.

J'arrive en conséquence à la conclusion que le juge des motions aurait dû se prononcer sur la question de l'applicabilité constitutionnelle de la *Loi ontarienne* soulevée par l'appelante.

(ii) *Eu égard aux faits de l'espèce, la Loi ontarienne est-elle constitutionnellement applicable à l'appelante compte tenu du « lien réel et substantiel » qui existerait entre cette dernière et l'Ontario, et/ou des obligations contractées aux termes du formulaire P&E (« la question constitutionnelle »)?*

46

47

48

49

50 It is well established that a province has no legislative competence to legislate extraterritorially. If the Ontario Act purported to regulate civil rights in British Columbia arising out of an accident in that province, this would be an impermissible extraterritorial application of provincial legislation: *Royal Bank of Canada v. The King*, [1913] A.C. 283 (P.C.); *Gray v. Kerlake*, [1958] S.C.R. 3; P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at pp. 13-4 to 13-25; R. E. Sullivan, “Interpreting the Territorial Limitations on the Provinces” (1985), 7 *Supreme Court L.R.* 511, at p. 531.

51 This territorial restriction is fundamental to our system of federalism in which each province is obliged to respect the sovereignty of the other provinces within their respective legislative spheres, and expects the same respect in return. It flows from the opening words of s. 92 of the *Constitution Act, 1867*, which limit the territorial reach of provincial legislation: “In each Province the Legislature may exclusively make Laws in relation to” the enumerated heads of power (emphasis added). The authority to legislate in respect of insurance is founded in s. 92(13), which confers on each legislature the power to make laws in relation to “Property and Civil Rights in the Province” (emphasis added).

52 Unifund does not take issue with these basic propositions. Its contention is that it seeks only to enforce its Ontario civil rights in Ontario, namely the right to indemnification created by s. 275 of the Ontario Act. It says it is entitled to do so under ordinary constitutional law principles because there is “a real and substantial connection” between the appellant and Ontario, or, alternatively, under the PAU.

53 I therefore turn to the first of the two grounds on which the respondent alleges the Ontario statutory scheme applies.

Il est bien établi qu’une province n’a pas le pouvoir d’édicter des lois ayant une portée extraterritoriale. Si la Loi ontarienne visait à régir, en Colombie-Britannique, les droits civils résultant d’un accident survenu dans cette province, il s’agirait d’une application extraterritoriale non permise d’une loi provinciale : *Royal Bank of Canada c. The King*, [1913] A.C. 283 (C.P.); *Gray c. Kerlake*, [1958] R.C.S. 3; P. W. Hogg, *Constitutional Law of Canada* (éd. feuilles mobiles), vol. 1, p. 13-4 à 13-25; R. E. Sullivan, « Interpreting the Territorial Limitations on the Provinces » (1985), 7 *Supreme Court L.R.* 511, p. 531.

Cette restriction de la portée territoriale est fondamentale dans notre régime fédéral où chaque province est tenue de respecter la souveraineté législative des autres provinces dans leurs champs de compétence respectifs, et où elle s’attend au même respect en retour. Cette restriction ressort du passage liminaire de l’art. 92 de la *Loi constitutionnelle de 1867*, qui limite la portée territoriale des lois provinciales : « Dans chaque province la législature pourra exclusivement faire des lois relatives aux matières tombant » sous les chefs de compétence qui y sont énumérés (je souligne). Le pouvoir de légiférer en matière d’assurance découle du par. 92(13), lequel confère à chaque province le pouvoir de faire des lois relatives à la « propriété et [aux] droits civils dans la province » (je souligne).

Unifund ne conteste pas ces propositions fondamentales, mais dit chercher simplement à exercer, en Ontario, les droits civils qui lui sont reconnus dans cette province, à savoir le droit à indemnisation créé par l’art. 275 de la Loi ontarienne. Elle affirme avoir droit de le faire soit en vertu des principes ordinaires de droit constitutionnel, du fait de l’existence d’un « lien réel et substantiel » entre l’appelante et l’Ontario, soit en vertu du formulaire P&E.

Je vais donc examiner les deux moyens invoqués par l’intimée pour établir l’application du régime législatif ontarien.

- (a) The respondent says that there is a “real and substantial connection” between the appellant and Ontario that makes it appropriate for Ontario law to regulate the outcome of their dispute.

The “real and substantial connection” test has been adopted and developed by this Court in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1103 and 1109; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at p. 328; and *Tolofson*, *supra*, at p. 1049; followed and applied more recently in cases such as *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, at para. 71, and *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78.

In this case, however, we are asked to apply the “real and substantial connection test” in the different context of the *applicability* of a provincial regulatory scheme to an out-of-province defendant. The issue is not just the competence of the Ontario court to entertain the appointment of an arbitrator (as in the choice of forum cases) but, as the constitutional question asks, whether the “connection” between Ontario and the respondent is sufficient to support the application to the appellant of Ontario’s regulatory regime.

Consideration of constitutional *applicability* can conveniently be organized around the following propositions:

1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;
2. What constitutes a “sufficient” connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;

- a) L’intimée affirme qu’il existe, entre l’appelante et l’Ontario, un « lien réel et substantiel » et que, de ce fait, il convient que les lois de l’Ontario décident de l’issue du litige l’opposant à l’appelante.

Notre Cour a adopté et explicité le critère du « lien réel et substantiel » dans les arrêts *Morguard Investments Ltd. c. De Savoye*, [1990] 3 R.C.S. 1077, p. 1103 et 1109; *Hunt c. T&N plc*, [1993] 4 R.C.S. 289, p. 328; et *Tolofson*, précité, p. 1049; elle l’a suivi et appliqué plus récemment dans des affaires telles que *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90, par. 71, et *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, [2002] 4 R.C.S. 205, 2002 CSC 78.

En l’espèce, toutefois, nous sommes appelés à appliquer le « critère du lien réel et substantiel » dans le contexte différent de l’applicabilité d’un régime de réglementation établi par une province donnée, à un défendeur de l’extérieur de cette province. Il ne s’agit pas seulement de décider si le tribunal judiciaire ontarien a compétence pour connaître de la demande de nomination de l’arbitre (comme dans les affaires de choix du forum), mais, comme le précise la question constitutionnelle, si le « lien » entre l’Ontario et l’intimée est suffisant pour justifier l’application à l’appelante du régime de réglementation ontarien.

L’examen de l’*applicabilité* du point de vue constitutionnel peut s’articuler autour des propositions suivantes :

1. La limitation territoriale de la portée du pouvoir de légiférer des provinces empêche les lois d’une province de s’appliquer aux affaires qui ne présentent pas de lien suffisant avec cette dernière.
2. Le caractère « suffisant » du lien dépend du rapport qui existe entre le ressort ayant légiféré, l’objet du texte de loi et l’individu ou l’entité qu’on cherche à assujettir à celui-ci.

54

2003 SCC 40 (CanLII)

55

56

3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;

4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.

57 I propose to address each of these elements to the extent necessary to resolve this aspect of the appeal.

1. *The Sufficient Connection*

58 The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it: J.-G. Castel and J. Walker, *Canadian Conflict of Laws* (5th ed. (loose-leaf)), at p. 2.1. As will be seen, a “real and substantial connection” sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome.

59 In *Tolofson*, La Forest J. observed: “It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country . . . it would lead to unfair and unjust results if it did. The same considerations apply as between the Canadian provinces” (p. 1052).

60 Territorial limits is an ancient doctrine developed in the context not of provinces but of sovereign states, as discussed by Lord Russell of Killowen C. J. in *R. v. Jameson*, [1896] 2 Q.B. 425, at p. 430:

One other general canon of construction is this — that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts

3. L’applicabilité d’une loi provinciale par ailleurs valide à un défendeur de l’extérieur de la province concernée est fonction des exigences d’ordre et d’équité qui sous-tendent nos structures fédérales.

4. Comme ils visent une finalité, les principes d’ordre et d’équité sont appliqués d’une manière souple, en fonction de l’objet de la loi.

Je me propose d’examiner ces éléments dans la mesure nécessaire pour régler cet aspect du pourvoi.

1. *L’existence d’un lien suffisant*

Les limites territoriales du pouvoir de légiférer des provinces ont pour effet d’empêcher l’application des lois d’une province aux affaires qui ne présentent pas de lien suffisant avec cette dernière : J.-G. Castel et J. Walker, *Canadian Conflict of Laws* (5^e éd. (feuilles mobiles)), p. 2.1. Comme nous le verrons, un « lien réel et substantiel » qui serait par ailleurs suffisant pour permettre aux tribunaux d’une province de se déclarer compétents à l’égard d’un litige peut toutefois ne pas être suffisant pour que les lois de cette province décident de l’issue de ce litige.

Dans l’arrêt *Tolofson*, p. 1052, le juge La Forest a fait l’observation suivante : « Il me semble aller de soi, par exemple, qu’il n’appartient pas à l’État A de définir les droits et obligations des citoyens de l’État B à l’égard d’actes accomplis dans leur propre pays, [. . .] car il s’ensuivrait des résultats inéquitables et injustes si c’était le cas. Les mêmes considérations s’appliquent en ce qui concerne les provinces canadiennes. »

Les limites territoriales du pouvoir législatif constituent une vieille doctrine qui a été élaborée dans le contexte d’affaires concernant non pas des provinces mais des États souverains, comme l’indiquent les explications suivantes de Lord Russell of Killowen dans *R. c. Jameson*, [1896] 2 Q.B. 425, p. 430 :

[TRADUCTION] Selon un autre principe général d’interprétation, si une loi se prête à une interprétation différente, on ne saurait considérer qu’elle s’applique

done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.

A similar concern for state comity, or reciprocal respect, was internalized within the federal structure of the United States as early as *Pennoyer v. Neff*, 95 U.S. 714 (1877), at p. 722:

. . . no State can exercise direct jurisdiction and authority over persons or property without its territory. . . . The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others.

These early formulations conceive of the territorial limitation in very physical terms, as was still the case in 1913 in *Royal Bank of Canada*, *supra*, where the court struck down an Alberta statute which purported to direct monies raised for a failed railway project to be paid over to provincial government coffers instead of having the monies returned to the lenders, most of whom resided in the United Kingdom. Viscount Haldane L.C. considered it notable that “[n]o money in specie was sent to the branch office” in Alberta (p. 294). He concluded that the debts were recoverable by the bondholders at the Bank’s head office in Montréal. Accordingly, the right of the foreign bondholders to receive back their money

was a civil right which had arisen, and remained enforceable outside the province. The statute was on this ground beyond the powers of the Legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province nor directed solely to matters of merely local or private nature within it. [p. 298]

See also *Attorney General for Ontario v. Scott*, [1956] S.C.R. 137, at p. 141; *Interprovincial Co-Operatives Ltd. v. The Queen*, [1976] 1 S.C.R.

aux étrangers à l’égard des actes qu’ils accomplissent à l’extérieur du territoire de la puissance souveraine qui a édicté la loi en question. Il s’agit d’une règle fondée sur le droit international en vertu de laquelle chaque puissance souveraine est tenue de respecter les sujets et les droits des autres puissances souveraines à l’extérieur de son propre territoire.

Un souci analogue à l’égard de la courtoisie internationale — ou respect mutuel — est depuis longtemps intégré à la structure fédérale des États-Unis comme en témoigne l’arrêt *Pennoyer c. Neff*, 95 U.S. 714 (1877), p. 722 :

[TRADUCTION] [A]ucun État ne peut exercer directement quelque compétence et autorité sur les personnes ou les biens à l’extérieur de son territoire. [. . .] Les divers États jouissent d’une dignité et d’une autorité équivalentes, et l’indépendance d’un de ces États implique exclusion du pouvoir de tous les autres.

Ces vieux énoncés expriment une conception très physique de la limitation territoriale, toujours présente en 1913 dans l’arrêt *Royal Bank of Canada*, précité, où notre Cour a invalidé une loi de l’Alberta qui prévoyait que des sommes recueillies pour un projet ferroviaire qui avait avorté seraient versées dans les coffres du gouvernement provincial au lieu d’être remboursées aux prêteurs, dont la plupart résidaient au Royaume-Uni. Le vicomte Haldane, lord chancelier, a considéré notable le fait qu’[TRADUCTION] « [a]ucune somme n’avait été envoyée en espèces à la succursale » en Alberta (p. 294). Il a conclu que les obligataires pouvaient se faire payer leur créance au siège social de la banque à Montréal. Par conséquent, le droit des créanciers obligataires étrangers de recouvrer leur argent

[TRADUCTION] était un droit civil qui avait pris naissance en dehors de la province et dont on pouvait encore demander le respect à l’extérieur de celle-ci. Pour cette raison, la loi excédait les pouvoirs de l’assemblée législative albertaine, dans la mesure où les dispositions qu’on entendait édicter ne se limitaient pas à la propriété et aux droits civils dans la province, et ne se rapportaient pas uniquement aux questions de nature purement locale ou privée dans la province. [p. 298]

Voir également *Attorney General for Ontario c. Scott*, [1956] R.C.S. 137, p. 141; *Interprovincial Co-Operatives Ltd. c. La Reine*, [1976] 1 R.C.S.

61

2003 SCC 40 (CanLII)

62

477, at p. 521; *Credit Foncier Franco-Canadien v. Ross*, [1937] 3 D.L.R. 365 (Alta. S.C.A.D.); and *Beauharnois Light, Heat and Power Co. v. Hydro-Electric Power Commission of Ontario*, [1937] O.R. 796 (C.A.).

2. *What Constitutes a “Sufficient Connection” Depends on the Relationship Among the Enacting Jurisdiction, the Subject Matter of the Law, and the Persons Sought To Be Regulated By It.*

63

Later formulations of the extraterritoriality rule put the focus less on the idea of actual physical presence and more on the relationships among the enacting territory, the subject matter of the law, and the person sought to be subjected to its regulation. The potential application of provincial law to relationships with out-of-province defendants became more nuanced. The evolution of the rule was perhaps inevitable given the reality, as La Forest J. commented in *Morguard*, that modern states “cannot live in splendid isolation” (p. 1095). The focus on the relationship, as something that did not necessarily require actual physical presence within the jurisdiction, was identified by Dixon J., speaking for the High Court of Australia in *Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.)* (1936-1937), 56 C.L.R. 337, at p. 375, who said it was

also within the competence of the [state] legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicile, carrying on business there, or even remoter connections.

64

Viewed in this way, the problem in *Royal Bank of Canada, supra*, was not physical presence as such but that there was insufficient *connection* between the province of Alberta, on the one hand, and the out-of-province bondholders and their money on deposit with the bank’s head office in Quebec, on the other hand, to justify the regulation of the debt by Alberta.

477, p. 521; *Credit Foncier Franco-Canadien c. Ross*, [1937] 3 D.L.R. 365 (C.S. Alb., div. app.); et *Beauharnois Light, Heat and Power Co. c. Hydro-Electric Power Commission of Ontario*, [1937] O.R. 796 (C.A.).

2. *L’existence d’un « lien suffisant » dépend du rapport qui existe entre le ressort ayant légiféré, l’objet du texte de loi en cause et les personnes qu’on entend assujettir à celui-ci.*

Dans des énoncés ultérieurs de la règle de l’extraterritorialité, on a moins insisté sur la notion de présence physique proprement dite, s’attachant davantage au lien entre le territoire ayant légiféré, l’objet du texte de loi en cause et la personne qu’on entendait assujettir à celui-ci. L’application potentielle des lois d’une province aux rapports mettant en cause des défendeurs se trouvant à l’extérieur de celle-ci est devenue une question plus nuancée. L’évolution de la règle était peut-être inévitable compte tenu du fait que, comme l’a souligné le juge La Forest dans l’arrêt *Morguard*, les États modernes « ne peuvent [. . .] pas vivre dans l’isolement le plus complet » (p. 1095). Cette insistance sur l’existence d’un lien ne requérant pas nécessairement une présence physique proprement dite dans le ressort a été énoncée par le juge Dixon, qui s’exprimait au nom de la Haute Cour d’Australie, dans l’arrêt *Broken Hill South Ltd. c. Commissioner of Taxation (N.S.W.)* (1936-1937), 56 C.L.R. 337, p. 375 :

[TRADUCTION] . . . l’assemblée législative [d’un État] a également le pouvoir de fonder la responsabilité uniquement sur le lien qu’a une personne avec le territoire. Ce lien peut être la présence dans le territoire, la résidence, le domicile, l’exercice d’activités commerciales à cet endroit ou même un rapport plus ténu.

Considéré sous cet angle, le problème dans l’affaire *Royal Bank of Canada*, précitée, n’était pas la présence physique comme telle, mais le fait qu’il existait, entre la province d’Alberta, d’une part, et les créanciers obligataires de l’extérieur de la province et leur argent déposé au siège social de la banque dans la province de Québec, d’autre part, un *lien* insuffisant pour justifier la réglementation de ces sommes par l’Alberta.

It appears from the case law that different degrees of connection to the enacting province may be required according to the subject matter of the dispute. *Broken Hill* was a tax case. In divorce matters, mere residence of the parties in the jurisdiction was regarded, at common law, as an *insufficient* “relationship”. Actual domicile was required, e.g., *Kalenczuk v. Kalenczuk* (1920), 52 D.L.R. 406 (Sask. C.A.). In another context, “[m]erely going through the air space over Manitoba” was an insufficient “relation” or connection with the province to support imposition of a provincial tax “within the Province”: *The Queen in Right of Manitoba v. Air Canada*, [1980] 2 S.C.R. 303, at p. 316, *per* Laskin C.J. Yet in a products liability case, the presence of the defendant manufacturer in the jurisdiction is considered unnecessary. The relationship created by the knowing dispatch of goods into the enacting jurisdiction in the reasonable expectation that they will be used there is regarded as sufficient: *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, at p. 409. In yet another context, in *R. v. Thomas Equipment Ltd.*, [1979] 2 S.C.R. 529, the “relation” requirement was satisfied for regulatory purposes where the accused, a non-resident, not only sold its products (which were *not* defective) in the enacting jurisdiction, but had hired a local agent to promote their sale. In each case, the court assessed the relationship between the enacting jurisdiction and the out-of-province individual or entity sought to be regulated by it in light of the subject matter of the legislation to determine if the relation was “sufficient” to support the validity or applicability of the legislation in question.

In *Ladore v. Bennett*, [1939] A.C. 468 (P.C.), Ontario legislation that reduced the rate of interest on out-of-province bondholders was upheld. Purchasers, wherever situated, of Ontario municipal bonds had created a relationship between themselves and Ontario which was sufficient to ground

Il ressort de la jurisprudence que différents degrés de rattachement à la province ayant légiféré peuvent être requis selon l’objet du différend. L’arrêt *Broken Hill* était une affaire fiscale. En matière de divorce, le simple fait pour les parties d’avoir une résidence dans un ressort était considéré, en common law, comme un « lien » *insuffisant*. On exigeait qu’elles y aient leur domicile réel : voir, par exemple, *Kalenczuk c. Kalenczuk* (1920), 52 D.L.R. 406 (C.A. Sask.). Dans un autre contexte, « [l]e seul fait de traverser l’espace aérien au-dessus du Manitoba » ne constituait pas un « lien » suffisant avec la province pour justifier l’imposition d’une taxe provinciale « dans les limites de la Province » : *La Reine du chef du Manitoba c. Air Canada*, [1980] 2 R.C.S. 303, p. 316, le juge en chef Laskin. Pourtant, dans les affaires de responsabilité du fabricant, la présence du fabricant défendeur dans le ressort n’est pas considérée nécessaire. Est considéré comme suffisant le lien que constitue le fait pour l’intéressé d’expédier sciemment des marchandises dans le ressort ayant légiféré tout en s’attendant raisonnablement qu’on les y utilisera : *Moran c. Pyle National (Canada) Ltd.*, [1975] 1 R.C.S. 393, p. 409. Dans un autre contexte, celui de l’affaire *R. c. Thomas Equipment Ltd.*, [1979] 2 R.C.S. 529, l’exigence requérant l’existence d’un « lien » aux fins d’assujettissement au régime de réglementation a été satisfaite lorsque l’entreprise accusée, qui résidait dans une autre province, a non seulement vendu ses produits (lesquels *n’étaient pas* défectueux) dans le ressort ayant légiféré, mais a également embauché un représentant local pour les y promouvoir. Dans chacun de ces arrêts, la Cour a évalué, à la lumière de l’objet du texte de loi en cause, le lien entre le ressort ayant légiféré et l’individu ou l’entité de l’extérieur de la province qu’on entendait réglementer afin de déterminer si le lien était « suffisant » pour étayer la validité ou l’applicabilité de la loi en question.

Dans l’affaire *Ladore c. Bennett*, [1939] A.C. 468 (C.P.), la validité d’une loi ontarienne réduisant le taux d’intérêt accordé aux créanciers obligataires de l’extérieur de la province, a été confirmée. Les acheteurs — où qu’ils se trouvaient — d’obligations municipales émises en Ontario avaient créé

jurisdiction in respect of the particular subject matter of the legislation. On the facts, *Ladore* is difficult to distinguish from *Royal Bank of Canada*. The different result can only be explained, from the perspective of the out-of-province parties, by an evolving sophistication in respect of the true scope of the territorial limitation. *Ladore* was expressly approved by this Court in *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297.

entre eux et l'Ontario un lien suffisant pour asseoir la compétence du législateur relativement à l'objet précis de la loi. Au regard des faits, il est difficile de distinguer les affaires *Ladore* et *Royal Bank of Canada*. Pour ce qui est des parties de l'extérieur de la province, la différence de résultat ne peut s'expliquer que par le raffinement de la doctrine relativement à la portée réelle de la limitation territoriale de la compétence législative provinciale. Notre Cour a expressément approuvé l'arrêt *Ladore* dans le *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297.

67 A further complication arises when the issue is not the *validity* of provincial legislation, but its *applicability* to out-of-province entities. In this case, the appellant does not at all challenge the validity of the Ontario *Insurance Act* which on its face regulates an aspect of “Property and Civil Rights in the Province” (emphasis added) (*Constitution Act, 1867*, s. 92(13)). The appellant says only that the Ontario Act must be confined to its proper constitutional sphere, and its reach cannot validly be extended to an out-of-province insurer to govern the outcome of the present dispute.

La situation se complique davantage lorsque la question à trancher n'est pas la *validité* de la loi provinciale mais plutôt son *applicabilité* à certaines entités à l'extérieur de la province. En l'espèce, l'appelante ne conteste absolument pas la validité de la *Loi sur les assurances* de l'Ontario, qui à première vue régleme un aspect visé par « la propriété et les droits civils dans la province » (je souligne) (*Loi constitutionnelle de 1867*, par 92(13)). L'appelante affirme seulement que la portée de la Loi ontarienne doit respecter les limites imposées par la Constitution et que son application ne peut valablement être élargie à un assureur de l'extérieur de la province et décider de l'issue du présent litige.

3. *The Applicability of an Otherwise Competent Provincial Legislation to Out-of-Province Defendants is Conditioned by the Requirements of Order and Fairness that Underlie Our Federal Arrangements.*

3. *L'applicabilité d'une loi provinciale par ailleurs valide à un défendeur de l'extérieur de la province concernée est fonction des exigences d'ordre et d'équité qui sous-tendent nos structures fédérales.*

68 The more flexible view of extraterritorial application evident in the later cases will, at least to some extent, increase the potential among the provinces for conflict. In *Hunt, supra*, an organizing principle of the federation was found in the requirements of order and fairness, described by the Court as “constitutional imperatives” (p. 324). Within the Canadian federation, comity requires adherence to “principles of order and fairness, principles that ensure security of transactions with justice” (*Morguard, supra*, at p. 1097). As La Forest J. explained in *Tolofson, supra*, at p. 1051:

L'interprétation plus souple de l'application extraterritoriale qui ressort clairement des arrêts plus récents accroîtra, dans une certaine mesure à tout le moins, le risque de conflit entre les provinces. Dans l'arrêt *Hunt*, précité, les exigences en matière d'ordre et d'équité ont été considérées comme un principe directeur de la fédération et qualifiées par notre Cour d'« impératifs constitutionnels » (p. 324). Au sein de la fédération canadienne, la courtoisie commande qu'on adhère aux « principes d'ordre et d'équité, des principes qui assurent à la fois la justice et la sûreté des opérations » (*Morguard*, précité, p. 1097). Comme l'a expliqué le juge La Forest dans l'arrêt *Tolofson*, précité, p. 1051 :

Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.

To similar effect is the concern expressed by La Forest J. in *Tolofson*, *supra*, at p. 1066:

. . . it is arguable that it is not constitutionally permissible for both the province where certain activities took place and the province of the residence of the parties to deal with civil liability arising out of the same activities. Assuming both provinces have legislative power in such circumstances, this would open the possibility of conflicting rules in respect of the same incident.

The issue in *Hunt* was whether a Quebec statute, which purported to prohibit the removal from Quebec of business records required by judicial process outside the province, excused compliance in a British Columbia court with documentary production. Noting (at p. 330) that this approach would effectively immunize the business concerns located in Quebec from ever having to produce documents sought for the purposes of litigation in other provinces, La Forest J. held that the Quebec “blocking statute” was “constitutionally inapplicable [in British Columbia] because it offends against the principles enunciated in *Morguard*” (p. 331).

Similarly, in my view, order in the federation would be undermined if every provincial jurisdiction took it upon itself to regulate aspects of the financial impact of the British Columbia car crash in relation to its own residents at the expense of the British Columbia insurer. The Brennans’ accident, for example, might have occasioned a multi-vehicle pile-up on the Upper Levels highway. On the respondent’s theory, each of the injured parties and their insurers could have imposed the varying insurance arrangements of their home jurisdictions on the appellant, ICBC. The problem is not at all fanciful. All it would take is a collision involving Mr. Singh’s truck and one 58-passenger tourist bus filled with out-of-province skiers heading along the Upper Levels Highway towards Whistler. Such “competing exercises” of regulatory regimes “must

Bien des activités qui se déroulent à l’intérieur d’un État ont nécessairement une incidence dans un autre État, mais il faut éviter une multiplicité d’exercices concurrents du pouvoir étatique à leur égard.

Dans le même ordre d’idées, le juge La Forest a fait la remarque suivante, à la p. 1066 de l’arrêt *Tolofson*, précité :

On peut [. . .] prétendre qu’il n’est pas constitutionnellement permis que les deux provinces, celle où certaines activités ont eu lieu et celle dans laquelle résident les parties, connaissent de la responsabilité civile résultant des mêmes activités. À supposer que les deux provinces aient compétence législative en pareilles circonstances, il pourrait y avoir conflit de règles à l’égard du même incident.

Dans l’affaire *Hunt*, la question était de savoir si une loi québécoise, qui interdisait de transporter hors du Québec des documents commerciaux requis par voie judiciaire à l’extérieur de la province, permettait de refuser de produire de tels documents à un tribunal de la Colombie-Britannique. Soulignant que si la validité de cette loi était confirmée, les entreprises situées au Québec n’auraient jamais à produire des documents demandés pour les besoins de litiges dans d’autres provinces (p. 330), le juge La Forest a conclu que la « loi prohibitive » du Québec était « constitutionnellement inapplicable [en Colombie-Britannique] parce qu’elle [était] contraire aux principes énoncés dans l’arrêt *Morguard* » (p. 331).

De même, je suis d’avis que l’ordre qui règne dans la fédération serait perturbé si chaque province prenait sur elle de réglementer, en ce qui concerne ses propres résidents, certains aspects des répercussions financières de l’accident d’automobile survenu en Colombie-Britannique, et ce au détriment de l’assureur de cette province. Par exemple, l’accident dont les Brennan ont été victimes aurait pu provoquer un carambolage sur l’autoroute Upper Levels. Suivant la thèse de l’intimée, chacune des parties lésées et son assureur auraient pu imposer à l’appellante, ICBC, le régime d’assurance particulier du ressort où ils résident. Le problème est loin d’être théorique. Il aurait en effet suffi d’une collision entre le camion de M. Singh et un autobus de 58 places rempli de skieurs de l’extérieur de la province se rendant à Whistler sur l’autoroute Upper Levels.

69

70

71

be avoided”. The cost of such regulatory uncertainties undermines economic efficiency.

« [I] faut éviter » de tels « exercices concurrents » d'établissement de régimes de réglementation. Ces incertitudes en matière de réglementation nuisent à l'efficience économique.

72 Fairness to the out-of-province defendant is also an important factor in the federation. Here, if the respondent is correct, the appellant would be obliged to respond to insurance regimes in each province or state claiming some sort of insured interest in the financial fall-out from the British Columbia accident arising out of whatever financial obligations those other provincial or state legislatures have seen fit for whatever reason to impose on their own insurance companies.

L'équité envers les défendeurs de l'extérieur de la province est également un facteur important à considérer au sein de la fédération. En l'espèce, si l'intimée a raison, l'appelante serait tenue de se soumettre aux régimes d'assurance de chaque province ou État revendiquant quelque intérêt assuré à l'égard des répercussions économiques de l'accident en Colombie-Britannique, par suite d'obligations financières que les législateurs de ces ressorts auraient jugé bon, pour une raison ou une autre, d'imposer à leurs propres sociétés d'assurance.

73 Adoption of the principles of order and fairness as a mechanism to regulate extraterritoriality concerns differentiates Canada somewhat from Australia (where s. 2 of the Constitution specifically confers extraterritorial jurisdiction on the several states, which, in some circumstances, can include the off-shore: *Union Steamship Co. of Australia Proprietary Ltd. v. King* (1988), 166 C.L.R. 1 (Aust. H.C.), at p. 12) and the United States, where the jurisprudence is governed by the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV of the Constitution.

L'adoption des principes d'ordre et d'équité, comme mécanisme servant à régir les problèmes d'extraterritorialité, différencie dans une certaine mesure le Canada de l'Australie (où l'art. 2 de la Constitution de ce pays confère expressément aux États une compétence extraterritoriale qui peut, dans certaines circonstances, s'étendre à la région extracôtière : *Union Steamship Co. of Australia Proprietary Ltd. c. King* (1988), 166 C.L.R. 1 (H.C. Aust.), p. 12) et des États-Unis, où la jurisprudence est influencée par la clause d'application régulière de la loi du Quatorzième amendement et la clause de reconnaissance totale prévue à l'article IV de la Constitution.

74 In *Broken Hill*, for example, Dixon J. went on to say, “If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers” (p. 375). We would say, after *Morguard, Hunt* and *Tolofson*, that, within our federal structure, it is not only the view of the enacting legislature that must be considered, but the collective interest of the federation as a whole in order and fairness. The same *caveat* should be placed at the door of the United States’ “minimum contacts” doctrine, endorsed by its Supreme Court in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). In that country, as well, state laws are given generous application to disputes with limited connections to the enacting jurisdiction (see, e.g., *Allstate Insurance Co. v. Hague*,

Dans l'arrêt *Broken Hill*, par exemple, le juge Dixon a ajouté ceci : [TRADUCTION] « S'il existe un lien, il appartient à l'assemblée législative de décider jusqu'où elle entend aller dans l'exercice de ses pouvoirs » (p. 375). Depuis les arrêts *Morguard, Hunt* et *Tolofson*, on peut affirmer que, dans notre structure fédérale, il ne faut pas considérer uniquement le point de vue du ressort ayant légiféré, mais aussi les intérêts collectifs de l'ensemble de la fédération en matière d'ordre et d'équité. La même réserve doit également assortir la doctrine américaine des [TRADUCTION] « liens minimaux », à laquelle a souscrit la Cour suprême des États-Unis dans l'arrêt *International Shoe Co. c. State of Washington*, 326 U.S. 310 (1945). Dans ce pays également, on applique largement les lois

449 U.S. 302 (1981)) to the point where Professor Laurence Tribe has commented:

There is much to be said for the view that the current state of the Supreme Court's personal jurisdiction and choice-of-law doctrines is precisely backwards. It is easy for a state to apply its law (which is by definition outcome-determinative) to a case, but relatively difficult for it to obtain jurisdiction over a dispute, even though jurisdiction is never directly outcome-determinative. Jurisdictional issues are unpredictable and endlessly litigated; choice-of-law matters are largely unregulated.

(L. H. Tribe, *American Constitutional Law* (3rd ed. 2000), vol. 1, at p. 1292)

Cases dealing with extraterritorial application from the courts of Australia and the United States should therefore be read with an eye to the differences in our constitutional arrangements.

Returning to the Canadian jurisprudence, a striking illustration of the applicable principles of extraterritoriality is found in *Thomas Equipment, supra*. In that case, a New Brunswick manufacturer of farm machinery (Thomas Equipment), which had contracted with an Alberta dealer to sell and promote its machinery in Alberta, was held to have committed an offence under the Alberta *Farm Implement Act*, R.S.A. 1970, c. 136. That statute, which regulated aspects of the farm equipment business in Alberta, provided that, on termination of a dealership, the supplier was required to repurchase unsold equipment and parts. There was no such obligation written into the dealership contract, which was expressly stated to be governed by the law of New Brunswick. The manufactured goods were not defective. Thomas Equipment refused to make the repurchase and was prosecuted in Alberta under *The Farm Implement Act* for this refusal. A majority of this Court, *per* Martland J.,

des États à des différends qui présentent des liens limités avec le ressort ayant légiféré (voir, par exemple, *Allstate Insurance Co. c. Hague*, 449 U.S. 302 (1981)), et ce à un point tel que la situation a amené le professeur Laurence Tribe à faire les commentaires suivants:

[TRADUCTION] Ne manque pas de pertinence l'opinion selon laquelle les positions de la Cour Suprême sur la compétence à l'égard de la personne et sur le conflit de lois sont précisément à l'effet contraire. Il est facile pour un État d'appliquer ses lois (qui, par définition, ont pour effet de décider du résultat) à une affaire, mais il lui est relativement difficile d'obtenir compétence sur un différend, même si le fait d'avoir compétence ne décide jamais directement de l'issue de l'affaire. Les questions de compétence font l'objet de débats interminables et leur issue est imprévisible; les questions de conflit de lois ne sont, dans une large mesure, pas encadrées.

(L. H. Tribe, *American Constitutional Law* (3^e éd. 2000), vol. 1, p. 1292)

La jurisprudence américaine et australienne sur l'application extraterritoriale des lois doit par conséquent être examinée en tenant compte des différences qui caractérisent nos arrangements constitutionnels et ceux de ces pays.

Si l'on revient à la jurisprudence canadienne, l'arrêt *Thomas Equipment*, précité, constitue un exemple frappant des principes d'extraterritorialité applicables. Dans cette affaire, on a statué qu'un fabricant néo-brunswickois de matériel agricole (Thomas Equipment), qui avait conclu avec un commerçant albertain un contrat de vente et promotion de son matériel en Alberta, avait commis une infraction à la loi de l'Alberta intitulée *The Farm Implement Act*, R.S.A. 1970, ch. 136. Cette loi, qui régissait les divers aspects du secteur du matériel agricole en Alberta, précisait qu'en cas de résiliation d'un tel contrat le fournisseur devait racheter le matériel et les pièces non vendus. Le contrat de concession ne comportait aucune obligation du genre et stipulait expressément qu'il était régi par les lois du Nouveau-Brunswick. Les produits manufacturés n'étaient pas défectueux. La société Thomas Equipment a refusé de racheter le matériel et a été poursuivie sur ce fondement en Alberta en vertu

approved, at p. 544, a *dictum* from one of the Alberta judges:

If a manufacturer wants to have his farm implements sold here he must comply with the rules of the game, as it were, established by the legislature of Alberta. One of these rules clearly covers the manufacturer's responsibility when his agreement with a dealer is terminated.

77 Martland J. considered it important that Thomas Equipment had done more than make a "simple contract for the sale of goods" (p. 542) for resale in Alberta. It had hired a local dealer to promote its products and goodwill within the province. Its "relationship" with Alberta was more than just that of an out-of-province vendor. In that sense, Thomas Equipment had itself (in addition to its machinery) entered the Alberta marketplace.

78 Even so, Martland J. was careful to point out, at p. 545, that no constitutional question had been raised by the accused, Thomas Equipment. The majority decision was therefore based solely and expressly on "the proper construction of the [Alberta] statute in respect of the facts of the case".

79 Laskin C.J., dissenting, squarely addressed the constitutional issue. He stated that the prosecution was "to me an attempt to give Alberta law an extra-provincial application" (p. 533). He referred in particular to *Gray, supra*, where Ontario law was held incompetent to direct a New York insurer to pay the benefits of an annuity, after the annuitant's death, to his lawful widow (pursuant to Ontario law) instead of to his former common law wife (as required by New York law). As Laskin C.J. explained, "Ontario could not change the terms of the [New York annuity] contract because it would be purporting to deal with civil rights outside the province" (p. 535). Similarly, in *Thomas Equipment* itself, the relationship between the New Brunswick manufacturer and the province of Alberta did not, in the view of Laskin C.J., properly expose Thomas Equipment to

de la loi albertaine susmentionnée. S'exprimant au nom de la majorité des juges de notre Cour, le juge Martland a souscrit, à la p. 544, à la remarque incidente suivante, formulée par un des juges albertains :

[TRADUCTION] Si un fabricant veut vendre son matériel agricole ici, il doit respecter les règles du jeu, telles qu'établies par la législature de l'Alberta. Une de ces règles porte précisément sur la responsabilité d'un fabricant lorsque son contrat avec le commerçant prend fin.

Le juge Martland a considéré important le fait que la société Thomas Equipment avait conclu plus qu'un « simple contrat de vente de marchandises » (p. 542) destinées à être revendues en Alberta. L'entreprise avait engagé un commerçant de l'Alberta pour promouvoir ses produits et créer un achalandage dans cette province. Son « lien » avec l'Alberta n'était pas uniquement à titre de vendeur de l'extérieur de la province. En ce sens, la société Thomas Equipment elle-même (en plus de son matériel) avait accédé au marché albertain.

Malgré cela, le juge Martland a pris soin de souligner, à la p. 545, que l'entreprise accusée, Thomas Equipment, n'avait soulevé aucune question d'ordre constitutionnel. La décision majoritaire était donc uniquement et expressément fondée sur « l'interprétation exacte de la loi [albertaine] par rapport aux faits ».

Dans une opinion dissidente, le juge en chef Laskin a examiné directement la question constitutionnelle, disant ceci, au sujet de la poursuite : « [à] mon avis, [. . .] [elle] revient à donner une portée extra-territoriale à la loi albertaine » (p. 533). Il s'est référé en particulier à l'arrêt *Gray*, précité, dans lequel il a été jugé qu'une loi ontarienne ne pouvait, après le décès du rentier, obliger un assureur de l'État de New York à verser une rente viagère à sa conjointe légitime (en vertu des lois ontariennes) plutôt qu'à son ancienne conjointe de fait (comme l'exigeaient les lois de l'État de New York). Comme l'a expliqué le juge en chef Laskin, « l'Ontario ne pouvait modifier les termes du contrat [de rente conclu à New York] parce qu'elle porterait alors atteinte à des droits civils à l'extérieur de la province » (p. 535). De façon similaire, dans l'arrêt *Thomas Equipment*

Alberta's regulatory regime. Although he did not, of course, apply the *Morguard* analysis as such, Laskin C.J. clearly considered Alberta's assertion of jurisdiction to be disruptive of good order among the provinces, and unfair to the New Brunswick manufacturer having regard to the choice of law provision in its dealer contract.

4. *The Principles of "Order and Fairness", Being Purposive, Are Applied Flexibly.*

The required strength of the relationship varies with the type of jurisdiction being asserted. A relationship that is inadequate to support the application of regulatory legislation may nevertheless provide a sufficient "real and substantial connection" to permit the courts of the forum to take jurisdiction over a dispute. This happens regularly. The courts, having taken jurisdiction, then apply the law of the other province applying rules of conflict resolution governing choice of law issues. Thus, in *Tolofson* itself, there was a sufficient relationship between British Columbia and the parties for the British Columbia courts to hear the case, but it was determined that Saskatchewan law should apply to determine the outcome of the dispute.

It would be unwise in this case to embark on a general discussion of "order and fairness". The question before us is quite specific: Does the respondent have a statutory cause of action against the appellant given the constitutional limitations on the reach of the Ontario *Insurance Act*?

5. *Application of These Principles to the Facts of This Case*

The respondent, Unifund, points to the fact that the payments for which reimbursement is claimed were paid in Ontario by an Ontario insurer to an

lui-même, le juge en chef Laskin était d'avis que le lien entre le fabricant néo-brunswickois et la province d'Alberta n'avait pas pour effet de soumettre adéquatement la société Thomas Equipment au régime de réglementation de l'Alberta. Bien qu'il n'ait évidemment pas appliqué l'analyse de l'arrêt *Morguard* comme telle, le juge en chef Laskin estimait manifestement que la compétence dont se réclamait l'Alberta perturbait l'ordre établi entre les provinces et créait une injustice envers le fabricant néo-brunswickois, compte tenu du choix de la loi applicable stipulé dans le contrat de concession.

4. *Comme ils visent une finalité, les principes d'ordre et d'équité sont appliqués d'une manière souple.*

Le lien requis doit présenter un caractère plus ou moins étroit selon la sorte de compétence invoquée. Un lien insuffisant pour soutenir l'application d'une loi de nature réglementaire peut néanmoins constituer un « lien réel et substantiel » permettant aux tribunaux de la province de se déclarer compétents dans un litige donné. Cela se produit régulièrement. S'étant d'abord déclarés compétents, les tribunaux appliquent ensuite le droit de l'autre province en recourant aux principes de règlement des différends régissant les problèmes de conflit de lois. Ainsi, dans l'affaire *Tolofson*, il existait un lien suffisant entre la Colombie-Britannique et les parties pour que les tribunaux de cette province puissent connaître de l'affaire, mais il a été jugé que le droit de la Saskatchewan devait s'appliquer pour déterminer l'issue du litige.

Il ne serait pas sage de se lancer dans une analyse générale des notions d'« ordre et d'équité ». La question à laquelle nous devons répondre est très précise : l'intimée dispose-t-elle d'une cause d'action prévue par la loi contre l'appelante, compte tenu des limites d'ordre constitutionnel restreignant la portée de la *Loi sur les assurances* de l'Ontario?

5. *Application de ces principes aux faits de l'espèce*

L'intimée, Unifund, insiste sur le fait que les paiements dont on demande le remboursement ont été faits en Ontario, par un assureur ontarien, à un

Ontario resident. This is true, but it leaves out of consideration the relationship between Ontario and the party sought to be made to pay, the out-of-province appellant. Not only is the appellant not authorized to sell insurance in Ontario, it does not in fact do so. Its insured vehicles in this case did not venture into Ontario. The accident did not take place in Ontario, and the appellant did not benefit from the \$750,000 deduction by virtue of Ontario law but by the law of British Columbia.

résident de l'Ontario. Tout cela est exact, mais fait abstraction du lien qui existe entre l'Ontario et la partie visée par la demande de paiement, en l'occurrence l'appelante de l'extérieur de la province. Non seulement cette dernière n'est-elle pas autorisée à vendre de l'assurance en Ontario, mais, dans les faits, elle n'en vend pas. Aucun des véhicules assurés par l'appelante en l'espèce ne s'est rendu en Ontario. L'accident n'a pas eu lieu dans cette province et l'appelante a pu bénéficier de la déduction de 750 000 \$ en vertu non pas des lois de l'Ontario mais de celles de la Colombie-Britannique.

83 The most that can be said for the respondent in this case is that the fact of a motor vehicle accident in British Columbia triggered certain payments in Ontario under Ontario law. However, the fact the Ontario legislature has chosen to attach legal consequences in Ontario to an event (the motor vehicle accident) taking place elsewhere does not extend its legislative reach to a resident of “elsewhere”. It can also be said that these payments in Ontario, in turn, triggered a deduction of an equivalent amount under the laws of British Columbia. Again, however, the decision of the British Columbia legislature to attach legal consequences (the deduction) in that province to an event that occurred in Ontario (the SAB payments) does not bring the appellant (beneficiary under the British Columbia legislation) into the orbit of the Ontario legislature for the purpose of taking away the British Columbia benefit in favour of an Ontario insurance company.

Le seul élément qui peut être invoqué en faveur de l'intimée, en l'espèce, est le fait qu'un accident d'automobile survenu en Colombie-Britannique a donné lieu au paiement de certaines sommes en Ontario, sous le régime des lois de cette province. Toutefois, la décision du législateur ontarien d'assortir de conséquences juridiques en Ontario un fait (l'accident d'automobile) survenant ailleurs que dans cette province n'a pas pour effet d'étendre l'application de cette mesure législative aux résidents « de l'extérieur de la province ». Il est également possible d'affirmer que les paiements effectués en Ontario ont, à leur tour, entraîné la déduction d'une somme équivalente en vertu des lois de la Colombie-Britannique. Ici aussi, cependant, la décision du législateur de la Colombie-Britannique d'assortir de conséquences juridiques (la déduction), dans sa province, un événement survenu en Ontario (le versement des IAL) n'a pas pour effet d'assujettir l'appelante (bénéficiaire sous le régime des lois de la Colombie-Britannique) à la compétence du législateur ontarien et de retirer à cette dernière, au profit d'une société d'assurance ontarienne, l'avantage que lui accorde la Colombie-Britannique.

84 Here, unlike *Thomas Equipment, supra*, the appellant had not hired anyone in Ontario to promote its products. It was not in the Ontario marketplace and, in my view, it was not required to “comply with the rules of the [Ontario] game”. The decision of the Ontario legislature to impose no-fault benefits on Unifund could not be bootstrapped into legislative jurisdiction to impose a corresponding debt on the appellant, which (leaving aside the

En l'espèce, contrairement à la situation dans l'affaire *Thomas Equipment*, précitée, l'appelante n'a engagé personne en Ontario pour promouvoir ses produits. Elle n'était pas un acteur sur le marché ontarien et, à mon avis, elle n'était pas tenue de « respecter les règles du jeu [ontariennes] ». On peut invoquer la décision du législateur de l'Ontario d'imposer à Unifund le paiement d'indemnités sans égard à la faute pour fonder quelque pouvoir

PAU argument) was beyond the territorial jurisdiction of the province.

More recently, in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, the Court upheld a legislative scheme that permitted the British Columbia securities regulator to exchange information with out-of-province securities regulators. The decision was based squarely on the proposition that statutory authorization of voluntary cooperation with foreign securities regulators “does not attempt to extend the reach of provincial legislation outside its borders” (para. 38). That decision is of no help to the respondent.

There are two other matters urged by the respondent that require brief comment.

Firstly, Unifund contends that in deducting a no-fault benefit from the court award to the Brennans, the appellant obtained the benefit of the Ontario legislation. Arguing that the appellant, ICBC, cannot be permitted to accept the benefit while avoiding the burden of the Ontario legislation, the respondent puts its position as follows (at para. 12 of its factum):

By claiming the deduction under section 25 of the *BC Act* in the litigation with the Brennans, ICBC sought and obtained the benefit of the Ontario legislation. In its argument in this litigation, ICBC is seeking to avoid the burden of the Ontario legislation, and to thereby obtain a massive windfall.

I do not think this analysis is correct. Private insurance is normally a collateral benefit that is not ordinarily deductible by a defendant from the damages it must pay a successful plaintiff: see *Ratyck v. Bloomer*, [1990] 1 S.C.R. 940, at pp. 945 and 974; *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359. The Brennans had paid for their Unifund policy, including the SABs, and would not ordinarily be deprived

législatif permettant d'imposer une obligation correspondante à l'appelante, qui (indépendamment de l'argument relatif au formulaire P&E) échappait à la compétence territoriale du législateur ontarien.

Plus récemment, dans l'arrêt *Global Securities Corp. c. Colombie-Britannique (Securities Commission)*, [2000] 1 R.C.S. 494, 2000 CSC 21, notre Cour a confirmé la validité d'un régime législatif autorisant les organismes de réglementation du marché des valeurs mobilières de la Colombie-Britannique et d'ailleurs de s'échanger des renseignements. La décision était clairement fondée sur la thèse selon laquelle la coopération volontaire, prévue par la loi, entre organismes étrangers de réglementation du marché des valeurs mobilières « ne tente pas d'étendre la portée de la mesure législative provinciale au-delà des frontières de la province » (par. 38). Cette décision n'est d'aucun secours à l'intimée.

L'intimée a soulevé deux autres arguments qui nécessitent de brefs commentaires.

Premièrement, Unifund prétend que, en déduisant l'indemnité sans égard à la faute de la somme que le tribunal a accordée aux Brennan, l'appelante s'est trouvée à profiter de cet avantage offert par les lois ontariennes. L'intimée plaide qu'on ne saurait permettre à ICBC de recevoir cet avantage tout en évitant les obligations de la Loi ontarienne. Voici comment l'intimée a exposé cet argument (au par. 12 de son mémoire) :

[TRADUCTION] En réclamant la déduction prévue à l'article 25 de la *Loi* de la C.-B. dans le cadre du litige qui l'oppose aux Brennan, ICBC a demandé et obtenu l'avantage accordé par la Loi ontarienne. Par l'argument qu'elle expose en l'espèce, ICBC tente d'éviter les obligations de la Loi ontarienne et en même temps d'obtenir une rentrée d'argent exceptionnelle.

Je ne crois pas que cette analyse soit juste. L'assurance privée est normalement une prestation parallèle que le défendeur ne peut généralement pas déduire des dommages-intérêts qu'il est condamné à payer au demandeur : voir les arrêts *Ratyck c. Bloomer*, [1990] 1 R.C.S. 940, p. 945 et 974, et *Cunningham c. Wheeler*, [1994] 1 R.C.S. 359. Les Brennan ont payé les sommes prévues à l'égard de

85

86

87

88

of the benefit for which they contracted. The deductibility benefit to the appellant was not conferred by the Ontario Act but by s. 25 of the British Columbia *Insurance (Motor Vehicle) Act*.

la police émise par Unifund, y compris à l'égard des IAL, et ne seraient normalement pas privés du bénéfice que leur assurait le contrat. Ce n'est pas la Loi ontarienne qui a conféré le bénéfice de déductibilité à l'appelante, mais l'art. 25 de la loi de la Colombie-Britannique intitulée *Insurance (Motor Vehicle) Act*.

89 Secondly, Unifund points out that on other occasions, the appellant has itself applied (successfully) for an order that it is entitled under s. 268(2) of the Ontario Act to claim indemnity from an Ontario insurer under s. 275: *Insurance Corp. of British Columbia v. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705 (C.A.). That, however, was a case of a motor vehicle accident in Ontario where Ontario law applied.

Deuxièmement, Unifund souligne que, à d'autres occasions, l'appelante a elle-même demandé (et obtenu) une ordonnance reconnaissant que le par. 268(2) de la Loi ontarienne lui donne le droit de réclamer une indemnité d'un assureur de l'Ontario en vertu de l'art. 275 : *Insurance Corp. of British Columbia c. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705 (C.A.). Il s'agissait toutefois, dans cette affaire, d'un accident d'automobile survenu en Ontario et auquel les lois ontariennes s'appliquaient.

90 It is true that the appellant has participated in litigation in Ontario from time to time, and on some occasions has "benefited" from the Ontario Act. However, the appellant's sporadic entries into Ontario were the result of motor vehicle accidents in Ontario involving motor vehicle policies issued in British Columbia, and were case-specific. Nothing in the appellant's activities in those cases gave rise to the obligation sought to be imposed in this case.

Il est vrai que l'appelante a été partie à des litiges en Ontario et qu'elle a, à l'occasion, « profité » de la Loi ontarienne. Cependant, ces incursions sporadiques de l'appelante en Ontario découlaient d'accidents d'automobile survenus dans cette province et couverts par des polices d'assurance automobile émises en Colombie-Britannique, et chaque cas constituait un cas d'espèce. Rien dans les activités de l'appelante dans ces affaires n'a fait naître l'obligation qu'on cherche à lui imposer dans le présent pourvoi.

91 I therefore conclude that under ordinary constitutional principles, the Ontario Act is inapplicable to the out-of-province appellant in this case. I turn, then, to the second string of the respondent's bow, the appellant's alleged "attornment" to Ontario law under the terms of the PAU.

Par conséquent, j'arrive à la conclusion que, suivant les principes ordinaires du droit constitutionnel, la Loi ontarienne est inapplicable en l'espèce à l'appelante de l'extérieur de la province. Je vais maintenant examiner le deuxième volet de l'argumentation de l'intimée, le prétendu « acquiescement » de l'appelante aux lois ontariennes par l'effet des modalités mêmes du formulaire P&E.

(b) Under the Power of Attorney and Undertaking

b) Le moyen fondé sur le formulaire P&E

92 The PAU system is an interprovincial (and interstate) web of interlocking arrangements for substitutional service and undertakings designed to ensure that travelling motorists are financially responsible for their actions in other provinces and participating

Le formulaire P&E est un mécanisme constitué d'un ensemble d'arrangements entre provinces (et États) comportant des mesures de signification indirecte et des engagements qui permettent de faire en sorte que les automobilistes assument

states, by confirming that their insurers will respond to claims in respect of an accident which occurs outside of the insured's home jurisdiction. It tracks the ordinary law. An out-of-province motorist can be required to defend an action in the jurisdiction where the accident occurred, and an insurer is contractually bound to the defendant to provide a defence in that place, whether there is a PAU in place or not.

Under the terms of the PAU, which the appellant executed on September 22, 1988, the appellant agreed to appoint the Superintendent of Insurance in other provinces to accept service on its behalf "with respect to an action or proceeding against it or its insured . . . arising out of a motor-vehicle accident in any of the respective Provinces or Territories" (emphasis added).

The PAU in this case does not extend to all provinces and territories. I interpret the phrase "respective Provinces or Territories" to be those thereafter listed, namely provinces and territories other than British Columbia, whose name was crossed out on the standard form.

The appointment is followed by three undertakings:

firstly, the signatory undertakes "[t]o appear in any action or proceeding against it or its insured in any Province or Territory in which such action has been instituted and of which it has knowledge";

secondly, to "forthwith cause the notice or process to be personally served upon the insured"; and,

thirdly, not to set up any defence "under a motor-vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with, the laws relating to motor vehicle liability insurance contracts or plan of automobile insurance of the Province or Territory of Canada in which such action or proceeding may be instituted".

la responsabilité financière de leurs actes dans les autres provinces et États participants, en confirmant que les assureurs donneront suite aux réclamations présentées à l'égard des accidents survenus à l'extérieur du ressort d'origine des assurés. Ces mesures correspondent aux règles de droit ordinaires en la matière. Un automobiliste d'une autre province peut avoir à se défendre contre une action intentée dans la province où l'accident a eu lieu, et son assureur est contractuellement tenu de représenter le défendeur à cet endroit, peu importe si le formulaire P&E s'applique ou non.

Aux termes du formulaire P&E qu'elle a signé le 22 septembre 1988, l'appelante a convenu de charger le surintendant des assurances des autres provinces de recevoir en son nom signification des [TRADUCTION] « actions ou autres procédures intentées contre elle ou contre son assuré [. . .] par suite d'un accident d'automobile survenu dans quelque province ou territoire concerné » (je souligne).

En l'espèce, le formulaire P&E ne s'applique pas à l'ensemble des provinces et territoires. À mon avis, l'expression [TRADUCTION] « province ou territoire concerné » s'entend des ressorts y énumérés, à savoir les provinces et territoires autres que la Colombie-Britannique, province dont le nom a été biffé sur le formulaire type.

La désignation est suivie des trois engagements suivants pris par les signataires :

premièrement, [TRADUCTION] « [. . .] comparaître à toute action ou autre procédure qui est intentée contre elle ou contre son assuré dans quelque province ou territoire et dont elle a connaissance »;

deuxièmement, [TRADUCTION] « faire immédiatement signifier à l'assuré cet avis ou acte de procédure »;

troisièmement, n'invoquer aucun moyen de défense [TRADUCTION] « fondé sur le contrat d'assurance-responsabilité automobile qu'elle a conclu et qui ne pourrait être invoqué si ce contrat était intervenu dans la province ou le territoire canadien où cette action ou autre procédure est intentée et avait été conclu conformément aux lois y régissant les contrats d'assurance-responsabilité automobile ou le régime d'assurance automobile ».

93

94

95

96 It is my view that the PAU has no application to the facts of this case.

97 Moreover, even if the PAU could be interpreted to require the appellant's appearance to defend the claim in Ontario, I do not think the appellant would be precluded by the PAU in general or its third undertaking in particular from contesting the application of the Ontario *Insurance Act* to impose a civil obligation on an out-of-province insurer in respect of an out-of-province motor vehicle accident. Such a defence does not arise under its "motor vehicle liability insurance contract".

98 In *MacDonald v. Proctor* (1977), 86 D.L.R. (3d) 455 (Ont. C.A.), a Manitoba driver was involved in an accident in Ontario. An Ontario action ensued, in which the Manitoba insurer, pursuant to the terms of a PAU, appeared. Under Manitoba law, the Manitoba insurer was obliged to pay statutory benefits. The Ontario tortfeasor attempted to deduct the SABs from the Ontario award of damages as allowed by the Ontario Act, but the deduction was disallowed. In the Ontario Court of Appeal, Zuber J.A. observed that the issue in dispute there (as here) was "the applicability of the Ontario *Insurance Act*" (p. 456). In his view, notwithstanding the PAU, the deductibility provisions of the Ontario Act did not apply. He noted that, where the insurers wished to incorporate Ontario statutory provisions in the PAU (as in the case of policy limits), they did so expressly (at pp. 457-58):

I am unable to read the undertaking as an agreement to incorporate into extraprovincial policies all those items that the *Ontario Insurance Act* obliges an Ontario policy to include. . . .

Although we have not been provided with the details of the Manitoba policy, it appears that it must contain

J'estime que le formulaire P&E ne s'applique pas aux faits de l'espèce.

En outre, même s'il était possible de considérer que le formulaire P&E oblige l'appelante à comparaître, en défense, à l'action intentée en Ontario, je ne crois pas que ce document en général, ou son troisième engagement en particulier, empêche l'appelante de contester la prétention selon laquelle la *Loi sur les assurances* de l'Ontario s'applique et a pour effet d'imposer à un assureur d'une autre province une obligation civile à l'égard d'un accident d'automobile survenu dans une autre province. Un tel moyen de défense n'est pas fondé sur le « contrat d'assurance-responsabilité automobile » de l'appelante.

Dans l'affaire *MacDonald c. Proctor* (1977), 86 D.L.R. (3d) 455 (C.A. Ont.), un automobiliste manitobain a eu un accident en Ontario. Par la suite, on a introduit en Ontario une action à laquelle l'assureur manitobain a comparu conformément aux modalités du formulaire P&E. En vertu du droit manitobain, l'assureur du Manitoba avait l'obligation de verser des indemnités prévues par la loi. L'auteur du délit civil en Ontario a tenté de déduire les IAL des dommages-intérêts accordés en Ontario, comme l'y autorise la Loi ontarienne, mais la déduction lui a été refusée. Le juge Zuber de la Cour d'appel de l'Ontario a fait observer que la question en litige dans cette affaire (comme dans celle qui nous occupe) portait sur [TRADUCTION] « l'applicabilité de la *Loi sur les assurances* de l'Ontario » (p. 456). Selon le juge Zuber, malgré l'existence du formulaire P&E, les dispositions de la Loi ontarienne relatives à la déductibilité ne s'appliquaient pas. Il a souligné que, lorsque les assureurs désirent intégrer des dispositions législatives ontariennes dans le formulaire P&E (par exemple les limites de couverture stipulées dans les polices d'assurance), ils le font de manière expresse (aux p. 457-458) :

[TRADUCTION] Je ne puis considérer l'engagement comme un accord intégrant dans les polices émanant d'autres provinces tous les éléments dont la *Loi sur les assurances de l'Ontario* exige l'inclusion dans les polices d'assurance ontariennes. . . .

Bien qu'on ne nous ait pas fourni le détail de la police d'assurance du Manitoba, elle comporte sans doute des

benefits very similar to (or perhaps the same as) those set out in Sch. E. However, the coverage providing those benefits is included in the policy by the Manitoba Public Insurance Corporation in the fulfilment of its own responsibilities; not because those benefits have been impressed into the policy by Ontario legislation.

. . . an undertaking by the Manitoba Public Insurance Corporation to, in effect, observe Ontario rules to a certain extent, where its insured is involved in Ontario proceedings, does not render the Manitoba policy one that is “made in Ontario”. [Emphasis added.]

MacDonald looked at the present problem through the opposite end of the telescope, i.e., from the perspective of the court of the forum where the accident occurred and where the litigation took place. However, the principled limitation on extraterritoriality is the same. As Laskin C.J. stated in affirming this judgment from the bench ([1979] 2 S.C.R. 153, at pp. 153-54):

The main point argued by counsel for the appellant concerned the right of his client to have the advantage, as a deduction from his liability for damages, of disability benefits to which the plaintiff was entitled under her Manitoba contract with the Manitoba Public Insurance Corporation, as if s. 237(2) of the Ontario *Insurance Act* applied. Neither the undertaking filed by the Manitoba insurer, taken alone or in association with s. 25 of the Ontario *Insurance Act*, avails the appellant on this point. We do not agree that the disability benefits are deductible from the damages assessed against the appellant.

The Court thus recognized the limited effect of the PAU, and did not accept as correct the theory of interprovincial integration urged in this case by the respondent. The importance of the PAU in this respect is as stated in *Healy v. Interboro Mutual Indemnity Insurance Co.* (1999), 44 O.R. (3d) 404 (C.A.), *per* Goudge J.A., at p. 409:

[The PAU] assures the same statutory guarantees to someone injured in an automobile accident in Ontario whether the relevant automobile insurance contract was made in Ontario or another participating jurisdiction.

The PAU is about enforcement of insurance policies, not about helping insurance companies, which

indemnités sensiblement similaires (voire identiques) à celles prévues à l’annexe E. Toutefois, la garantie accordant ces indemnités figure dans la police parce que la Société d’assurance publique du Manitoba l’y a insérée dans l’exécution de ses propres obligations, et non parce que la Loi ontarienne a incité à l’inclusion de ces indemnités dans la police.

. . . l’engagement de la Société d’assurance publique du Manitoba de respecter dans les faits les règles ontariennes jusqu’à un certain point, dans les cas où son assuré est partie à des procédures en Ontario, ne fait pas de la police d’assurance manitobaine une police « faite en Ontario ». [Je souligne.]

Dans l’arrêt *MacDonald*, le problème qui nous occupe a été examiné à partir de l’autre bout de la lorgnette, soit du point de vue du tribunal du ressort où l’accident a eu lieu et où le litige s’est déroulé. Toutefois, la restriction raisonnée à l’extraterritorialité est la même. Comme a dit le juge en chef Laskin en confirmant ce jugement séance tenante ([1979] 2 R.C.S. 153, p. 153-54) :

La plaidoirie de l’avocat de l’appelant a surtout porté sur le droit de son client de pouvoir faire déduire des dommages-intérêts dont il est tenu, les prestations d’invalidité auxquelles la demanderesse avait droit aux termes de son contrat manitobain conclu avec The Manitoba Public Insurance Corporation, comme si le par. 237(2) de *The Ontario Insurance Act* s’appliquait. L’engagement déposé par l’assureur manitobain, seul ou associé à l’art. 25 de *The Ontario Insurance Act*, n’est d’aucun secours à l’appelant sur ce point. Nous ne sommes pas d’avis que les prestations d’invalidité sont déductibles des dommages-intérêts dus par l’appelant.

Notre Cour a donc reconnu l’effet limité du formulaire P&E, et elle a rejeté la thèse de l’intégration interprovinciale qu’invoque en l’espèce l’intimée. L’importance du formulaire P&E à cet égard a été exposée par le juge Goudge de la Cour d’appel de l’Ontario, à la p. 409 de l’arrêt *Healy c. Interboro Mutual Indemnity Insurance Co.* (1999), 44 O.R. (3d) 404 :

[TRADUCTION] [Le formulaire P&E] accorde les mêmes garanties légales à toute personne blessée dans un accident d’automobile survenu en Ontario, peu importe si le contrat d’assurance automobile en cause a été conclu en Ontario ou dans un autre ressort participant.

Le formulaire P&E vise à faciliter l’application des policies d’assurance, et non à aider les

have been paid a premium for the no-fault coverage, to seek to recover in their home jurisdictions their losses from other insurance companies located in a different jurisdiction when the accident took place in that other jurisdiction, and where the claims arising out of the accident were litigated there. The appellant referred us to the observation of Professor Black:

The reciprocal system, of which the PAU is a key part, thus has what might loosely be described as a pro-compensation, consumer-protection function.

(V. Black, “Interprovincial Inter-Insurer Interactions: *Unifund v. ICBC*” (2002), 36 *Can. Bus. L.J.* 436, at p. 444)

101 I agree. I am reinforced in that conclusion by several considerations:

Firstly, as stated, the opening language of the PAU, which sets the framework for the rest of the document, talks about a proceeding “arising out of a motor-vehicle accident in any of the respective Provinces” which, in this PAU, excluded British Columbia where this accident took place.

Secondly, s. 275 of the Ontario Act is an indemnity provision that does not arise out of the motor vehicle policy itself. SABs, as their name suggests, are “statutory accident benefits” required by the Ontario legislation. If the respondent is correct, Ontario could attach whatever benefits it liked to an out-of-province accident and require the appellant to come to Ontario to reimburse the Ontario insurer irrespective of whether or not British Columbia law permitted any deduction in that respect from the judgment award. As the Court pointed out in *Hunt*, *supra*, at p. 327, “[a] province undoubtedly has an interest in protecting the property of its residents within the province, but it cannot do so by unconstitutional means.”

compagnies d’assurance — qui ont par ailleurs touché des primes pour la garantie d’assurance sans égard à la faute — à se faire indemniser de leurs pertes, dans leur ressort d’origine, par d’autres assureurs situés dans la province où l’accident a eu lieu et où les réclamations découlant de l’accident ont été débattues devant les tribunaux. L’appelante nous a cité cette observation du professeur Black :

[TRADUCTION] Le régime de réciprocité, dont le formulaire P&E est un élément fondamental, joue un rôle que l’on pourrait décrire assez librement comme tendant à l’indemnisation et à la protection du consommateur.

(V. Black, « Interprovincial Inter-Insurer Interactions : *Unifund v. ICBC* » (2002), 36 *Rev. can. dr. comm.* 436, p. 444)

Je suis d’accord avec cette observation. Plusieurs considérations viennent étayer cette conclusion :

Premièrement, comme il a été indiqué précédemment, la disposition liminaire du formulaire P&E, qui fixe le cadre applicable à l’ensemble du document, fait état des procédures intentées [TRADUCTION] « par suite d’un accident d’automobile survenu dans leur province [. . .] respecti[ve] », ce qui excluait, dans ce formulaire, la Colombie-Britannique, province où l’accident s’est produit.

Deuxièmement, l’art. 275 de la Loi ontarienne est une disposition en matière d’indemnisation qui ne prend pas sa source dans la police d’assurance automobile elle-même. Comme leur nom l’indique, les IAL ou « indemnités d’accident légales » sont des indemnités prévues par la Loi ontarienne. Si l’intimée a raison, l’Ontario pouvait, à son gré, accorder n’importe quelle sorte d’indemnité à l’égard d’un accident survenu dans une autre province et obliger l’appelante à venir en Ontario rembourser l’assureur ontarien, peu importe si les lois de la Colombie-Britannique permettaient de déduire quelque partie que ce soit de cette indemnité de la somme accordée par le jugement. Comme l’a souligné notre Cour à la p. 327 de l’arrêt *Hunt*, précité, « [u]ne province a sans doute intérêt à protéger les biens de ses résidents sur son territoire, mais elle ne peut pas le faire par des moyens inconstitutionnels. »

Thirdly, the fact the PAU is aimed at litigation arising directly out of the motor vehicle accident itself is confirmed by the nature of the three undertakings:

(1) The first undertaking (to appear) is triggered by proper substituted service on the Superintendent. If the accident had occurred in Ontario, the travelling tortfeasors from British Columbia could (quite apart from the PAU) have been served under the rules *ex juris* and the appellant would have been contractually bound to provide a defence. In that sense, the PAU merely facilitates the inevitable.

(2) The second undertaking requires the insurer to effect personal service on the insured. The insured is not, of course, named as a party to the proposed arbitration. This is because this proceeding does not affect the Brennans. As stated, it is an attempt by Unifund to access an Ontario statutory scheme to reimburse itself for the payments it had paid pursuant to its Ontario policy, and in respect of which it had received a premium. The irrelevance of this undertaking to Unifund's action reinforces the conclusion that this dispute is not one contemplated by the PAU.

(3) The third undertaking is not to raise a defence "under a motor-vehicle liability insurance contract entered into by it". The reference to "insurance contract" must necessarily be to the British Columbia policies issued to the truck, trucker and repair shop. This makes perfect sense in seeking to harmonize an out-of-province motor vehicle policy with the laws of the jurisdiction where the accident took place. The Ontario Court of Appeal has itself held that the defences which an insurance company may raise "are dictated by the laws

Troisièmement, la nature des trois engagements confirme le fait que le formulaire P&E vise les poursuites découlant directement des accidents d'automobile :

(1) Le premier engagement (celui de comparaître) prend effet avec la signification indirecte régulièrement effectuée au surintendant des assurances concerné. Si l'accident s'était produit en Ontario et que les auteurs du délit civil avaient été des visiteurs de la Colombie-Britannique, ils auraient pu recevoir signification (indépendamment du formulaire P&E) en vertu des règles relatives à la signification *ex juris* et l'appelante aurait été tenue par contrat de les défendre. En ce sens, le formulaire P&E ne fait que faciliter ce qui aurait été inévitable.

(2) Le deuxième engagement oblige l'assureur à faire signifier à personne à l'assuré les documents pertinents. En l'espèce, les assurés ne sont évidemment pas désignés comme partie à l'arbitrage proposé, tout simplement parce que les Brennan ne sont pas touchés par cette procédure. Comme je l'ai indiqué plus tôt, Unifund tente en l'espèce de tirer profit du régime établi par la Loi ontarienne et de se faire rembourser ainsi les sommes qu'elle a versées en vertu de la police d'assurance qu'elle a émise en Ontario, et à l'égard desquelles elle a reçu une prime. La non-pertinence de cet engagement en ce qui concerne l'instance introduite par Unifund renforce la conclusion que le présent litige n'est pas visé par le formulaire P&E.

(3) Le troisième engagement consiste à s'abstenir d'invoquer un moyen de défense [TRADUCTION] « fondé sur le contrat d'assurance-responsabilité automobile qu'elle a conclu ». Les mots « contrat d'assurance » s'entendent nécessairement des polices d'assurance émises en Colombie-Britannique à l'égard du camion, du camionneur et de l'atelier de réparation. Cette interprétation est parfaitement logique lorsqu'on tente d'harmoniser une police d'assurance automobile émanant d'une

of the province in which the motor vehicle accident occurred” (emphasis added): *Potts, supra*, at p. 562, citing *Corbett v. Co-operative Fire & Casualty Co.* (1984), 14 D.L.R. (4th) 531 (Alta. Q.B.), at p. 535. In the cases relied upon by the respondent, Unifund, the motor vehicle accident had occurred within the territorial jurisdiction of the court which “harmonized” the out-of-province policy with the local rules pursuant to the term of the PAU: see *Royal Insurance, supra*, and *Healy, supra*, leave to appeal to this Court denied, [2000] 1 S.C.R. xiii. All of this, however, has little relevance to an action between insurance companies commenced in a province where the accident did not occur.

(4) The third undertaking goes on to require the signatory to satisfy any final judgment rendered against it “in the claim, action or proceeding, in respect of any kind or class of coverage provided under the contract or plan and in respect of any kind or class of coverage required by law to be provided under a plan or contracts of automobile insurance entered into in such Province” up to certain limits. In other words, actions contemplated by the PAU involve the dollar amounts and “kind or classes of coverage” contained in the original motor vehicle policy itself. This has nothing to do with the interinsurer indemnification procedure under s. 275 of the *Insurance Act* of Ontario.

Fourthly, the appellant, on December 16, 1997, filed a further undertaking with the Ontario Insurance Commission (called the “Protected Defendant Undertaking”) which provides in part:

THE INSURER UNDERTAKES AND AGREES that motor vehicle liability policies issued by the Insurer will include at least the Ontario Coverages, as set out above,

autre province avec les lois de la province où s’est produit l’accident. La Cour d’appel de l’Ontario elle-même a jugé que les moyens de défense qu’une société d’assurance pouvait soulever [TRADUCTION] « sont dictés par les lois de la province où l’accident a eu lieu » (je souligne) : *Potts*, précité, p. 562, citant *Corbett c. Co-operative Fire & Casualty Co.* (1984), 14 D.L.R. (4th) 531 (B.R. Alb.), p. 535. Dans les décisions invoquées par l’intimée, Unifund, l’accident d’automobile s’était produit dans le ressort du tribunal qui avait « harmonisé » la police d’assurance émise dans une autre province avec les règles locales conformément aux modalités du formulaire P&E : voir *Royal Insurance*, précité, et *Healy*, précité, autorisation de pourvoi refusée, [2000] 1 R.C.S. xiii. Tous ces éléments sont toutefois peu pertinents dans une instance entre sociétés d’assurance introduite dans une province où l’accident n’est pas survenu.

(4) Le troisième engagement oblige en outre le signataire à exécuter, jusqu’à concurrence des limites prévues, tout jugement définitif prononcé contre lui [TRADUCTION] « à l’égard de la demande, de l’action ou de la procédure, relativement à toute garantie prévue par le contrat ou régime applicable ou qui doit, selon la loi, être prévue par le régime ou les contrats d’assurance automobile dans cette province ». Autrement dit, les actions visées par le formulaire P&E portent sur les sommes et les « garanties » prévues par la police d’assurance automobile source. Tout cela n’a cependant rien à voir avec la procédure d’indemnisation réciproque prévue par l’art. 275 de la *Loi sur les assurances* de l’Ontario.

Quatrièmement, le 16 décembre 1997, l’appelante a déposé, auprès de la Commission des assurances de l’Ontario, un engagement supplémentaire (intitulé [TRADUCTION] « Engagement à l’égard des défendeurs exclus »), lequel comporte notamment les stipulations suivantes :

[TRADUCTION] L’ASSUREUR S’ENGAGE à insérer, dans les polices d’assurance-responsabilité automobile qu’il émet, à tout le moins les garanties prévues en

when automobiles insured by the Insurer are operated in Ontario. . . .

Ontario, qui sont énoncées précédemment, lorsque les automobiles qu'il assure sont utilisées en Ontario. . .

THE INSURER ALSO AGREES to appear and to be bound by the laws of Ontario in defending any claim under its motor vehicle liability policy. [Emphasis added.]

L'ASSUREUR ACCEPTE ÉGALEMENT d'être assujéti aux lois de l'Ontario et de comparaître en défense à l'égard de toute réclamation fondée sur les polices d'assurance-responsabilité automobile qu'il émet. [Je souligne.]

While the Protected Defendant Undertaking operates in addition to the PAU, which remains in full force and effect, its terms seem to me to reinforce the nature of the arrangements between the appellant and Ontario, which have to do with defending claims under the appellant's insurance policies, not defending a claim under the Ontario Act to re-allocate the cost of payments required by the Ontario Act amongst insurance companies subject to the Ontario Act.

Bien que l'engagement à l'égard des défendeurs exclus s'applique en sus du formulaire P&E, qui demeure toujours en vigueur, j'estime que ses modalités confirment la nature des engagements intervenus entre l'appelante et l'Ontario, c'est-à-dire la présentation de défenses en cas de réclamations fondées sur les polices d'assurance émises par l'appelante, et non la présentation de défenses en cas de réclamations fondées sur la Loi ontarienne et sollicitant la répartition du coût des paiements que requiert cette loi entre les compagnies d'assurance assujetties à celle-ci.

As stated earlier, the fact that the appellant, ICBC, has on occasion attorned to Ontario in defending British Columbia motorists involved in accidents in that province does not constitute a general attornment to Ontario in respect of all accidents wherever they take place and any consequent proceedings.

Comme je l'ai indiqué plus tôt, le fait que l'appelante, ICBC, ait à l'occasion acquiescé à la compétence des tribunaux de l'Ontario en présentant une défense au nom d'automobilistes de la Colombie-Britannique ayant eu des accidents en Ontario, ne constitue pas un acquiescement général à la compétence des tribunaux ontariens relativement à tout accident — peu importe le lieu où il se produit — et aux procédures qui en découlent.

The courts should strive to give full effect to voluntary, interprovincial arrangements that seek to overcome some of the practical difficulties inherent in our federal structure. The danger, however, is that if the courts overstate the effect of these voluntary arrangements, and thereby impose on the parties obligations that were never in their contemplation, cooperation may no longer be forthcoming. In my view, the respondent's argument attempts to push the PAU beyond its intended scope. Acceptance of its argument would undermine rather than enhance voluntary interprovincial cooperation in the field of motor vehicle insurance. If the insurers wish to expand their voluntary

Les tribunaux devraient s'efforcer de donner plein effet aux arrangements interprovinciaux volontaires conclus en vue de surmonter certaines des difficultés d'ordre pratique inhérentes à notre structure fédérale. Cela n'est toutefois pas sans risque, car si les tribunaux exagèrent les effets de ces arrangements volontaires et imposent en conséquence aux parties des obligations qu'elles n'avaient jamais envisagées, celles-ci pourraient ne plus être disposées à coopérer. À mon avis, l'intimée cherche par son argument à donner au formulaire P&E une portée plus large que celle qu'il est censé avoir. Retenir cet argument aurait pour effet non pas de renforcer, mais plutôt d'affaiblir la

cooperation, the PAU can be amended to achieve this purpose.

coopération interprovinciale volontaire dans le domaine de l'assurance automobile. Si les assureurs souhaitent accroître cette coopération volontaire, le formulaire P&E peut être modifié pour réaliser cet objectif.

104 If, as I concluded earlier, the appellant is not otherwise within the legislative jurisdiction of Ontario, the PAU does not put it there by agreement.

Si, conformément à la conclusion à laquelle je suis arrivé plus tôt, l'appelante ne relève pas de quelque autre façon de la compétence législative de l'Ontario, le formulaire P&E n'a pas pour effet de l'y assujettir par consentement.

105 In any event, as noted earlier, even if the PAU were interpreted (wrongly, in my view) to require the appellant to litigate Unifund's claim in Ontario, there is nothing in the PAU that would prevent the appellant from contesting the purported extraterritorial assertion of s. 275 of the Ontario *Insurance Act*. For the reasons already discussed, such an objection would succeed. However one looks at this case, the respondent's claim should be dismissed.

Quoi qu'il en soit, comme je l'ai souligné précédemment, même si on considérait (à tort selon moi) que le formulaire P&E oblige l'appelante à contester la demande présentée par Unifund en Ontario, rien dans le formulaire P&E n'empêche l'appelante de contester la portée extraterritoriale qu'aurait, prétend-on, l'art. 275 de la *Loi sur les assurances* de l'Ontario. Pour les motifs exposés plus tôt, un tel moyen de contestation serait accueilli. Peu importe l'angle sous lequel on considère la présente affaire, la demande de l'intimée doit être rejetée.

(iii) *Should the Judge Have Dealt with the Issue of Forum Non Conveniens, or, Having Found the Ontario Act Constitutionally Applicable, Should the Issue of Forum Non Conveniens Have Been Referred to the Arbitrator ("the Forum Non Conveniens Issue")?*

(iii) *Le juge aurait-il dû examiner la question du forum non conveniens, ou, ayant conclu que la Loi ontarienne était constitutionnellement applicable, aurait-il dû renvoyer cette question à l'arbitre (« la question du forum non conveniens »)?*

106 Having concluded, in response to the constitutional question, that the Ontario regulatory scheme does not apply to the out-of-province appellant on the facts of this case, the issue of *forum non conveniens* is moot. There is no statutory cause of action available to the respondent to sue upon in Ontario *or* in British Columbia. Unifund's application rests on a faulty constitutional basis and must be dismissed.

Puisque j'ai conclu, en réponse à la question constitutionnelle, que le régime ontarien ne s'applique pas à l'appelante de l'extérieur de la province eu égard aux faits de l'espèce, la question du *forum non conveniens* est devenue théorique. L'intimée ne dispose d'aucune cause d'action prévue par la loi la fondant à intenter des poursuites en Ontario *ou* en Colombie-Britannique. La demande de Unifund est constitutionnellement défectueuse et doit être rejetée.

X. Conclusion

X. Conclusion

107 I would allow the appeal with costs throughout and dismiss the respondent's application.

Je suis d'avis d'accueillir le pourvoi, avec dépens dans toutes les cours, et de rejeter la demande de l'intimée.

108 The constitutional question should be answered as follows:

La question constitutionnelle devrait recevoir la réponse suivante :

Q. Is s. 275 of the *Insurance Act*, R.S.O. 1990, c. I.8, as amended, constitutionally inapplicable to the appellant because its application in the circumstances of this case would not accord with territorial limits on provincial jurisdiction?

A. Yes.

The reasons of Major, Bastarache and Deschamps JJ. were delivered by

BASTARACHE J. (dissenting) —

I. Introduction

This appeal involves two insurers which are parties to a reciprocal scheme for the enforcement of motor vehicle claims. They disagree on the effect of that scheme and on the extraterritorial application of the Ontario *Insurance Act*, R.S.O. 1990, c. I.8, notably s. 275, which provides for the indemnification of a no-fault insurer, here Unifund Assurance Company (“Unifund”), by a tortfeasors’ insurer, here the Insurance Corporation of British Columbia (“ICBC”), for benefits paid over \$2,000. Also at issue in this appeal is the jurisdiction of an arbitrator to be appointed pursuant to s. 275(4) of the Ontario *Insurance Act* to decide the issues of jurisdiction *simpliciter*, *forum conveniens* and choice of law.

For the reasons that follow, I am of the view that a superior court judge must decide the issues of jurisdiction *simpliciter* and *forum conveniens*. I am also of the view that, on the facts of this case, ICBC has accepted the jurisdiction of Ontario in this matter by signing a “Power of Attorney and Undertaking” (“PAU”). That instrument, interpreted in light of the principles of private international law set out in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, recently affirmed in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78, constitutes a sound

Q. L’article 275 de la *Loi sur les assurances*, L.R.O. 1990, ch. I.8 et ses modifications, est-il constitutionnellement inapplicable à l’appelante pour le motif que, dans les circonstances de la présente affaire, son application ne serait pas conforme aux limites territoriales de la compétence provinciale?

R. Oui.

Version française des motifs des juges Major, Bastarache et Deschamps rendus par

LE JUGE BASTARACHE (dissident) —

I. Introduction

Le présent pourvoi concerne deux assureurs qui sont parties à un régime de réciprocité visant l’exécution des demandes d’indemnités présentées par les victimes d’accidents d’automobile. Les parties ne s’entendent ni sur les effets du régime ni sur l’application extraterritoriale de la *Loi sur les assurances* de l’Ontario, L.R.O. 1990, ch. I.8, plus particulièrement l’art. 275 de cette loi, qui précise que l’assureur d’un assuré non responsable de l’accident, en l’occurrence Unifund Assurance Company (« Unifund »), a droit d’être indemnisé par l’assureur de l’auteur du délit civil, en l’occurrence Insurance Corporation of British Columbia (« ICBC »), lorsque les indemnités à verser dépassent 2 000 \$. Est également en litige le pouvoir de l’arbitre visé au par. 275(4) de la *Loi sur les assurances* de l’Ontario de trancher les questions de la simple reconnaissance de compétence, du *forum conveniens* et du choix du droit applicable.

Pour les motifs qui suivent, j’estime qu’il appartient aux juges des cours supérieures de trancher les questions de la simple reconnaissance de compétence et du *forum conveniens*. Eu égard aux faits en l’espèce, je suis également d’avis que, en signant le document intitulé [TRADUCTION] « Procuration et engagements » (le « formulaire P&E »), ICBC a accepté que les lois ontariennes régissant la question s’appliquent à la présente affaire. Ce document, interprété à la lumière des principes de droit international privé qui ont été énoncés dans l’arrêt *Morguard Investments Ltd. c. De Savoye*, [1990] 3

foundation for the application of the Ontario *Insurance Act* to the parties in this case. By virtue of the fact of attornment through the PAU, amongst other factors, I conclude that the subject matter which the *Insurance Act* covers is sufficiently connected to Ontario so as to render the Act applicable to ICBC.

II. Factual Background

111 Mr. and Mrs. Brennan, Ontario residents, were injured while visiting British Columbia in 1995. They were struck by a tractor-trailer while traveling in a car rented in British Columbia and Mrs. Brennan was rendered quadriplegic. Following the accident, the Brennans returned to Ontario. All of the vehicles involved in the accident were registered in British Columbia and insured by the appellant, ICBC, which provides mandatory insurance in that province. Both Mr. and Mrs. Brennan received substantial statutory accident benefits (SABs) from their insurer, the respondent, Unifund.

112 The Brennans were awarded substantial damages as a result of an action brought in British Columbia against the owner and driver of the tractor-trailer, and against the garage that had repaired the said tractor-trailer. The trial judge only dealt with the quantum of damages as all three defendants, insured by the appellant, admitted joint liability: *Brennan v. Singh*, [1999] B.C.J. No. 520 (QL) (S.C.). The three defendant tortfeasors, in accordance with s. 25 of the British Columbia *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, c. 231, sought to deduct from the damages the amount of money that the Brennans had received from the respondent in the form of SABs. The British Columbia Court of Appeal confirmed that the ICBC policy which insured the garage was automobile insurance within the meaning of the British Columbia *Insurance (Motor Vehicle) Act* and that the tortfeasors were entitled to deduct the benefits received from the respondent pursuant to its s. 25: *Brennan v. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294, aff'g (1999), 70 B.C.L.R. (3d) 342

R.C.S. 1077, et confirmés récemment dans l'arrêt *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, [2002] 4 R.C.S. 205, 2002 CSC 78, constitue une assise solide pour justifier l'application aux parties de la *Loi sur les assurances* de l'Ontario. En raison notamment de l'acquiescement à la compétence des tribunaux ontariens, j'estime que la question visée a un lien suffisant avec cette province pour rendre la loi applicable à ICBC en l'espèce.

II. Les faits

M. et M^{me} Brennan, des résidents de l'Ontario, ont été blessés au cours d'un voyage en Colombie-Britannique en 1995. Un camion gros porteur a heurté la voiture qu'ils avaient louée sur place, et l'accident a laissé M^{me} Brennan quadriplégique. Par la suite, les Brennan sont retournés en Ontario. Tous les véhicules en cause dans l'accident étaient immatriculés en Colombie-Britannique et assurés par l'appelante, ICBC, laquelle vend l'assurance obligatoire dans cette province. M. et M^{me} Brennan ont reçu de leur assureur, l'intimée, Unifund, des indemnités d'accident légales substantielles.

Les Brennan ont obtenu des dommages-intérêts élevés à l'issue d'une action intentée en Colombie-Britannique contre le propriétaire et conducteur du camion gros porteur, et contre le garage qui avait réparé ce véhicule. Le juge de première instance n'a examiné que la question du montant des dommages-intérêts, étant donné que les trois défendeurs, assurés par l'appelante, ont reconnu leur responsabilité conjointe : *Brennan c. Singh*, [1999] B.C.J. No. 520 (QL) (C.S.). Conformément à l'art. 25 de la loi de la Colombie-Britannique intitulée *Insurance (Motor Vehicle) Act*, R.S.B.C. 1996, ch. 231, les trois codéfendeurs et auteurs du délit civil ont demandé que soit déduite des dommages-intérêts la somme obtenue par les Brennan de l'intimée à titre d'indemnités d'accident légales. La Cour d'appel de la Colombie-Britannique a confirmé que la police émise par ICBC à l'égard du garage constituait une assurance automobile au sens de l'*Insurance (Motor Vehicle) Act* de la Colombie-Britannique et que les auteurs du délit avaient droit, en vertu de l'art. 25, à la déduction

(S.C.). An action is continuing in the Supreme Court of British Columbia to determine the amount of the benefits that will be ordered to be deducted from the damage award: *Brennan v. Singh* (2001), 15 C.P.C. (5th) 17, 2001 BCSC 1812.

The parties were unable to agree with respect to indemnification under s. 275 of the Ontario *Insurance Act*, the appellant, ICBC, taking the position that the Act did not apply. Consequently, the respondent, Unifund, brought an application before the Ontario Superior Court for the appointment of an arbitrator pursuant to s. 10 of the Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17. The appellant took two steps in response. First, it brought an application in the British Columbia Supreme Court for a declaratory order that the law of British Columbia (and not that of Ontario) applies to the rights of the two insurers, and that the respondent has no right of subrogation under British Columbia law. Second, it brought an application returnable before a judge in Ontario for an order staying the arbitration.

The “Power of Attorney and Undertaking” (“PAU”), titled “Canada Non-Resident Inter-Province Motor Vehicle Liability Insurance Card”, provides that when an insured is sued in another province or territory, the Superintendent of Insurance of that province will accept service on behalf of the insurer or its insured, and that the insurer undertakes to appear in the action. As a signatory to the PAU, the insurer further undertakes not to set up any defence in respect of any action under a motor vehicle liability contract which might not be set up in the province in which the action is instituted, and to satisfy judgment up to the greater of the amounts and limits of coverage provided for in the contract, or the minimum for that kind or class of coverage provided for by the laws of the province or territory in which the action is filed. This reciprocal scheme provides a uniform basis for the enforcement of motor

des indemnités reçues de l’intimée : *Brennan c. Singh* (2000), 75 B.C.L.R. (3d) 93, 2000 BCCA 294, conf. (1999), 70 B.C.L.R. (3d) 342 (C.S.). Une action est en instance devant la Cour suprême de la Colombie-Britannique afin de déterminer l’indemnité dont le tribunal ordonnera la soustraction du montant des dommages-intérêts : *Brennan c. Singh* (2001), 15 C.P.C. (5th) 17, 2001 BCSC 1812.

Les parties ont été incapables de s’entendre sur l’indemnisation visée à l’art. 275 de la *Loi sur les assurances* de l’Ontario, l’appelante, ICBC, plaidant l’inapplication de cette loi. En conséquence, l’intimée, Unifund, a demandé à la Cour supérieure de l’Ontario la nomination d’un arbitre suivant l’article 10 de la loi ontarienne intitulée *Loi de 1991 sur l’arbitrage*, L.O. 1991, ch. 17. En réponse à cette demande, l’appelante a effectué deux démarches. Premièrement, elle a sollicité de la Cour suprême de la Colombie-Britannique une ordonnance déclarant, d’une part, que ce sont les lois de la Colombie-Britannique (et non celles de l’Ontario) qui s’appliquent à l’égard des droits des deux assureurs, et, d’autre part, que l’intimée n’a aucun droit de subrogation en vertu des lois de la Colombie-Britannique. Deuxièmement, elle a demandé à un juge de l’Ontario d’ordonner la suspension de l’arbitrage.

Selon le formulaire P&E, document dont le titre est [TRADUCTION] « Carte d’assurance-responsabilité automobile interprovinciale pour non-résidents du Canada », lorsqu’un assuré est poursuivi dans une autre province ou un autre territoire, le surintendant des assurances de cet endroit accepte de recevoir signification d’actes de procédure ou d’avis au nom de l’assureur ou de son assuré, et l’assureur s’engage à comparaître à l’action. À titre de signataire du formulaire P&E, l’assureur s’engage également à ne pas présenter, à l’égard de toute action découlant d’un contrat de responsabilité automobile, de moyen de défense qui ne pourrait être invoqué dans la province où l’action a été intentée, et à exécuter le jugement jusqu’à concurrence de la plus élevée des sommes suivantes : la garantie maximale prévue par le contrat ou la somme minimale prévue pour ce genre ou cette catégorie de garantie par les lois en vigueur dans la

113

114

vehicle insurance claims in Canada and, to a lesser extent, in North America.

III. Relevant Statutory Provisions

115 *Insurance Act*, R.S.O. 1990, c. I.8

275.—(1) The insurer responsible under subsection 268(2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.

(2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each insurer's insured as determined under the fault determination rules.

(3) No indemnity is available under subsection (2) in respect of the first \$2,000 of statutory accident benefits paid in respect of a person described in that subsection.

(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*.

(5) No arbitration hearing shall be held with respect to indemnification under this section if, in respect of the incident for which indemnification is sought, any of the insurers and an insured are parties to a mediation under section 280, an arbitration under section 282, an appeal under section 283 or a proceeding in a court in respect of statutory accident benefits.

IV. Judicial History

A. *Ontario Superior Court of Justice* (2000), 23 C.C.L.I. (3d) 96

116 Campbell J. determined that the case dealt with the narrow issue of the indemnification between two insurers pursuant to the Ontario *Insurance Act*.

province ou le territoire où l'action a été intentée. Ce régime de réciprocité assure l'exécution uniforme des réclamations d'assurance automobile au Canada et, dans une moindre mesure, en Amérique du Nord.

III. Les dispositions législatives pertinentes

Loi sur les assurances, L.R.O. 1990, ch. I.8

275 (1) L'assureur tenu de payer, aux termes du paragraphe 268(2), des indemnités d'accident légales à des catégories de personnes qui peuvent être nommées dans les règlements a droit, sous réserve des conditions, dispositions, exclusions et restrictions qui peuvent être prescrites, à une indemnisation, en ce qui concerne les indemnités qu'il a payées, de la part des assureurs d'une catégorie ou des catégories d'automobiles qui peuvent être nommées dans les règlements et qui étaient impliquées dans l'incident dont découle l'obligation de payer des indemnités d'accident légales.

(2) L'indemnisation visée au paragraphe (1) est effectuée en fonction du degré de responsabilité de l'assuré de chaque assureur tel qu'il est établi selon les règles de détermination de la responsabilité.

(3) Aucune indemnité n'est offerte aux termes du paragraphe (2) relativement à la première tranche de 2 000 \$ d'indemnités d'accident légales payées à l'égard d'une personne mentionnée dans ce paragraphe.

(4) Si les assureurs n'arrivent pas à s'entendre à l'égard de l'indemnisation visée au présent article, le différend est réglé par voie d'arbitrage aux termes de la *Loi sur l'arbitrage*.

(5) Aucune audience d'arbitrage n'est tenue à l'égard de l'indemnisation visée au présent article si, en ce qui concerne l'incident qui a entraîné la demande d'indemnisation, un des assureurs et un assuré sont parties à une procédure de médiation entamée en vertu de l'article 280, à un arbitrage effectué aux termes de l'article 282, à un appel interjeté en vertu de l'article 283 ou à une instance judiciaire à l'égard d'indemnités d'accident légales.

IV. L'historique des procédures judiciaires

A. *Cour supérieure de justice de l'Ontario* (2000), 23 C.C.L.I. (3d) 96

Le juge Campbell a décidé que l'affaire portait uniquement sur la question de l'indemnisation entre deux assureurs en application de la *Loi sur les*

He decided that his task was not to determine with finality the applicable law with respect to the resolution of the dispute but rather to consider the balance of convenience with regard to a motion for a stay on the basis of *forum non conveniens*. The question of jurisdiction *simpliciter* was not explicitly considered by the applications judge.

In the circumstances, the applications judge was not satisfied that there would be a loss of a juridical advantage, as feared by the respondent, Unifund, were a stay to be granted. The reciprocal nature of the scheme and the need for consideration by a court in one province of the applicability of the rules in another province led him to conclude that it was not simply a matter for a court in Ontario to apply Ontario law, or a court in British Columbia to apply British Columbia law. Rather, it was for each court to consider the nature of the reciprocal scheme as effected by the legislation in both provinces. The applications judge found the factors for granting a stay of proceedings in this case to be: (1) an absence of evidence of any serious or substantial prejudice to the plaintiff if a stay were granted; (2) the need to provide an opportunity for an expeditious determination of the issues raised by the plaintiff; and, (3) a serious prospect for inconsistent findings if both proceedings moved forward concurrently. The applications judge concluded that the balance favoured the stay of the Ontario arbitration as he was of the view that the arbitration procedure instituted under s. 275 of the Ontario *Insurance Act* was not enacted to resolve legal issues that arise as a result of the operation of an interprovincial scheme which poses problems of conflicting provincial laws. Because everything that gave rise to the dispute between the insurers commenced with an accident and an action in British Columbia, that province's courts were deemed to be the appropriate forum for the resolution of the dispute.

assurances de l'Ontario. Il a conclu que son rôle ne consistait pas à décider de façon définitive du droit applicable au règlement du différend, mais plutôt à examiner la prépondérance des inconvénients dans le cadre d'une motion sollicitant le sursis de l'instance pour cause de *forum non conveniens*. Le juge des motions n'a pas examiné explicitement la question de la simple reconnaissance de la compétence.

Vu les circonstances, le juge des motions n'était pas convaincu qu'il y aurait, comme le craignait l'intimée, Unifund, perte d'un avantage juridique s'il ordonnait le sursis à l'arbitrage. Le caractère réciproque du régime et la nécessité qu'un tribunal d'une province donnée s'interroge sur l'applicabilité des règles dans une autre province ont amené le juge à conclure qu'il ne s'agissait pas simplement d'une affaire requérant d'un tribunal ontarien qu'il applique les lois de l'Ontario ou d'un tribunal de la Colombie-Britannique qu'il applique les lois de cette province. L'un ou l'autre de ces tribunaux devra plutôt examiner la nature du régime de réciprocité au regard de la législation applicable dans les deux provinces. Le juge des motions a estimé que les facteurs pertinents justifiant de surseoir à l'arbitrage dans cette affaire étaient les suivants : (1) l'absence de preuve de quelque préjudice grave ou important pouvant être causé au demandeur s'il ordonnait le sursis à l'arbitrage; (2) la nécessité de favoriser le règlement expéditif des questions soulevées par le demandeur; (3) le risque important de jugements contradictoires si les deux instances devaient se poursuivre parallèlement. Le juge des motions a conclu que la balance penchait en faveur de la suspension de l'arbitrage en Ontario puisque, à son avis, la procédure d'arbitrage prévue par l'art. 275 de la *Loi sur les assurances* de l'Ontario n'a pas été instituée pour régler des questions de droit découlant de l'application d'un régime interprovincial créant des problèmes d'incompatibilité entre lois provinciales. Comme tous les éléments à l'origine du différend entre les assureurs ont pour point de départ un accident et une action en Colombie-Britannique, les tribunaux de cette province ont été réputés être le forum approprié pour connaître du litige.

B. *Court of Appeal for Ontario* (2001), 204 D.L.R. (4th) 732

118

Feldman J.A., for a unanimous court, held that when a statute provides that a matter is to be decided by arbitration under the Ontario *Arbitration Act, 1991*, it is for the arbitrator to decide questions of jurisdiction, applicable law and questions of law, subject to the right to appeal that decision to a court of justice. The Court of Appeal considered the issue of *forum non conveniens* and found that the applications judge was in error when he stated that an arbitrator appointed to determine issues under s. 275 of the Ontario *Insurance Act* could only decide “intra-Ontario” issues. First, the applications judge’s conclusion was found to be inconsistent with s. 275 when read in conjunction with the PAU to which British Columbia and Ontario are signatories. Paragraph A of the PAU states that the signatory company undertakes “[t]o appear in any action or proceeding against it or its insured in any Province or Territory in which such action has been instituted and of which it has knowledge”. The Court of Appeal held that, in part because of the presence of the PAU, there is no basis to conclude that s. 275(4) of the Ontario *Insurance Act* is to operate fully only in those circumstances where all parties and issues are confined to Ontario. Second, the applications judge’s conclusion was held to be contrary to the scheme of the Ontario *Arbitration Act, 1991* and the powers accorded to an arbitral tribunal under this same Act, namely to initially decide all questions of law and jurisdiction, unless the arbitrator or the parties consent to a referral to a court of justice.

V. Analysis

A. *The Procedural Issues*

119

The law of interprovincial jurisdiction and enforcement was changed drastically in *Morguard*, *supra*, where the Court held that the principles of

B. *Cour d’appel de l’Ontario* (2001), 204 D.L.R. (4th) 732

Rédigeant la décision unanime de la Cour d’appel, le juge Feldman a conclu que, lorsqu’une loi prévoit qu’une affaire doit être soumise à l’arbitrage en application de la *Loi de 1991 sur l’arbitrage* de l’Ontario, il appartient à l’arbitre de se prononcer sur les questions de compétence, sur les lois applicables et sur les questions de droit, sous réserve du droit des parties d’interjeter appel de sa décision à un tribunal judiciaire. Après avoir examiné la question du *forum non conveniens*, la Cour d’appel a estimé que le juge des motions avait commis une erreur en disant qu’un arbitre chargé de statuer sur les questions visées à l’art. 275 de la *Loi sur les assurances* de l’Ontario ne pouvait se prononcer que sur des questions [TRADUCTION] « régies par les lois de l’Ontario ». Premièrement, la Cour d’appel a décidé que la conclusion du juge des motions était incompatible avec l’art. 275, lorsque celui-ci est lu en corrélation avec le texte du formulaire P&E auquel la Colombie-Britannique et l’Ontario ont adhéré. Le paragraphe A de ce formulaire indique que la société signataire s’engage [TRADUCTION] « [à] comparaître à toute action ou autre procédure qui est intentée contre elle ou contre son assuré dans quelque province ou territoire et dont elle a connaissance ». La Cour d’appel a jugé, partiellement en raison de l’existence du formulaire P&E, que rien ne permettait de conclure que le par. 275(4) de la *Loi sur les assurances* de l’Ontario ne doit recevoir plein effet que dans les cas où les parties se trouvent en Ontario et les questions en litige y ont leur origine. Deuxièmement, selon la Cour d’appel, la conclusion du juge des motions était contraire à l’objet de la *Loi de 1991 sur l’arbitrage* de l’Ontario et aux pouvoirs conférés par cette loi au tribunal arbitral, à savoir celui de trancher en première instance toute question de droit et de compétence, sauf lorsque l’arbitre ou les parties acceptent de déférer la question à un tribunal judiciaire.

V. Analyse

A. *Les questions d’ordre procédural*

L’arrêt *Morguard*, précité, a modifié de façon radicale le droit en matière de saisine extraprovinciale et d’application extraterritoriale de lois

order and fairness require limits on the reach of provincial legislation facilitating the enforcement of an extraprovincial judgment, but that extraprovincial jurisdiction can nevertheless be asserted on the basis of a real and substantial connection. The territoriality issue arose again in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; in that case, the Court considered whether a provincial statute preventing documents relating to any business concerns in Quebec from being sent out of the province was *ultra vires* the province as being in relation to a matter outside the province, or constitutionally inapplicable to judicial proceedings in other provinces. In *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, this Court dealt with the question of which law should govern in cases involving the interests of more than one jurisdiction, specifically as it concerns automobile accidents involving residents of different provinces. However, the principles developed in *Hunt* and *Tolofson* are of little help in the case at bar as it concerns consent-based jurisdiction in the context of a conflict between insurers. The difficulty with this appeal is that there is a disagreement between the parties about the effect of the PAU and whether signing it constituted attornment by the parties to Ontario's jurisdiction. The preliminary question, however, is whether these issues should be decided by a superior court judge or by an arbitrator, as held by the Court of Appeal for Ontario.

In its reasons, the Court of Appeal relied on paragraph A of the PAU, the undertaking to appear, and on the fact that the determination of *forum non conveniens* by the applications judge would be inconsistent with the provisions of the Ontario *Insurance Act*. The appellant, ICBC, submits that if there is any doubt about the application of the Ontario *Insurance Act* or the appropriateness of Ontario as a forum, that doubt should not be resolved by an arbitrator appointed under the very legislation whose

provinciales. Dans cette affaire, la Cour a conclu que les principes d'ordre et d'équité requièrent que soient assorties de limites la portée des lois provinciales visant à faciliter l'exécution des jugements émanant de l'extérieur de la province concernée, mais que les tribunaux d'une autre province peuvent néanmoins se saisir d'une affaire sur la base d'un lien réel et substantiel. La question de la territorialité s'est présentée à nouveau dans l'arrêt *Hunt c. T&N plc*, [1993] 4 R.C.S. 289, où notre Cour s'est demandée si une loi québécoise interdisant la communication à l'extérieur de la province de tout document relatif à une entreprise commerciale située au Québec était *ultra vires* parce qu'elle portait sur une matière de nature extraprovinciale ou qu'elle était constitutionnellement inapplicable aux procédures judiciaires se déroulant dans une autre province. Dans l'arrêt *Tolofson c. Jensen*, [1994] 3 R.C.S. 1022, notre Cour a examiné la question de savoir quel droit doit régir les affaires dans lesquelles des intérêts situés dans plusieurs ressorts sont en jeu, en particulier lorsqu'il s'agit d'accidents d'automobile touchant des résidents de provinces différentes. Les principes élaborés dans les arrêts *Hunt* et *Tolofson* ne sont pas toutefois d'un grand secours dans le présent pourvoi, puisque nous sommes en présence d'une affaire d'acquiescement à la compétence des tribunaux, dans le contexte d'un conflit entre assureurs. En l'espèce, le problème tient au fait que les parties ne s'entendent ni sur les effets à donner au formulaire P&E ni sur la question de savoir si la signature de ce document constitue un acquiescement à la compétence des tribunaux et des lois de l'Ontario. Préalablement, toutefois, il faut se demander si ces diverses questions doivent être tranchées par un juge d'une cour supérieure ou, comme l'a décidé la Cour d'appel de l'Ontario, par un arbitre.

Dans ses motifs, la Cour d'appel a invoqué le paragraphe A du formulaire P&E, soit l'engagement à comparaître, et le fait que la conclusion du juge des motions selon laquelle l'Ontario est un *forum non conveniens* serait incompatible avec les dispositions de la *Loi sur les assurances* de cette province. L'appelante, ICBC, prétend que s'il existe quelque doute quant à l'application de la *Loi sur les assurances* de l'Ontario ou au choix de l'Ontario en tant que forum approprié, il n'appartient pas à l'arbitre

application is questioned. The appellant submits that Ontario's *Arbitration Act, 1991* does not confer exclusive jurisdiction on an arbitrator to construe legislation to determine its constitutional applicability. It argues that a party should not be required to submit to a tribunal whose fundamental existence, authority and jurisdiction are challenged, but should be able to first ask a court of justice to rule on this important threshold question.

121 The respondent, Unifund, agrees with the Court of Appeal that the determination of the preliminary question of whether an insurer is an insurer within the meaning of s. 275 of the Ontario *Insurance Act* should be made in the first instance by an arbitrator. It argues that the characterization of this issue by the appellant as jurisdictional and constitutional does not transform the nature of the inquiry or remove from the arbitrator the power to make such a decision. The respondent submits that the mandatory arbitration clause in s. 275(4) of the Act confers exclusive jurisdiction on an arbitrator to deal with all the issues raised by the appellant, in the first instance.

122 I think that the first issue presented to the applications judge was that of jurisdiction *simpliciter*, and that in any event he was required to deal with it before addressing the question of *forum conveniens*. Even though it may be difficult to perfectly isolate these two issues of jurisdiction, I am of the view that the Court of Appeal could not decide to submit the whole matter to an arbitrator without inferentially deciding that the Ontario *Insurance Act* applied. The reason for this is that the appointment of the arbitrator depends on the application of s. 275 of the Ontario *Insurance Act*. With respect, I find the decision of the Court of Appeal inconsistent as it orders the appointment of an arbitrator while remitting to this same arbitrator the question of whether or not his or her jurisdiction is constitutional.

nommé en vertu de la loi même dont l'application est contestée de dissiper ce doute. L'appelante affirme que la *Loi de 1991 sur l'arbitrage* de l'Ontario ne donne pas à l'arbitre compétence exclusive pour interpréter les lois en vue de statuer sur leur applicabilité au regard de la Constitution. L'appelante plaide qu'une partie ne devrait pas être tenue de s'en remettre à un tribunal administratif dont on conteste l'existence, l'autorité et la compétence fondamentales, sans d'abord pouvoir demander à un tribunal judiciaire de se prononcer sur cette importante question préliminaire.

L'intimée, Unifund, fait sienne l'opinion de la Cour d'appel selon laquelle il appartient à l'arbitre de se prononcer en première instance sur la question préliminaire de savoir si l'assureur est un assureur au sens de l'art. 275 de la *Loi sur les assurances* de l'Ontario. L'intimée, Unifund, prétend que le fait pour l'appelante de qualifier cette question préliminaire de question de compétence et de constitutionnalité n'a pas pour effet de transformer la nature de l'examen et d'enlever à l'arbitre le pouvoir de prendre une telle décision. Elle soutient que la clause d'arbitrage obligatoire prévue au par. 275(4) de la Loi confère à l'arbitre compétence exclusive pour statuer, en première instance, sur toutes les questions soulevées par l'appelante.

J'estime que la première question présentée au juge des motions était celle de la simple reconnaissance de compétence et que, quoi qu'il en soit, il n'avait d'autre choix que de l'examiner avant d'aborder celle du *forum conveniens*. Bien qu'il puisse être difficile de dissocier complètement ces deux questions de compétence, je suis d'avis que la Cour d'appel ne pouvait décider que toute l'affaire relevait de l'arbitre sans implicitement conclure à l'application de la *Loi sur les assurances* de l'Ontario. Cette opinion repose sur le fait que la nomination de l'arbitre dépend de l'application de l'art. 275 de cette loi. En toute déférence, la décision de la Cour d'appel est, selon moi, illogique, puisqu'elle ordonne la nomination d'un arbitre tout en laissant à celui-ci le soin de statuer sur la constitutionnalité de sa compétence.

The argument that an arbitrator is mandated to decide questions of law and therefore must do so before these questions are to be decided by a court of justice is not persuasive in this case because of the very nature of the appellant's claim, namely that the Ontario legislation imposing arbitration is constitutionally inapplicable. I fail to see how an arbitrator can have any jurisdiction if the procedure under which he or she is empowered to decide questions of law is *ultra vires* the legislature. This reasoning is consistent with the principles that govern the *Model Law on International Commercial Arbitration*, adopted by the United Nations Commission on International Trade Law in 1985, on which the *Ontario Arbitration Act, 1991* is based. The former's Article 8(1) reads:

A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

The territorial application of the Ontario *Insurance Act* is an issue that is distinct from those considered in cases dealing with the power of administrative tribunals to determine their own jurisdiction. This is, in my opinion, consistent with the opinion of La Forest J. in *Morguard, supra*, at pp. 1099-1100:

The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges — who also have superintending control over other provincial courts and tribunals — are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments.

The same point is made forcefully in *Canada Labour Relations Board v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147, at pp. 162-63.

L'argument voulant que comme l'arbitre a le mandat de trancher les questions de droit et qu'il doit en conséquence se prononcer sur celles-ci avant qu'un tribunal judiciaire puisse le faire n'est pas convaincant en l'espèce, vu la nature même de la prétention de l'appelante, savoir que la loi ontarienne imposant l'arbitrage est constitutionnellement inapplicable. Je ne vois pas comment l'arbitre peut disposer de quelque compétence que ce soit si la procédure l'autorisant à trancher des questions de droit excède les pouvoirs de la législature. Ce raisonnement est compatible avec les principes qui régissent la *Loi type sur l'arbitrage commercial international* adoptée en 1985 par la Commission des Nations Unies pour le droit commercial international, dont est inspirée la *Loi de 1991 sur l'arbitrage* de l'Ontario. Le paragraphe 8(1) de la *Loi type* est rédigé ainsi :

Le tribunal saisi d'un différend sur une question faisant l'objet d'une convention d'arbitrage renverra les parties à l'arbitrage si l'une d'entre elles le demande au plus tard lorsqu'elle soumet ses premières conclusions quant au fond du différend, à moins qu'il ne constate que ladite convention est caduque, inopérante ou non susceptible d'être exécutée.

L'application territoriale de la *Loi sur les assurances* de l'Ontario est une question distincte de celles examinées dans les affaires portant sur le pouvoir de tribunaux administratifs de statuer sur leur propre compétence. À mon avis, ce point de vue concorde avec l'opinion exprimée par le juge La Forest dans l'arrêt *Morguard*, précité, p. 1099-1100 :

Le système judiciaire canadien est organisé de telle manière que toute crainte de différence de qualité de justice d'une province à l'autre ne saurait être vraiment fondée. Tous les juges de cour supérieure — qui ont également un pouvoir de contrôle sur d'autres tribunaux judiciaires et administratifs provinciaux — sont nommés et rémunérés par les autorités fédérales. De plus, toutes les cours de justice sont sujettes à l'examen en dernier ressort de leurs décisions par la Cour suprême du Canada qui peut décider si les cours d'une province ont à bon droit exercé leur compétence dans une action et dans des circonstances où les cours d'une autre province devraient reconnaître ces jugements.

Cette même idée est énoncée de façon convaincante dans l'arrêt *Conseil canadien des relations du travail c. Paul L'Anglais Inc.*, [1983] 1 R.C.S. 147, p. 162-163.

B. *Jurisdiction Simpliciter*

124

The first issue to be decided is therefore that of jurisdiction *simpliciter*. *Morguard* determined that, given considerations of comity, the exercise of extraterritorial jurisdiction depends on the existence of a real and substantial connection to the forum that assumed jurisdiction and gave judgment. In *Hunt*, *supra*, at pp. 324-28, the Court gave these considerations the force of constitutional principles, acknowledging that their meaning and limits had not been fully defined. In *Spar Aerospace*, *supra*, at para. 52, LeBel J., for a unanimous Court, insisted that a flexible approach is to be adopted when the “real and substantial connection” criterion is applied, finding support in La Forest J.’s discussion in *Morguard*, at p. 1106 (thereby agreeing with Dickson J.’s approach in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, at pp. 408-9) of the requisite “inherently reasonable” character of any finding of jurisdiction. Later, at para. 56 of *Spar Aerospace*, LeBel J. is of the opinion that each ground listed at art. 3148(3) of the *Civil Code of Quebec*, namely fault, injurious act, damage and contract, taken on its own, is an example of a real and substantial connection between a province and an action for the purposes of jurisdiction *simpliciter*. Approving a number of cases where damage suffered in a province was judged sufficient to establish a real and substantial connection (in the majority of cases, enabling the plaintiff’s chosen forum to assume jurisdiction), he concludes that a broad basis for jurisdiction, based on a less stringent real and substantial connection, is all the more favourable where inappropriate exercises of jurisdiction can be moderated by way of the application of the doctrine of *forum non conveniens*: *Spar Aerospace*, at paras. 58-61.

125

Obviously, jurisdiction *simpliciter* and *forum non conveniens* are related and the factors determining

B. *La simple reconnaissance de compétence*

La première question à trancher est donc celle de la simple reconnaissance de compétence. Dans l’arrêt *Morguard*, il a été jugé que, pour des raisons de courtoisie judiciaire, l’exercice d’une compétence extraterritoriale dépend de l’existence d’un lien réel et substantiel avec le tribunal qui s’est déclaré compétent et qui a rendu jugement. Aux pages 324 à 328 de l’arrêt *Hunt*, précité, notre Cour a donné à ces considérations une valeur de principe constitutionnel, tout en reconnaissant qu’elle n’avait pas entièrement fixé leur sens et leurs limites. Exprimant l’opinion unanime de notre Cour dans l’arrêt *Spar Aerospace*, précité, le juge LeBel a souligné, au par. 52, qu’il fallait faire montre de souplesse dans l’application du critère du « lien réel et substantiel ». Le juge LeBel a invoqué à cet égard les propos tenus par le juge La Forest à la p. 1106 de l’arrêt *Morguard* (et souscrit par le fait même à la démarche retenue par le juge Dickson (plus tard Juge en chef) dans l’arrêt *Moran c. Pyle National (Canada) Ltd.*, [1975] 1 R.C.S. 393, p. 408-409), relativement à la condition exigeant que toute décision concluant à la compétence soit « intrinsèquement raisonnable ». Plus loin, au par. 56 de l’arrêt *Spar Aerospace*, le juge LeBel estime que les divers éléments énumérés au par. 3148(3) du *Code civil du Québec* — faute, fait dommageable, préjudice et contrat — sont autant d’exemples de lien réel et substantiel entre une province et une action pour l’application du critère de la simple reconnaissance de compétence. Approuvant un certain nombre de décisions dans lesquelles les tribunaux ont jugé que le préjudice subi dans une province était suffisant pour établir l’existence d’un lien réel et substantiel (ce qui, dans la majorité des cas, a permis au tribunal choisi par le demandeur de se déclarer compétent), le juge LeBel conclut que la reconnaissance d’une large assise juridictionnelle, découlant d’une application moins stricte du critère du lien réel et substantiel, est d’autant plus avantageuse lorsqu’il est possible de réduire les acceptations inappropriées de compétence par l’application de la doctrine du *forum non conveniens* : *Spar Aerospace*, par. 58-61.

Il existe manifestement un lien entre les notions de simple reconnaissance de compétence et de

the latter inquiry will overlap with those applicable in the former. Nevertheless, the jurisdictional issue is a legal rule, not a discretionary one, as pointed out by Sharpe J.A. for a unanimous Court of Appeal for Ontario in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, at para. 43. The first jurisdictional inquiry consists in establishing whether there exists a sufficient connection between the forum and the action, not whether the said connection is stronger than those existing between the action and other forums. The jurisdiction *simpliciter* inquiry is one based on order, fairness and efficiency in the context of the needs of modern federalism.

In *Muscutt*, Sharpe J.A. held at para. 53 that Ontario's Rule 17.02(h) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which permits service outside Ontario, is a procedural device that is constitutionally valid and does not interfere with the ability of the party served to move to set aside the service or stay the proceeding. The Court of Appeal held that personal jurisdiction is not a necessary component to establish jurisdiction *simpliciter*, but that a substantial connection to the subject matter of the litigation will suffice. This, I believe, is consistent with this Court's reasons in *Spar Aerospace*. I note, however, that several trial level decisions, perhaps finding inspiration in the American "minimum contacts" doctrine, have made of contact between the defendant and the forum a *de facto* prerequisite for the assumption of jurisdiction *simpliciter*: *Muscutt*, at paras. 59-62; see for instance: *Long v. Citi Club*, [1995] O.J. No. 1411 (QL) (Gen. Div.), at para. 7, *Brookville Transport Ltd. v. Maine* (1997), 189 N.B.R. (2d) 142 (Q.B.), at para. 23; *Negrych v. Campbell's Cabins (1987) Ltd.*, [1997] 8 W.W.R. 270 (Man. Q.B.), at para. 6. I do not endorse this reasoning. Indeed, it was rejected by more than one court of appeal, including that of Ontario (*Muscutt*, at para. 74; *McNichol Estate v. Woldnik* (2001), 150 O.A.C. 68, at paras. 12-16), of Nova Scotia (*Oakley v. Barry* (1998), 158 D.L.R. (4th) 679, at pp. 691-92 and 698-99; *O'Brien v. Canada (Attorney General)* (2002), 210

forum non conveniens, et les facteurs déterminants dans le deuxième cas recourent ceux applicables dans le premier. Néanmoins, la détermination de la compétence commande l'application d'une règle de droit impérative, et non d'une règle discrétionnaire, comme l'a fait remarquer, au par. 43 de l'arrêt *Muscutt c. Courcelles*, (2002), 60 O.R. (3d) 20, le juge Sharpe, qui exprimait alors la décision unanime de la Cour d'appel de l'Ontario. Le premier volet de cette détermination consiste à se demander s'il existe un lien suffisant entre le tribunal et l'action, et non si ce lien est plus solide que ceux qui existent entre l'action et d'autres forums. L'examen de la simple reconnaissance de compétence repose sur des considérations relatives à l'ordre, à l'équité et l'efficacité, dans le contexte des besoins du fédéralisme moderne.

Au paragraphe 53 de l'arrêt *Muscutt*, le juge Sharpe a conclu que l'al. 17.02h) des *Règles de procédure civile* de l'Ontario, R.R.O. 1990, Règl. 194, lequel autorise la signification à l'extérieur de l'Ontario, est un mécanisme procédural constitutionnellement valide, qui n'empêche pas la partie qui reçoit signification de présenter une motion pour faire annuler la signification ou suspendre l'instance. La Cour d'appel a jugé que l'assujettissement personnel n'est pas un élément requis pour établir la simple reconnaissance de compétence, et qu'un lien substantiel avec l'objet du litige suffit. Ce raisonnement est, à mon avis, compatible avec les motifs exposés par notre Cour dans l'arrêt *Spar Aerospace*. Je tiens toutefois à signaler que plusieurs décisions de première instance, s'inspirant peut-être de la doctrine américaine des [TRADUCTION] « liens minimaux », ont fait du lien entre le défendeur et le tribunal un préalable à la simple reconnaissance de compétence : *Muscutt*, par. 59-62; voir, par exemple : *Long c. Citi Club*, [1995] O.J. No. 1411 (QL) (Div. gén.), par. 7; *Brookville Transport Ltd. c. Maine* (1997), 189 R.N.-B. (2^e) 142 (B.R.), par. 23; *Negrych c. Campbell's Cabins (1987) Ltd.*, [1997] 8 W.W.R. 270 (B.R. Man.), par. 6. Je ne peux souscrire à ce raisonnement. De fait, plusieurs cours d'appel l'ont rejeté, dont celle de l'Ontario (*Muscutt*, par. 74; *McNichol Estate c. Woldnik* (2001), 150 O.A.C. 68, par. 12-16), de la Nouvelle-Écosse (*Oakley c. Barry* (1998), 158 D.L.R. (4th) 679, p. 691-692 et

D.L.R. (4th) 668, at paras. 20-21), and of British Columbia (*Pacific International Securities Inc. v. Drake Capital Securities Inc.* (2000), 194 D.L.R. (4th) 716, at paras. 15-17; *Cook v. Parcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213, at para. 20). In any event, I agree with Sharpe J.A.'s conclusion on the preferability of an approach broader than personal subjection and his approval of G. D. Watson and F. Au's position in "Constitutional Limits on Service *Ex Juris*: Unanswered Questions from *Morguard*" (2000), 23 *Advocates' Q.* 167, as explained at para. 73 of his reasons in *Muscutt*:

On the basis of these objections, Watson and Au conclude that the real and substantial connection test should be interpreted as requiring a connection either between the forum and the defendant or between the forum and the subject matter of the action. In their view, the defendant's connection with the forum should not determine the choice of forum. Rather, the defendant's connection should simply be a relevant factor to be weighed together with other factors.

127

The present appeal does not revolve around the question of attainment by simple admission of service; it is based on the meaning of the PAU with regard to the interconnectedness of the various provincial motor vehicle insurance regimes. This does not diminish the relevance to the determination of this appeal of the previous discussion of the requirement of a personal connection in establishing jurisdiction *simpliciter*, which is not required in the post-*Morguard* case law.

128

The appellant, ICBC, submits that as a matter of statutory interpretation, the Ontario *Insurance Act* does not apply to this case. The arbitration model endorsed by that Act is not engaged, it argues, because the appellant is not an "insurer" within the meaning of the Act as it is not licensed to, and does not in fact, carry on business in Ontario. Nothing in the Ontario *Insurance Act*, the appellant submits, can be construed as extending the Ontario loss-allocation scheme to non-resident insurers who do not insure Ontario residents and whose obligations

698-699; *O'Brien c. Canada (Attorney General)* (2002), 210 D.L.R. (4th) 668, par. 20-21) et de la Colombie-Britannique (*Pacific International Securities Inc. c. Drake Capital Securities Inc.* (2000), 194 D.L.R. (4th) 716, par. 15-17; *Cook c. Parcel, Mauro, Hultin & Spaanstra, P.C.* (1997), 143 D.L.R. (4th) 213, par. 20). Quoi qu'il en soit, à l'instar du juge Sharpe, j'estime qu'il faut préférer une théorie plus large que celle de l'assujettissement personnel et j'approuve la thèse défendue par G. D. Watson et F. Au dans « Constitutional Limits on Service *Ex Juris* : Unanswered Questions from *Morguard* » (2000), 23 *Advocates' Q.* 167, thèse qu'il explique en ces termes au par. 73 de l'arrêt *Muscutt* :

[TRADUCTION] Se fondant sur ces objections, Watson et Au concluent qu'il faut considérer que le critère du lien réel et substantiel requiert l'existence d'un lien entre le tribunal et le défendeur, ou entre le tribunal et l'objet de l'action. À leur avis, le lien qui existe entre le défendeur et le ressort ne devrait pas déterminer le choix du tribunal, il ne constitue qu'un facteur pertinent qui doit être soupesé avec d'autres.

Le présent pourvoi ne porte pas sur une question d'acquiescement à compétence par simple acceptation de la signification, mais plutôt sur la portée du formulaire P&E eu égard à l'interrelation des différents régimes provinciaux d'assurance automobile. Ce fait n'enlève rien à la pertinence, pour trancher le présent pourvoi, de l'analyse faite plus tôt relativement à la condition exigeant l'existence d'un lien personnel pour l'établissement de la simple reconnaissance de compétence, condition que ne requiert pas la jurisprudence postérieure à l'arrêt *Morguard*.

L'appelante, ICBC, soutient que, selon les règles d'interprétation législative, la *Loi sur les assurances* de l'Ontario ne s'applique pas en l'espèce. Le modèle d'arbitrage retenu dans cette loi ne s'applique pas à elle, affirme l'appelante, parce qu'elle n'est pas un « assureur » au sens de la Loi, du fait qu'elle n'est pas autorisée à exercer ses activités en Ontario et qu'elle ne le fait d'ailleurs pas. Elle prétend que la *Loi sur les assurances* de l'Ontario n'a pas pour effet d'étendre l'application du régime provincial de répartition des pertes aux

arise from accidents outside Ontario. According to the appellant, the PAU does not alter the conclusion that Ontario law does not apply to the facts of this case. It submits that the object of the reciprocal scheme to which insurers in North America have subscribed is to protect insureds and those entitled to recover damages from them. The appellant therefore takes the position that the respondent's attempt to impose Ontario's loss allocation regime in a case arising out of an accident in British Columbia has nothing to do with the object of the PAU or of the reciprocal scheme. The appellant submits that the PAU does not include a general or comprehensive submission to the law of Ontario for all purposes and in all circumstances.

In the present case, the underlying tort claim is not a relevant factor in determining whether Ontario has jurisdiction *simpliciter*. What is relevant is the fact that the insurers, by signing the PAU, have recognized the interrelationship of insurance regimes across Canada and accepted that insurers in one province will sometimes be sued in other provinces. In my opinion it is therefore reasonably foreseeable that the appellant will sometimes have to appear in Ontario to defend an action brought in that jurisdiction as a result of an accident having occurred in British Columbia. The appellant is, at least notionally, an insurer in Ontario, or one carrying out business in that province. In fact, the appellant has facilitated service and agreed, in limited circumstances, not to raise certain defences in Ontario courts. I do not find it unfair that insurers involved in the interprovincial scheme underlying this appeal, and having accepted the risk of harm to extraprovincial parties to the agreement, be considered to have attorned to the jurisdiction of Ontario's courts. I think that all of the reasons justifying a widened jurisdiction in *Morguard* apply in this case. Most importantly, the demands of Canadian federalism strongly favour this result. I wish to clarify at this juncture that my conclusion does not interfere with the right of the appellant in this case to argue that Ontario is *forum*

assureurs de l'extérieur de la province qui n'assurent pas les résidents ontariens et dont les obligations résultent d'accidents survenus à l'extérieur de l'Ontario. Selon l'appelante, le formulaire P&E ne change rien à la conclusion que les lois ontariennes ne s'appliquent pas aux faits de l'espèce. Elle fait valoir que le régime de réciprocité auquel les assureurs souscrivent en Amérique du Nord vise la protection des assurés et des personnes ayant le droit d'être indemnisées par ceux-ci. L'appelante estime en conséquence que le désir de l'intimée d'imposer un régime de répartition des pertes dans une affaire résultant d'un accident survenu en Colombie-Britannique n'a rien à voir avec l'objet du formulaire P&E ou du régime de réciprocité. Elle plaide que le formulaire P&E n'emporte pas assujettissement général ou total aux lois de l'Ontario à toutes fins et dans tous les cas.

En l'espèce, l'action principale en responsabilité délictuelle n'est pas un facteur pertinent pour simplement reconnaître compétence à l'Ontario. Sont pertinents, d'une part le fait que, en signant le formulaire P&E, les assureurs ont reconnu la connexité entre les régimes d'assurance au Canada, et d'autre part le fait qu'ils aient accepté que les assureurs d'une province puissent à l'occasion être poursuivis dans une autre. À mon avis, il est donc raisonnablement prévisible que l'appelante sera parfois tenue de comparaître en Ontario afin de se défendre contre une action intentée dans cette province à la suite d'un accident survenu en Colombie-Britannique. L'appelante est, en principe à tout le moins, assureur en Ontario ou un assureur exerçant des activités dans cette province. En fait, l'appelante a facilité la signification et a accepté, dans des cas limités, de ne pas plaider certains moyens de défense devant les tribunaux ontariens. Comme les assureurs qui participent au régime interprovincial à l'origine du présent pourvoi ont accepté le risque que des parties à l'accord venant d'autres provinces subissent un préjudice, il n'est pas injuste de considérer qu'ils ont acquiescé à la compétence des tribunaux ontariens. Je crois que toutes les raisons ayant justifié la reconnaissance d'une compétence élargie dans l'arrêt *Morguard* s'appliquent dans la présente affaire. Qui plus est, les exigences du fédéralisme canadien

non conveniens, or that the law of Ontario should not apply.

130 With respect, I cannot agree with the interpretation of Binnie J. that the phrase “respective Provinces or Territories” in the first paragraph of the PAU operates in a way that excludes the province of British Columbia from its reach. British Columbia is one of the respective provinces participating in the PAU interprovincial system. Given that, as indicated at the very top of the PAU, the appellant’s head office is in the city of North Vancouver in the province of British Columbia, it need not appoint the superintendent of insurance of that province to accept service of notice or process on its behalf. The province of British Columbia was crossed out in the PAU only with regard to the fact that the appellant is bound by the ordinary rules of service to respond to claims against it in British Columbia.

131 The appellant submits that the PAU is designed only to protect the insured and those entitled to recover damages from those insured, and does not constitute a general submission to jurisdiction by it. Submission to jurisdiction with regard to motor vehicle accidents entered into by its insured, the appellant argues, has nothing to do with the indemnification of insurers between themselves. Faced with a PAU whose wording, notably in paragraph A, is general, the appellant refers to s. 18 of the British Columbia *Insurance (Motor Vehicle) Act*, which speaks of its ability to execute such undertakings, in order to limit their scope. The appellant also alleges that the undertaking to appear in an action refers to an action properly instituted, and that its appearance is not to be interpreted as restricting its right to raise issues of jurisdiction. The respondent submits that a real and substantial link between Ontario and the action is established by the fact that it has paid SABs

militent fortement en faveur de ce résultat. J’aimerais toutefois préciser, à ce stade-ci de l’analyse, que ma conclusion ne porte pas atteinte au droit qu’a l’appelante, en l’espèce, de soutenir que l’Ontario est un *forum non conveniens*, ou que les lois ontariennes ne devraient pas s’appliquer.

En toute déférence, je ne peux souscrire à l’interprétation du juge Binnie, selon laquelle les mots [TRADUCTION] « province ou territoire concerné » figurant dans le premier paragraphe du formulaire P&E ont pour effet d’exclure la Colombie-Britannique du champ d’application de ce document. La Colombie-Britannique est l’une des diverses provinces qui participent au régime interprovincial. Compte tenu du fait que, comme il est indiqué au tout début du formulaire P&E, le siège de l’appelante est situé dans la ville de North Vancouver dans la province de Colombie-Britannique, l’appelante n’a pas besoin de désigner le surintendant des assurances de la Colombie-Britannique pour qu’il reçoive signification des avis ou actes de procédure. La seule raison pour laquelle le nom de la Colombie-Britannique a été biffé dans le formulaire P&E est le fait que l’appelante est liée par les règles ordinaires en matière de signification pour ce qui est des actions intentées contre elle en Colombie-Britannique.

L’appelante soutient que le formulaire P&E vise uniquement à protéger les assurés et les personnes ayant droit d’être indemnisées par ceux-ci, et qu’il n’emporte pas acquiescement général à la compétence des tribunaux des autres ressorts signataires. L’appelante prétend que l’acquiescement à compétence auquel a consenti son assuré en matière d’accidents d’automobile n’a aucun rapport avec l’indemnisation entre assureurs. Relativement à l’interprétation du formulaire P&E, document rédigé en termes généraux, particulièrement le paragraphe A, l’appelante se réfère à l’art. 18 de la loi intitulée *Insurance (Motor Vehicle) Act* de la Colombie-Britannique, qui précise sa capacité de prendre de tels engagements, afin de limiter la portée de ceux-ci. En outre, elle prétend que la promesse de comparaître vise les actions intentées de façon régulière, et que sa comparution ne doit pas être considérée comme ayant pour effet

to its insured pursuant to the Ontario *Insurance Act*, and that those payments will be deducted by the appellant from payments it owes to the respondent's insured. The respondent argues that the appellant is in fact carrying out business in Ontario, though it does not sell insurance products there, by the very fact that it has responsibilities with regard to insured persons there as a result of the PAU. It submits that the terms of the PAU are sufficiently broad to establish jurisdiction *simpliciter* because in signing this document the appellant appointed the Superintendent of Insurance of Ontario to accept service of notice or process on its behalf "with respect to an action or proceeding against it or its insured, or its insured and another or others, arising out of a motor-vehicle accident in any of the respective Provinces or Territories" (emphasis added). The respondent further submits that the appellant undertook "[t]o appear in any action or proceeding against it or its insured in any Province or Territory in which such action has been instituted and of which it has knowledge" (emphasis added).

I accept that s. 275 of the Ontario *Insurance Act*, the indemnification provision at issue in this appeal, is not directly related to the protection of the insured and those injured by them, or to facilitating the mobility of persons in Canada. That said, I do not think that it is reasonable, when deciding the issue of jurisdiction *simpliciter*, to enter into a piecemeal interpretation of the regime providing for the integration of insurance protection across Canada and to establish distinctions between benefits payable to the insured, on the one hand, and the indemnification of their insurers, on the other hand. I think it is interesting, when dealing with some claims coming under the PAU and others not, to note the similar holistic approach taken by Goudge J.A. in his analysis of jurisdiction *simpliciter* in *McNichol Estate*, *supra*, at paras. 11-13. There is no valid reason to

de restreindre son droit de soulever des questions de compétence. L'intimée affirme que l'existence d'un lien réel et substantiel entre l'Ontario et l'action est établie du fait qu'elle a versé des indemnités d'accident légales à son assuré conformément à la *Loi sur les assurances* de l'Ontario, et que l'appelante déduira ces sommes de celles qu'elle doit verser à l'assuré de l'intimée. Cette dernière soutient que, en réalité, l'appelante exerce des activités en Ontario, même si elle n'y vend pas de produits d'assurance, justement à cause des obligations qui lui incombent dans cette province, par l'effet du formulaire P&E, à l'égard des personnes assurées. Elle soutient que les termes du formulaire P&E sont suffisamment larges pour conclure à la simple reconnaissance de compétence parce qu'en signant ce document l'appelante a chargé le surintendant des assurances de l'Ontario d'accepter en son nom la signification d'avis ou d'actes de procédure [TRADUCTION] « relativement aux actions ou autres procédures intentées contre elle ou contre son assuré, ou contre son assuré et d'autres, par suite d'un accident d'automobile survenu dans quelque province ou territoire concerné » (je souligne). L'intimée prétend également que l'appelante s'est engagée « [à] comparaître à toute action ou autre procédure qui est intentée contre elle ou contre son assuré dans quelque province ou territoire et dont elle a connaissance » (je souligne).

Je reconnais que l'art. 275 de la *Loi sur les assurances* de l'Ontario, la disposition relative à l'indemnisation en litige dans le présent pourvoi, ne vise pas directement à protéger les assurés et les personnes à qui ceux-ci causent préjudice, ni à faciliter la libre circulation des personnes au Canada. Cela dit, lorsqu'il s'agit de trancher la question de la simple reconnaissance de compétence, je ne crois pas qu'il soit raisonnable de s'engager dans une interprétation élément par élément d'un régime pourvoyant à l'intégration des garanties d'assurance en vigueur dans l'ensemble du Canada, et d'établir des distinctions entre les indemnités payables à l'assuré, d'une part, et l'indemnisation de leurs assureurs, d'autre part. Lorsqu'on examine des réclamations, dont certaines relèvent du formulaire P&E et d'autres non, il est intéressant, selon moi, de

give the PAU a restrictive interpretation at this point in order to overcome the principled approach developed in *Morguard*.

133

In light of the foregoing, wherein I accept that a link with the subject matter of the claim is sufficient to establish the jurisdiction *simpliciter* of a forum given the flexible approach that has been endorsed by this Court, I think that it is fair to say that there are a number of considerations which, taken together with the general language of the PAU, indicate that the appellant is subject to Ontario's jurisdiction. I accept the position of the respondent that the benefits it paid to an Ontario resident which were later deducted by the appellant, the general undertaking to appear by the appellant, and its limited undertaking not to present certain defences in Ontario actions, all militate in favour of a finding that jurisdiction *simpliciter* is made out. I also find the reasoning of Goudge J.A., for a unanimous Court of Appeal for Ontario in *Insurance Corp. of British Columbia v. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705, to be applicable here. In that case, the trial judge had concluded at trial that the entitlement to indemnification found at s. 275(1) of the Ontario *Insurance Act* only applied to insurers responsible under s. 268(2) of the Act for the payment of SABs. The trial judge was of the opinion that s. 268 of the Act could only apply to contracts made in Ontario. The Court of Appeal disagreed and held at p. 5759 "that an extra-provincial insurer that has chosen to participate in the reciprocal scheme is obliged to pay those SABs mandated by s. 268(1) of the *Insurance Act* as if its policy were a valid Ontario motor vehicle liability policy. By filing the PAU, that insurer [in that case, ICBC] has undertaken to comply with the no-fault coverage required by s. 268(1) and (2)." The issue before us is not, at this stage, whether a different result was justified in *Royal Insurance* on the basis of the choice of law; it is that the integration of the provincial regimes is real and substantially made out by the obligation to pay SABs in another province under the PAU. As

souligner la démarche globale similaire qu'a adoptée le juge Goudge de la Cour d'appel de l'Ontario dans son analyse de la simple reconnaissance de compétence, aux par. 11 à 13 de l'arrêt *McNichol Estate*, précité. À ce stade-ci, il n'existe aucune raison valable d'interpréter restrictivement le formulaire P&E afin de surmonter l'approche fondée sur des principes élaborée dans l'arrêt *Morguard*.

À la lumière des paragraphes qui précèdent, dans lesquels j'admets que l'existence d'un lien avec l'objet de l'action suffit pour établir la simple reconnaissance de compétence d'un tribunal vu la démarche souple à laquelle a souscrit notre Cour, je pense qu'on peut légitimement dire qu'il existe un certain nombre de facteurs qui, conjugués aux termes généraux du formulaire P&E, indiquent que l'appelante est assujettie aux lois et tribunaux de l'Ontario. J'accepte la thèse de l'intimée selon laquelle tous les éléments suivants incitent à conclure à la simple reconnaissance de compétence : les indemnités que l'intimé a versées à un résident de l'Ontario et que l'appelante a ensuite déduites, la promesse générale de comparaître faite par l'appelante et son engagement limité de ne pas présenter certains moyens de défense dans les actions intentées en Ontario. En outre, j'estime que s'applique en l'espèce le raisonnement suivi par le juge Goudge, qui exprimait alors l'opinion unanime de la Cour d'appel de l'Ontario dans l'arrêt *Insurance Corp. of British Columbia c. Royal Insurance Co. of Canada*, [1999] I.L.R. ¶I-3705. Dans cette affaire, le juge de première instance avait conclu que le droit à l'indemnisation prévu au par. 275(1) de la *Loi sur les assurances* de l'Ontario ne s'appliquait qu'aux assureurs tenus de verser les indemnités d'accident légales en vertu du par. 268(2) de la Loi. Il était d'avis que l'art. 268 de la Loi ne pouvait s'appliquer qu'aux contrats conclus en Ontario. Ne partageant pas cet avis, la Cour d'appel a exprimé son désaccord et a conclu, à la p. 5759, [TRADUCTION] « qu'un assureur de l'extérieur de la province qui a choisi d'adhérer au régime de réciprocité est tenu de verser les indemnités d'accident légales prévues par le par. 268(1) de la *Loi sur les assurances*, au même titre que si sa police était une police ontarienne de responsabilité automobile valide. En déposant le formulaire P&E, cet assureur [ICBC dans cette affaire] s'est engagé à respecter la

mentioned earlier, the determination of jurisdiction *simpliciter* is a preliminary issue, distinct from the issues of *forum non conveniens* and choice of law. I reject the idea that the latter inquiries into *forum conveniens* and choice of law should have any influence over the determination of jurisdiction *simpliciter*. This is consistent with the approach taken by a unanimous Court of Appeal for Ontario in *Berg (Litigation guardian of) v. Farm Bureau Mutual Insurance Co.* (2000), 50 O.R. (3d) 109, and I think that it is the appropriate one.

Having found that jurisdiction *simpliciter* is established, I must decide whether the question of *forum non conveniens* should be decided by the court or remitted to an arbitrator, as ordered by the Court of Appeal. In my view, the same arguments that justify that a court of justice, not an arbitrator, decide the issue of jurisdiction *simpliciter* in this case apply to that of whether the former or the latter should determine whether there exists a more convenient forum in this case. The *forum non conveniens* inquiry is a preliminary one that must be raised at the earliest opportunity and its determination is necessary before the jurisdiction of an arbitrator can be effective in a case such as this.

C. *Review of the Decision on Forum Conveniens*

The Court of Appeal did not deal with this issue, holding that an arbitrator should first decide whether there was a clearly more appropriate forum for the action. The applications judge had decided to grant a stay on the basis that he was not satisfied that there

garantie d'assurance sans égard à la faute prescrite par les par. 268(1) et (2). » La question que nous devons trancher à ce stade-ci n'est pas de savoir si le choix du droit applicable aurait justifié un résultat différent dans l'arrêt *Royal Insurance*, mais de savoir si l'intégration des régimes provinciaux est réalisée de façon réelle et substantielle par l'obligation, prévue par le formulaire P&E, de verser les indemnités d'accident légales dans une autre province. Comme je l'ai mentionné plus tôt, la simple reconnaissance de compétence est une question préliminaire, distincte des questions touchant le *forum non conveniens* et le choix du droit applicable. Je rejette l'idée que les analyses concernant ces questions devraient influencer d'une manière ou d'une autre sur la décision relative à la simple reconnaissance de compétence. Cette conclusion est conforme à la démarche adoptée par la Cour d'appel de l'Ontario dans l'arrêt unanime *Berg (Litigation guardian of) c. Farm Bureau Mutual Insurance Co.* (2000), 50 O.R. (3d) 109, démarche qui est à mon avis celle qu'il convient d'appliquer.

Ayant conclu à la simple reconnaissance de compétence, je dois maintenant décider si la question du *forum non conveniens* doit être tranchée par un tribunal judiciaire ou être renvoyée à un arbitre conformément à l'ordonnance de la Cour d'appel. À mon sens, les arguments justifiant qu'un tribunal judiciaire, et non un arbitre, statue sur la question de la simple reconnaissance de compétence dans la présente affaire s'appliquent également à la question de savoir si le tribunal ou l'arbitre doit décider s'il existe un autre tribunal plus approprié en l'espèce. La question du *forum non conveniens* est une question préliminaire qui doit être soulevée à la première occasion et tranchée avant que l'arbitre puisse avoir effectivement compétence dans une affaire comme celle dont nous sommes saisis.

C. *Contrôle de la décision relative au forum conveniens*

La Cour d'appel ne s'est pas penchée sur cette question, estimant plutôt qu'un arbitre devait d'abord décider s'il existait un autre tribunal nettement plus approprié pour connaître de l'action. Quant au juge des motions, il avait décidé de

would result a loss of a juridical advantage to the respondent, that s. 275 of the Ontario *Insurance Act* was not meant to deal with issues arising in the context of an interprovincial scheme, and that the underlying dispute between the parties was a civil action in British Columbia concerning an automobile accident that occurred in that province.

136

The appellant submits that British Columbia has clearly been established as the “natural forum” for the determination of the respondent’s indemnification claim because all of the facts giving rise to the claim, and all legal proceedings resulting from those facts, occurred in British Columbia. It adds that British Columbia courts are quite capable of deciding which law applies and of applying the law of another province, should it be necessary to do so. The respondent replies that the applications judge incorrectly applied the onus of proof by not requiring that the appellant show that British Columbia is clearly the more appropriate forum, and by only requiring that the respondent prove that it would suffer the loss of a juridical advantage if the action were stayed. The other factors that should have been considered, the respondent submits, are the fact that its insureds, the Brennans, are residents of Ontario, the fact that the SABs were paid in Ontario under the terms of a contract concluded in that province, that the right of indemnification arises in Ontario under Ontario law, that the key documents and witnesses required to determine the claimed right to indemnification are in Ontario, that the right of indemnification is unconnected to the tort action in British Columbia, that the appellant, in signing the PAU, appointed the Superintendent of Insurance of Ontario as agent of service and undertook to appear in any action or proceeding against it, and that the respondent is not a licensed insurer in British Columbia.

surseoir à l’instance en Ontario pour les motifs suivants : il n’était pas convaincu que cette décision ferait perdre à l’intimée un avantage juridique; l’art. 275 de la *Loi sur les assurances* de l’Ontario n’a pas pour objet de régler des questions se soulevant dans le cadre d’un régime interprovincial; le fond du différend entre les parties est une action civile intentée en Colombie-Britannique par suite d’un accident d’automobile survenu dans cette province.

L’appelante prétend qu’il a clairement été établi que la Colombie-Britannique est le « ressort naturel » pour connaître de la demande d’indemnisation de l’intimée, étant donné que tous les faits à l’origine de la réclamation sont survenus dans cette province et que toutes les procédures judiciaires en découlant y ont été intentées. Elle ajoute que les tribunaux de la Colombie-Britannique sont parfaitement capables de déterminer quel est le droit applicable et, au besoin, d’appliquer celui d’une autre province. L’intimée répond que le juge des motions a mal appliqué le fardeau de la preuve, du fait qu’il n’a pas obligé l’appelante à démontrer que la Colombie-Britannique était clairement le ressort le plus approprié, mais s’est plutôt contenté d’exiger que l’intimée prouve qu’elle perdrait un avantage juridique s’il ordonnait la suspension de l’instance. Selon l’intimée, les autres facteurs dont il aurait fallu tenir compte sont les suivants : Les Brennan, ses assurés, sont des résidents de l’Ontario; les indemnités d’accident légales ont été versées en Ontario en vertu d’un contrat conclu dans cette province; le droit à l’indemnisation prend sa source en Ontario en vertu des lois de cette province; les documents et les témoins importants nécessaires pour décider du droit à l’indemnisation revendiqué se trouvent en Ontario; le droit à l’indemnisation n’a aucun lien avec l’action en responsabilité délictuelle intentée en Colombie-Britannique; en signant le formulaire P&E, l’appelante a confié au surintendant des assurances de l’Ontario la responsabilité de recevoir signification des actes de procédure et autres documents et elle s’est engagée à comparaître à toute action ou autre procédure intentée contre elle; l’intimée n’est pas un assureur autorisé à exercer ses activités en Colombie-Britannique.

I agree with the respondent that the proper test to a *forum non conveniens* inquiry is to ask whether the existence of a more appropriate forum has been clearly established to displace the forum selected by the plaintiff: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at pp. 920-21; affirmed by the Court in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90, at para. 89. If neither forum is clearly more appropriate, the domestic forum wins by default: *Amchem*, at p. 931. The application of the balance of convenience by the applications judge constituted an error of law since "a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides": *Amchem*, at p. 920.

With regard to the loss of a juridical advantage, I am of the view that, in staying the proceedings in part because he was not satisfied that there would result a loss of a juridical advantage to the respondent, the applications judge established an unduly high threshold. As the Court explained in *Amchem*, at p. 920:

The weight to be given to juridical advantage is very much a function of the parties' connexion to the particular jurisdiction in question . . . [A] party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available. [Emphasis added.]

Put another way, all that a party has to show is "a fair possibility of gaining an advantage by prosecuting the action in the desired jurisdiction": *Avenue Properties Ltd. v. First City Development Corp.* (1986), 32 D.L.R. (4th) 40 (B.C.C.A.), at pp. 46-47. Given the respondent's real and substantial connection to Ontario, I am of the view that it has a legitimate claim to, and it is reasonable to expect that it will, take advantage of the interinsurer indemnification scheme which Ontario provides. There is a fair possibility that the respondent will gain an advantage by prosecuting the action in Ontario. Other

À l'instar de l'intimée, j'estime que le critère applicable pour décider si le tribunal choisi par le demandeur à l'action est un *forum non conveniens* consiste à se demander si on a clairement établi l'existence d'un tribunal plus approprié : *Amchem Products Inc. c. Colombie-Britannique (Workers' Compensation Board)*, [1993] 1 R.C.S. 897, p. 920-921; opinion confirmée par notre Cour dans l'arrêt *Holt Cargo Systems Inc. c. ABC Containerline N.V. (Syndics de)*, [2001] 3 R.C.S. 907, 2001 CSC 90, par. 89. Lorsqu'aucun des tribunaux n'est clairement le plus approprié, le tribunal interne l'emporte *ipso facto* : *Amchem*, p. 931. Le juge des motions a commis une erreur de droit en appliquant le critère de la prépondérance des inconvénients, puisque « la partie dont la demande a un lien réel et important avec un ressort peut légitimement faire valoir les avantages qu'elle peut en retirer » : *Amchem*, p. 920.

Pour ce qui est de la perte d'un avantage juridique, j'estime que le juge des motions a appliqué un critère excessivement exigeant lorsqu'il a sursis à l'instance, en partie parce qu'il n'était pas convaincu que l'intimée perdrait un avantage juridique. Comme l'a expliqué notre Cour dans l'arrêt *Amchem*, p. 920 :

Le poids à accorder à un avantage juridique dépend grandement du lien des parties avec le ressort en question. [. . .] [L]a partie dont la demande a un lien réel et important avec un ressort peut légitimement faire valoir les avantages qu'elle peut en retirer. La légitimité de sa demande repose sur l'attente raisonnable qu'en cas de litige découlant de l'opération en cause, elle pourra se prévaloir de ces avantages. [Je souligne.]

En d'autres termes, la partie n'a qu'à démontrer qu'elle possède de [TRADUCTION] « bonnes chances d'obtenir un avantage en poursuivant l'action dans le ressort désiré » : *Avenue Properties Ltd. c. First City Development Corp.* (1986), 32 D.L.R. (4th) 40 (C.A.C.-B.), p. 46-47. En raison du lien réel et substantiel que l'intimée possède avec l'Ontario, je suis d'avis qu'elle peut légitimement faire valoir les avantages qu'elle peut tirer du régime d'indemnisation réciproque de l'Ontario, et qu'il est raisonnable de s'attendre à ce qu'elle les fasse valoir. L'intimée a de bonnes chances d'obtenir un avantage en

factors also matter: consideration must be given to matters of public policy, where relevant, the places where the parties carry on their business, the convenience and expense of litigating in one place or the other, the discouragement of forum shopping (*Holt Cargo Systems*, at para. 91), as well as other relevant factors that may appear.

139

In my view, ICBC did not provide any evidence that British Columbia was clearly the more appropriate forum. It is totally irrelevant that the underlying action was launched in British Columbia, given the issues in the case at bar. This action is altogether independent of the one before the British Columbia court; it was started in Ontario on the basis of payments made under an insurance policy contracted in Ontario. Many factors previously mentioned link the parties to Ontario. Furthermore, the possibility of interinsurer indemnification is the product of an Ontario statutory regime. I would think that it is obvious that there is a juridical disadvantage to the respondent in having this action proceed in British Columbia. Obviously, both parties are concerned that the choice of the forum will have an impact on the choice of law. The question of the choice of law, in my view, is a separate issue and should be dealt with, in the first instance, by an arbitrator appointed pursuant to s. 275(4) of the Ontario *Insurance Act*, his or her decision being subject to appeal in the normal course of things.

D. *The Constitutional Issue*

140

I do not propose to deal at any length with the question of the permissible reach of Ontario's *Insurance Act*. In *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, the Court opined that valid provincial legislation can affect extra-provincial rights in an "incidental" manner. I am of the view that valid provincial laws can affect "matters" which are "sufficiently connected" to the province. See J.-G. Castel and J. Walker, *Canadian Conflict of Laws* (5th ed. (loose-leaf)), at p. 2.1. In my view, the respondent has

intentant l'action en Ontario. D'autres facteurs sont également importants : il faut tenir compte des considérations de politique générale pertinentes, de l'endroit où les parties exploitent leur entreprise, des aspects pratiques et financiers de la tenue du litige dans un endroit ou dans l'autre, de la nécessité de dissuader les parties de s'adonner à la recherche d'un tribunal favorable (*Holt Cargo Systems*, par. 91) et de tous les autres facteurs pertinents qui peuvent se présenter.

À mon avis, ICBC n'a présenté aucune preuve établissant que la Colombie-Britannique était clairement le forum le plus approprié. Le fait que l'action principale ait été intentée dans cette province n'a aucune pertinence, vu les questions qui se soulèvent en l'espèce. La présente action est tout à fait indépendante de celle dont est saisi le tribunal de la Colombie-Britannique; elle a été introduite en Ontario, sur la base des paiements effectués en vertu d'une police d'assurance souscrite en Ontario. Bon nombre des facteurs mentionnés précédemment rattachent les parties à l'Ontario. De plus, la possibilité qu'il y ait indemnisation entre assureurs découle d'un régime législatif ontarien. Il est selon moi évident que l'intimée subira un désavantage juridique si l'action est entendue en Colombie-Britannique. Il est clair que les deux parties craignent que le choix du tribunal ait une incidence sur le choix du droit applicable. Cette question est à mon avis une question distincte, qui doit être tranchée en première instance par un arbitre nommé conformément au par. 275(4) de la *Loi sur les assurances* de l'Ontario, décision normalement susceptible d'appel.

D. *La question constitutionnelle*

Je n'entends pas examiner en profondeur la question de la portée que l'on peut donner à la *Loi sur les assurances* de l'Ontario. Dans l'arrêt *Renvoi relatif à la Upper Churchill Water Rights Reversion Act*, [1984] 1 R.C.S. 297, la Cour a émis l'opinion qu'une loi provinciale valide peut porter atteinte de façon « accessoire » à des droits extraprovinciaux. Je suis d'avis qu'une loi provinciale valide peut produire des effets sur des « matières » qui présentent un « lien suffisant » avec la province. Voir J.-G. Castel et J. Walker, *Canadian Conflict of Laws* (5^e

shown that the subject matter which the *Insurance Act* covers, interinsurer indemnification, falls within provincial jurisdiction and is sufficiently connected to Ontario so as to render the statute applicable to the ICBC.

VI. Disposition

I would dismiss the appeal, with costs, and affirm the decision of the Court of Appeal to refer the matter back to the applications judge to appoint an arbitrator under s. 10 of the *Arbitration Act, 1991*, to deal with the question of the choice of law and consider the substantive issues raised by the parties. The constitutional question should be answered in the negative.

APPENDIX

Insurance Act, R.S.O. 1990, c. I.8 (prior to amendment by S.O. 1996, c. 21)

Statutory accident benefits

268.—(1) Every contract evidenced by a motor vehicle liability policy, including every such contract in force when the *Statutory Accident Benefits Schedule* is made or amended, shall be deemed to provide for the statutory accident benefits set out in the *Schedule* and any amendments to the *Schedule*, subject to the terms, conditions, provisions, exclusions and limits set out in that *Schedule*.

. . .

Indemnification in certain cases

275.—(1) The insurer responsible under subsection 268(2) for the payment of statutory accident benefits to such classes of persons as may be named in the regulations is entitled, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed, to indemnification in relation to such benefits paid by it from the insurers of such class or classes of automobiles as may be named in the regulations involved in the incident from which the responsibility to pay the statutory accident benefits arose.

Idem

(2) Indemnification under subsection (1) shall be made according to the respective degree of fault of each

éd. 2002 (feuilles mobiles)), p. 2.1. Selon moi, l'intimée a établi que la question traitée dans la *Loi sur les assurances* de l'Ontario, soit l'indemnisation entre assureurs, est un sujet de compétence provinciale qui présente un lien suffisant avec l'Ontario pour que la loi en question s'applique à ICBC.

VI. Dispositif

Je rejetterais le pourvoi, avec dépens, et je confirmerais la décision de la Cour d'appel renvoyant l'affaire au juge des motions pour qu'il nomme, en vertu de l'art. 10 de la *Loi de 1991 sur l'arbitrage*, un arbitre chargé de trancher la question du choix du droit applicable et d'examiner les questions de fond soulevées par les parties. La question constitutionnelle devrait recevoir une réponse négative.

ANNEXE

Loi sur les assurances, L.R.O. 1990, ch. I.8 (avant sa modification par L.O. 1996, ch. 21)

Indemnités d'accident légales

268 (1) Chaque contrat constaté par une police de responsabilité automobile, y compris chaque contrat en vigueur au moment où est prise ou modifiée l'*Annexe sur les indemnités d'accident légales*, est réputé prévoir les indemnités d'accident légales énoncées à l'*Annexe* et dans les modifications apportées à celle-ci, sous réserve des conditions, dispositions, exclusions et restrictions énoncées à cette *Annexe*.

. . .

Indemnisation dans certains cas

275 (1) L'assureur tenu de payer, aux termes du paragraphe 268(2), des indemnités d'accident légales à des catégories de personnes qui peuvent être nommées dans les règlements a droit, sous réserve des conditions, dispositions, exclusions et restrictions qui peuvent être prescrites, à une indemnisation, en ce qui concerne les indemnités qu'il a payées, de la part des assureurs d'une catégorie ou des catégories d'automobiles qui peuvent être nommées dans les règlements et qui étaient impliquées dans l'incident dont découle l'obligation de payer des indemnités d'accident légales.

Idem

(2) L'indemnisation visée au paragraphe (1) est effectuée en fonction du degré de responsabilité de l'assuré

insurer's insured as determined under the fault determination rules.

Arbitration

(4) If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitrations Act*.

Arbitration Act, 1991, S.O. 1991, c. 17

Stay

7.—(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.

8. . . .

Questions of law

(2) The arbitral tribunal may determine any question of law that arises during the arbitration; the court may do so on the application of the arbitral tribunal, or on a party's application if the other parties or the arbitral tribunal consent.

Appeal

(3) The court's determination of a question of law may be appealed to the Court of Appeal, with leave.

Appointment of arbitral tribunal

10.—(1) The court may appoint the arbitral tribunal, on a party's application, if,

de chaque assureur tel qu'il est établi selon les règles de détermination de la responsabilité.

Arbitrage

(4) Si les assureurs n'arrivent pas à s'entendre à l'égard de l'indemnisation visée au présent article, le différend est réglé par voie d'arbitrage aux termes de la *Loi sur l'arbitrage*.

Loi de 1991 sur l'arbitrage, L.O. 1991, ch. 17

Sursis

7 (1) Si une partie à une convention d'arbitrage introduit une instance à l'égard d'une question que la convention oblige à soumettre à l'arbitrage, le tribunal judiciaire devant lequel l'instance est introduite doit, sur la motion d'une autre partie à la convention d'arbitrage, surseoir à l'instance.

Exceptions

(2) Cependant, le tribunal judiciaire peut refuser de surseoir à l'instance dans l'un ou l'autre des cas suivants :

3. L'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario.

8 . . .

Questions de droit

(2) Le tribunal arbitral peut statuer sur toute question de droit qui est soulevée au cours de l'arbitrage. Le tribunal judiciaire peut également le faire à la requête du tribunal arbitral, ou à la requête d'une partie, si les autres parties ou le tribunal arbitral y consentent.

Appel

(3) La décision du tribunal judiciaire sur une question de droit peut faire l'objet d'un appel devant la Cour d'appel, sur autorisation de celle-ci.

Désignation du tribunal arbitral

10 (1) Le tribunal judiciaire peut désigner le tribunal arbitral, à la requête d'une partie, dans les cas suivants :

- (b) a person with power to appoint the arbitral tribunal has not done so after a party has given the person seven days notice to do so.

No appeal

(2) There is no appeal from the court's appointment of the arbitral tribunal.

. . .

Arbitral tribunal may rule on own jurisdiction

17.—(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

. . .

Declaration of invalidity of arbitration

48.—(1) At any stage during or after an arbitration, on the application of a party who has not participated in the arbitration, the court may grant a declaration that the arbitration is invalid because,

. . .

- (c) the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law. . . .

Appeal allowed with costs, MAJOR, BASTARACHE and DESCHAMPS JJ. dissenting.

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the respondent: Fogler, Rubinoff, Toronto; Samis & Company, Toronto.

- b) une personne investie du pouvoir de désigner le tribunal arbitral n'a pas procédé à sa désignation après la remise par une partie d'un préavis de sept jours à cette fin.

Désignation sans appel

(2) La désignation du tribunal arbitral par le tribunal judiciaire n'est pas susceptible d'appel.

. . .

Possibilité pour le tribunal arbitral de statuer sur sa propre compétence

17 (1) Le tribunal arbitral peut statuer sur sa propre compétence en matière de conduite de l'arbitrage et peut, à cet égard, statuer sur les objections relatives à l'existence ou à la validité de la convention d'arbitrage.

. . .

Déclaration de nullité de l'arbitrage

48 (1) À quelque étape que ce soit durant ou après un arbitrage, à la requête d'une partie qui n'a pas participé à l'arbitrage, le tribunal judiciaire peut, par jugement déclaratoire, déclarer nul l'arbitrage pour l'un des motifs suivants :

. . .

- c) l'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario. . .

Pourvoi accueilli avec dépens, les juges MAJOR, BASTARACHE et DESCHAMPS sont dissidents.

Procureurs de l'appelante : Fasken Martineau DuMoulin, Vancouver.

Procureurs de l'intimée : Fogler, Rubinoff, Toronto; Samis & Company, Toronto.

TAB 18

CSA Consultation Paper 25-403*Activist Short Selling***December 3, 2020****Introduction**

The purpose of this consultation paper (the **Consultation Paper**) is to facilitate discussion of concerns relating to activist short selling and its potential impact on Canadian capital markets.

Since 2019, a committee (**we** or the **Committee**) comprised of staff from the Canadian Securities Administrators (**CSA**) has undertaken research and analysis on activist short selling. The CSA's consideration of this activity arose in the wake of an increased number of campaigns targeting Canadian issuers (**Campaigns**) and concerns raised about the potential impact of activist short selling on our markets.¹ We have also heard concerns from stakeholders about potential regulatory intervention inhibiting beneficial short selling activity and detracting from the price discovery process.²

To further inform our analysis of the issues, and to ensure that the CSA has all relevant information before determining whether regulatory intervention is required, the Committee is consulting with the public on issues identified through our research. While this Consultation Paper discusses our understanding of the concerns raised and summarizes the research we have undertaken, we are focussed on soliciting feedback, supported by evidence whenever possible, from stakeholders on specific questions, which are set out in this Consultation Paper.

This Consultation Paper is organized into four parts; Part I provides an introduction and background to the Committee's consideration of activist short selling with the three remaining Parts dedicated to the specific areas of consultation, namely:

- (II) The nature and extent of activist short selling activity in Canada;
- (III) The Canadian and international regulatory framework; and
- (IV) Issues related to enforcement and other potential remedial actions.

Each Part summarizes the Committee's research, our understanding of the issues and concerns raised and sets out questions for consultation.

¹ See e.g., Barbara Shecter, "Activist short-sellers are increasingly targeting Canadian companies – is Canada ready?", *Financial Post* (6 October 2017) [Shecter]; Orestes Pasparakis, Walied Soliman & Joe Bricker, "It's time for legislators to crack down on abusive short-selling", *Globe and Mail Op-ed* (18 January 2019) [Pasparakis, Soliman & Bricker]; and Pete Evans, "Canada needs to toughen short selling rules to weed out abuse, market watchers say", *CBC News* (11 February 2019) [Evans]; Yves Allaire "Short-seller heists: Why do institutional investors support activist hedge funds only out for a quick profit?", *Financial Post Op-ed* (13 December 13 2019)

² See e.g., Larry MacDonald, "Regulations to rein in short-sellers must not undercut activists' positive effects", *The Globe and Mail* (30 January 2020)

I. BACKGROUND

We use the term “activist short selling” to refer to instances where an individual or entity takes a short position in a security and then makes a public statement, issues a report, or otherwise publicly shares information or analysis that is likely to have a negative effect on the price of the security. If the value of the security declines, the short seller realizes a profit.³ Activist short sellers are a subset of “directional” short sellers.⁴ The key difference between activist and other directional short sellers is that activists will publicly disclose concerns they have identified with an issuer. **Material and accurate information about issuers, whether it is positive or negative, assists in ensuring market prices reflect the fundamental value of the issuer’s securities.** However, the utility or harm of activist short selling to the market depends on the materiality and accuracy of the information relied upon and whether there is a manipulative intent to spread falsehood or to distort prices.

Activist short selling is not new. However, these types of campaigns have received considerably more attention in recent years. This may be due, in part, to the rise in the use of social media and its impact on markets.⁵ Indeed, through social media platforms, prominent activists with a large following can promote and disseminate their short theses about target companies to a broader audience and at a much faster pace.⁶

While traditional long shareholder activism is a well-accepted practice in our markets and viewed by most as an effort to improve shareholder value in public companies, activism by short sellers is often viewed differently. **Activist short sellers state that they create real value for public markets by contributing to market efficiency and price discovery. Some take it even further describing their work as a “first line of defence against fraud and subsequent losses.”⁷** The approach of activist short sellers is not without controversy. If an activist short seller’s objective is met, it will mean they have convinced the market of their thesis and caused a decline in a target issuer’s share price, leading to a loss of value for its shareholders.⁸

³ For further details on the mechanics of short selling, see Part I, Section B below. See also e.g., Wuyang Zhao, “Activist Short-Selling and Corporate Opacity” (January 28, 2020), available at SSRN [Zhao]; and Alexander Ljungqvist & Wenlan Qian, “How Constraining Are Limits to Arbitrage?” (March 5, 2016), Institute of Global Finance Working Paper No. 7, available at SSRN [Ljungqvist & Qian]. Some academics also refer to this type of activity as “negative activism”, see Joshua Mitts, “A Legal Perspective on Technology and the Capital Markets: Social Media, Short Activism and the Algorithmic Revolution” (October 28, 2019), Columbia Law and Economics Working Paper No. 615, available at SSRN.

⁴ Directional short sellers anticipate a decline in the market price of a security sold, in contrast to other short sellers who hedge a long position or take advantage of an arbitrage opportunity and who will not benefit from subsequent downward or upward price movements.

⁵ See Adam Kornblum “11 Tweets that Turned the Stock Market Upside Down” *Ogilvy Insights* (13 August 2018).

⁶ Michael P. Regan, “The Tiny Activist Fund That Reaped 24% Return by Unearthing ‘Cockroaches’”, *Bloomberg Markets* (20 May 2019).

⁷ Letter from Fahmi Quadir, Chief Investment Officer, Safkhet Capital Management LLC to Dr. Jean-Pierre Bussalb, Head of Short Selling Section, Bundesanstalt für Finanzdienstleistungsaufsicht dated March 15, 2019. [Safkhet Open Letter]

⁸ As noted by Partoy et al., “unlike positive activism, which often carries a powerful and positive normative presumption, negative activism faces an uphill normative battle, the presumption being that it destroys shareholder value.” Barbara A Bliss, Peter Molk & Frank Partnoy, “Negative Activism” (February 25, 2019) 97 *Washington University Law Review*, Forthcoming. University of Florida Levin College of Law Research Paper No. 19-19 at 11. Available at SSRN. [Bliss, Molk & Partnoy]

A. Concerns Raised

In the last few years, certain Canadian market stakeholders, primarily in the issuer community, have raised concerns about activist short selling and its impact on our markets.⁹ These concerns appear to be based on perceptions that:

- There is an increasing number of activist short selling Campaigns in Canada¹⁰;
- The Canadian regulatory framework addressing short selling is less strict in comparison to other jurisdictions¹¹; and
- There is inadequate deterrence to problematic conduct given the limited number of enforcement proceedings involving problematic activist short selling as well as a lack of meaningful remedial actions for misconduct.¹²

In contrast, activist short sellers have said they target Canadian firms because Canada is “fertile ground for corporate malfeasance”¹³ and that their research and analysis serve an important function in the price discovery process by bringing to light new information.¹⁴ Shorts sellers and others have expressed concerns that regulatory intervention that restrict activist short selling could inhibit beneficial short selling activity.¹⁵

As the CSA considered these issues, additional information was necessary to properly analyze the concerns raised. For example, with the exception of activist short sellers that have become well-known in the media or have publicly issued full reports and analysis, there is very limited information and data about other less prominent activist short selling activity (e.g., an anonymous negative commentary or analysis about an issuer posted on social media platforms). Even among more prominent activists, there is little information on the impact such campaigns have on affected issuers and on markets more generally.

As regulators considering the overall impact of activist short selling on our markets, it is important to consult and understand the concerns that have been raised from all stakeholders and understand the evidentiary basis for these concerns.

⁹ As discussed in Part III.D, concerns about short selling and activist short selling have also seen a resurgence in other jurisdictions.

¹⁰ See e.g., Shecter, *supra* note 1; Pasparkis, Soliman & Bricker, *supra* note 1; Evans *supra* note 1.

¹¹ See e.g., Justice Perell’s statement in *Harrington Global Opportunities Fund S.A.R.L. v Investment Industry Regulatory Organization of Canada*, 2018 ONSC 7739 at para. 11: “There is a perception that the regulation of shorting [*sic*] selling is permissive and lax in Canada compared to other capital markets.” [Harrington]

¹² Paul Davis et al, “An Analysis of the Short Selling Landscape in Canada: A New Path Forward is Needed to Improve Market Efficiency and Reduce Systemic Risk” (2019) *McMillan LLP*. [Davis et al.]

¹³ See e.g., Shecter, *supra* note 1.

¹⁴ See e.g., Ben Axler “Counterpoint: Short sellers like us create real value for public markets by telling Canadian investors the truth”, *Financial Post* (17 December 2019).

¹⁵ See Saffkhet Open Letter, *supra* note 7, criticizing the short sale ban on Wirecard: “Short selling, writ large, affords positive externalities on the broader market, and more specifically to the investors which regulators have a duty to protect...the data does not support the existence of any material level of short seller manipulation.”

B. Short Selling

Short selling, as a trading activity, is subject to a well-developed risk based regulatory regime and is overseen mainly by the Investment Industry Regulatory Organization of Canada (IIROC), as will be further discussed below in Part III. IIROC's Universal Market Integrity Rules (UMIR) define a short sale as a sale of a security, other than a derivative instrument, which the seller does not own either directly or through an agent or trustee.¹⁶ It involves selling the borrowed securities at the current market price with the expectation of being able to cover the short position by purchasing later at a lower price to replace the borrowed securities.

Short selling is a legitimate trading practice which contributes to market liquidity and price efficiency.¹⁷ It also contributes to the price discovery process by providing an opportunity for negative views about the issuer to be reflected in the price of a security thereby limiting overvaluation and biased price increases.¹⁸ Short selling can also be an important part of an investor's hedging and investment risk management strategy.¹⁹ For example, the proceeds from a short sale may be applied to a long position in a different security. Even so, there is also risk inherent in short sales because unless the sale is otherwise "hedged", a short seller can lose a potentially unlimited amount if the price of the security rises unexpectedly.

A short seller can take a short position in a stock either directly (by borrowing shares to sell short)²⁰ or synthetically (via options or stock futures). There are, however, obstacles to short selling. For example, it can be difficult or expensive to borrow shares to sell short if the securities are thinly traded, in large demand by other short sellers, or not readily made available for loan.²¹ Further, many Canadian listed issuers trade infrequently²² and the available inventory of equities in the Canadian securities lending market, where short sale shares are typically borrowed, tends to be more heavily concentrated in securities of larger, widely held, heavily traded issuers.²³ Similarly,

¹⁶ Universal Market Integrity Rule (UMIR), Part 1 - *Definitions and Interpretation*, Rule 1.1.

¹⁷ Carole Comerton-Forde, Charles M Jones & Talis J Putnins, "Shorting at Close Range: A Tale of Two Types" (March 18, 2015). *Journal of Financial Economics (JFE)*, Forthcoming; AFA 2012 Chicago Meetings Paper; Columbia Business School Research Paper No. 12/22, available at SSRN.

¹⁸ Ekkehart Boehmer and J Julie Wu, "Short Selling and the Price Discovery Process" (July 16, 2012). *Review of Financial Studies*, Forthcoming, available at SSRN.

¹⁹ See: Canadian Securities Administrators/Investment Industry Regulatory Organization of Canada, CSA/IIROC Joint Notice 23-312 *Request for Comment – Transparency of Short Selling and Failed Trades*, (2 March 2012). [Joint Notice 23-312].

²⁰ Short sales made without prior arrangements to borrow or reasonable expectation to borrow the security first are considered "naked short sales" and not permitted under securities legislation and UMIR except for short sales by market makers that provide liquidity in the stock (See *Rules Notice – Notice of Approval – Provisions Respecting Regulation of Short Sales and Failed Trades*, IIROC Notice 12-0078 (2 March 2012) [IIROC Notice 12-0078]). Naked short sales can lead to failed trades when the seller is not able to deliver the shares within the two-day settlement period. Discussed further in section III.B.

²¹ See Owen A. Lamont, "Go Down Fighting: Short Sellers vs. Firms" (July 24, 2009). Yale ICF Working Paper No. 04-20, available at SSRN [Lamont].

²² For example, in the years 2017-2019, between 50% to 57% of listed issuers in Canada's two largest marketplaces (based on number of issuers) had fewer than 2,500 trades per year or an average of less than 10 trades per day. Also, more than two-thirds of listed issuers had an annual traded volume of less than 25 million shares or an average daily traded volume of under 100,000 shares. (Based on aggregated annual trade counts and volume traded of TSX and TSXV issuers obtained from TMX listings data.)

²³ Short sellers represent only one of many borrowers in the securities lending market. Since securities lending is a scale business, the lenders are typically large buy-side firms (pension funds, insurance firms, mutual fund/ETF providers etc.) that offer for loan their holdings of securities of mostly large and frequently traded issuers. Additionally, IIROC's fully-paid securities lending (FPL) program will only include certain equity securities that meet at least one of three minimum requirements: volume-weighted

it can also be difficult to take a synthetic short position as the listed derivatives market for derivatives with an underlying equity is relatively small in Canada, representing only a small proportion of listed equity securities.²⁴

C. Activist Short Selling

In most CSA jurisdictions, activist short sellers are not currently subject to specific regulatory requirements,²⁵ nor are they defined or easily identifiable. However, as with other market activity conducted by non-regulated or unregistered entities or individuals, short selling activism is subject to the existing prohibitions under securities law, for instance prohibitions against market manipulation, making misleading statements or fraud.²⁶

Activist short selling campaigns can be understood as occurring on a spectrum and their utility to the market ultimately depends on whether the information being disseminated is material and neither false nor misleading.²⁷ At one end of the spectrum, there are beneficial campaigns that can contribute to price discovery by producing research and analysis about issuers based on facts. At the other end of the spectrum, there are campaigns that may involve either intentionally producing false information about the issuer or making misleading or untrue statements for which there is no factual foundation. These are often referred to as “short and distort” campaigns.²⁸

The types of conduct that give rise to concerns in the context of activist short selling campaigns include:

- disseminating unbalanced information that does not provide a complete picture, does not include other material contrary information or is inconsistent with information disclosed in a broader report;

average price (\$2.00), average trading volume (100,000 share) or average free float market capitalization (\$2 million) over a six-month period. For more information on securities lending, see Bank of Canada, Staff Discussion Paper 2019-5, *Canadian Securities Lending Market Ecology* (2019). For more information on IIROC’s FPL program see IIROC Notice 19-0109 *Fully-paid Securities Lending* (June 17, 2019).

²⁴ For example, as of March 11, 2020, Canada’s primary options exchange, the Montreal Exchange, listed fewer than 300 companies (under 10% of all TSX and TSXV issuers) on their equity options list and only 223 of those had available options contracts on the market.

²⁵ For example, activist short sellers would not be required to obtain registration under securities law requirements unless they otherwise meet a registration requirement, such as fund manager. See also in British Columbia where recent amendments to the *Securities Act* introduced rule making authority over those engaged in “promotional activities.” “Promotional activities” is defined to include any activity / communication that encourages a person to buy, not buy, sell or hold a security or derivative. Note there is rulemaking authority to prescribe that certain activities are not promotional activities. See *Securities Act* (British Columbia), RSBC 1996, c 418, s. 1 and 183(12.2).

²⁶ See e.g., *Securities Act* (Ontario), RSO 1990, c S.5, ss 126.1 and 126.2; *Securities Act* (Québec), V-1.1, ss 199.1 and 196; *Securities Act* (Alberta), RSA 2000, c S-4, ss 93 and 221.1; *Securities Act* (British Columbia), RSBC 1996, c 418, ss 57 and 168.1; *Securities Act* (Manitoba), CCSM, c S50, ss 76 and 136(1); and *The Securities Act* (Saskatchewan), 1988-98 c S-42.2, ss 55.1, 55.11, 55.13(1).

²⁷ Bliss, Molk & Partnov describes this as “informational negative activism” – behaviour that seeks to uncover and then communicate the truth about companies whose shares the activists believe are overvalued. It can be focussed on past disclosures by companies which the activist argues contain misrepresentations or omissions or on future expectations about a company’s prospects. See: Bliss, Molk & Partnov, *supra* note 8 at 12.

²⁸ Although out-of-scope, we also recognize that within the context of social media, the converse is also true – the potential for investors or related parties to spread false or misleading positive information about the issuer in order to profit from a rise in the issuer’s share price (otherwise known as a “pump and dump”).

- disseminating exaggerated reports or commentary;
- making conclusions without an evidentiary basis; or
- making potentially misleading statements through links to other documents.

Exacerbating these concerns is the speed at which information spreads through social media and the constraints on the target of a campaign to respond or disprove allegations before the price of their stock is impacted. However, issues arising from the use of social media or similar online platforms to spread information to the market is not limited to activist short selling. The CSA has acknowledged that social media can present challenges when used for sharing information with the market.²⁹ While we acknowledge that the new market reality is that any individual (e.g., influencers, customers, clients, vendors) can easily share unverified information on social media about an issuer that could potentially impact its stock price,³⁰ the integrity of the capital markets is undermined if those participating in our markets engage in activity that may mislead investors or otherwise artificially distorts an issuer's share price.

In order to be successful, an activist short seller must, at the very least, have some credibility and their thesis should raise sufficient doubt about an issuer that it convinces existing shareholders to sell their shares, and potentially other investors to short the stock or not buy it. Unlike long-only investors, activist short sellers generally incur direct costs to maintain their positions. Once a campaign is launched, activist short sellers are also exposed to the additional risk that the target's share price does not decline because of responses from issuers, opposing views from long traders, large institutional shareholders and analysts. If the share price rises significantly this can make the cost to close out the short position very expensive.³¹

As discussed in further detail in Part II, our research indicates that the prominent activist short sellers behind the Campaigns are relatively well-established (e.g., Close to 80% of the 48 activist short sellers identified have been active for over 5 years) and predominantly based in the U.S. (approximately 60%, compared to 13% that are Canadian-based).³² Anonymous or pseudonymous short sellers, or those with only a presence on SeekingAlpha.com (SA),³³ account for less than 20% of the 48 activist short sellers that have targeted Canadian issuers since 2010.³⁴

²⁹ See CSA Staff Notice 51-348 *Staff's Review of Social Media Used by Reporting Issuers* and CSA Staff Notice 51-356 *Problematic Promotional Activities by Issuers*.

³⁰ Social media's implications on financial markets extends beyond activist short selling and is therefore outside the scope of this consultation paper. For more information see Lin, Tom C. W., *The New Market Manipulation* (July 3, 2017). *Emory Law Journal*, Vol. 66, p. 1253, 2017; Temple University Legal Studies Research Paper No. 2017-20, available at SSRN.

³¹ See: Ljungqvist & Qian, *supra* note 3. In that paper, the authors conclude that the main barrier to launching public short campaigns is the cost to produce credible and new information that will convince long investors to sell, rather than a lack of capital or other short-sale constraints (such as cost of borrowing).

³² Academic studies have noted that a key component for the activist short seller's strategy is dependent on its own track record to convince current long shareholders to sell. See: *Ibid*. Statistics based on AI data of short campaigns targeting issuers with Canadian headquarters as of December 31, 2019.

³³ SA is a crowdsourced research platform and claims to be "the world's largest investing community" with approximately 17 million users per month; over 16,000 contributors; and a dedicated section to short selling for called "Short Ideas" for paid subscribers. The platform requires all contributors to disclose positions in stocks they write about and to obtain editor approval before posting information. SA states that pseudonym contributors are held to the same compliance and biographical standards and their real name and contact information are kept confidential. Additionally, contributors involved in a settlement or SEC action must reveal their real names. For more information see, [About Seeking Alpha](#).

³⁴ This may be a relevant factor to understanding the potential impact of activist short sellers on Canadian markets as a recent U.S. academic study found evidence that potential short and distort strategies are more likely to be associated with

II. Research and Empirical Findings

The CSA's research consisted of an empirical analysis of activist short seller Campaigns and an academic literature review related to activist short selling.³⁵ The empirical analysis was limited to Campaigns identified by Activist Insight (AI), a third-party data provider focused on tracking activist investors on both the long and short side. AI's database only tracks campaigns by prominent activist short sellers, whether they are named or they are anonymous individuals or entities.³⁶ This data would cover campaigns that have the most market impact but may also potentially overlook campaigns by less prominent actors engaged in similar activities.

The current academic literature on activist short selling activity is sparse and is focused predominantly on U.S. markets where, as explained below, there is a sufficiently greater amount of activist short selling activity and data to conduct a more rigorous analysis.

A. Activist Short Selling Activity

Between 2010 and September 2020, a total of 73 Canadian issuers have been the target of 116 Campaigns and among them 16 Campaigns (including all 12 Campaigns from 2020)³⁷ are still active according to AI.³⁸ While there has been increased activity since 2015, annually there have been no more than 5 Canadian targets for every 1,000 Canadian listed issuers.³⁹ In comparison, U.S. issuers are more frequently targeted by activist short sellers - an average of 21 U.S. targets annually for every 1,000 U.S. listed issuers.⁴⁰

pseudonymous authors than with identifiable individuals. Activist short sellers identified in the study were authors who published a negative article about an issuer and declared that they held a short position on SA. See: Joshua Mitts, "Short and Distort" (February 13, 2020) *Columbia Law and Economics Working Paper No. 592*, available at SSRN.

³⁵ This analysis was based on listed issuers with a head office in Canada. Canadian listed issuers without a Canadian head office are not captured. In 2019, there was only one Campaign that targeted a Canadian listed issuer without a Canadian head office.

³⁶ AI considers prominent activist short sellers to be those with a history of disclosing strong thesis or reports, disclosing a position in the target company and having a considerable impact on the target's stock price.

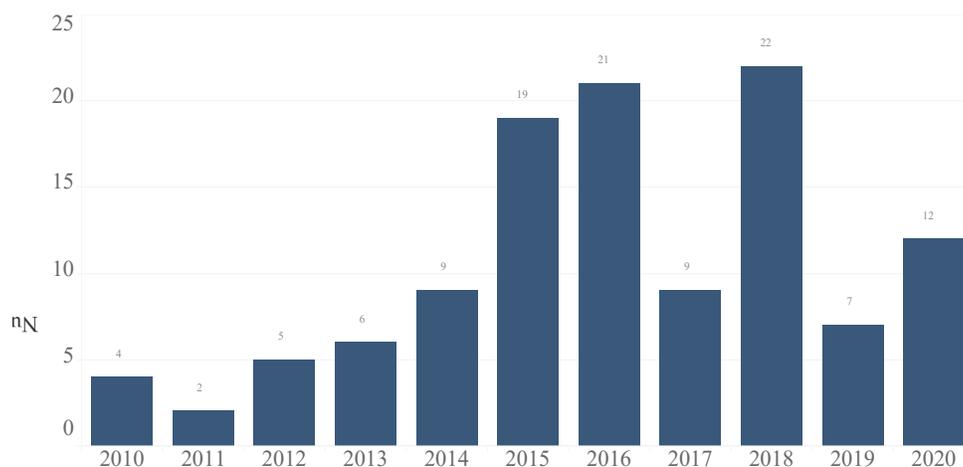
³⁷ In 2020, there have been twelve Campaigns identified as of September 30, 2020.

³⁸ Based on AI data from January 1, 2010 to September 30, 2020. Canadian issuers are identified based on the location of their headquarters. Some issuers are targeted by multiple activist short sellers. AI identifies whether a campaign status is ended (as opposed to current) when "the short seller either no longer supports its position according to publicly available information or there has been one year of inactivity from the short seller. As announcements regarding this are rare most campaigns are ended due to inactivity".

³⁹ OSC calculations based on AI data of annual campaign targets from 2010 to September 2020 and end-of year listed issuer counts from the World Federation of Exchanges from 2010 to June 2020. Includes all domestic NASDAQ and NYSE issuers for the U.S. Market and all domestic TSX and TSXV issuers for the Canadian market, excluding investment funds.

⁴⁰ See *Ibid.*

Figure 1 - Activist Short Seller Campaign Activity in Canada (2010 – Sept. 2020)

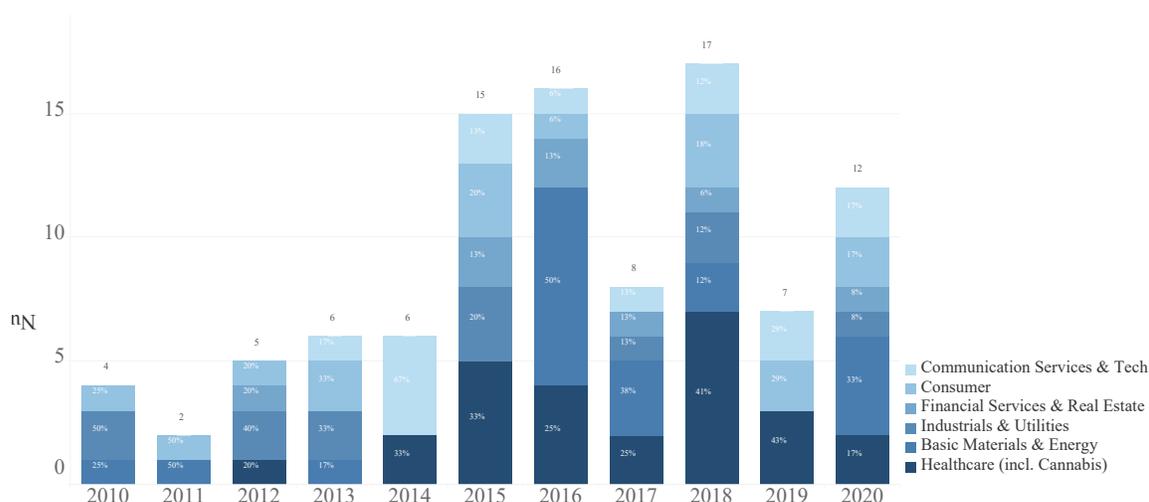


For the small number of Canadian targets identified, annual Campaign activity appears to be highly cyclical as evidenced in Figure 1. In general, short sellers gravitate towards the securities of issuers and sectors where there is a perceived overvaluation (See Figure 2).⁴¹ In peak Campaign years, this is evident as activist short sellers targeted Canadian issuers in specific, potentially overheated, sectors. For instance, in 2018 among a record 17 Canadian targets, approximately 35% (or 6 targets) were operating in the cannabis industry.⁴² However, Campaign activity was largely muted in 2017 with 8 Canadian targets and in 2019 with only 7 Canadian targets. In 2020, there have been 12 new campaigns targeting Canadian issuers as of September 2020, however 4 of those Canadian issuers were also the target of activist short sellers in prior years.

⁴¹ Ekkehart Boehmer, Charles M Jones & Xiaoyan Zhang, “Which Shorts are Informed?” (February 4, 2007). AFA 2007 Chicago Meetings Paper, available at SSRN.

⁴² Cannabis issuers were categorized under the healthcare sector. The 2019 AI report on Activist Investing in Canada reported that the precedent set in 2018 was “largely due to exuberance in the emerging cannabis sector, which invited detractors.” In 2016, increased activist short seller activity was concentrated among materials and mining issuers.

Figure 2 - Activist Short Seller Targets by Sector (2010 – Sept. 2020)⁴³



B. Canadian Campaign Characteristics

The following highlights select Campaign characteristics to provide a better understanding of the types of Canadian issuers targeted; the target size; the stock price impact; the pattern of allegations made by activist short sellers; and the proportion of targets that engaged in a strategic response or were impacted by certain negative outcomes during the Campaign as identified by AI.

i. Target Size

The Campaigns tended to be focused on relatively larger issuers (with a median market capitalization of \$867 million and average market capitalization of \$4.5 billion⁴⁴) compared to the broader Canadian market.⁴⁵ This is in some ways not surprising given AI’s focus on prominent activist short sellers but it is also consistent with the findings of U.S. academic studies indicating that target firms are more likely to be larger sized issuers with listed securities that are more heavily traded in both the cash and options markets.⁴⁶

ii. Price Impact

Most Campaigns analyzed (75% of targets) experienced a negative price impact on the day of the first-campaign announcement and up to one month after the first-campaign announcement.⁴⁷

⁴³ The number of Campaigns and targets are not equivalent for any given year because there may be multiple Campaigns against the same target.

⁴⁴ Market capitalization calculated 1-day prior to the announcement of the first activist short seller campaign for 69 Canadian targets from 2010 to September 30, 2020 for which historical market data was available.

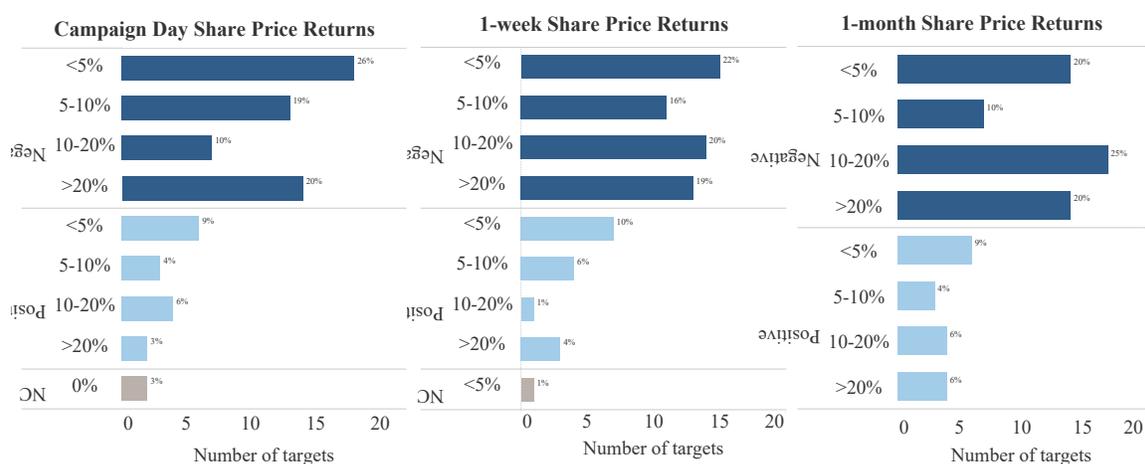
⁴⁵ In contrast, the year-end median market capitalization of all TSX issuers from 2014 to 2019 was between \$112 million and \$153 million. As of September 30, 2020, approximately 64% of TSX issuers had a market capitalization of \$300 million or less and 92% of TSXV issuers had a market capitalization of \$100 million or less.

⁴⁶ See: Ljungqvist & Qian, *supra* note 3; Ian Appel, Jordan Bulka & Vyacheslav Fos, “Public Short Selling by Activist Hedge Funds” (October 1, 2018); and Zhao, *supra* note 3.

⁴⁷ Stock price returns were calculated by OSC from 1-day prior to the first Campaign announcement for 69 Canadian targets between 2010 and September 2020 for which historical market data was available. Stock price returns reflect more than just the disclosure of a short seller’s Campaign, it also incorporates other positive or negative information about the target either specifically or more broadly (e.g., market or sector).

However, the extent of the short-term price impact varied across targets and also over time (see Figure 3). Approximately 26% of targets experienced less than a 5% price decline on the day of the first-campaign announcement. The proportion of targets with negative share price returns of 10% or greater increased over time from day of first-campaign announcement (approximately 30% of targets) to 1-month after first-campaign announcement (approximately 45% of targets).⁴⁸

Figure 3 – Share Price Impact of Canadian Target’s First Campaign (2010 – Sept. 2020)



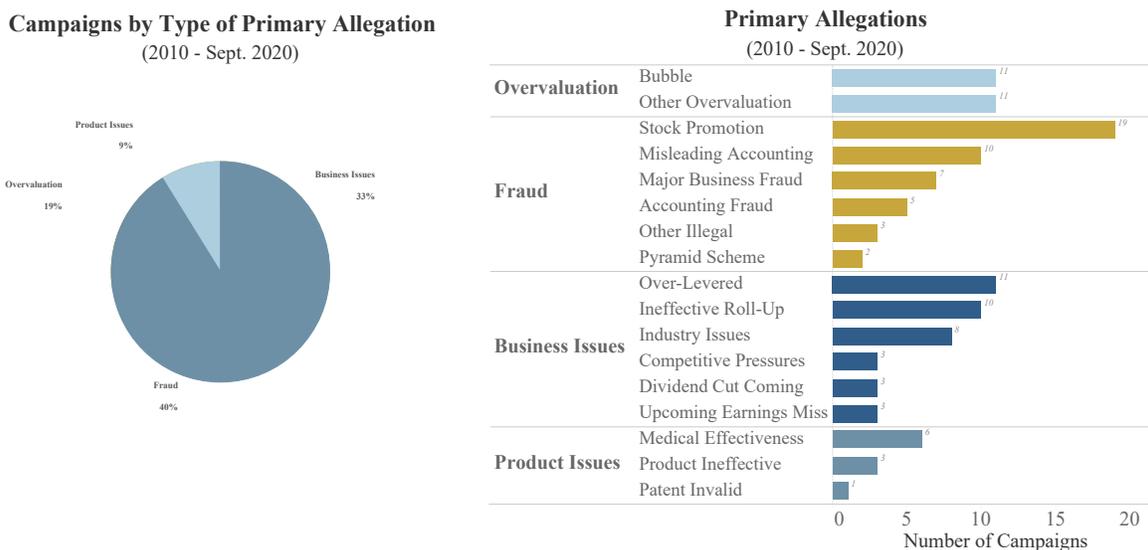
iii. Campaign Allegations

Across all 116 Canadian Campaigns, 40% involved allegations of some type of fraud at the issuer. The most common type of fraud allegation was that of there being a stock promotion scheme (or an alleged “pump and dump” scheme), where the company was being promoted by a connected third party (e.g., an outside firm) (see Figure 4).⁴⁹ In peak Campaign years (2015, 2016 and 2018) fraud-related allegations accounted for under one-third of the Campaigns. Allegations related to business or industry issues (e.g., drop in commodity prices) and more general market overvaluation concerns have been more common in recent years.

⁴⁸ *Ibid.*

⁴⁹ Based on AI’s assessment of the Campaigns.

Figure 4 – Activist Short Sellers' Primary Allegations



iv. Target Responses and Outcomes

Across the 73 Canadian targets in the 116 Campaigns identified, approximately 73% of targets pursued certain responses during the Campaign (Figure 5). These responses included either changing or replacing the CEO or CFO, hiring a new auditor or independent investigator, halting the issuer’s stock from trading, pursuing a lawsuit against the activist short seller or announcing a capital market transaction (e.g., divestiture, acquisition, private placement) during the Campaign.⁵⁰

Figure 5 – Campaign Target Responses and Outcomes (2010 – Sept. 2020)

Target HQ	Targets	Target pursued response (%)	Target had negative outcome (%)	Target either responded or had negative outcome
Canada	73	73%	29%	78%
US	783	60%	26%	67%
Other foreign issuers	344	65%	28%	69%

Separately, the AI data also identified certain outcomes which occur following a Campaign and would generally be viewed as negative by the market (e.g., a delisting, auditor resignation or class-action lawsuit). Among the Canadian targets, approximately 29% of them experienced at least one of these outcomes.⁵¹ Class action lawsuits against issuers were the most common among the three types of outcomes considered. In about 23% of the Canadian targets, class action proceedings were commenced following a Campaign (as compared to U.S. (23%) and other

⁵⁰ Issuer responses identified from AI data.

⁵¹ This is consistent with campaign outcomes for foreign issuers in foreign markets as well (see Figure 5).

foreign (21%) targets).⁵² We cannot know with any certainty that the issuer's responses or the outcomes experienced were the direct result of the Campaign, however, academics have considered such responses (or similar ones) to be indicative that a campaign brought to light problems with the issuer.⁵³

C. Analysis and Consultation Questions

There appears to be a perception that activist short selling is on the rise in Canada⁵⁴ and that this form of activism plays a negative role in our markets. As previously noted, taking into consideration the size of our market and the number of public companies, it does not appear that Canada's experience with activist short selling is disproportionately high compared to the U.S. With that said, we recognize that comparisons of this nature, or simply comparing the absolute number of campaigns, does not provide the necessary context to understand the issues. Market factors unique to each jurisdiction must be considered.

The available empirical evidence indicates that recent increases in Campaigns may be indicative of a cyclical trend, i.e., activist short sellers targeting issuers in specific potentially overheated sectors. This suggests that our market will see increases in activism of this nature where there is a sense that an industry sector or issuer is overvalued, but does not necessarily address whether, in this context, there is misconduct by activist short sellers.

Activism by short selling is premised on effecting a loss of shareholder value for the target issuer, which makes it controversial. Most academic studies of U.S. markets support the notion that activist short sellers are more likely to improve the market's informational/price efficiency by identifying actual problems with an issuer's business and operations, than they are to engage in "short and distort" strategies. The analysis of post-Campaign outcomes and responses by issuers suggests the allegations have been a force for change although it is not obvious that such changes were intended to address the concerns raised by the Campaign.

Activist short sellers are also criticized for being driven by short-term trading profits rather than promoting long-run price accuracy. However, they can also serve as a countervailing check on the potential for excessive market optimism.

Lastly, we recognize that targeted issuers may be reluctant to complain to the securities regulator about what they view as problematic conduct in the context of a campaign as this may be seen as inviting a review of the allegations by the regulator. An issuer's response following a campaign

⁵² Our review confirmed that almost all class proceedings commenced following a Campaign made the same or similar allegations as those made in the Campaign. We acknowledge that the commencement of a class proceeding, even with similar allegations, does not establish the veracity of the underlying allegations in a Campaign.

⁵³ A U.S. study reviewed 124 campaigns in an effort to determine whether activist short sellers were engaged in short and distort campaigns based on a study of subsequent events. The study indicated that separate investigations by the Securities and Exchange Commission and the Department of Justice reached similar conclusions as the activist short sellers in 90% of those campaigns and eventually, 50% of the targets were delisted, 47% replaced auditors, and 23% restated earnings. See: Ljungqvist & Qian, *supra* note 3.

⁵⁴ For example, see: Schechter, *supra* note 1. We note that activism in general has increased (both long and short). See e.g., "Shareholder Activism: 2019 Trends and Major Developments", *Davies Corporate Governance Insights 2019* (3 October 2019); Eric Woerth and Benjamin Dirx, [Report to the National Assembly \(France\) on Shareholder Activism](#) (October 2, 2019) [Woerth Report].

may be seen as giving credibility or in some way substantiating the legitimacy of the issues raised, however, it also may be that issuers are choosing to respond for other strategic reasons.

Consultation Questions

1. What is your perception about activist short sellers? Please describe the basis of that perception.
2. Can you give examples of conduct in activist short selling Campaigns that you view as problematic?
3. Given the focus of the available data is on prominent activist short sellers, what is your view regarding less prominent activist short sellers or pseudonymous activist short sellers targeting Canadian issuers? How can they be identified? Is there any evidence that they are engaging in short and distort Campaigns?
4. What empirical data sources related to Campaigns should we consider?
5. In 2019, there was a large drop in the number of Canadian issuers targeted by prominent activist short sellers compared to the year before. Are there market conditions or other circumstances that in your view could lead to an increase? Please explain.
6. Is there any specific evidence that would suggest that Canadian markets are more vulnerable to activist short selling, including potentially problematic activist short selling (e.g., size and type of issuers, industries/sectors represented or other market conditions)? Please provide specific examples of these vulnerabilities, and how they differ from other jurisdictions.
7. Do issuers have practical limitations in terms of their ability to respond to allegations made in a Campaign? If so, what are these limitations, and do you have any recommendations on how to alleviate them?
8. Are issuers reluctant to approach securities regulators when they believe that they are being unfairly targeted by an activist short seller? If so, why? If not, why not?

III. Regulatory Framework

A. Canada – Monitoring, Reporting and Restrictions on Short Selling Activity

Activist short sellers are not subject to formal securities regulatory requirements (for example, Canadian securities legislation does not regulate the content of an activist short seller's statements). Short selling as a trading activity however is subject to a well-developed framework that is largely administered by IIROC involving a detailed reporting regime that provides timely information to IIROC enabling it to monitor and supervise any potentially inappropriate short selling practices. It includes:

- a requirement to mark all orders representing a short sale as either “short” or “short-marking exempt”,⁵⁵
- a requirement to disclose “Extended Failed Trades” to IIROC;⁵⁶
- a requirement that, if an Extended Failed Trade report is filed with IIROC, further short sales generally cannot be made by that Participant⁵⁷(acting as a principal or as an agent) or by an access person without prior arrangements to borrow the securities necessary for settlement (that is, IIROC may require pre-borrowing in certain circumstances);⁵⁸ and
- the ability for IIROC to designate a security as a “Short Sale Ineligible Security.”⁵⁹

Canadian securities legislation also requires a person who places an order for the sale of a security with a registered dealer to declare to the dealer at the time of placing the order if they do not own the security.⁶⁰ This statutory requirement is supported by UMIR which requires Participants to calculate and report to IIROC the aggregate short position of each individual account twice a month,⁶¹ which IIROC then publishes on its website.⁶² IIROC also aggregates trades marked

⁵⁵ See UMIR, *Part 3 - Short Selling, Prohibition on the Entry of Orders*, Rule 3.2 [Rule 3.2]. A short-marking exempt order includes an order for a security from an arbitrage account, an account of a market maker for that account, or other specified accounts that buy and sell securities and that has at the end of any trading day no more than a nominal long or short position in any security. UMIR, *Part 1 – Definitions and Interpretation*, Rule 1.1.

⁵⁶ A trade that did not settle and was not rectified within 10 trading days from the original settlement must be reported to IIROC. See: UMIR, *Part 7 Trading in a Marketplace - Extended Failed Trades*, Rule 7.10.

⁵⁷ Participants include dealers that are members of an exchange, users of a quotation and trade reporting system or subscribers to an alternative trading system.

⁵⁸ “Pre-Borrow Security” means a security that has been designated by a Market Regulator to be a security in respect of which an order, that on execution would be a short sale, may not be entered on a marketplace unless the Participant or Access Person has made arrangements to borrow the securities that would be necessary to settle the trade prior to the entry of the order. UMIR, *Part 1 – Definitions and Interpretation*, Rule 1.1. See also, UMIR, Policy 1.1, *Definitions of Pre-Borrow Security*, [1.1](#); UMIR, *Part 6 – Order Entry and Exposure – Entry of Orders on Marketplace*, [Rules 6.1\(4\) and 6.1\(6\)](#).

⁵⁹ “Short Sale Ineligible Security” is defined as a security or a class of securities that has been designated by a market regulatory to be a security in respect of which an order on execution would be a short sale may not be entered on a marketplace for a particular trading day or trading days. UMIR, *Part 1 – Definitions and Interpretation*, [Rule 1.1](#); See also, Rule 3.2, *supra* note 55 at (1)(b).

⁶⁰ Note for instance section 194 of the *Securities Act* (Québec), which provides that no person may sell a security short without previously notifying the dealer responsible for carrying out the transaction. See also, *Securities Act* (Ontario), section 48.

⁶¹ UMIR, *Part 10 – Compliance, Report of Short Positions*, [Rule 10.10](#).

⁶² The Consolidated Short Position Report (CSPR) shows the aggregate short positions on all listed securities as of the current reporting date and the net change in short positions from the previous reporting date, on a per security basis, pursuant to UMIR

“short sale” from all of the marketplaces it monitors, consolidates that information, and publishes a semi-monthly report showing the total industry short sales for each security over the reporting period.⁶³ In contrast to other jurisdictions discussed below (EU, Australia), there are no reporting requirements or obligations to disclose information on the short position of an individual account to IIROC or to the public. Even so, it is not uncommon for an activist short seller to voluntarily disclose that they are short a particular issuer when they commence a campaign.

B. Prohibition on Deceptive or Manipulative Activity

Securities legislation, National Instrument 23-101 *Trading Rules* and UMIR prohibit activities that are manipulative and/or deceptive. In the context of short selling activity this would include the entering of an order for the sale of a security without, at the time of entering the order, having the reasonable expectation of settling any trade that would result from the execution of the order.⁶⁴ As such, “naked short selling”, as that term is sometimes understood, is not permitted under UMIR.⁶⁵

IIROC monitors for potentially abusive trading activity. For example, in the context of short selling activity, IIROC uses algorithms to monitor for unusual levels of short selling coupled with significant price movements and reviews alerts to determine the cause of the price movement and whether there is an indication of manipulative trading activities. These reviews may include a review of social media or chatrooms as well as Extended Failed Trades reports for indications of settlement issues. If appropriate, referral to the enforcement branch of the appropriate CSA jurisdiction for investigation may also occur.

As set out in Part I, securities legislation also contains provisions which address prohibitions on manipulative activity that apply to all market participants, including activist short sellers.

C. International Regulatory Frameworks

The most notable difference among the regulatory frameworks that apply to activist short selling in the European Union (EU) and Australia relates to the reporting and disclosure of position size and the identity of short sellers generally.⁶⁶

The European Securities and Markets Authority (ESMA) requires that net short positions (including direct and synthetic shorts) of “natural or legal persons” be made first to the regulator at 0.2% and that the position be publicly disclosed if the position reaches 0.5% of the issued share

10.10. The report is published twice monthly and based on the short position information submitted to IIROC by Participant Dealer Members and applicable Access Persons.

⁶³ The Short Sale Trading Statistics Summary Report is based on data for trades marked “short sale” supplied by each marketplace that IIROC monitors. The report is published twice monthly.

⁶⁴ See: Companion Policy to National Instrument 23-101- *Trading Rules*, s 3.1(3)(f); UMIR, *Part 2 – Abusive Trading, Manipulative and Deceptive Activities*, [Policy 2.2 at Part 2 \(g\)-\(h\)](#).

⁶⁵ As previously noted in IIROC Notice 12-0078 - *Provisions Respecting Regulation of Short Sales and Failed Trades*, *supra* note 19, there is no universally accepted definition of “naked short selling”. The most common usage is in connection with a short sale when the seller has intentionally chosen not to make arrangements to borrow any securities that may be required to settle the resulting trade. Some commentators use a more restrictive interpretation that describes any short sale when the seller has not pre-borrowed the securities necessary for settlement.

⁶⁶ Note, in the US, only the short selling volume for individual securities is published daily and individual short sale transactional information is published on a one-month delay but does not contain short seller details.

capital of the company concerned, and each 0.1% above that.⁶⁷ Anyone can therefore view the identity of holders of short positions that meet these position-level thresholds for an EU security.⁶⁸ This is more granular public transparency compared to aggregated data that is publicly available in Canada. Requiring disclosure of this nature was seen as an alternative policy tool to short selling bans, with the similar aim of introducing a constraint on short selling activity. Indeed, the relevant EU regulation was created primarily in response to the financial crises and the sovereign debt crisis, with the goal of promoting market stability.⁶⁹

In Australia, there are short selling reporting requirements for both transactions⁷⁰ and positions above a certain threshold.⁷¹ Based on this information, the total of short positions for financial products on a given reporting day will be published on the Australian Securities and Investments Commission's website, and the Australian Securities Exchange website will publish the transaction reports. These reports will not contain short seller details but will provide an indication of the proportion of trades in a particular security that are short sales and the aggregate level of short positions for each security.⁷²

D. Analysis and Consultation Questions

Concerns have been raised that Canadian issuers are vulnerable to abusive short selling based on the perception that the Canadian regulatory framework for short selling is “permissive and lax.”⁷³ We note that while the regulatory framework in Canada differs in some ways from other

⁶⁷ See *Regulation (EU) No 236/2012* of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (2012). Note, in 2017 ESMA considered whether to further increase transparency of short positions by publishing aggregate short positions that are currently still confidential. See: European Securities and Markets Authority, Final Report, *Technical Advice on the Evaluation of Certain Elements of the Short Selling Regulation* (21 December 2017). On the issue of transparency, the technical advice made by ESMA to the European Commission was: “practical improvements of the current regime including building a centralised notification and publication system across Europe...[and] supports requiring the LEI for the identification of certain position holders.” More specifically, for the area discussed in the paper, “ESMA also recommends that NCAs should be allowed to periodically publish anonymised aggregated net short positions by issuer on a voluntarily basis when they consider that the issues described above can be adequately addressed in their jurisdiction.”

⁶⁸ In the context of activist short sellers, additional disclosure may be required by the market abuse regulations which provide that conflicts of interest be disclosed by any entity issuing recommendations where it holds a net short or long position of 0.5% or more of the capital of the company concerned by the recommendation. See *Market Abuse Regulation – Regulation 596/2014* of the European Parliament and of the Council.

⁶⁹ Corrado Malberti, Stephane Rousseau & Konstantinos Sergakis, “The Regulation of Short Selling: A Transatlantic Discussion on Policy Issues and Instruments” (October 6, 2018), *Corporate Finance and Capital Markets Law Review*, RTDF No. 4-2018. [Malberti, Rousseau & Sergakis]

⁷⁰ Short sale transaction reporting is the reporting of daily volumes of products that are short sold in the market.

⁷¹ A person may be required to report a short position, i.e., where the quantity of the product that a person has, when acting in a particular capacity, is less than the quantity of the product that the person has an obligation to deliver when acting in the same capacity. Short position reporting is exempt where the seller's short position is less than or equal to (a) \$100,000; and (b) 0.01% of the total quantity of securities or products in the relevant class of securities or products. The total of short positions for financial products on a given reporting day will be published on the ASIC website four days after the reporting day (T+4). These reports will not contain short seller details.

⁷² Australian Securities & Investments Commission, “Regulatory Guide 196: Short Selling” (October 2018), see Reg. 196.8.

⁷³ *Harrington, supra* note 11.

jurisdictions, it is consistent with the four IOSCO principles for the effective regulation of short selling.⁷⁴

Over the years, IIROC has reviewed the regulatory regime governing short sales to determine whether it continues to be appropriate. In 2012, a number of amendments to UMIR regarding short sales and failed trades were approved by the CSA and implemented.⁷⁵ These amendments included:

- repealing the “tick test”;⁷⁶
- imposition of pre-borrow requirements for short sales made in certain circumstances; and
- introduction of the “short-marking exempt” designation.⁷⁷

The amendments were part of an overall strategy on regulation of short sales and failed trades that included increasing transparency around information regarding short sale activity and failed trades, monitoring regulatory arbitrage opportunities related to short sales and enhancing monitoring of short sales and failed trades. It was also at this time that the pre-borrow requirements for short sales in certain circumstances were introduced as another mechanism to monitor and address potentially problematic short selling.

Also at the time of these amendments, the CSA and IIROC published a request for comment to solicit feedback on aspects of disclosure and transparency measures regarding short sales and failed trades.⁷⁸ After consideration of comments received and of the data on short sales and failed trades,⁷⁹ it was determined that no additional regulatory requirements were needed at that time.⁸⁰ It is important to note that failed trades occur in both long and short sales for a variety of reasons. Failed trades are not always evidence of abusive or naked short selling. There are many justifiable reasons why a trade fails, and failures may be more common for thinly traded or illiquid stocks.⁸¹ IIROC indicated that it would continue to monitor international developments in the regulation of

⁷⁴ See IOSCO report entitled “Regulation of Short Selling – Final Report” (June 2009), which articulates four high-level principles for the effective regulation of short selling and is designed to assist regulators in the management of risk through a regulatory regime for short selling. See also Joint Notice 23-312 *supra* note 19. Note the International Monetary Fund’s Financial Sector Assessment Program Report “Canada : Financial Sector Assessment Program-IOSCO Objectives and Principles of Securities Regulation-Detailed Assessment of Implementation” which reviewed Canada’s short selling regime as part of Principle 37 (Regulation should aim to ensure the proper management of large exposures, default risk and market disruption) and it was found to be “fully implemented” (March 7, 2014). See p. 18, 27 and 239-243.

⁷⁵ IIROC Notice 12-0078 *supra* note 20.

⁷⁶ The tick test was a requirement under UMIR that a short sale not be made at a price which is less than the last sale price of the security.

⁷⁷ See footnote 55.

⁷⁸ Joint Notice 23-312, *supra* note 19.

⁷⁹ See IIROC *Study on the Impact of the Prohibition on the Short Sale of Inter-listed Financial Sector Issuers* (February 2009) [IIROC Study].

⁸⁰ CSA/IIROC Notice 23-315 *Summary of Comments on CSA IIROC Notice 23-312 [Request for Comments – Transparency of Short Selling and Failed Trades](#)*, (28 February 2013).

⁸¹ See Securities and Exchange Commission, 2016a. *Frequently Requested FOIA Document: Fails-to-Deliver Data — Archive Data*. See also Talis J Putnins, “Naked Short Sales and Fails to Deliver: An Overview of Clearing and Settlement Procedures for Stock Trades in the US” (October 27, 2009). *Journal of Securities Operations and Custody*, Forthcoming, available at SSRN.

short selling and failed trades related issues. It has recently commenced looking into required data sources to initiate its work on a new broader and more granular failed trade study.⁸²

Concerns around short selling regulation have seen a resurgence both in Canada and abroad.⁸³ Internationally, we have also seen that heightened concerns around short selling activities have led some foreign public and private actors to impose restrictions or bans on short selling and related activities.⁸⁴ For example, in December 2019, the world's largest pension fund, the Japanese Government Pension Investment Fund announced that it had suspended stock lending activities relating to its portfolio of non-Japanese equity securities 'until further notice.'⁸⁵ Earlier in 2019, ESMA backed Germany's two-month short sale ban on payment firm Wirecard following a report of financial irregularities by certain Wirecard critics.⁸⁶ Other jurisdictions have called for increased transparency and disclosure. In October 2019, the National Assembly in France released a report on activist investors recommending that France should increase disclosure requirements when activist investors and short sellers take large positions in French companies.⁸⁷

In Canada, there appears to be perception by some that the current regulatory environment is disproportionately conducive to problematic activist short selling. Some who have raised concerns have suggested increased transparency around short selling as a response to these concerns, similar to the approach that currently exists in the EU. In their view, this type of disclosure can equip issuers and investors with additional information upon which to trade, as well as act as a constraint on inappropriate short selling. However, some studies have noted that such disclosure obligations may have undesirable effects, such as compromising the strategies short sellers use, which would inevitably lead to decreased market liquidity or price discovery.⁸⁸ Increased transparency on the

⁸² Note ESMA has adopted new rules related to failed trades set to come into effect next year. Trades that fail to settle — usually within a window of two or three days — face a mandatory “buy-in” to close the deal and cash penalties on failed transactions. Commission Delegated Regulation (EU) 2018/1229 of 25 May 2018 supplementing Regulation (EU) No 909/2014 of the European Parliament and of the Council with regard to regulatory technical standards on settlement discipline. See ESMA Final Report - *CSDR RTS on Settlement Discipline – postponed entry into force* (4 February 2020).

⁸³ E.g. Issues around transparency and disclosure of short selling information, lack of locate requirement and lack of a tick test in Canada. See: Davis et al, *supra* note 12.

⁸⁴ Lawrence Delevingne, Simon Jessop, & Jonathan Spicer, “Return of short-selling bans: market protection of ‘war against truth’?”, *Reuters* (19 November 2019).

⁸⁵ GPIF claimed that the current framework lacks transparency over who is the “ultimate borrower” of a stock after a short seller sells the shares loaned to them and added that a third party could vote GPIF shares contrary to GPIF’s policies or interests. GPIF has not ruled out returning to the stock lending space in the future but clarified that “improvements” to “enhance transparency” would need to be introduced first. See: Billy Nauman & Leo Lewis, “This is a decision between making cash immediately or being better stewards for our constituency”, *The Financial Times* (12 December 2019). This decision was not without cost, as it has been estimated the GPIF earned approximately US\$115 million in fees annually through stock lending. See Tim Kelly, “World’s largest pension fund halts stock lending to short sellers,” *Reuters* (3 December 2019).

⁸⁶ Note that in 2020, following the short sale ban and a subsequent special audit by KPMG it was uncovered that approximately €1.9 billion on Wirecard’s balance sheet could not be verified, and likely did not exist. This accounting scandal has not only resulted in the collapse of Wirecard, but also prompted ESMA to assess the supervisory response of Germany’s financial regulator and oversight bodies in the events leading up to its collapse. On November 3, 2020, ESMA published the results of its Fast Track Peer Review. See: [“Fast Track Peer Review on the Application of the Guidelines on the Enforcement of Financial Information \(ESMA/2014/1293\) by BaFin and FREP in the Context of Wirecard.”](#)

⁸⁷ David Keohane and Harriet Agnew, “France seeks crackdown on short sellers and activist investors”, *FT Online* (2 October 2019); Woerth Report, *supra* note 54.

⁸⁸ Malberti, Rousseau & Sergakis, *supra* note 69; Julien Mazzacurati “The public disclosure of net short positions” in *ESMA Report on Trends, Risks, Vulnerabilities*, No 1 (2018) at 60. See also at ESMA *Final Report - Technical Advice on the evaluation of certain elements of the Short Selling Regulation* (December 21, 2017) at p. 51. ESMA confirmed that “some investors avoid

identity of a short seller may also expose them to litigation and regulatory action, potentially stifling legitimate short selling activity.⁸⁹ One study found that when required to disclose their positions short sellers simply remain below the public disclosure threshold (0.5%) deliberately to protect their private information.⁹⁰ The impact of additional disclosure around short selling must be considered in light of these issues to determine whether this tool meets the policy outcome desired without introducing undue constraints on legitimate short selling and activist short selling activity.

As discussed in Part I, short sellers already face significant risks and costs in taking such positions and these risks are amplified for activist short sellers. Some academics have suggested that policy makers should consider efforts to reduce the difficulties and costs associated with short selling given the potential for improvements in market efficiencies introduced by campaigns.⁹¹ Others have suggested alternative approaches to the EU model of disclosure that more directly addresses concerns raised around problematic conduct by activist short sellers as well as the implications of social media on promotional activities, whether short or long. For example, a group of U.S. academics recently petitioned the SEC to impose a “duty to update” a short position when there has been a voluntary disclosure of that short position.⁹² The rationale for such a requirement being that when a short seller voluntarily discloses a short position, failure to disclose the position closed is “doubly misleading” because their original disclosure of being short is no longer accurate and the short seller’s “negative opinion lacks the skin in the game element that gives market participants reason to believe the underlying claims are true.”⁹³ Another example is a proposal for a ten-day minimum holding period that would apply to any stock promoter or short seller who opens a large position and disseminates market-moving information, irrespective of the medium. The theory behind this proposal is that a holding period could provide the market with an opportunity to evaluate the quality and credibility of the information.⁹⁴

Consultation Questions

9. Is the existing regulatory framework adequate to address the risks associated with problematic activist short selling? Please explain why or why not and provide specific examples of concerns and areas where, in your view, the regulatory framework may not be adequate.

crossing the 0.5% threshold, as reflected in the lower frequency of short position increases and relatively longer duration of positions just below the threshold.”

⁸⁹ Bliss, Molk & Partnoy, *supra* note 8 at 14, 17. “Owen Lamont provides evidence that firms take legal and regulatory action against shorts sellers, by alleging criminal conduct, suing them, hiring private investigators, asking public authorities to investigate them, and manipulating securities markets to impede short selling.” See: Lamont, *supra* note 21.

⁹⁰ Riens Galema and Dirk Gerritsen, “The effect of the accidental disclosure of confidential short sales positions” (2018) Finance Research Letters, Forthcoming.

⁹¹ Bliss, Molk & Partnoy, *supra* note 8 at 46-47.

⁹² See *Petition for Rule Making on Short and Distort*, Letter to Vanessa Countryman, Secretary of U.S. Securities and Exchange Commission (February 16, 2020); John Coffee Jr & Joshua Mitts, “Petition for Rule Making on Short and Distort”, *The CLS Blue Sky Blog* (February 18, 2020).

⁹³ *Ibid*. The authors have also asked the SEC to confirm that rapidly closing a position after publishing a report, without specifically disclosing an intent to do so can constitute fraud in violation of Rule 10b-5, and propose a safe harbour provision for closing at a price that is the equal to or lower the valuation stated or implied in the report.

⁹⁴ Mark Cohodes, “Pump-and-dump stock trading needs new rules for the digital age”, [FT Online](#), April 26, 2020.

10. Have there been market developments or new information since 2012, when UMIR amendments regarding short selling and failed trades were implemented, that would warrant revisiting the existing regulatory framework for short selling? If so, please describe these new developments or information and indicate, providing evidence to support your views:

- a. whether, in your view, there is a connection between failed trades and activist short selling;
- b. what changes should be considered and why, and specifically with respect to potentially problematic activist short selling activities; and
- c. whether there are relevant regulatory requirements in other jurisdictions that should be considered and why.

11. Is the existing disclosure regime for short selling activities adequate? Please explain why or why not, indicating:

- a. what disclosure requirements would address risks associated with potentially problematic activist short selling and how would such requirements improve deterrence;
- b. what should be the trigger and the timing of any additional disclosure;
- c. how can additional disclosure be meaningful without negatively impacting market liquidity; and
- d. do you foresee any issues with imposing a duty to update once there has been a voluntary disclosure of a short position?

IV. Enforcement and Remedies

A. Oversight of Activist Short Sellers

In most CSA jurisdictions, there is no mechanism under securities law that explicitly regulates the activities of activist short sellers or the form or content of their public statements.⁹⁵ However, there is potential for the conduct and statement of an activist short seller to fall offside of securities legislation if it involves making materially misleading or untrue statements to the market.⁹⁶ Securities legislation generally requires that a person or company not make a statement that they know, or reasonably ought to know,

- (a) in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; and
- (b) would reasonably be expected to have a significant effect on the market price or value of a security, derivative or underlying interest of a derivative.⁹⁷

Recent B.C. *Securities Act* amendments introduced an additional prohibition for those engaged in promotional activities. Under this prohibition, a person engaged in a promotional activity must not make a statement or provide information that is false or misleading in circumstances where a reasonable investor/person would consider that statement or information important when making an investment decision. Unlike other securities law prohibitions against making a misrepresentation, this prohibition does not require that the statement or the information:

- be materially misleading or untrue;
- be reasonably expected to have a significant effect on the market price or value of a security.⁹⁸

Canadian securities legislation also contains fraud and market manipulation prohibitions⁹⁹ that could, in appropriate circumstances, be used to address misconduct by activist short sellers. In general, these provisions prohibit persons from directly or indirectly engaging in acts relating to securities, and in some cases derivatives,¹⁰⁰ that:

⁹⁵ In British Columbia recent amendments to section 1(1) of the *Securities Act* introduced a new definition of “promotional activities.” “Promotional activities” is defined to include any activity / communication that encourages or could reasonably encourage a person to purchase, not purchase, trade or not trade a security or derivative. Note the definition of “promotional activities” provides the British Columbia Securities Commission with rulemaking authority to prescribe that certain activities are not promotional activities. Section 183 generally, section 183 (12.2) and section 184 (1)(b) provide rulemaking authority to make rules imposing disclosure requirements on a person engaging in promotional activities and to impose different requirements, restrictions or prohibitions on different classes of persons engaging in promotional activity. *BCSA Amendments supra* note 26.

⁹⁶ See e.g., *Re Cohodes*, 2018 ABASC 161 [*Cohodes*].

⁹⁷ See e.g., *Securities Act* (Ontario), RSO c. S.5, s. 126.2.

⁹⁸ *BCSA Amendments*, section 50(3), *supra* note 26.

⁹⁹ See e.g., subsection 126.1(1) of the *Securities Act* (Ontario).

¹⁰⁰ See e.g., *Derivatives Act* (Québec), CQLR c. I-14.01, s. 151, *Securities Act* (Ontario), s. 126.1(1)

- the person knows (or reasonably ought to know), results in or contributes to a misleading appearance of trading activity or an artificial price for a security, or
- perpetrates a fraud on any person or company.¹⁰¹

In Québec, it is also an offence to influence or attempt to influence the market price or the value of securities by means of unfair, improper or fraudulent practices.¹⁰²

B. Remedies

In Canada, there is no mechanism under securities law for issuers or investors to seek damages against activist short sellers for statements made in the context of campaigns.¹⁰³ Some jurisdictions like Australia have provisions under their corporate or securities legislation which provide a private right of action for certain contraventions, including prohibitions on the making or dissemination of false or misleading information and statements by any person, which could capture activist short selling activity.¹⁰⁴

Apart from statutory remedies under securities law, there may be common law or civil code remedies available to issuers and/or investors who wish to commence legal proceedings for damages arising from allegations of problematic conduct by activist short sellers. There are, however, very few recent Canadian judicial decisions that deal with activist short selling.¹⁰⁵ This may be due to the practical and evidentiary challenges of civil litigation.¹⁰⁶

C. Analysis and Consultation Questions

There is a concern that limited regulatory proceedings in Canada arising from the conduct of activist short sellers may contribute to a perception that current enforcement tools are ineffective in addressing or deterring problematic conduct.¹⁰⁷ From an enforcement perspective, securities

¹⁰¹ In some jurisdictions, including British Columbia, Alberta, Québec and Ontario, it is also an offence to attempt to engage in a fraud or market manipulation.

¹⁰² *Securities Act* (Québec), CQLR c V-1.1, s. 195.2 and *Derivatives Act* (Québec), CQLR c. I-14.01, s. 150. It is also an offence, for [e]very person who, not being registered as a dealer, adviser or representative, gives out information to investors which could influence their investment decisions and derives advantage therefrom separate from his ordinary remuneration. See *Securities Act* (Québec), section 200.

¹⁰³ Depending on circumstances, statutory civil liability for misrepresentations generally only attaches to statements made by issuers, their directors, certain officers and other “influential persons.” See e.g., Part XXIII and Part XXIII.1 of *Securities Act* (Ontario) and Division II of Chapter II of Title VIII of *Securities Act* (Québec).

¹⁰⁴ See e.g., *Rural Funds Management Limited as Responsible Entity for the Rural Funds Trust and RF Active v Bonitas Research LLC* [2020] NSWSC 61, 12 February 2020. Note also that Singapore securities legislation also provides a private right of action for contravention of its legislation. *Securities and Futures Act* (Sing), Cap 289 (2006 rev ed), ss 199, 234(1A).

¹⁰⁵ Most of the judicial decisions dealing with activist short selling are defamation or libel actions against activist short sellers.

¹⁰⁶ For example, some Canadian jurisdictions have passed what is known as ‘Anti-SLAPP’ legislation which provides a preliminary, pretrial procedure for a defendant to seek dismissal of a defamation suit when they are brought for tactical reasons (e.g., to silence critics or suppress debate or publication on matters of public interest). Recently, the Ontario Court of Appeal provided some assurances to analysts who write reports critical of issuers when it struck down a defamation suit brought by an issuer against an analyst (*Fortress Real Developments Inc. v Rabidoux*, 2017 ONSC 167). These applications are, however, highly fact-driven and courts have also ruled against a prominent short seller in his Anti-SLAPP application, notwithstanding the acknowledgement that information on “management of publicly traded corporations is a matter of public interest”. See: *Thompson v Cohodes*, 2017 ONSC 2590.

¹⁰⁷ For example, see *Re Carnes*, 2015 BCSECCOM 187; *Cohodes*, *supra* note 96. However, it should also be noted that this issue is not unique to Canada. There are very few enforcement cases against activist short sellers in other jurisdictions as well.

regulators have tools to address activist short seller behaviour that constitutes fraud, market manipulation or making a misleading statement to the market. However, for many of the misleading statement offences under Canadian securities legislation, evidence of a threshold of unlawful conduct *and* materiality *and* market impact related to a statement must be proven.¹⁰⁸ The use of social media to convey information has also introduced new complexities, including in terms of understanding and demonstrating market impact of a particular statement.

An additional means of deterrence, statutory civil liability for misrepresentations in the context of a campaign, does not currently exist in Canada. Initiating civil proceedings has also not been widely used by issuers or investors in relation to allegations of problematic conduct. This may be due to difficulties in the civil litigation process,¹⁰⁹ including challenges in pursuing defamation and/or libel claims. It could also reflect an issuer's desire to simply put an end to the issue rather than to prolong it through litigation. In most cases, it seems litigation is an undesirable route to seek meaningful and timely redress.¹¹⁰ The concern is therefore whether a lack of meaningful remedial options provides further incentives for activist short sellers to engage in problematic conduct. A statutory provision which addresses some of the practical complexities of seeking redress in the civil courts may provide an additional means of deterring problematic conduct, however, this would be somewhat novel and may have corresponding unintended liability for others, including analysts.

Consultation Questions

12. In your view, do the existing enforcement mechanisms adequately deter problematic activist short selling? If so, why? If not, why not?
 - a. Can deterrence be improved through specific regulation of activist short sellers? If so, how?
13. Are there additional or different regulatory or remedial provisions that could be considered to improve deterrence of problematic conduct? If so, what are these provisions?
14. Can you provide examples of specific activist short selling conduct that in your view is problematic but may not fall within the scope of existing securities offences such as market manipulation and misrepresentation/misleading statements? In your view, how should this problematic conduct be addressed by securities regulators?
15. Is it important that a statement have actual market impact to trigger enforcement action by securities regulators?

¹⁰⁸ See footnote 97.

¹⁰⁹ For example, see *Harrington supra* note 11.

¹¹⁰ As noted, "When a short-seller seriously attacks the integrity of a company's senior executives or Board members, the temptation to sue for defamation is almost impossible to overcome. Some believe that they almost have to sue for defamation, for fear that their failure to do so will be viewed as an admission of the short-seller's claims. Canadian CEOs and companies have accordingly sued in the past over critical reports. But the business wisdom of pursuing such a claim is not universally supported, and the efficacy of such defamation claims is disputed. ... Moreover, there is a risk that the short-seller will maintain its position in the company for a longer period of time after being hit with a defamation claim, in order to avoid reputational risk" Bell, Derek and Ellins, Katelyn, "Get Shorty: Defamation and Regulatory Claims in Canada" (*DLA Piper Canada*), July 26, 2017.

- a. Should another standard be used? For example, in your view is the “reasonable investor” standard a preferable approach (e.g., would a reasonable investor consider that statement important when making an investment decision)? If so, why? What are the potential implications of such a change?

CONSULTATION QUESTIONS

1. What is your perception about activist short sellers? Please describe the basis of that perception.
2. Can you give examples of conduct in activist short selling Campaigns that you view as problematic?
3. Given the focus of the available data is on prominent activist short sellers, what is your view regarding less prominent activist short sellers or pseudonymous activist short sellers targeting Canadian issuers? How can they be identified? Is there any evidence that they are engaging in short and distort campaigns?
4. What empirical data sources related to Campaigns should we consider?
5. In 2019, there was a large drop in the number of Canadian issuers targeted by prominent activist short sellers compared to the year before. Are there market conditions or other circumstances that in your view could lead to an increase? Please explain.
6. Is there any specific evidence that would suggest that Canadian markets are more vulnerable to activist short selling, including potentially problematic activist short selling (e.g., size and type of issuers, industries/sectors represented or other market conditions)?
 - a. Please provide specific examples of these vulnerabilities, and how they differ from other jurisdictions.
7. Do issuers have practical limitations in terms of their ability to respond to allegations made in a Campaign? If so, what are these limitations, and do you have any recommendations on how to alleviate them?
8. Are issuers reluctant to approach regulators when they believe that they are being unfairly targeted by an activist short seller? If so, why? If not, why not?
9. Is the existing regulatory framework adequate to address the risks associated with problematic activist short selling? Please explain why or why not and provide specific examples of concerns and areas where, in your view, the regulatory framework may not be adequate.
10. Have there been market developments or new information since 2012, when UMIR amendments regarding short selling and failed trades were implemented, that would warrant revisiting the existing regulatory framework for short selling? If so, please describe these new developments or information and indicate, providing evidence to support your views:

- a. whether, in your view, there is a connection between failed trades and activist short selling;
 - b. what changes should be considered and why, and specifically with respect to potentially problematic activist short selling activities; and
 - c. whether there are relevant regulatory requirements in other jurisdictions that should be considered and why.
11. Is the existing disclosure regime for short selling activities adequate? Please explain why or why not, indicating:
- a. what disclosure requirements would address risks associated with potentially problematic activist short selling and how would such requirements improve deterrence;
 - b. what should be the trigger and the timing of any additional disclosure;
 - c. how can additional disclosure be meaningful without negatively impacting market liquidity; and
 - d. do you foresee any issues with imposing a duty to update once there has been a voluntary disclosure of a short position?
12. In your view, do the existing enforcement mechanisms adequately deter problematic activist short selling? If so, why? If not, why not?
- a. Can deterrence be improved through specific regulation of activist short sellers? If so, how?
13. Are there additional or different regulatory or remedial provisions that could be considered to improve deterrence of problematic conduct? If so, what are these provisions?
14. Can you provide examples of specific activist short selling conduct that in your view is problematic but may not fall within the scope of existing securities offences such as market manipulation and misrepresentation/misleading statements? In your view, how should this problematic conduct be addressed by regulators?
15. Is it important that a statement have actual market impact to trigger enforcement action by securities regulators?
- a. Should another standard be used? For example, in your view is the “reasonable investor” standard a preferable approach (e.g., would a reasonable investor consider that statement important when making an investment decision)? If so, why? What are the potential implications of such a change?

Comments and submissions

The Committee invites participants to provide input on the issues outlined in this public consultation paper. You may provide written comments in hard copy or electronic form. The consultation period expires **March 3, 2021**.

Statement for consultation paper

Certain CSA regulators require publication of the written comments received during the comment period. We will publish all responses received on the websites of the Autorité des marchés financiers (www.lautorite.qc.ca), the Ontario Securities Commission (www.osc.gov.on.ca), and the Alberta Securities Commission (www.albertasecurities.com). Therefore, you should not include personal information directly in comments to be published. It is important that you state on whose behalf you are making the submission.

Please submit your comments in writing on or before March 3, 2021. Please send your comments by email in Microsoft Word format.

Please address your submission to all members of the CSA as follows:

British Columbia Securities Commission
Alberta Securities Commission
Financial and Consumer Affairs Authority of Saskatchewan
The Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Financial and Consumer Services Commission (New Brunswick)
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Superintendent of Securities, Newfoundland and Labrador
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Nunavut

Please deliver your comments only to the addresses below. Your comments will be distributed to the other participating CSA members.

Me Philippe Lebel
Corporate Secretary and Executive Director, Legal Affairs
Autorité des marchés financiers
Place de la Cité, tour Cominar
2640, boulevard Laurier, bureau 400
Québec (Québec) G1V 5C1
Fax: (514) 864-8381
E-mail: consultation-en-cours@lautorite.qc.ca

The Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, Ontario M5H 3S8
Fax: (416) 593-2318
E-mail: comments@osc.gov.on.ca

Questions

Please refer your questions to any of the following:

Autorité des marchés financiers

Serge Boisvert
Analyste à la réglementation
Direction de l'encadrement des bourses et
des OAR
514-395-0558, poste 4358
1 877 525-0337, poste 4358
serge.boisvert@lautorite.qc.ca

Roland Geiling
Analyste en produits dérivés
Direction de l'encadrement des bourses et
des OAR
514 395-0337, poste 4323
1 877 525-0337, poste 4323
roland.geiling@lautorite.qc.ca

Catherine Lefebvre
Analyste experte aux OAR
Direction de l'encadrement des bourses et
des OAR
514 395-0337, poste 4348
1 877 525-0337, poste 4348
catherine.lefebvre@lautorite.qc.ca

British Columbia Securities Commission

Kathryn Anthistle
Senior Legal Counsel, Legal Services
Capital Markets Regulation Division
604-899-6536
kanthistle@bcsc.bc.ca

Eric Pau
Senior Legal Counsel, Legal Services
Corporate Finance
604-899-6764
epau@bcsc.bc.ca

Jennifer Whately
Senior Enforcement Counsel
Enforcement
(604) 899-6625
jwhately@bcsc.bc.ca

Alberta Securities Commission

Jesse Ahlan
Regulatory Analyst, Market Structure
403.297.2098
Jesse.Ahlan@asc.ca

Jan Bagh
Senior Legal Counsel,
403.355.2804
Jan.Bagh@asc.ca

Jay Mitchell
Securities Analyst
403.355.4486
Jay.Mitchell@asc.ca

Manitoba Securities Commission

Tyler Ritchie
Investigator
204-945-6922
tyler.ritchie@gov.mb.ca

Ontario Securities Commission

Timothy Baikie
Senior Legal Counsel, Market Regulation
416-593-8136
tbaikie@osc.gov.on.ca

Paloma Ellard
Manager, General Counsel's Office
416-595-8906
pellard@osc.gov.on.ca

Steven Oh
Senior Legal Counsel, Corporate Finance
416-595-8778
soh@osc.gov.on.ca

Ruxandra Smith
Senior Accountant, Market Regulation
416-593-8322
rsmith@osc.gov.on.ca

Kevin Yang
Senior Research Analyst, Regulatory Strategy
and Research
416-204-8983
kyang@osc.gov.on.ca

THE CATALYST CAPITAL GROUP INC., et al. WEST FACE CAPITAL INC., et al.
Plaintiffs and Defendants

Court File No.: CV-17-587463-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**BRIEF OF AUTHORITIES of the MOVING
PARTIES /
DEFENDANTS, CLARITYSPRING INC. and
NATHAN ANDERSON
(Motion pursuant to s. 137(1) of the *Courts
of Justice Act*)**

LERNERS LLP

225 King Street West, Suite 1500
Toronto, ON M5V 3M2

Lucas E. Lung LSO#: 52595C

llung@lerners.ca
Tel: 416.601.2673

Rebecca Shoom LSO#: 68578G

rshoom@lerners.ca
Tel: 416.601.2382

Lawyers for the Defendants,
ClaritySpring Inc. and Nathan Anderson